Interpretation or international treaties: Recommendations to legal researchers

Interpretación de tratados internacionales: recomendaciones para los investigadores juristas

Interpretação de tratados internacionais: recomendações para pesquisadores jurídicos

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Abstract

In international law, States Parties to human rights treaties must identify and understand their legal obligations so that they can comply with those obligations. Legal researchers can support States Parties representatives to achieve greater understanding of treaty provisions. Treaty interpretation is a legal research methodology used to determining the meaning of treaty provisions. International law prescribes the rules and principles of treaty interpretation in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). However, the applicability of Articles 31 and 32 VCLT may be challenging for some legal researchers who require proper training in treaty interpretation. Based on a literature review, this article provides legal researchers with useful insights on the scope and applicability of Articles 31 and 32 VCLT in practice. It also includes several examples of relevant case law illustrating the applicability of the rules and principles of treaty interpretation by domestic and international courts. The underlying purpose of this article is thus to provide legal researchers with valuable insights on treaty interpretation as a regulated and rigorous legal research method. Notably, treaty interpretation is not a mechanical process, but an active human reasoning process. The resulting interpretation establishes the legal basis for the assessment of compliance with certain obligations by States Parties to, *inter alia*, human rights treaties.

Keywords: International law, treaties, legal theory.

Resumen

El cumplimiento de las obligaciones legales consagradas en los tratados de derechos humanos por los Estados Parte implica la plena comprensión del contenido y el alcance de dichas obligaciones. Los Estados Parte pueden ser asistidos en esta tarea a través de la producción académica de los investigadores juristas, quienes facilitan la interpretación del articulado de los tratados. Este artículo presenta algunas reflexiones académicas sobre la interpretación de los tratados como una metodología de investigación en derecho que permite analizar el contenido y el alcance del articulado de los tratados. Las reglas y los principios de interpretación de los tratados se encuentran codificados en los artículos 31 y 32 de la Convención de Viena sobre el Derecho de los Tratados (CVDT). Sin embargo, la aplicación de los artículos 31 y 32 CVDT puede ser una tarea desafiante para algunos investigadores, quienes requieren adecuado entrenamiento sobre el particular. Este artículo, con base en una revisión de literatura, ofrece a los investigadores un análisis reflexivo sobre la aplicación de las reglas de la CVDT en la práctica. Además, se han incluido ejemplos de decisiones judiciales que son relevantes para comprender el uso de las reglas de la CVDT por parte de cortes nacionales e internacionales. De tal modo, este artículo genera aportes al conocimiento sobre la metodología de la interpretación de tratados y la presenta como un proceso racional activo, cuyos resultados son la base legal para evaluar el cumplimiento de las obligaciones por parte de los Estados Parte en el derecho internacional de los derechos humanos, entre otros.

Palabras clave: derecho internacional, tratado internacional, teoría legal.

Resumo

No direito internacional, os Estados Partes de tratados de direitos humanos devem identificar e compreender suas obrigações legais para que possam cumpri-las. Os pesquisadores jurídicos podem ajudar os representantes dos Estados Partes a obter maior compreensão das disposições dos tratados. A interpretação do tratado é uma metodologia de pesquisa jurídica usada para determinar o significado das disposições do tratado. O direito internacional prescreve as regras e os princípios de interpretação de tratados nos artigos 31 e 32 da Convenção de Viena sobre o Direito dos Tratados (VCLT). No entanto, a aplicabilidade dos artigos 31 e 32 da VCLT pode ser um desafio para alguns pesquisadores jurídicos que precisam de treinamento adequado

em interpretação de tratados. Com base em uma revisão da literatura, este artigo oferece aos pesquisadores jurídicos percepções úteis sobre o escopo e a aplicabilidade dos artigos 31 e 32 do VCLT na prática. Ele também inclui vários exemplos de jurisprudência relevante que ilustram a aplicabilidade das regras e dos princípios de interpretação de tratados por tribunais nacionais e internacionais. O objetivo subjacente deste artigo é, portanto, fornecer aos pesquisadores jurídicos percepções valiosas sobre a interpretação de tratados como um método de pesquisa jurídica regulamentado e rigoroso. Notadamente, a interpretação de tratados não é um processo mecânico. É um processo de raciocínio humano ativo. A interpretação resultante estabelece a base jurídica para a avaliação do cumprimento de determinadas obrigações pelos Estados Partes, entre outros, dos tratados de direitos humanos.

Palavras-chave: Direito internacional, tratados, teoria jurídica.

I. Introduction

Colombia has ratified nine human rights treaties and two Optional Protocols by 2023.[1] Accordingly, there are numerous international legal obligations of Colombia to comply with under international human rights law. These obligations include to submit treaty-specific reports periodically to human treaty bodies. In such reports, Colombia must comprehensively explain to the treaty bodies whether or not the country is complying with its international obligations.

Compliance with international law involves interpreting the States' duties before assessing States' compliance with such duties.[2] In international law, treaties are designed to be clear enough for duty bearers to understand. However, the interpretation of treaty language is dynamic and can be subject to various constructions.[3] Moreover, a treaty may convey different understandings of its provisions.[4] This implies that there may be a need for clarifications of certain terms or provisions to enable States to fully comply with their obligations. Achieving such clarifications requires a legal interpretation of a treaty.[5]

1 Office of the High Commissioner for Human Rights. "View the Ratification Status by Country or by Treaty. Ratification Status for Colombia." 2023. Available at: https://tinyurl.com/5fr98bxu

2 Katherine Vorderbruggen. *A Rules-Based System? Compliance and Obligation in International Law*. E-International Relations [online]. October 9, 2018. Available at: https://tinyurl.com/sabnu6fj

3 Jared Mayer. *Treaty Interpretation under a Covenant Paradigm*. CHICAGO JOURNAL OF INTERNATIONAL LAW, vol. 21, no. 1. 2020. P. 194-226; Richard Gardiner. TREATY INTERPRETATION. Oxford University Press. (2008). P. 12.

4 Richard Gardiner, *supra*, note 3. P. 39.

5 Kirsten Schmalenbach. *Acts of International Organizations as Extraneous Material for Treaty Interpretation*. NETHERLANDS INTERNATIONAL LAW REVIEW, vol. 69, no. 1. 2022. P. 271-293, 273.

Caballero-Pérez[6] asserts that treaty interpretation is "a research methodology used to determine what an international rule requires from the moment it came into existence, and to make sense of what the rule requires at the moment of its application." Legal researchers must employ a robust methodology to analyze the content of treaty provisions during the interpretation of a treaty,[7] and such a methodology must be rigorous.[8] Legal researchers may opt to apply treaty interpretation as prescribed by the Vienna Convention on the Law of Treaties (1969) (or VCLT). The VCLT describes treaty interpretation as a distinct research methodology for interpreting treaties in international law.[9] The present article discusses Articles 31 and 32 VCLT that prescribed the rules of treaty interpretation.

This article examines treaty interpretation within the normative analytical framework. It also provides examples from case law illustrating how judges in domestic and international tribunals apply the rules of the VCLT. The author of this article supports the view that treaty interpretation forms the basis for analyzing States Parties' compliance with their obligations.[10] Hence, legal researchers must be proficient in treaty interpretation when analyzing a treaty. Treaty interpretation is crucial for addressing research inquiries. Researchers should base their treaty analysis on the rules of the VCLT to ensure that the resulting interpretation is scientifically sound.[11] Interpreters must comprehensively understand the VCLT rules and the principles of treaty interpretation. Nevertheless, applying the rules of treaty interpretation from the VCLT is challenging.[12]

6 Adriana Caballero-Pérez. VOTING MATTERS: AN ANALYSIS OF THE USE OF ELECTORAL-ASSISTIVE DEVICES THROUGH THE LENS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES. Proefschriftmaken. (2023). P. 27.

7 Jared Mayer, *supra*, note 3. P. 218.

8 Fuad Zarbiyev. The 'Cash Value' of the Rules of Treaty Interpretation. Leiden Journal of International Law, vol. 32, no. 1. 2019. P. 33-45, 44.

9 Pierre D'Argent. *Sources and the Legality and Validity of International Law: What Makes Law 'International'?* Eds. Samantha Besson, Jean D'Aspremont & Séverine Knuchel. THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW. Oxford University Press. (2017). P. 541-560, 542.

10 Santiago Torres-Bernárdez. *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties*. Ed. Alfred Rest *et al*. LIBER AMICORUM PROFESSOR IGNAZ SEIDL-HOHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY. Kluwer Law International. (1998). P. 721-740.

11 Ulf Linderfalk. *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*. EUROPEAN JOURNAL OF INTERNATIONAL LAW, vol. 26, no. 1. 2015. P. 169-189, 170.

12 Martin Stone. *Legal Positivism As An Idea About Morality*. UNIVERSITY OF TORONTO LAW JOURNAL, vol. 61, no. 2. 2011. P. 313-341, 313.

A thorough understanding of the rules and principles of treaty interpretation enhances the accuracy of treaty interpretation.[13]

The present article provides a comprehensive elaboration on the established VCLT rules of treaty interpretation. It is divided into three sections. Following this introduction, Section 2 of this article discusses Articles 31 and 32 VCLT. Section 2 aims to examine the applicability of the rules set forth by Articles 31 and 32 VCLT and the principles of treaty interpretation. Section 2 also provides some examples of case law addressing the task of interpreting a treaty. Lastly, Section 3 provides some concluding remarks.

II. Development

Interpreting a written text involves uncovering its meaning.[14] Interpretation is a hermeneutic endeavor that aims to explain, elucidate, or understand the terms, ideas, statements, and reasoning within a written text.[15] D'Argent[16] argues that in treaty interpretation the legal researcher's role is to faithfully uncover the original intent of the treaty's drafters and utilize this understanding to discern the purpose and objectives of the treaty. Furthermore, the researcher must fully understand treaty provisions to delineate the legal obligations of States Parties under that treaty.[17]

The normative rules for interpreting a treaty are set out in the VCLT: Articles 31 and 32. The VCLT was signed in 1969 and entered into force in 1980.[18] According to the International Court of Justice (ICJ),[19] Articles 31 and 32 VCLT are in principle applicable to the interpretation of all treaties. However, some international legal scholars are skeptical about the suitability of the VCLT rules of treaty interpretation. For example, Zarbiyev[20] argues that, given their high level of generality, "the rules of treaty

13 Matthias Herdegen. *Interpretation in International Law*. In: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW. Oxford University Press. (2012), P. 58.

14 Jared Mayer, *supra*, note 3. P. 196; Richard Gardiner, *supra*, note 3. P. 79.

15 Kirsten Schmalenbach, *supra*, note 5. P. 274; Roy Suryapratim. *Privileging (Some Forms of) Interdisciplinarity and Interpretation: Methods in Comparative Law*. INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, vol. 13. 2014. P. 17.

16 Pierre D'Argent, *supra*, note 9.

17 Adriana Caballero-Pérez, *supra*, note 6. P. 110.

18 Organization of the United Nations. Vienna Convention on the Law of Treaties. 23 May 1969. Treaty Ser. (1969). Available at: https://tinyurl.com/34j2x29x

19 International Court of Justice. Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. LEG 46/03(6). 1951. P. 15. Available at: https://tinyurl.com/2s48zyvu

20 Fuad Zarbiyev, *supra*, note 8. P. 35.

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interpretation are unlikely to be of much assistance in resolving concrete interpretive disputes." The author believes that the rules of the VCLT lack practical significance and their application may not lead the interpreter to a single correct interpretation. Moreover, these rules have been criticized for not having an immediate application.[21] This criticism is rooted in several reasons, including the notion that, to some extent, the rules of the VCLT may need interpretation themselves.[22] This implies that the rules of the VCLT allow for a significant amount of discretion on the part of the interpreter.

Importantly, the skepticism surrounding the VCLT rules of treaty interpretation does not diminish the authoritative value of Articles 31 and 32 of the VCLT in guiding legal researchers when interpreting a treaty. This assertion is significant because the VCLT rules do not directly dictate the meaning of a treaty provision. Instead, it is the legal researcher who reflexively utilizes the VCLT rules to identify and comprehend the correct meaning of a treaty provision. Therefore, treaty interpretation is not a mechanical process. It is a process of reasoning that requires the interpreter to consider the rules of treaty interpretation in their interpretive approach.

1. What Are the Rules of Treaty Interpretation?

This section concentrates on the criteria and rules for treaty interpretation outlined in Articles 31 and 32 of the VCLT. These articles are relevant to the interpretation of nearly all human rights treaties ratified by Colombia under international law.

A) General Rule of Interpretation

Article 31 VCLT establishes the general rule of interpretation. It provides:

> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

21 Jan Klabbers. *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?* NETHERLANDS INTERNATIONAL LAW REVIEW, VOL. 50, no. 3. 2003. P. 267-288.

22 *Id*. P. 271; Fuad Zarbiyev, *supra*, note 8. P. 36.

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> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended. (Article 31 VCLT, 1969).

Article 31(1) VCLT includes four elements: good faith, the ordinary meaning of the terms of the treaty, the object and purpose of the treaty, and the context. The principle of *good faith* applies throughout the treaty interpretation process and is akin to conducting a "reasonable" interpretation.[23] Furthermore, *good faith* is linked to the endeavor of discerning the actual intention of the States Parties to a treaty.[24] Therefore, the principle of *good faith* applies to the entire process of treaty interpretation.

The *ordinary meaning* of a term encompasses its "regular, normal, or customary" definition.[25] Interpreting the "ordinary meaning" is linked to the literal interpretation (or "textual interpretative approach"), which suggests that the ordinary meaning serves as a "starting point" for interpreting a term.[26] This "starting point" may be decisive, but only if the other elements of the general rule of interpretation support the interpretation based on the ordinary meaning. As pointed out by Schmalenbach,[27] "Article 31(1) VCLT does not identify any particular assistive material that an interpreter may use to clarify the ordinary meaning of treaty terms."

23 Jared Mayer, *supra*, note 3. P. 27; Hersch (Sir) Lauterpacht. *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*. BRITISH YEARBOOK OF INTERNATIONAL LAW, vol. 26, no. 1. (1949). P. 48-85, 51.

24 Richard Gardiner, *supra*, note 3. P. 409.

25 Richard Gardiner, *supra*, note 3. P. 412.

26 Adriana Caballero-Pérez, *supra*, note 6. P. 112.

27 Kirsten Schmalenbach, *supra*, note 5. P. 274.

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Therefore, legal researchers typically use material from both intrinsic and extrinsic sources. With intrinsic sources, interpreters derive the meaning of a treaty provision from other provisions within the same treaty. Additionally, interpreters utilize extraneous material. According to Schmalenbach,[28] extraneous material is "an interpretive resource that originates from outside the primary text and is brought into the process of interpretation in order to better understand the (current) meaning of the primary text." Importantly, Article 31(1) VCLT incorporates material from both intrinsic and extrinsic sources. It also underscores the significance of States Parties' acceptance of the material's interpretive value.

The *object and purpose* are the treaty's *raison d'être* (*i.e.*, the reason for existence) and *ratio legis* (*i.e.*, the reason or principle behind a law).[29] These elements are discerned through a teleological interpretation (or "functional interpretation approach"), which posits that the *object and purpose* of a treaty are founded on a normative construction.[30] Schmalenbach[31] suggests that discerning the *object and purpose* of a treaty necessitates a thorough analysis of the treaty itself. The author argues that "there are cases were the object and purpose of one treaty have been determined by distinguishing them from 'extraneous' treaties of a similar type (e.g., one friendship and commerce treaty from others of the same kind)."[32] Therefore, there is no single or precise method for identifying the *object and purpose* of a treaty.[33] The primary guidance offered by the VCLT is that these elements cannot be used to contradict the meaning of the treaty text.

Finally, the *context* of a treaty encompasses the entire text of the treaty.[34] Additionally, the contextual material is also considered extrinsic. This means, as elaborated by Schmalenbach,[35] that "any agreement and instrument relating to a given treaty is evidently not part of the primary treaty text that has to be interpreted." The utilization of contextual material as extraneous material for interpreting a treaty is prescribed by Article 31(2)(a-b) VCLT. Therefore, the *context* is associated with systematic

28 *Id*. P. 273.

29 Cambridge Dictionary. Available at: https://dictionary.cambridge.org/us/

30 Fuad Zarbiyev, *supra*, note 8. P. 271; International Court of Justice. Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. LEG 46/03(6). 1951. P. 15. Available at: https://tinyurl.com/2s48zyvu

31 Kirsten Schmalenbach, *supra*, note 5. P. 274.

32 *Id*. P. 274.

33 Richard Gardiner, *supra*, note 3. P. 338.

34 Hanneke Senden. INTERPRETATION OF FUNDAMENTAL RIGHTS IN A MULTILEVEL LEGAL SYSTEM: AN ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN COURT. Leiden University. (2011). P. 15.

35 Kirsten Schmalenbach, *supra*, note 5. P. 274.

interpretation (or the "contextual interpretation approach"), which argues that different provisions of a treaty cannot be considered entirely separately from each other or from the preamble of a treaty.[36]

Article 31(3) VCLT stipulates that the *context* includes any agreement between the parties regarding the interpretation or application of a treaty (such as the Optional Protocol to a treaty), the practice in the application of the treaty, and any relevant applicable rules of international law.[37] In this regard, two observations are crucial. Firstly, the decisions and recommendations adopted by the treaty bodies may constitute "subsequent practice" and "subsequent agreements." However, concluding observations and general comments are not legally binding instruments *per se*.[38] Therefore, formally, the views adopted by a human rights body are a supplementary source of interpretation with an undeniable authoritative but non-binding weight. Secondly, in fields like international human rights law, there is a mutually reinforcing nature among all treaties, meaning that the treaties complement each other.[39] Therefore, when interpreting a particular human rights treaty, it is important for legal researchers to consider other human rights instruments.

Moreover, Article 31(4) VCLT provides an exception to the interpretation rules in Article 31(1) VCLT for cases in which the States Parties agree to replace the ordinary meaning of a term with a "special meaning."[40] Gardiner[41] defines the term "special meaning" from two perspectives: first, it corresponds to the meaning that a term has in a particular area of human endeavor (such as a term of art); second, it is a meaning that deviates from the most common one. In the latter case, States Parties must provide some indication that the meaning of a term differs from the expected one. For example, the UN Convention on the Rights of Persons with Disabilities (CRPD) includes the term "universal design" in several of its provisions (e.g., Article 2, 4, and 9).[42] The concept of "universal design" is relatively recent in human rights law and has its

36 Adriana Caballero-Pérez, *supra*, note 6. P. 112.

37 Michael S Kirsch. *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*. TEXAS LAW REVIEW, vol. 87, no. 6. 2009. P. 1063-1135, 1073.

38 Gerald L. Neuman. *Giving Meaning and Effect to Human Rights: The Contribution of Human Rights Committee Members*. Eds. Daniel Moeckli, Helen Keller & Corina Heri. THE HUMAN RIGHTS COVENANTS AT 50: THEIR PAST, PRESENT, AND FUTURE. Oxford Academic. (2018). P. 31-47, 33.

39 Office of the United Nations High Commissioner for Human Rights. THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES. United Nations. (2012). P. 40.

40 Adriana Caballero-Pérez, *supra*, note 6. P. 113.

41 Richard Gardiner, *supra*, note 3. P. 291.

42 United Nations General Assembly. Convention on the Rights of Persons with Disabilities. 13 December 2006. A/RES/61/106.

origins in the field of architecture.[43] The creators of the CRPD outlined the definition of "universal design" in Article 2 of the CRPD. This article, which deals with definitions, states the following:

B) Article 2

> For the purposes of the present Convention: […] 'Universal design' means the design of products, environments, programs and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. 'Universal design' shall not exclude assistive devices for particular groups of persons with disabilities where this is needed. (Article 2, Convention on the Rights of Persons with Disabilities, 2006)

In defining the term "universal design," the drafters of the CRPD used a term of art, which referred to the design of products and environments, and extended it to cover programs and services used by persons with disabilities.[44] In doing so, drafters of the CRPD assigned a special meaning to the term "universal design." The supplementary means of treaty interpretation are explained below.

2. Supplementary Means of Interpretation

Article 32 VCLT deals with the supplementary means of interpreting a treaty. It states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. (Article 32 VCLT, 1969)

43 Gerard Martino. *What Is Universal Design?* ArchDaily [online]. January 2, 2023. Available at: https://www.archdaily.com/994337/what-is-universal-design

44 Rachele Cera. *Article 29 Participation in Political and Public Life*. Eds. Valentina Della Fina, Rachele Cera & Giuseppe Palmisano. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES A COMMENTARY. Springer. (2017). P. 525-539.

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Article 32 establishes the basis for interpreting an international treaty by referencing its preparatory work (*travaux préparatoires*). This rule is consistent with the historical approach to interpretation.[45] This approach indicates that the use of preparatory work for interpretation occurs when applying the methods outlined in Article 31, and leads to an ambiguous or "obscure" meaning or a clearly "absurd" or unreasonable outcome.[46] However, Article 32 VCLT does not specify the scope of the material encompassed by the term "preparatory work." This provision simply needs the inclusion of extraneous material in the interpretive process. McNair[47] argues that, when drafting the VCLT, the International Law Commission did not define the content of preparatory work since "to do so might only lead to the possible exclusion of relevant evidence."

Generally, it is acknowledged that official working papers of delegates drafting a treaty (such as preliminary drafts of a human rights treaty body and reports of the drafters) serve as a supplementary source for interpreting a treaty.[48] Importantly, Article 32 VCLT does not include material produced by expert bodies.[49] Therefore, adopting a historical interpretative perspective, the legal researcher may consider including certain documents relevant to the negotiation process of a treaty, such as daily summaries and minutes of the drafting sessions, as well as preliminary drafts of the treaty.

3. How to Apply the Rules of Treaty Interpretation?

Gardiner,[50] Zarbiyev,[51] and Mayer[52] agree in asserting that the predefined rules of the VCLT do not provide a step-by-step formula for achieving an indisputable interpretation of a treaty provision. Gardiner[53] suggests viewing interpretation as a process of progressive refinement. In this process, the interpreter begins with the ordinary meaning of the terms of the treaty, within their context and considering the treaty's object and purpose, under the general rule. By iteratively cycling through this three-step inquiry, the interpreter gradually narrows down the correct interpretation. This progressive

45 Richard Gardiner, *supra*, note 3.

46 Adriana Caballero-Pérez, *supra*, note 6. P. 113.

47 Lord McNair. THE LAW OF TREATIES. Oxford University Press. (1986). P. 411.

48 Fuad Zarbiyev, *supra*, note 8. P. 276; *Id*. P. 596.

49 Kirsten Schmalenbach, *supra*, note 5. P. 276.

50 Richard Gardiner, *supra*, note 3.

51 Fuad Zarbiyev, *supra*, note 8.

52 Jared Mayer, *supra*, note 3.

53 Richard Gardiner, *supra*, note 3. P. 148.

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refinement entails that all relevant elements of the general rule of interpretation must be considered together in each exercise of treaty interpretation.[54] Therefore, the VCLT does not favor any particular rule of treaty interpretation.

Furthermore, treaty interpretation is not a mechanical procedure.[55] The rules of the VCLT delineate the factors that researchers must consider when interpreting a treaty. These rules serve as a guide for approaching the provisions of the treaty. The resulting legal interpretation of international law provisions must be founded on a synthesis of all interpretative rules outlined by the VCLT, as well as principles of treaty interpretation. These principles are elaborated upon below.

4. What Are the Principles of Treaty Interpretation?

Crawford[56] and Brownlie[57] assert that the principles of treaty interpretation are logical precepts and common-sense guidelines that assist interpreters in comprehending the meaning of treaty provisions. In international law, three primary principles of treaty interpretation are recognized: the principle of autonomous interpretation, the principle of effective interpretation, and the principle of evolutive interpretation.[58]

The principle of autonomous interpretation posits that there can be only one authentic interpretation of a treaty.[59] Therefore, the meaning of treaty provisions does not necessarily align with the interpretation given to them by the domestic law of States Parties to the treaty.[60] The statement made by Lord Steyn in the case of R v. Secretary of State for the Home Department exemplifies this principle: "It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of

54 *Id*.

55 Adriana Caballero-Pérez. *New Legal Realism: A Promising Legal Theory for Interdisciplinary and Empirical Research about the 'Law-in-Action'*. NOVUM JUS, vol. 16, no. 1. 2022. P. 209-228.

56 James Crawford. BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW. 9th edition. Oxford University Press. (2019). P. 355.

57 Ian Brownlie. PRINCIPLES OF PUBLIC INTERNATIONAL LAW. 6th edition. Oxford University Press. (2003). P. 602.

58 Adriana Caballero-Pérez, *supra*, note 6. P. 114.

59 Richard Gardiner, *supra*, note 3. P. 93.

60 Stephen Carruthers. HOW JUST IS THE UNION'S AREA OF FREEDOM, SECURITY AND JUSTICE?: AN ASSESSMENT OF THE NORMATIVE STATUS OF INTERNATIONAL FUNDAMENTAL RIGHTS IN THE UNION'S LEGAL ORDER. University of Ulster. (2006). P. 291.

the VCLT] and without taking color from distinctive features of the legal system of any individual contracting state."[61]

Therefore, the legal researcher must seek the autonomous and international meaning of treaty provisions. Secondly, the principle of effective interpretation underscores the integrity of a treaty and the necessity to give practical effect to all its terms.[62] In accordance with this principle, the researcher must endeavor to comprehend the agreement reached by the parties to achieve an accurate understanding of the provisions of each treaty and the treaty as a whole.

Lastly, the principle of evolutive interpretation regards international treaties as dynamic instruments.[63] This principle is founded on the premise that treaty interpretation must be in harmony with the evolution of time and the acknowledgment of the current living conditions of individuals within societies.[64] Bjorge[65] cites Judge Lady Hale in the McCaughey case to elucidate the approach of the domestic courts in the United Kingdom to the "living instrument doctrine": "If the evolutive interpretation of the Convention rights means that they now mean something different from what they meant when the 1998 Act was passed, then it is our duty to give effect to their current meaning, rather than to the one they had before."[66]

The interpreter must recognize that the meanings of rights evolve from those they held when treaties were formulated. Therefore, embracing a dynamic interpretation approach is strongly advised to ensure an accurate interpretation of the provisions' meanings in the treaties under consideration. In conclusion, treaty interpretation cannot be conceptualized as a mechanical procedure but rather as a process of legal reasoning. As highlighted, legal researchers apply the VCLT rules of treaty interpretation (Articles 31 and 32) and the principles of treaty interpretation in a unified reasoning process to pertinent provisions of international law.[67]

61 United Kingdom Court of Appeal (England and Wales). R v. Secretary of State for the Home Department, Ex Parte Soblen. 26 July 1962. Para. 515. Available at: https://tinyurl.com/e2tybra2

62 Hersch (Sir) Lauterpacht, *supra*, note 23. P. 70.

63 Eirik Bjorge. *Evolutionary Interpretation: The Convention Is a Living Instrument*. Ed. Eirik Bjorge. DOMESTIC APPLICATION OF THE ECHR: COURTS AS FAITHFUL TRUSTEES. Oxford Scholarship Online. (2015), P. 131-154, 131.

64 *Id*.

65 *Id*.

66 The Northern Ireland Supreme Court. *Judgment In the Matter of an Application by Brigid McCaughey and Another for Judicial Review*. United Kingdom Supreme Court. February 2011. Para. 769. Available at: https://tinyurl.com/ehv6st6k

67 Adriana Caballero-Pérez, *supra*, note 6. P. 114.

Expertise in interpretation can also be observed in various international institutions and communities, as discussed by Schmalenbach.[68] The author proposes that "expert treaty bodies," comprised of independent individuals, contribute their professional expertise to the interpretation of the treaty itself.[69] Expert treaty bodies, also referred to as "committees," indeed offer State Parties a plethora of recommendations and general observations. These documents contribute to comprehending the evolution of the pertinent human rights treaty.[70] All of this inevitably results in new insights into international law.

A) Case Law Examples: Consensus on the Applicability of the VCLT Rules and Principles of Treaty Interpretation

Case law serves as an example of the application of Articles 31 and 32 VCLT. For instance, the ICJ has affirmed that the correct interpretation of treaty provisions, particularly the terms of the treaty, is attained through the application of the Vienna rules. In the case of Avena and Other Mexican Nationals (Mexico v. United States of America), the ICJ explicitly endorsed the Vienna rules by stating: "The Court now addresses the question of the proper interpretation of the expression 'without delay'. The Court begins by noting that the precise meaning of 'without delay', is not defined in the Convention [Vienna Convention on Consular Relations]. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the VCLT."[71]

The European Court of Human Rights (ECtHR) has similarly endorsed the Vienna rules of treaty interpretation. In the case of Banković and Others v. Belgium and Others, where the Court declared the case inadmissible, the ECtHR invoked Article 32 of the VCLT when using preparatory work to exclude other interpretive tools. The Court stated:

> In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasize that

68 Kirsten Schmalenbach, *supra*, note 5.

69 *Id*. P. 276.

70 Adriana Caballero-Pérez. *Building up a Constructive Relationship between Law and the Social Sciences to Investigate the 'CRPD-in-Action': Experiences from a Descriptive Study of Disabled People's Right to Vote*. OÑATI SOCIO-LEGAL SERIES, vol. 12, no. 6. 2022. P. 1704-1732.

71 Advisory Opinions and Orders International Court of Justice. Reports of Judgments, International Court of Justice. Avena and Other Mexican Nationals (Mexico v. United States of America). 31 March 2004. Para. 83.

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> it is not interpreting Article 1 "solely" in accordance with the *travaux préparatoires* or finding those *travaux* "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 VCLT).[72]

In the case of Rantsev v. Cyprus and Russia, the ECtHR offered a clear demonstration of how Article 31(3) VCLT, which deals with the systematic interpretation of treaties, can be applied. The Court expressed that:

> The Court has never considered the provisions of the Convention [European Convention on Human Rights] as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. […] As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties.
>
> […]
>
> The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, […]. Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part […].[73]

Additionally, the ECtHR has interpreted provisions of the European Convention on Human Rights (ECHR) by considering other pertinent international human rights instruments. In the case of Soering v. The United Kingdom, the European Court interpreted Article 2 of the ECHR with reference to Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the American Convention on Human Rights. The Court remarked that:

72 ECtHR. (12 December 2001). Banković and Others v. Belgium and Others. Application No. 52207/99. Grand Chamber Decision as to the Admissibility. Para. 65. Available at: https://n9.cl/g4fd1

73 ECtHR. (10 May 2010). Rantsev v. Cyprus and Russia. Application No. 25965/04. Judgment. Para. 273-274. Available at: https://tinyurl.com/mrvybtzh

> Unlike Article 2 (art. 2) of the Convention, Article 6 of the 1966 International Covenant on Civil and Political Rights and Article 4 of the 1969 American Convention on Human Rights expressly prohibit the death penalty from being imposed on persons aged less than 18 at the time of commission of the offence. Whether or not such a prohibition be inherent in the brief and general language of Article 2 (art. 2) of the European Convention, its explicit enunciation in other, later international instruments, the former of which has been ratified by a large number of States Parties to the European Convention, at the very least indicates that as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 (art. 3) of measures connected with a death sentence.[74]

The ECtHR also has used the teleological method of interpretation in compliance with Article 31(1) VCLT (addressing the *object and purpose* of a treaty). For example, in the above-mentioned judgment in Soering v. The United Kingdom, the Court indicated:

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms [...]. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective [...].[75]

Pursuant to Article 31(3) VCLT, the ECtHR has also referred to soft law instruments when interpreting provisions of the ECHR in relevant contexts. In its judgment in Saadi v. The United Kingdom, the ECtHR referred to the Guidelines on Refugee and Asylum Seeker Rights published by the UN High Commissioner for Refugee's Programme. The Court stated:

> It [the Court] does not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorized" entry, with the result that detention cannot be justified

74 ECtHR. (07 July 1989). Soering v. The United Kingdom. Application No. 14038/88. Judgment. Para. 108. Available at: https://tinyurl.com/3u49yv3y

75 ECtHR. (07 July 1989). Soering v. The United Kingdom. Application No. 14038/88. Judgment. Para. 87.

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> under the first limb of Article 5 § 1 (f). To interpret the first limb of Article 5 § 1 (f) as permitting detention […]. Such an interpretation would, moreover, be inconsistent with Conclusion no. 44 of the Executive Committee of the United Nations High Commissioner for Refugees' Program, the UNHCR's Guidelines and the Committee of Ministers' Recommendation […].[76]

Pursuant to Article 32 VCLT, the ECtHR has adopted a historical interpretative approach when interpreting the ECHR. It has referred to the purpose of the drafters of the ECHR by exploring relevant preparatory work. In its judgment in Johnston and Others v. Ireland, the Court asserted:

> Moreover, the foregoing interpretation of Article 12 (art. 12) is consistent with its object and purpose as revealed by the *travaux préparatoires*. The text of Article 12 (art. 12) was based on that of Article 16 of the Universal Declaration of Human Rights, paragraph 1 of which reads:
>
> […]
>
> In the Court's view, the *travaux préparatoires* disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce.[77]

The Inter-American Court of Human Rights (IACtHR) has also applied the VCLT rules of treaty interpretation. For example, in its judgment in Ivcher Bronstein v. Perú, the IACtHR recalled the applicability of Article 31(1) VCLT. The Court stated:

> Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention") 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 […].[78]

76 ECtHR. (29 January 2008). Saadi v. United Kingdom. Application No. 13229/03. Judgment. Para. 65. Available at: https://tinyurl.com/3cycdfne

77 ECtHR. (18 December 1986). Johnston and Others v. Ireland. Application No. 9697/82. Judgment. Para. 52. Available at: https://tinyurl.com/2vk86suf

78 IACtHR. (06 February 2001). Case Ivcher Bronstein v. Perú. Reparaciones y Costas. 2001. Para. 38. Available at: https://tinyurl.com/5n79kuzy

Pursuant to Article 31(1) VCLT, the IACtHR interpreted the "ordinary meaning" of terms of the American Convention on Human Rights (ACHR), as prescribed by Article 31(1) VCLT. Article 31(1) VCLT prescribes that the "ordinary meaning" of a term is related to the literal interpretation, which asserts that the ordinary meaning is a "starting point" to interpret a term. The IACtHR has explicitly referred to the literal interpretation in its case law in compliance with Article 31(1) VCLT. For example, in Artavia Murillo *et al.* (*"In vitro fertilization"*) v. Costa Rica (2012), the IACtHR stated:

> In this case the Court observes that the concept of "person" is a legal term that is analyzed in many of the domestic legal systems of the States Parties. However, for the purposes of the interpretation of Article 4(1) [ACHR], the definition of person stems from the mentions made in the treaty with regard to "conception" and to "human being," terms whose scope should be assessed based on the scientific literature.
>
> [...]
>
> In addition, the Court will refer to the literal meaning of the expression "in general" in Article 4(1) of the Convention.[79]

Pursuant to Article 31(3) VCLT, the IACtHR has interpreted the ACHR using the Convention's context. This means that the IACtHR has adopted a systematic interpretation approach to take a treaty provision and the context together as a larger whole, as a system. In its judgment in Furlán and Family v. Argentina, the Court analyzed the alleged human rights violations of the applicants in light of the international body of law on the protection of children. The IACtHR also applied international standards on the protection of persons with disabilities. It took into consideration the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities and the CRPD to address the social model of disability, which is not addressed by the ACHR. It stated:

> Moreover, in the universal system the Convention on the Rights of Persons with Disabilities entered into effect on May 3, 2008, establishing the following guiding principles on this matter: [...]
>
> The Court further recalls that the Convention on the Rights of Persons with Disabilities, contains rules on the importance of effective access

79 IACtHR. (28 November 2012). Case Artavia Murillo *et al*. ('In vitro fertilization') v. Costa Rica. 2012. Para. 176 and 178.

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> to justice for persons with disabilities, […] Thus, the Court considers that when vulnerable persons are involved, as in the case of a person with disabilities, it is imperative to take the pertinent actions, such as ordering the authorities to give priority to addressing and settling such cases, […].[80]

Finally, another good example of how the IACtHR has applied Article 31(3) VCLT, as regards the systematic interpretation, is its judgment in Barbosa de Souza *et al*. v. Brazil. In this case, the IACtHR found Brazil responsible for the improper use of parliamentary immunity to keep feminicide with impunity. Such a decision was based on interpreting relevant provisions of the ACHR in light of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) and the UN Convention on the Elimination of Discrimination Against Women (CEDAW). The IACtHR also referred to relevant general comments and concluding observations published by the CEDAW Committee addressing the legal obligations of States Parties, including Brazil. The Court stated, for example: "The Convention on the Elimination of All Forms of Discrimination against Women establishes the obligation of States Parties to 'modify the social and cultural patterns of conduct of men and women, […]'. On this point, the CEDAW Committee has stated that the presence of gender stereotypes in the judicial system severely impacts the full enjoyment of women's human rights, given that these 'impede women's access to justice in all areas of law, and may particularly impact women victims and survivors of violence'."

In the inter-American sphere, the preamble of the Belém do Pará Convention states that violence against women is "a manifestation of the historically unequal relations of power between women and men"; and, in addition, it recognizes that "the right of every woman to a life free of violence includes the right to be free from all forms of discrimination."[81]

As illustrated above, domestic and international courts have discussed and applied the VCLT in its case law. Articles 31 VCLT (General Rule of Interpretation) and Article 32 VCLT (Supplementary Means of Interpretation) have been complied with by the ICJ, the ECtHR, and the IACtHR in the judgments above-cited. These courts provided relevant examples of interpreters using the VCLT rules and principles of treaty interpretation in practice. As noted, international judges interpret treaty provisions in good faith in accordance with the ordinary meaning to be given to the terms of the treaty

80 IACtHR. (31 August 2012). Case of Furlán and Family v. Argentina. Judgment. 2012. Para. 131 and 196. Available at: https://tinyurl.com/3vxdy2yk

81 IACtHR. (07 September 2021). Case of Barbosa de Souza *et al*. v. Brazil. Judgment. 2021. Para. 141-142. Available at: https://tinyurl.com/5n95857a

in their context and in the light of its object and purpose, as prescribed by Article 31 VCLT. Moreover, judges have explored the *travaux préparatoires* to allow any relevant evidence of the parties' intentions to be considered to determine the meaning of a disputed term or provision, as prescribed by Article 32 VCLT.

III. Conclusions

This article elucidates the provisions of the VCLT governing the interpretation of treaties, which outline the methods available to legal scholars for ascertaining the intent behind treaty provisions. Articles 31 and 32 VCLT, while crucial, do not in themselves provide definitive interpretations of treaty provisions. The process of treaty interpretation necessitates active engagement by legal scholars, who must apply the rules outlined in the VCLT. These rules are in place because treaty interpretation is a regulated practice, with established legal principles governing its elements and methods. Consequently, legal scholars have access to a meticulously prescribed methodology for interpreting treaties, ensuring a rigorous and structured approach to the interpretation process.

This article underscores treaty interpretation as a method in legal research aimed at elucidating the legal obligations of States Parties under international law. Operating as a scientific research method, treaty interpretation relies on the established rules delineated in Articles 31 and 32 VCLT. Legal scholars apply these rules to give precise meaning to treaty provisions. Additionally, the article explains how the principles of treaty interpretation, such as autonomous interpretation, effective interpretation, and evolutive interpretation, guide legal researchers in interpreting treaty provisions. The appropriateness of these principles in any given case hinges on its specific context and circumstances, as evidenced by the case law discussed above.

Drawing from the case law examples provided in this article, two fundamental considerations emerged regarding the application of the VCLT rules and principles of treaty interpretation. Firstly, treaty interpretation is inherently a deliberate human reasoning process, indicating that it cannot be reduced to a mechanical formula. Secondly, the legitimacy of the interpretation process hinges on maintaining a coherent methodology and analytical rigor throughout the interpretative process.

Moreover, this article demonstrated the consensus among domestic and international courts regarding the applicability of the Vienna Convention rules of treaty interpretation to pertinent treaties, a determination that falls within the realm of judicial discretion. Analytically, the article delineated at least four scenarios in which

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international courts applied Articles 31 and 32 of the VCLT, along with the associated principles of treaty interpretation.

Firstly, courts have engaged in literal interpretation of treaties, employing a textual approach as outlined in Article 31 VCLT. In this process, judges have considered objective criteria of interpretation and upheld the primacy of the treaty text.

Secondly, international tribunals have established the international legal standard meaning of treaty terms in accordance with Article 31 VCLT. Judges have analyzed the relationship of treaty terms with provisions of other international legal instruments, thereby considering the context of treaty provisions. This approach entails taking into account the broader context of other international human rights instruments within which each treaty is situated.

Thirdly, international courts have interpreted the purpose and object of a treaty, utilizing a teleological approach to achieve the treaty's social objectives, as prescribed by Article 31 VCLT. Consequently, judges have endeavored to identify the object and purpose of a treaty to inform its interpretation.

Fourthly, by adopting a historical interpretative approach under Article 32 VCLT, international tribunals have elucidated the intentions of the treaty's drafters. Judges have employed a historical approach to refer to the purpose or objective that the drafters had in mind when negotiating the treaty.

In summary, judges, including those from the ECtHR and the IACtHR, have consistently utilized the rules and principles of treaty interpretation outlined in the VCLT to resolve their cases. The application of Articles 31 and 32 of the VCLT by judges appears to be driven by a responsible purpose: to establish a shared framework of acceptable methods for conducting treaty interpretation. This presents an opportunity for legal researchers to ascertain the meaning of treaty provisions. The outcomes of such research can benefit States Parties to human rights treaties, such as Colombia, by enabling them to use expert interpretations of treaty texts to identify and comprehend their legal obligations. Through scholarly interpretations, States can enhance their understanding of their obligations and thereby work toward compliance with them.

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