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The Use of Article 31(3)(c) of the VCLT in the Interpretation of Human Rights Treaties:

A Study of ECtHR Practice*

การใช้ข้อ 31(3)(c) แห่งอนุสัญญากรุงเวียนนาว่าด้วย
กฎหมายสนธิสัญญาในการตีความสนธิสัญญา
ด้านสิทธิมนุษยชน : ศึกษาจากแนวปฏิบัติ
ของศาลสิทธิมนุษยชนยุโรป[†]

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Abstract

This article examines Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), focusing on its meaning and function in treaty interpretation. It explores the concept of “relevant rules of international law applicable in the relations between

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the parties” and considers what it means for an interpreter to “take into account” such rules. The article approaches this issue in three stages. First, it analyses the general rule of interpretation under Article 31 of the VCLT in order to clarify the interpretative framework within which Article 31(3)(c) operates. Second, it examines Article 31(3)(c) from a doctrinal perspective, including its drafting history and scholarly debates on its scope and function. Third, it analyses the practice of the European Court of Human Rights (ECtHR).

The article argues that the concept of “relevant rules” cannot be determined solely by the proximity between norms. Instead, it proposes an argument-based approach, under which relevancy is assessed in light of the interpretative arguments that such rules enable. The article offers an approach to the application of Article 31(3)(c) of the VCLT, as well as a framework for studying its use in practice.

Keywords: Article 31(3)(c) of the VCLT, Treaty Interpretation, Human Rights

บทคัดย่อ

บทความฉบับนี้มุ่งศึกษาการตีความตามข้อ 31(3)(c) ของอนุสัญญากรุงเวียนนาว่าด้วยกฎหมายสนธิสัญญา ค.ศ. 1969 (VCLT) ว่ามีความหมายและบทบาทอย่างไรในการตีความสนธิสัญญา โดยพิจารณาว่า “กฎเกณฑ์อื่น ๆ ในกฎหมายระหว่างประเทศที่ปรับใช้ในความสัมพันธ์ระหว่างรัฐภาคี” หมายความว่าถึงสิ่งใด และเมื่อผู้ตีความคำนึงถึงกฎเกณฑ์ดังกล่าว กฎเกณฑ์นั้นสามารถชี้นำการตีความไปในทิศทางใดได้บ้าง โดยได้ทำการศึกษาทั้งสามวิธี ได้แก่ (1) การศึกษากฎเกณฑ์ทั่วไปของการตีความตามข้อ 31 ของ VCLT ซึ่งเป็นกระบวนการเดียวกัน โดยข้อ 31(3)(c) ของ VCLT เป็นส่วนหนึ่งของกระบวนการดังกล่าว (2) การศึกษาความเห็นของนักวิชาการและเอกสารเตรียมร่างที่เกี่ยวข้องกับขอบเขตและแนวคิดภายใต้ข้อ 31(3)(c) ของ VCLT และ (3) การศึกษาการใช้หลักการตีความสนธิสัญญาตามข้อ 31(3)(c) ของ VCLT ในทางปฏิบัติของศาลสิทธิมนุษยชนยุโรป

บทความฉบับนี้เสนอว่าการพิจารณา “กฎเกณฑ์ที่เกี่ยวข้อง” ภายใต้ข้อ 31(3)(c) ของ VCLT นั้นไม่สามารถอาศัยหลักเกณฑ์ความใกล้ชิดระหว่างกฎเกณฑ์เพียงอย่างเดียวได้ ผู้เขียนจึงเสนอแนวทางการพิจารณาความเกี่ยวข้องที่ตั้งอยู่บนฐานของข้อโต้แย้งทางกฎหมาย ซึ่งประเมินความเกี่ยวข้องของกฎเกณฑ์บนฐานลักษณะของข้อโต้แย้งที่ผู้ตีความสามารถนำมาใช้ได้จากการคำนึงถึงกฎเกณฑ์ดังกล่าว เพื่อเป็นแนวทางในการใช้และการตีความตามข้อ 31(3)(c) ของ VCLT ต่อไป

คำสำคัญ : ข้อ 31(3)(c) ของ VCLT การตีความสนธิสัญญา สิทธิมนุษยชน



1. Introduction

Treaty is among the most significant sources of international law.¹ According to Article 2 of the Vienna Convention on the Law of Treaties (VCLT), a treaty is “*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*”.² Due to their textual nature, treaties tend to offer greater certainty than customary international law and general principles of law. Nevertheless, a treaty remains a text, and, as such, inevitably contains some degree of uncertainty.³ Before applying a treaty, the interpreter must first engage in interpretation.

Treaty interpretation is guided by the general rule of interpretation reflected in Article 31 of the VCLT and supplementary means in Article 32 of the VCLT. These rules are widely used in the practice of international tribunals, including the International Court of Justice (ICJ), the World Trade Organization (WTO), and the European Court of Human Rights (ECtHR).

Among the interpretative tools provided by Article 31, Article 31(3)(c) is particularly significant. It allows the interpreter to take into account “*any relevant rules of international law applicable in the relations between the parties*”. Article 31(3)(c) is often regarded as a valuable tool for addressing the conflict of norms,⁴ and it has been applied extensively in international legal practice for many years.⁵ In preliminary terms,

¹ จตุรนต์ ธีระวัฒน์, *กฎหมายระหว่างประเทศ* (พิมพ์ครั้งที่ 6, วิญญูชน 2565) 110.

² *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 2(a).

³ HLA Hart describes the problem as “open texture of law”; ดู HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 2012) 124–129.

⁴ International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (18 July 2006) UN Doc A/CN.4/L.682 and Add.1, paras 412–419; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 251–252.

⁵ Especially in the ECtHR’s practice, it has been used since *Golder v the United Kingdom* App no 4451/70 (ECtHR, 21 February 1975). See also *Al-Adsani v the United Kingdom* App no 35763/97 (ECtHR, 21 November 2001); *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008); *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016). The ICJ has likewise relied on art 31(3)(c), including in *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* ICJ Rep 161. and *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045. For a recent example, see *Obligations of States in Respect of Climate Change (Advisory Opinion)*.

it can be said that Article 31(3)(c) embodies the principle of systemic integration, permitting the consideration of other relevant rules of international law in the interpretative process.⁶ However, Article 31(3)(c) leaves several important questions open to inquiry: What qualifies as a “rule” under Article 31(3)(c)? Does it include judicial decisions and soft law? How relevant must other rules be to a treaty being interpreted in order to be considered? And what guidance do relevant rules provide once they are taken into account?

Under Article 31(3)(c) of the (VCLT), “rules” should be understood as encompassing only binding norms of international law, excluding non-binding instruments. While Panos Merkouris conceptualizes “relevancy” through proximity criteria, an examination of the practice of the ECtHR demonstrates that relevancy cannot be determined solely through such criteria and does not consistently prioritize proximity across all dimensions.

Furthermore, the ECtHR’s case law shows that Article 31(3)(c) does not function as a mechanism that automatically ensures coherent or harmonious interpretation; rather, it may lead to divergent interpretative outcomes. These outcomes depend on how relevant rules are invoked within legal reasoning. Accordingly, this article proposes an “argument-based relevancy” approach, under which the relevancy of external rules is determined by the interpretative arguments they enable, rather than by proximity alone.

This article seeks to address Article 31(3)(c) of the VCLT by examining three main sources. First, it analyses the process of interpretation under Article 31 of the VCLT in order to clarify the nature of the interpretative framework of which Article 31(3)(c) forms a part, thereby providing the necessary context for its analysis.

Second, it considers Article 31(3)(c) from a doctrinal perspective, including its drafting history and scholarly views on its scope and function.

Third, it examines the practice of the European Court of Human Rights (ECtHR). Through this analysis, the article aims to offer greater clarity regarding the operation and limits of Article 31(3)(c) of the VCLT.

⁶ ILC (n 4) para 413.

2. Interpretation under Article 31(3)(c) VCLT: Relevant Rules of International Law

2.1 Understanding Article 31(3)(c) of the VCLT

Article 31(3)(c) is a part of the general rule of interpretation reflected in Article 31 of the VCLT. Since the general rule of interpretation is a single combine operation; in order to properly understand Article 31(3)(c), we must examine the general rule of interpretation as a whole. The fact that the word “general rule” is used rather than “rules” indicates that it is not a collection of various rules of interpretation. Instead, a general rule is often described as a single combined operation; every element of interpretation in the general rule has some sort of interaction. According to this, Article 31(3)(c) of the VCLT, should not be examined in isolation. Now it is time to understand the process of interpretation under the general rule of interpretation, which is often described as “the crucible.”⁷

2.2 General Rules of Treaty Interpretation under Article 31 of the VCLT

Article 31 of the VCLT provides that the terms of a treaty shall be interpreted in accordance with: (1) good faith; (2) the ordinary meaning; (3) context; (4) object and purpose; (5) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (6) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (7) any relevant rules of international law applicable in the relations between the parties.

All seven elements of interpretation under Article 31 of the VCLT are what Djefal described as “techniques” of interpretation. Interpretative techniques function as tools that provide guidance to lead the interpreter to a result and serve as a basis for legal argumentation.⁸

⁷ นพดล เดชสมบูรณ์รัตน์, *กฎเกณฑ์และหลักการพื้นฐานว่าด้วยการตีความสนธิสัญญา* (พิมพ์ครั้งที่ 1, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2565) 91; International Law Commission, *Draft Articles on the Law of Treaties with Commentaries* (1966) UN Doc A/6309/Rev.1, 220.

⁸ Christian Djefal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge University Press 2016) 115–116.

First, as guidelines, these techniques can show the interpreter how a treaty may be interpreted in a particular way. For example, object and purpose suggest that treaties should be interpreted in the light of their aims.⁹ This does not mean that the techniques provide a definitive answer or result; they still leave room for the interpreter's discretion.¹⁰ Different interpreters may therefore arrive at different outcomes, even when applying the same technique, depending on how they understand the object and purpose of the treaty.¹¹

Second, interpretative techniques function as parameters of legal argumentation.¹² Only arguments derived from the interpretative elements recognized under the VCLT may properly form part of the treaty interpretation process. As the Appellate Body observed, “a permissible interpretation is one which is found to be appropriate after application of the pertinent rule of the Vienna Convention.”¹³

Once arguments are derived from these techniques, the question arises as to how they should be evaluated. While the techniques may point towards the same result, they may also support different interpretative outcomes. This raises the question of how the various techniques interact and whether any hierarchy exists among them, which they are not intended to have.¹⁴

As Waldock described, Article 31 of the VCLT operates as a “single combined operation”.¹⁵ Furthermore, the use of the term “general rule”, rather than “rules”, indicates that Article 31 is not a collection of interpretative rules¹⁶ from which an interpreter may selectively choose what to apply. Instead, all interpretative techniques must be considered together in order to arrive at an appropriate result.¹⁷

⁹ Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 211.

¹⁰ Djefal (n 8) 115–116.

¹¹ Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press 2009) 4.

¹² Djefal (n 8) 116; Andrea Bianchi and Fuad Zarbiyev, *Demystifying Treaty Interpretation* (Cambridge University Press 2024) 275.

¹³ *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Appellate Body Report, WT/DS184/AB/R (24 July 2001) para 60.*

¹⁴ International Law Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) UN Doc A/6309/Rev.1, 218 para 9.

¹⁵ *ibid* para 8.

¹⁶ Humphrey Waldock, ‘Third Report on the Law of Treaties’ (1964) UN Doc A/CN.4/167, 54 para 8.

¹⁷ International Law Commission (n 14) 219 para 8.

Accordingly, each interpretative technique interacts with the others through a process of weighing and balancing. It is through this process that the arguments derived from these techniques are assessed. The task of the interpreter is therefore to weigh and balance competing interpretative considerations in order to determine the most appropriate interpretative outcome.¹⁸

Having clarified the process of interpretation under the general rule reflected in Article 31 of the VCLT, this section now turns to Article 31(3)(c), which constitutes the central focus of this study.

2.3 Article 31(3)(c) of the VCLT and the Principle of Systemic Integration

Article 31(3)(c) of the VCLT provides as follows:

“Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith on 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

...

3. There shall be taken into account together with the context:

(c) Any relevant rules of international law applicable in the relations between parties”

Article 31(3)(c) of the VCLT appears to function as an interpretative tool that permits interpreters to take into account other rules of international law when interpreting a treaty. According to the ILC Fragmentation Report, Article 31(3)(c) embodies the principle of systemic integration, which calls for the interpretation of international obligations in relation to their broader normative environment.¹⁹ This principle is based on the understanding that the force and validity of treaties derive from general international law. Accordingly, their rights and obligations do not exist in isolation but coexist, on a non-hierarchical basis, with obligations arising from other treaties and customary international law. Their relationship should therefore be determined in a manner that renders them “part of a coherent and meaningful whole.”²⁰ Article 31(3)(c)

¹⁸ See Djefal (n 8) 114–128; Bianchi and Zarbiyev (n 12) 272–276; นพดล เดชสมบูรณ์รัตน์ (n 7) 71–74.

¹⁹ ILC (n 4) para 413.

²⁰ *ibid* para 414.

serves as a mechanism through which these various legal rules may be integrated into the interpretative process.²¹

Similarly, Sands argues that Article 31(3)(c) reflects the principle of systemic integration and the unity of international law. In his view, rules of international law should not be examined in isolation from other rules of international law.²²

McLachlan likewise emphasizes the integrative function of Article 31(3)(c). According to him, the provision operates as a “master key in a large building”; metaphorically, it enables an interpreter to open all the rooms within that building. In other words, Article 31(3)(c) permits the interpreter to take into account other rules of international law that originate outside the treaty being interpreted but nevertheless form part of the broader legal framework within which that treaty operates.²³

From the foregoing discussion, Article 31(3)(c) permits interpreters to take into account other rules of international law and embodies the principle of systemic integration. It may suggest that the provision is primarily directed toward harmonized interpretation. However, as discussed above, Article 31(3)(c) is merely one interpretative technique among others and is not tied to any predetermined interpretative outcome. It continues to leave room for interpreters to develop competing arguments, which may ultimately lead to different interpretative conclusions. Although interpretations that avoid normative conflict will often be preferred, Article 31(3)(c) is capable of supporting a broader range of interpretative arguments. This point will be explored further below.²⁴

Taken literally, Article 31(3)(c) may be divided into four constituent elements: (1) Rules of international law; (2) Relevant rules; (3) Rules applicable in the relations between the parties; and (4) Intertemporal considerations. Each of these elements will be examined in turn.

²¹ Panos Merkouris, ‘Article 31(3)(c) of the VCLT and the Principle of Systemic Integration’ (PhD thesis, Queen Mary University of London 2010) 73.

²² To put it in his own word: “Article 31(3)(c) reflects a ‘principle of integration’. It emphasizes both the ‘unity of the international law’ and the sense in which rules should not be considered in isolation of general international law” in Philippe Sands, ‘Treaty, Custom and the Cross-Fertilization of International Law’ in Joost Pauwelyn (n 4) 253.

²³ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, 280–281.

²⁴ See also Christian Djeflal (n 8) 168.



2.3.1 Rules of International Law

Article 31(3)(c) permits interpreters to take into account “rules” of international law. This raises the preliminary question of what qualifies as a “rule” for the purposes of Article 31(3)(c).

According to the *Black Law Dictionary*, a rule means “an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.”²⁵ Based on this definition, a rule must possess the character of a binding norm. Within international law, such norms are commonly reflected in Article 38(1)(a)–(c) of the Statute of the International Court of Justice (ICJ Statute), namely treaties, customary international law, and general principles of law. Many scholars therefore regard these sources as falling within the meaning of “rules” under Article 31(3)(c).²⁶ By contrast, judicial decisions and the teachings of the most highly qualified publicists under Article 38(1)(d) of the ICJ Statute are generally regarded only as subsidiary means for the determination of rules of law. Although they may be used as evidence of the existence of binding norms or to clarify the content of the law,²⁷ they do not themselves possess binding force.²⁸ In this sense, the term “rules of international law” under Article 31(3)(c) refers to *lex lata* rather than *lex ferenda*,²⁹ meaning that the subsidiary means are not themselves included within Article 31(3)(c).

Nevertheless, Article 38 of the ICJ Statute is simply a provision setting out the law applicable, which the ICJ may apply in deciding a dispute, not an actual source of law in and of itself.³⁰ This Article should not be regarded as an exhaustive catalogue of all materials relevant to the identification of international law. Consequently, the question of what constitutes a “rule” under Article 31(3)(c) remains open to further discussion.³¹

²⁵ Bryan A Garner (ed), *Black’s Law Dictionary* (9th edn, Abridged, Thomson West 2010).

²⁶ Richard Gardiner (n 9) 299–303; Panos Merkouris (n 21) 14; Joost Pauwelyn (n 4) 254; International Law Commission (n 4) para 426; *EC – Measures Affecting the Approval and Marketing of Biotech Products* (29 September 2006) WT/DS291/R (Panel Report) para 7.67.

²⁷ Richard Gardiner (n 9) 307; Panos Merkouris (n 21) 14; Charles C Jalloh, ‘Subsidiary Means for the Determination of Rules of International Law’ (2021) Florida International University Legal Studies Research Paper No 21-17, 188 para 7 <<https://ssrn.com/abstract=3925583>> accessed 28 March 2025.

²⁸ Charles C Jalloh (n 27) 190 para 13

²⁹ Panos Merkouris (n 21) 15.

³⁰ Joost Pauwelyn (n 4) 90.

³¹ *Ibid.*

2.3.2 “Relevant” Rules of International Law

Article 31(3)(c) further requires that rules of international law be “relevant” to the treaty being interpreted before they may be taken into account. According to Gardiner, a rule will be relevant where it establishes obligations touching upon the same subject matter as the treaty under interpretation.³² Similarly, Pauwelyn understands relevance in terms of material overlap, namely situations in which two norms may apply to the same factual circumstances and potentially give rise to normative conflict.³³ On the other hand, Merkouris adopts a broader approach. He proposes what he terms “proximity criteria” as a means of assessing the relationship between other rules of international law and the treaty being interpreted. These criteria consist of four dimensions: (1) Terminological proximity; (2) Subject-matter proximity; (3) Shared signatory parties proximity; and (4) Temporal proximity.³⁴ Unlike approaches that focus exclusively on subject matter, Merkouris’s framework extends the notion of relevance to encompass similarities in language, the identity of the parties bound by the relevant norms, and temporal considerations.

2.3.3 Rules Applicable in the Relations between the Parties

Article 31(3)(c) further requires that the relevant rules be “applicable in the relations between the parties.” This raises the question of who the relevant parties are.

This phrase can be interpreted in at least two ways. One interpretation is that the term refers to all parties to the treaty under interpretation. Under this view, the other rules must be binding upon all parties. A second interpretation is that the term refers only to the parties to the dispute, meaning that the other rules need only be binding upon the disputing parties.³⁵ On this matter, McLachlan identifies four possible approaches to this issue:³⁶

- “1. Require that all parties to the treaty under interpretation also be parties to any treaties relied upon.*
- 2. Permit reference to another treaty provided that the treaty parties in dispute are also parties to the other treaty.*

³² Richard Gardiner (n 9) 299.

³³ Joost Pauwelyn (n 4) 364–367.

³⁴ Panos Merkouris (n 21) 16.

³⁵ Noppadon Detsomboonrut, ‘The Problem of Normative Conflicts in the International Legal System’ (2017) 46(2) *Thammasat Law Journal* 1086, 1102.

³⁶ Campbell McLachlan (n 23) 314–315.

3. *A third option would be to require a finding that, insofar as the treaty was not in force between all members to the treaty under interpretation, the rule contained in it was treated as being a rule of customary international law.*

4. *Establish an intermediate test which does not require complete identity of treaty parties but does require that the other rule relied upon can be said to be implicitly accepted or tolerated by all parties to the treaty.”*

According to McLachlan's suggestion, each approach has its own advantages and disadvantages. Requiring complete identity of treaty parties may significantly limit the availability of relevant rules. By contrast, focusing only on the parties to the dispute may reduce this difficulty but could create a risk of inconsistency in interpretation.³⁷ Nevertheless, Pauwelyn observes that WTO practice appears to favour the latter approach. On this view, the relevant rule need not be binding upon all parties to the treaty under interpretation; rather, it is sufficient that it has been accepted by the parties to the dispute.³⁸

2.3.4 Intertemporal Considerations

Intertemporal considerations are not expressly mentioned in Article 31(3)(c). Nevertheless, they formed one of the principal issues discussed during the drafting process of the provision.

The doctrine of intertemporal law is traditionally associated with the Island of Palmas Award. In that case, Judge Max Huber stated:

*“a judicial fact must be appreciated in the light of the law contemporary with it, and not the law on force at the time when a dispute in regard to it arises or falls to be settled ... the same principle which subjects the act creative of a right to the law in force at the time arises, demands that the existence of the right, in other words its continued manifestations, shall follow the conditions required by the evolution of law.”*³⁹

³⁷ *ibid*; Noppadon Detsomboonrut (n 35) 1104.

³⁸ Joost Pauwelyn (n 4) 261–262.

³⁹ *Island of Palmas Case (Netherlands v United States of America)* (1928) 2 RIAA 829, 845.

According to the above statement, the principle of intertemporal law is generally understood as containing two limbs. First, a juridical fact must be appreciated in accordance with the law in force at the time it occurred, meaning that a treaty should be interpreted in light of the law in force at the time of its conclusion. Secondly, as Fitzmaurice put it, the continued existence and validity of rights arising from that fact must be evaluated in light of subsequent developments in the law.⁴⁰

During the Sixteenth and Eighteenth Sessions of the International Law Commission (ILC), the intertemporal issue in treaty interpretation was extensively debated in the course of drafting what later became Article 31(3)(c) of the VCLT (then Draft Article 70), which provided:

“Article 70 (General Rule of Interpretation)⁴¹

1. A treaty shall be interpreted in good faith
accordance with the ordinary meaning to be given to each
provision.

...

**(b) in the light of the rules of international law
[in force at the time of its conclusion]”**

The phrase “rules in force at the time of its conclusion” became the central focus of the debate. It suggests that a treaty should be interpreted in light of the rules of international law existing at the time of its conclusion, thereby reflecting only the first limb of the doctrine of intertemporal law. There are therefore two viewpoints. The first places significant weight on the drafters' intention, arguing that this clause should be included as the drafters created the treaty based on the facts and law of that time period; therefore, when interpreting a treaty, one must consider the rules in force at the time of its conclusion as part of the context rather than subsequent developments of international law, which the parties could not have foreseen.⁴²

⁴⁰ Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law’ (1953) 30 *British Year Book of International Law* 1, 6; Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014) 146.

⁴¹ Humphrey Waldock, in *Yearbook of the International Law Commission 1964*, vol I, UN Doc A/CN.4/SR.769, 53 para 3.

⁴² Humphrey Waldock, *ibid*, para 25; Mustafa Kamil Yasseen, in *Yearbook of the International Law Commission 1964*, vol I, UN Doc A/CN.4/SR.769, para 28; Antonio de Luna, in *Yearbook of the International Law Commission 1964*, vol I, UN Doc A/CN.4/SR.770, para 34.



The opposing view argued that the phrase should be deleted. Proponents of this position maintained that treaty interpretation is not limited to the intentions of the parties at the time of conclusion. Rather, interpretation may also be influenced by subsequent practice and developments in international law, both of which may affect the meaning attributed to treaty provisions. Furthermore, treaties frequently employ concepts derived from domestic law that naturally evolve over time, and legal rules existing at the time of conclusion are often superseded by later developments. From this perspective, exclusive reliance on the law in force at the time of conclusion would unduly restrict the interpretative process.⁴³

In 1966, the prevailing understanding of treaty interpretation had undergone a significant transformation. The purpose of treaty interpretation is the elucidation of the meaning of the text, rather than an investigation *ab initio* into the intention of the parties.⁴⁴ This conception of interpretation allows for approaches beyond the parties' intentions within the general rule, thereby making it more flexible.⁴⁵ This flexibility led to the acceptance of interpretations that take into account the subsequent development of international law.⁴⁶ At this stage, the drafters also acknowledged that the question of intertemporal law is a difficult one and did not seek to provide a definitive solution.⁴⁷

As a result, the phrase "in force at the time of its conclusion" was removed, making the general rule of interpretation temporally open. This means that, when interpreting a treaty, the interpreter may consider either the rules in force at the time of its conclusion or those in force at the time of interpretation.⁴⁸ The question of what

⁴³ Grigory Tunkin, in *Yearbook of the International Law Commission 1964*, vol I, UN Doc A/CN.4/SR.769, para 24; in *Yearbook of the International Law Commission 1964*, vol I, UN Doc A/CN.4/SR.770, paras 25–26; Roberto Ago, in *Yearbook of the International Law Commission 1964*, vol I, UN Doc A/CN.4/SR.769, para 27.

⁴⁴ Antonio de Luna, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.870, para 7; Herbert W Briggs, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.870, para 30; Grigory Tunkin, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.870, para 61.

⁴⁵ Abdullah El-Erian, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.871, para 31; Sayed Hosni Tabibi, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.871, para 43.

⁴⁶ Abdullah El-Erian, *ibid*; Humphrey Waldock, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.872, para 10.

⁴⁷ Humphrey Waldock, *ibid*; see also Humphrey Waldock, 'Sixth Report on the Law of Treaties', 93–97.

⁴⁸ Richard Gardiner (n 9) 298; Christian Djefall (n 8) 168.

the deciding factor is in determining which rules the interpreter should consider remains debated to this day.⁴⁹

Merkouris suggests that Article 31(3)(c) may be broken down into the following elements:

“1. *Rules of international law*

2. *Relevancy, assessed through proximity criteria:*⁵⁰

2.1 *Terminological proximity — the extent to which the relevant rules employ similar terminology and language;*

2.2 *Subject-matter proximity — the extent to which the relevant rules regulate the same subject matter;*

2.3 *Shared signatory parties proximity — the extent to which the same parties are bound by the relevant rules; and*

2.4 *Temporal proximity — the extent to which the relevant rules are connected in temporal terms”*

According to the foregoing discussion, Merkouris’s approach appears to provide a comprehensive framework for understanding Article 31(3)(c) of the VCLT. Not only does it encompass all relevant aspects of Article 31(3)(c),⁵¹ but it also adopts a broader conception of relevancy between external rules and the treaty being interpreted. In this regard, the notion of “relevancy” extends beyond mere subject matter and may also be assessed through terminological, temporal, and party-related considerations.⁵²

Merkouris further argues that the relevancy between other rules and the treaty being interpreted should be understood as a matter of degree. The greater the similarity between an external rule and the treaty being interpreted, the stronger the

⁴⁹ During the drafting process, some members appeared to regard the parties’ intention as the decisive factor; see Abdullah El-Erian, (n 45); Eduardo Jiménez de Aréchaga, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.870, para 71; Paul Reuter, in *Yearbook of the International Law Commission 1966*, vol I, UN Doc A/CN.4/SR.871, para 23. See also Eirik Bjørge (n 40) 189; Panos Merkouris (n 21) 120; Christian Djefal, ‘An Interpreter’s Guide to Static and Evolutive Interpretations: Solving Intertemporal Problems According to the VCLT’ in Georges Abi-Saab and others (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 26.

⁵⁰ Panos Merkouris (n 21) 67-69.

⁵¹ Panos Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (Brill Nijhoff Publishing 2015) 90.

⁵² Panos Merkouris (n 21) 67-69, 78.



case for taking that rule into account.⁵³ In assessing relevancy, it is not necessary for all the factors to exhibit the same degree of similarity. Since all four elements serve to evaluate the same underlying criterion—namely, relevancy—they must be considered together. Similarity in one dimension may compensate for shortcomings in others. As he explains:

*“Since all four elements are merely manifestations of the same criterion, it is only natural that all will be part and parcel of the consideration by the relevant court when deciding to resort to interpretative renvoi or not. The more one element tends to ‘identity’, the lesser the level of ‘proximity’ that will be required from the other elements.”*⁵⁴

The author agrees with Merkouris that relevancy should be understood as a multidimensional concept comprising these four aspects. However, whether relevancy can adequately be measured through proximity alone remains an open question. Accordingly, the following chapters will examine Article 31(3)(c) of the VCLT through the lens of Merkouris’s framework and assess its explanatory value against the ECtHR’s practice.

3. The Use of Article 31(3)(c) in the ECtHR jurisprudence

3.1 The European Court of Human Rights

The ECtHR has played a significant role in the development of international human rights law.⁵⁵ It was established under the European Convention on Human Rights (ECHR) and, together with the former European Commission of Human Rights and the Committee of Ministers of the Council of Europe, forms part of the Convention’s enforcement mechanism.⁵⁶ The ECHR is one of the earliest and most successful regional human rights treaties. It transformed many of the rights proclaimed in the Universal Declaration of Human Rights (UDHR) into legally binding obligations for States Parties.⁵⁷

⁵³ Panos Merkouris (n 51) 85-90.

⁵⁴ *ibid* 88.

⁵⁵ Shai Dothan, ‘The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights’ (2019) 42 (3) *Fordham International Law Journal* 765, 770.

⁵⁶ Council of Europe, ‘European Convention on Human Rights’ <<https://www.echr.coe.int/european-convention-on-human-rights>> accessed 28 March 2025.

⁵⁷ *ibid*.

The Convention entered into force on 3 September 1953 and currently has 46 High Contracting Parties.⁵⁸

The Convention protects a wide range of civil and political rights, including the right to life⁵⁹, the prohibition of torture⁶⁰, the prohibition of slavery and forced labour⁶¹, the right to liberty and security⁶², the right to a fair trial⁶³, and the right to respect for private and family life.⁶⁴ Since many of its provisions are framed in broad and open-ended terms, the ECtHR enjoys a considerable degree of interpretative discretion.⁶⁵ The ECtHR differs from many other international tribunals in several respects. Most notably, it possesses jurisdiction over both individual applications and inter-State complaints,⁶⁶ unlike the International Court of Justice (ICJ), whose jurisdiction is generally limited to disputes between States. Furthermore, judgments of the ECtHR are legally binding upon respondent States and generally enjoy a high level of compliance.⁶⁷ This contrasts with the views adopted by the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR), which are generally regarded as non-binding.⁶⁸

The ECtHR has played a significant role in the development of international human right law. Since its establishment, it has delivered more than 20,000 judgments and decisions, many of which have shaped the interpretation of human rights norms both within and beyond Europe.⁶⁹ In interpreting the ECHR, the Court has developed a number of distinctive interpretative doctrines, such as the principles of effectiveness, autonomous interpretation, evolutionary interpretation, and the margin of appreciation.

⁵⁸ European Implementation Network, 'Countries Overview' <<https://www.einnetwork.org/countries-overview?>> accessed 28 March 2025.

⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2.

⁶⁰ *ibid* art 3.

⁶¹ *ibid* art 4.

⁶² *ibid* art 5.

⁶³ *ibid*, art 6.

⁶⁴ *ibid* art 8.

⁶⁵ Shai Dothan (n 55) 771.

⁶⁶ ECHR (n 59), art 33, 34.

⁶⁷ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 36.

⁶⁸ Rosanne Van Alebeek and André Nollekaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 356–413.

⁶⁹ Shai Dothan (n 55) 770.

These doctrines have often resulted in an expansive interpretation of Convention rights and have occasionally led to criticism that the Court adopts an overly activist approach to judicial interpretation.⁷⁰

One of the interpretative tools frequently employed by the ECtHR is Article 31(3)(c) of the VCLT. Among the Court's early decisions, *Golder v. United Kingdom* is often regarded as one of the first explicit instances in which the Court relied upon the provision in the interpretative process. Since *Golder*, the provision has played an important role in the Court's jurisprudence⁷¹ and has been invoked in a wide range of cases involving the interpretation of Convention rights.

3.2 Interpretation through Relevant Rules under Article 31(3)(c) in ECtHR Jurisprudence

The ECtHR has employed Article 31(3)(c) of the VCLT for at least three distinct purposes. First, it may be used to fill gaps in the provisions of the ECHR. Second, it may serve to clarify the content of obligations already contained within the Convention. Third, it may function as a tool for avoiding or minimizing normative conflicts between the ECHR and other rules of international law. These three functions will be examined in turn.

3.2.1 Filling Gaps in the ECHR

One of the most significant ways in which the ECtHR has used Article 31(3)(c) of the VCLT is to fill apparent gaps in the ECHR. Through this interpretative technique, rights that are not expressly guaranteed by the Convention, or that had previously been regarded as falling outside its scope, may come to be recognized as implicitly protected under existing Convention provisions.

The Court has generally employed two methods for filling such gaps through Article 31(3)(c): (1) reliance on general principles of international law; and (2) reliance on European consensus.

3.2.1.1 Filling Gaps through General Principles of International Law

The ECtHR has occasionally relied on general principles of international law through Article 31(3)(c) of the VCLT in order to fill gaps in the ECHR.

⁷⁰ Christian Djéffal (n 8) 273-278, Marko Bosnjak and Kacper Zajac, 'Judicial Activism and Judge-Made Law at the ECtHR', *Human Rights Law Review*, Volume 23, Issue 3, September 2023, ngad015, 1, <<https://doi.org/10.1093/hrlr/ngad015>> accessed 11 January 2024.

⁷¹ See Christian Djéffal (n 8) 325.

In *Golder v. The United Kingdom*, the Court was required to determine whether the right of access to a court formed part of the right to a fair trial guaranteed under Article 6 of the ECHR. Based on textual and historical perspectives, the right of access was not intended to be part of the right to a fair trial, as the latter regulates proceedings, whereas the former concerns acts occurring before proceedings begin.⁷² Consequently, the text of Article 6 does not expressly guarantee a right of access to a court.

In reaching its conclusion, the Court relied principally on Article 31(3)(c) of the VCLT⁷³ together with the object and purpose of the Convention in interpreting Article 6 of the ECHR.⁷⁴ Through Article 31(3)(c), the Court took into account general principles of law within the meaning of Article 38(1)(c) of the ICJ Statute, including the principle that a civil claim must be capable of being submitted to a judge and the principle prohibiting the denial of justice.⁷⁵ The Court reasoned if Article 6 of the ECHR were interpreted as applying only after proceedings had already been initiated before a court, it could allow states to exercise discretion in determining jurisdiction over certain types of cases, potentially leading to the arbitrary use of power.⁷⁶ Furthermore, if the right of access to a court were not considered part of Article 6, procedural guarantees such as fairness, publicity, and equality of arms would become largely meaningless if individuals could not gain access to judicial proceedings in the first place.⁷⁷ On this basis, the Court concluded that the right of access to a court is implicitly contained within Article 6 of the ECHR, notwithstanding the absence of any explicit textual reference to such a right.⁷⁸

In order to fill in the gaps in the ECHR, the Court used Article 31(3)(c) of the VCLT to refer to general principles of international law that provided broader scope of human rights protection than the Convention text itself appeared to offer. This result was a treaty interpretation that required the Convention to create a similar obligation to the general principle. In other words, the ECHR ought to protect the disputed right if the general principle does. This is one way to harmonise the ECHR provisions with the

⁷² *Golder v the United Kingdom App no 4451/70 (ECtHR, 21 February 1975) paras 28–32; see also Separate Opinion of Zekia, 22–23.*

⁷³ *ibid*, para 35.

⁷⁴ *ibid*, para 34.

⁷⁵ *ibid*, para 35.

⁷⁶ *ibid*.

⁷⁷ *ibid*.

⁷⁸ *ibid*, para 36.



general principle of law, which seems like an expansion of the ECHR and ultimately fills in the *prima facie* gaps in the ECHR.

Nevertheless, this approach has been criticized. Fitzmaurice argued that general principles of law are often considerably more abstract and indeterminate than treaty provisions themselves. Because of their broad and flexible character, such principles may be incapable of providing sufficiently precise guidance for the interpretation of a specific treaty provision. As he observed:

*“[general principle] are factors external to Article 6.1 (art. 6-1) of the Human Rights Convention and having little or no direct bearing on the precise point of interpretation involved ... They might be useful as straws to clutch at, or as confirmatory of a view arrive at aliter, they are in no way determining in themselves, even taken cumulatively”*⁷⁹

3.2.1.2 Filling Gaps through European Consensus

A second method by which the ECtHR fills gaps in the Convention is through reliance on European consensus. The Court frequently invokes Article 31(3)(c) of the VCLT when identifying and relying upon such consensus.

In *Magyar Helsinki Bizottság v Hungary*, the Court was required to determine whether the right to access state-held information formed part of the right to freedom of expression under Article 10 of the ECHR. Based on a textual perspective, Article 10 contains no explicit guarantee of a right of access to information. It refers to information to receive and impart information and ideas.⁸⁰ Furthermore, the Court also examined its earlier case law, particularly *Leander v. Sweden*, in which it had held that freedom of expression only obliges states to refrain from interfering with the receiving and imparting of information that others were willing to impart; it does not extend to a right of access to information, or impose an obligation on States to make such information publicly available.⁸¹

In reconsidering this issue, the Court expressly relied upon Article 31(3)(c) of the VCLT and took into account a number of rules of international and regional instruments. These included Article 19 of the ICCPR, which is a provision that has a high degree of similarity to Article 10 of the ECHR. It governs freedom of expression and has almost identical language. The difference is the former explicitly refers to the right to

⁷⁹ *ibid*, Separate opinion of Gerald Fitzmaurice para 35.

⁸⁰ *Magyar Helsinki Bizottság v Hungary App no 18030/11 (ECtHR, 8 November 2016) para 126.*

⁸¹ *ibid*, para 127.

seek information as part of freedom of expression, alongside the right to receive and impart information. The same cannot be said of the latter.⁸²

Article 19 of the UDHR, which is very similar to Article 19 of the ICCPR and Article 10 of the ECHR. Article 19 of the UDHR also explicitly refers to the right to seek information as part of freedom of expression.⁸³

Article 42 of the European Union's Charter of Fundamental Rights and EU Regulation No. 1049/2001. The former grants the right to access documents held by EU bodies, not Member States, and the latter provides some exceptions to that right.⁸⁴

Council of Europe Convention on Access to Official Documents, which, at the time of interpretation, had been ratified by only seven parties to the ECHR. The convention grants the right to access public information. The Court considered this treaty as evidence of a trend toward a European standard, which could be taken into consideration when interpreting the ECHR.⁸⁵

These rules, alongside state practice and international instruments, demonstrated, in the ECtHR's opinion, that a broad consensus has emerged within European society that the right of access to state-held information, which may generate public discussion on matters of public interest, must be protected.⁸⁶ The Court then recognized the right of access to state-held information in particular circumstances as an essential part of the right to receive and impart information. If such a right is excluded from the Convention, the right to receive and impart information might be rendered ineffective,⁸⁷ leading to the protection of the right of access to state-held information in specific circumstances falling within the scope of Article 10 of the ECHR.

Therefore, examining the relationship between the ECHR and other relevant rules of international law, it appears that, from the Court's perspective, the rules of international law taken into consideration point in the same direction. They all protect the right to access state-held information. This influences the Court to interpret Article 10 of the ECHR to protect such right as well. This harmonization between the ECHR and other rules of international law led to the result of filling the gaps that were not covered by its previous rulings.

⁸² *ibid*, para 140.

⁸³ *ibid*.

⁸⁴ *ibid*, para 144.

⁸⁵ *ibid*, para 145.

⁸⁶ *ibid*, para 148.

⁸⁷ *ibid*, para 155.



3.2.2 Clarifying Obligations

Most provisions of the ECHR define the rights enjoyed by individuals but do not specify in detail the measures that States must adopt to secure those rights. The ECtHR frequently relies on relevant rules of international law through Article 31(3)(c) of the VCLT to clarify the concrete obligations arising under the Convention. The issue in such cases is not whether the ECHR protects a particular right, but rather what States must do in order to guarantee the effective enjoyment of that right.

In *X v Latvia*, a case concerning international child abduction and falling within the scope of Article 8 of the ECHR concerning the right to family life, the Court used other relevant rules to describe the obligation embedded in Article 8 of the ECHR in the case of child abduction, namely the Hague Convention on Civil Aspects of International Child Abduction (Hague Convention) and the Convention on the Rights of the Child (CRC).⁸⁸ This is a case in which Article 8 of the ECHR states that everyone has the right to respect for his or her family but does not expressly define the obligations of States in cases involving international child abduction. To address this issue, the Court took into account the Hague Convention as a relevant rule under Article 31(3)(c) to assist in the interpretation of Article 8 of the ECHR. It concluded that, in principle, States are required to secure the prompt return of the child to the State of habitual residence, as reflected in Article 11 of the Hague Convention,⁸⁹ and subject to the exceptions under Articles 12, 13, and 20 of that Convention.⁹⁰

The relationship between the Convention and the Hague Convention appears to be that, by interpreting the ECHR while taking into account the Hague Convention, States have to comply with the Hague Convention in order to ensure the right under Article 8 of the ECHR. It may be illustrated through a simple example involving A (the first parent), B (the second parent), and C (the child), which can be used to describe how the Court uses the Hague Convention as a tool to determine the specific obligation under the ECHR. In the case where A abducts C from B, the rights of B are interfered with, and states have an obligation to immediately return C to B pursuant to the Hague Convention to comply with Article 8 of the ECHR.⁹¹ On the other

⁸⁸ *X v Latvia* App no 27853/09 (ECtHR, 26 November 2013) paras 93-94.

⁸⁹ *Ibid*, para 97; Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983) art 11.

⁹⁰ *Ibid* paras 98-101, 107; *ibid* art. 12, 13, 20.

⁹¹ *X v Latvia (n 88)* Separate Opinion of Judge Pinto de Albuquerque, 36-37; see also *Maumousseau and Washington v France* App no 39388/05 (ECtHR, 6 December 2007) para 69.

hand, where States return C to B, this means that the right of A is being interfered with. If the States correctly comply with their obligation under the Hague Convention, the interference with A's rights will be deemed lawful under Article 8 of the ECHR.⁹² In short, the Court uses the Hague Convention to determine what states must do in cases of international child abduction. In these circumstances, Article 8 of the ECHR obliges States to return the child to their home state immediately, subject to some exceptions. This is the outcome of harmonizing the Hague Convention and Article 8 of the ECHR, in which the Hague Convention serves as a tool to clarify the obligation under the ECHR.

A similar approach can be seen in *Pindo Mulla v Spain*, which concerned the right protected under Article 8 of the ECHR in the context of patients' autonomy and self-determination in relation to medical treatment in emergency situations.⁹³ In this case, the applicant explicitly refused a blood transfusion⁹⁴ but after being admitted with severe internal bleeding, the doctors obtained urgent judicial authorization⁹⁵ which was obtained in a manner that was very limited and inaccurate regarding the applicant's wishes.⁹⁶ Therefore, the applicant argued that such a decision interfered with her right under Article 8 of the ECHR.⁹⁷

Article 8 of the ECHR does not provide specific details regarding the refusal of medical treatment in emergency situations.⁹⁸ In determining whether the interference was justified, the Court relied upon the Oviedo Convention as a relevant rule under Article 31(3)(c) of the VCLT.⁹⁹ As a result, in the context of the refusal of medical treatment in emergency situations, the State can provide essential care if there is uncertainty regarding the refusal of treatment, but this is an exception and must be construed strictly. The State has an obligation to make every reasonable effort to determine the patient's wishes corresponding to Article 8 of the Oviedo Convention and its explanatory report.¹⁰⁰ In this case, the authorisation by the duty judge was made on the basis of incomplete or insufficient information and there was no way for the

⁹² *ibid*, 37.

⁹³ *Pindo Mulla v Spain* App no 15541/20 (ECtHR, 17 September 2024) paras 98,146.

⁹⁴ *ibid*, para 11.

⁹⁵ *ibid*, paras 25-26.

⁹⁶ *ibid*, paras 159-160.

⁹⁷ *ibid*, para 129.

⁹⁸ *ibid*, para 144.

⁹⁹ *ibid*, para 128.

¹⁰⁰ *ibid*, paras 149, 162.



applicant to challenge such a decision.¹⁰¹ Therefore, the right of the applicant was violated. This can be understood as the State failing to take reasonable measures to ascertain the applicant's wishes, an obligation derived from the interpretation of Article 8 of the ECHR by taking into account the Oviedo Convention through Article 31(3)(c) of the VCLT.¹⁰²

In sum, taking together, *X v. Latvia* and *Pindo Mulla v. Spain*, the Court used the Hague Convention, the Oviedo Convention, and its explanatory report to clarify the obligations under Article 8 of the ECHR in specific contexts.

3.2.3 Conflict Avoidance

One of the recurring challenges arising from the decentralization of international law is the possibility of conflicts between legal norms. Article 31(3)(c) of the VCLT serves as an important interpretative tool for minimizing or avoiding such conflicts.

According to Pauwelyn, a conflict of norms is “*Essentially two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, breach of the other*”¹⁰³.

On this basis, conflicts may be divided into three categories. The first category is inherent conflict. This occurs where two norms conflict with each other simply through their emergence or conclusion, such as conflicts between *jus cogens* and another norm.¹⁰⁴ The second category is necessary conflict, which arises during the application of legal rules. This type of conflict will occur only when States must comply with their obligations. When the conflicting norms offer no choice, the states must comply with its obligation, the conflict will occur inevitably.¹⁰⁵ Lastly, the third category is potential conflict. Like necessary conflicts, these arise at the stage of application. However, the difference is that in this case the conflicting norms offer some discretion. Only when States decide to exercise or comply with such norms will the conflict occur.¹⁰⁶

Article 31(3)(c) is a useful tool to tackle such issues. In *Al-Adsani v the United Kingdom*, there was a possibility of a conflict between Article 6 of the ECHR,

¹⁰¹ *ibid*, para 182.

¹⁰² *ibid*, para 183.

¹⁰³ Joost Pauwelyn (n 4) 175–176.

¹⁰⁴ *ibid* 176.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid*.

which guarantees the right to a fair trial, and the customary international law rule of State immunity. The applicant alleged that he had been subjected to torture by individuals benefiting from State immunity and sought compensation before the court of a court of the United Kingdom (UK court). His claim was dismissed on the basis of State immunity.¹⁰⁷

The applicant argued before the ECtHR that the refusal of access to a court violated Article 6 of the ECHR. In addressing this claim, the Court interpreted Article 6 in light of the customary international law rule of State immunity. The Court observed that the right guaranteed by Article 6 is not absolute¹⁰⁸ and may be subject to lawful restrictions where those restrictions pursue a legitimate aim and are proportionate.¹⁰⁹ The Court took into account State immunity and treated it as a legitimate objective grounded in international law. The Court concluded that a restriction based on compliance with other international law, particularly State immunity, cannot be regarded as a disproportionate restriction.¹¹⁰

By this reasoning, it allows States to comply simultaneously with both obligations arising under the ECHR and State immunity. Under the rule of State immunity, the person still enjoys immunity and cannot be sued in a domestic court, and in terms of the ECHR, even if the right of the applicant is subject to restriction, the UK still does not violate its obligation under Article 6 of the ECHR in the form of a lawful restriction.

4. The Concept and Function of “Relevant Rules of International Law Applicable in the Relations between the Parties” under Article 31(3)(c): Insights from ECtHR Jurisprudence

4.1 Defining Relevant “Rules” of International Law under Article 31(3)(c) from the ECtHR’s Perspective

As discussed earlier, the term “rules” under Article 31(3)(c) means norms of *lex lata*, not of *lex ferenda*. However, the ECtHR often explicitly cites Article 31(3)(c) and

¹⁰⁷ *Al-adsani v The United Kingdom* App no 35763/97 (ECtHR, 21 November 2001) paras 18-19.

¹⁰⁸ *ibid*, para 53.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*, para 55-56.



considers instruments that do not possess the character of binding norms. Some authors argue that the ECtHR adopts a soft approach to the term “rules,” which leads to the inclusion of international tribunal practice and non-binding instruments within Article 31(3)(c).¹¹¹

In *Mamatkulov and Askarov v Turkey*, the Court had to determine whether Article 34 of the ECHR (concerning individual application) gives it the competence to impose interim measures; if so, whether such measures are binding upon the parties. In interpreting Article 34 of the ECHR, the Court directly referred to Article 31(3)(c) of the VCLT¹¹² and considered the practice of other international tribunals, namely the CAT Committee¹¹³, the Inter-American Court of Human Rights¹¹⁴, the Human Rights Committee¹¹⁵, and the ICJ (*LaGrand* judgment)¹¹⁶.

As previously mentioned, international judicial decisions are not rules of international law; rather, they are applications of rules, not the rules themselves.¹¹⁷ In addition, judicial decisions are not generally binding; they are binding only upon the parties to a particular dispute.¹¹⁸ In this sense, they cannot be considered rules directly under Article 31(3)(c) of the VCLT..

However, they have a determining function, which can be a useful tool to determine the existence of rules of international law and their substance.¹¹⁹ In their separate opinions, Judge Caflisch, Türmen, and Kovler raised the idea that the Court could use such judicial practice to identify and ascertain whether there are any general principles of international law concerning interim measures.¹²⁰ Even if the judges conclude, in their separate opinions, that such a general principle may not have existed

¹¹¹ Christian Djeflal (n 8) 332-333; Vassilis P Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration’ (2010) 31 *Michigan Journal of International Law* 621.

¹¹² *Mamatkulov and Askarov v Turkey* App no 46827/99 and no 46951/99 (ECtHR, 4 February 2005) 111.

¹¹³ *ibid*, paras 43-45, 115.

¹¹⁴ *ibid*, paras 51-53, 116.

¹¹⁵ *ibid*, paras 41-42, 114.

¹¹⁶ *ibid*, para 117.

¹¹⁷ Joost Pauwelyn (n 4) 110.

¹¹⁸ Hugh Thirlway, *The Source of International Law* (2nd edn, Oxford University Press 2019) 134-135.

¹¹⁹ Richard Gardiner, (n 9) 307; Charles C Jalloh (n 27) 188 para 7.

¹²⁰ *Mamatkulov and Askarov v Turkey* (n 112), Joint Concurring Opinion of Judges Caflisch, Türmen and Kovler, paras 161-162; see also Richard Gardiner (n 9) 329.

at the time of the interpretation,¹²¹ this indicates that the Court does not specifically mention international tribunal practice as rules of international law, but rather as evidence of such rules possessing a binding character within the scope of Article 31(3)(c) of the VCLT.

Another category of instruments that raises questions as to whether it falls within the scope of “rules” under Article 31(3)(c) of the VCLT consists of non-binding instruments, commonly referred to as soft law. The ECtHR often directly refers to Article 31(3)(c) of the VCLT and then goes on to consider soft law when interpreting the ECHR; this might create confusion about the idea that soft law constitutes rules of international law within the scope of Article 31(3)(c) of the VCLT.

European consensus is a common interpretative technique used by the ECtHR to interpret the ECHR. European consensus can be found by considering state practice alongside international “instruments.” In *Magyar Helsinki Bizottság v Hungary* and *Demir and Baykara v Turkey*, the Court used European consensus in its interpretation and considered soft law as an international “instrument.”¹²² The Court directly refers to Article 31(3)(c) of the VCLT and uses the term “rules of international law”,¹²³ as previously discussed, meaning only those that possess the character of legally binding norms; however, when the Court speaks of the method of finding European consensus, it uses the word “instrument” instead.¹²⁴ This choice of wording appears to be deliberate. As the two terms have different meanings, the word “instrument” refers to any instrument, whether legally binding or not, whereas the word “rules” can refer only to legally binding norms. This choice of wording demonstrates that the ECtHR does not regard soft law as “rules” falling under the scope of Article 31(3)(c) of the VCLT, but instead considers soft law as an international instrument and therefore does not include it directly within Article 31(3)(c).

This does not preclude the consideration of soft law in treaty interpretation. Soft law can be used as evidence of rules of international law, such as custom or general principles. In *N.D. and N.T. v Spain*, the Court cited Article 31(3)(c) of the VCLT and focused primarily on the International Law Commission’s Draft Articles on the Expulsion of Aliens, which constitute a non-binding legal instrument, as evidence of the

¹²¹ *ibid*, paras 161-162.

¹²² *Demir and Baykara v Turkey* (n 5) paras 61; *Magyar Helsinki Bizottság v Hungary* (n 80), para 123.

¹²³ *ibid*, paras 85-86; *Magyar Helsinki Bizottság v Hungary* (n 80), para 124.

¹²⁴ *Demir and Baykara v Turkey* (n 5) para 61; *Magyar Helsinki Bizottság v Hungary* (n 80) para 123.



existing international custom regarding the expulsion of aliens.¹²⁵ As discussed above, the Court often considers soft law as a tool to find European consensus. Judge Kjølbros expressed his opinion in *Magyar Helsinki Bizottság* that soft law can be considered a “general aspiration at the level of policy”¹²⁶ and can be used as evidence of the crystallization of European consensus,¹²⁷ but due to its non-binding nature, it cannot be considered as a rule of international law within the scope of Article 31(3)(c) of the VCLT.

In conclusion, based on the foregoing discussion, the ECtHR considers rules of international law to be only those norms that possess a binding character, such as treaties, customary international law, and general principles, and does not include those that have not yet become legal norms, such as non-binding instruments and international tribunal practice. In other words, the rules of international law under Article 31(3)(c) of the VCLT are meant for those that are considered *lex lata* and not *lex ferenda*.

4.2 Relevancy of Relevant Rules under Article 31(3)(c) of the VCLT

Not every rule of international law can be taken into account under Article 31(3)(c) of the VCLT. Only those that are “relevant” may be considered. As mentioned above, Merkouris proposed “proximity criteria” that treat relevancy as a matter of degree and determine it through proximity. The author agrees with him that relevancy between rules of international law and the treaty being interpreted has four aspects, but his proximity criteria contain weaknesses when one tries to use them to explain the behaviour of the ECtHR.

1) Relevancy cannot be measured objectively. Although Merkouris does not explicitly claim that relevancy is objective, his idea of proximity criteria, which suggests

¹²⁵ *N.D. and N.T. v Spain* App no 8675/15 and no 8697/15 (ECtHR, 13 February 2020); see also Donato Greco, ‘Some Remarks on the Role of Soft Law in Treaty Interpretation: 50 Years after the Adoption of the Vienna Convention on the Law of Treaties’ in Giuseppe Pascale and Sara Tonolo (eds), *The Vienna Convention on the Law of Treaties: The Role of the Treaty on Treaties in Contemporary International Law* (Edizioni Scientifiche Italiane 2022) 281-282.

¹²⁶ *Magyar Helsinki Bizottság v Hungary* (n 80) Separate Opinion of Judge Kjølbros para 36.

¹²⁷ *Muršić v Croatia* App no 7334/13 (ECtHR, 20 October 2016); Separate Opinion of Judge Pinto de Albuquerque, para 14.

that rules with greater similarity are more likely to be relevant,¹²⁸ implies that there must be a proximity threshold that rules must satisfy. According to his criteria, if one aspect has high proximity, it can compensate for other shortcomings.¹²⁹ To put it in his own words, “reminiscent of the law of communicating vessels, according to which water poured in interconnected vessels will always find a position of balance amongst them.”¹³⁰ This illustrates that, when all aspects are combined, there should be a proximity threshold and that the proximity of relevancy in a given case could be assessed in some measurable way, allowing one to determine whether, in a specific aspect, there is a lack of proximity and how much compensation is required from other aspects to pass such a threshold.

Based on the water metaphor for proximity, the degree of proximity may be illustrated as follows: assume that the proximity threshold is set at 100 ml. Terminological proximity in the case of customary rules, due to their non-textual nature, would contribute 0 ml. Subject-matter proximity, where there is only material overlap, would contribute 50 ml. With regard to shared parties proximity, where the rule binds all parties to the treaty, this would contribute 100 ml. Lastly, temporal proximity in the case of customary rules, where the exact time of entry into force cannot be clearly identified, would contribute 0 ml. On this basis, the rule would reach a total of 150 ml of proximity and thus exceed the threshold required to enter the interpretative process.

In reality, however, relevancy cannot be measured in such a manner. From the study, the practice of the ECtHR shows that relevancy cannot be measured objectively as if we were measuring the distance between two objects in the realm of reality. If norms are almost identical in terms of terminological proximity, is it the same as the distance between A and B being 1 cm apart? If two norms are not the exact same subject matter but they only overlap in *ratione materiae*, are they five cm apart? At the very least, this suggests that the former has greater proximity, and whereas the latter requires greater compensation. But how much exactly? Does this mean that in the former case, the rules of international law can be rules that bind only the parties to the dispute and the latter require rules that bind all parties to the treaty? This shows that we cannot objectively measure each factor individually, which leads to difficulties in determining the proximity threshold. If an individual factor cannot be measured, its

¹²⁸ Panos Merkouris (n 51) 89-90.

¹²⁹ Panos Merkouris (n 21) 71.

¹³⁰ Panos Merkouris (n 51) 88.



combination cannot be measured either. Therefore, the inability to measure proximity clearly and objectively leads the proximity criteria to encounter more complications when used to explain the Court's practice.

2) The ECtHR did not treat proximity as decisive in every situation. In applying Article 31(3)(c) of the VCLT, the Court appears to be unconcerned with differences in certain aspects of relevancy, particularly in terminological and subject-matter aspects. In many instances, the Court takes into account rules of international law that differ in wording or subject-matter, and these differences themselves provide interpretative guidance.¹³¹ For example, in *Magyar Helsinki Bizottság v Hungary*, the Court could have relied on Article 11 of the Charter of Fundamental Rights of the European Union which has identical wording compared to the ECHR,¹³² but it chose not to do so. Instead, it referred to other rules of international law that differ in both terminology and scope, notably Article 19 of the ICCPR.¹³³ This appears to be a deliberate choice. The author argues that proximity is not the priority here and a study of the Court's practice shows that the only aspect of relevancy that requires proximity is shared parties proximity.¹³⁴ Accordingly, the Court does not appear to prioritize or determine relevant norms on the basis of proximity; rather, it must be based on something else.

Article 31(3)(c) of the VCLT constitutes one element of the interpretative process, which Djeflal characterises as an interpretative technique. This technique performs two functions: first, a parameter function, and second, a guidance function.¹³⁵ When viewed in this way, rules of international law that are considered relevant under Article 31(3)(c) should fulfil both roles. Accordingly, determining whether a rule is relevant involves two related questions. The first is whether the rule is capable of being taken into account. Only rules that are relevant can pass this threshold and enter the interpretative process, serving as a threshold stage prior to interpretation. The second concerns the direction or guidance that such a rule provides for interpreting the treaty. In other words, rules of international law should not only satisfy the parameter

¹³¹ As explained below.

¹³² As it was referred to in the section on relevant international and comparative law materials, but not relied upon in the Court's reasoning, see *Magyar Helsinki Bizottság v Hungary* (n 80) paras 55, 138-148.

¹³³ *Ibid*, para 140.

¹³⁴ The Court often interprets the ECHR by reference to European consensus. Shared-party proximity strengthens this line of reasoning, as discussed below in relation to intention-based arguments.

¹³⁵ Christian Djeflal (n 8) 115-116.

requirement but also contribute meaningful guidance; if a rule offers no guidance, there would be little reason to consider it in the first place.

As mentioned above, Article 31(3)(c) of the VCLT is often examined from the perspective that rules of international law must possess certain characteristics to be considered relevant, focusing primarily on the preliminary stage prior to interpretation. Discussions concerning how rules become relevant therefore tend to concentrate on this filtering aspect.¹³⁶ With respect to the function of guidance, some scholars argue that Article 31(3)(c) leads to systemic interpretation.¹³⁷ This conclusion follows when Article 31(3)(c) is analysed by treating these questions separately. However, the practice of the ECtHR reveals that the assessment of the relevancy of a rule is closely connected with both functions. According to the practice of the ECtHR, Article 31(3)(c) not only leads to harmonized interpretation to avoid conflict between norms; it can also result in comparisons between the wording of different norms, which may reveal potential conflicts, as well as support teleological reasoning. These different outcomes arising from Article 31(3)(c) are closely connected to the relevancy of the rule of international law being considered.

For example, if the interpreter seeks to contrast the terminology of two norms, the relevant rules must differ in their linguistic qualities.¹³⁸ If the aim is to harmonize

¹³⁶ See Merkouris (n 51) 83-95, Even though he said Article 31(3)(c) of the VCLT as a tool to integration it will reflect various school of interpretation but his proximity criteria act as a gateway to let those rules come in not exactly link between function of guidance and qualification of the rule of international law; see also Gardiner, (n 9) 299; Julain Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37 *Brooklyn Journal of International Law* 373. Propose that rule must touch on the same subject matter which still seems like a qualification rather the question of what these rules could provide.

¹³⁷ See A Rachovitsa 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) *International and Comparative Law Quarterly* 557, 575; International Law Commission (n 4) para 420; Vassilis P Tzevelekos (n 111) 631-632; Joost Pauwelyn (n 4) 253.

¹³⁸ Panos Merkouris characterizes this as "negative interpretation", referring to an approach that excludes certain meanings, in contrast to "positive interpretation", which identifies or confirms meaning. Only positive interpretation is treated as necessary to establish relevance through the proximity criteria. See Panos Merkouris (n 51) 65-66.

However, where taking into account relevant rules leads to negative interpretation, this still counts as an interpretation relying on a relevant rule, in the same way as interpretation by reference to context, where the wording of treaty provisions is compared and contrasted. Therefore, if the proximity criteria can be applied to positive interpretation, they should also be applied to negative interpretation; see Richard Gardiner (n 9) 199-200; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, [1992] ICJ Rep 351, 373-374.

norms and avoid conflict, the rules must differ in certain respects while also materially overlapping so as to create the possibility of conflict. If two norms are identical, there will be no conflict. This demonstrates that the guidance function is closely linked to the relevancy of rules of international law. Accordingly, it suggests that relevancy is ultimately connected to the type of argument that a rule can provide.

Accordingly, the author proposes an “argument-based relevancy approach” as a framework for understanding Article 31(3)(c) of the VCLT. Under this approach, relevancy is assessed in light of the types of arguments that rules of international law can contribute to the interpretative process. Robert Alexy regards various interpretative canons as forms of argument.¹³⁹ Because relevancy is related to argumentative roles, I adopt his framework to classify the relevancy of such rules derived from interpretative arguments in the Court’s interpretation under Article 31(3)(c) of the VCLT. This framework can be divided into four categories: semantic arguments, systemic arguments, intention-based arguments, and teleological arguments, each of which will be examined in turn.

4.2.1 Semantic Argument

A semantic argument is one that derives from linguistic usage.¹⁴⁰ In the context of the ECtHR, when the Court takes relevant rules of international law into account, this may lead to a textual comparison between those rules and the ECHR. Such a comparison can result in conclusions drawn from a semantic perspective, namely that differences in wording indicate differences in meaning.

For example, in the case of *Magyar Helsinki Bizottság v Hungary*, the Court considered Article 19 of the ICCPR in interpreting Article 10 of the ECHR, which provides:

Article 10 of the ECHR: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises...”

¹³⁹ Robert Alexy (n 11) 244-245; Panos Merkouris also suggests that Article 31(3)(c) of the VCLT has the character of *interpretative renvoi*, suggesting that it reflects the entire interpretative process in connection with all the schools of interpretation, namely textual interpretation, subjective interpretation, teleological interpretation. see also Panos Merkouris (n 51) 90-91.

¹⁴⁰ Robert Alexy, (n 11) 235.

Article 19 of the ICCPR: “2. Everyone shall have the rights to freedom of expression; this right shall include freedom to ‘seek’, receive, and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

As can be seen, the terminology of these two provisions is almost identical; the only difference is that Article 19 of the ICCPR contains the word “seek,” which is not found in Article 10 of the ECHR. Because of this difference, the text of the two provisions can be compared, which leads to the argument that, according to language usage, Article 19 of the ICCPR expressly mentions the right to seek information, while Article 10 of the ECHR does not; this implies that the right to seek information is a component of freedom of expression under Article 19 of the ICCPR and not a component of freedom of expression under Article 10 of the ECHR.¹⁴¹

Semantic arguments in the form of textual comparison require that the two norms differ in language usage so that they can be compared and contrasted. This argument focuses primarily on differences in terminology. It requires terminological differences between the norms, so they can be contrasted with each other. As a result, this argument suggests that these two norms, regarding their differences in language usage, do not have the same meaning.¹⁴²

4.2.2 Systemic Argument

A systemic argument is based on consistency between norms within the same legal environment. It refers to contradictions or conflicts between norms. When treaties are open to multiple interpretations, they should be interpreted in a manner that avoids conflict with other norms in the same legal order.¹⁴³ This type of argument reflects an important feature of Article 31(3)(c) of the VCLT, which is often regarded as a tool for avoiding conflict within international law, a problem that arises from the

¹⁴¹ See *Magyar Helsinki Bizottsag v Hungary* (n 80) Separate Opinion of Judge Kjølborg (n 80) para 36; see also *Johnston v Ireland* App no 9697/82 (ECtHR, 18 December 1986) paras 51-54. In this case the Court compared the text between ECHR and UDHR then lead to the conclusion that both of these norms have difference in language use therefore these norms must have different meaning.

¹⁴² If one wants to use a relevant rule of international law to confirm meaning, the terms of both norms should be the same; this would require proximity in terminological relevancy. See *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections)* ICJ Rep 3, paras 87-98.

¹⁴³ Robert Alexy (n 11) 240; See also International Law Commission (n 4) paras 413-414; and Philippe Sands, ‘Treaty, Custom and the Cross-Fertilization of International Law’, cited in Joost Pauwelyn (n 4) 253.



fragmented nature of the international legal system.¹⁴⁴ The Court places importance on harmonized interpretation, as the Court regularly states that “the Convention should, so far as possible, be interpreted in harmony with other rules of international law of which it forms part”¹⁴⁵

The case of *Al-Adsani v The United Kingdom* is the key example of this type of interpretation. As can be seen, on the surface, there was a possibility that Article 6 of the ECHR and the rule of State immunity were in a relationship of conflict. Al-Adsani claimed that he had the right, under Article 6 of the ECHR, to bring his case before a court. However, State immunity grants protection that prevents those who enjoy it from being sued in domestic courts. If the Court had interpreted Article 6 in a way that allowed Al-Adsani to sue an individual benefiting from immunity, it would have led to a real conflict, where only one of the two norms could be applied: either Article 6, granting Al-Adsani a right of access, or State immunity, preventing such action.

To harmonize these two norms, the Court made use of the flexible nature of Article 6, noting that this right is not absolute but subject to lawful restrictions.¹⁴⁶ The Court reasoned that fulfilling obligations under State immunity constitutes a legitimate aim and that the restriction is proportionate to that aim. By this reasoning, the Court allowed States to comply with both obligations simultaneously: those arising under the ECHR and those arising from State immunity. In practice, the person still enjoys immunity and cannot be sued in a domestic court, and although Al-Adsani’s right was restricted, the UK did not violate its obligations under Article 6, because the restriction was considered lawful.

Moreover, this type of interpretation should not be classified as teleological because its main purpose is to avoid conflict between norms, not to promote the protection of human rights. As discussed above, the object and purpose of the ECHR are the protection of human rights, and interpretations that favour the protection of rights are considered to be in line with that purpose. In *Al-Adsani*, although the

¹⁴⁴ Noppadon Detsomboonrat, ‘*International Law as a Constitutionalized Legal System*’ (PhD thesis, University of Edinburgh 2015) 123–125.

¹⁴⁵ *Al-Adsani v The United Kingdom* App no 35763/97 (ECtHR, 21 November 2001) para 55; see also *Fogarty v The United Kingdom* App no 37112/97 (ECtHR, 21 November 2001) para 35; *McElhinney v Ireland* App no 31253/96 (ECtHR, 21 November 2001) para 36; *Hassan v The United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) para 77; *Banković and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001) para 57.

¹⁴⁶ *Al-Adsani v the United Kingdom* (n 145) para 53.

interpretation succeeded in avoiding a conflict, there was still an interference with Al-Adsani's right. This shows that the interpretation prioritized the avoidance of conflict over the promotion of the right itself. Therefore, it cannot be considered a teleological interpretation.¹⁴⁷

In terms of relevancy in systemic arguments, it focuses on two aspects in particular, namely, subject-matter and shared parties relevancy.

1) Subject-matter relevancy. In this case, the rules of international law must have differences in subject-matter, yet still materially overlap with the treaty being interpreted. Such differences are necessary to create the possibility of conflict in the first place.¹⁴⁸

As shown in *Al-Adsani v The United Kingdom*, the principle of State immunity and Article 6 of the ECHR concern different subject matters. The former governs the performance of public functions by States and their representatives by protecting them from being sued or prosecuted before foreign courts,¹⁴⁹ while the latter belongs to the field of human rights law and concerns the right to a fair trial, including the right of access to a court.¹⁵⁰ However, as shown above, both norms can be applied to the facts of the case and raise the possibility of conflict.

2) Shared parties relevancy. This requires that the rule of international law should bind the parties to the dispute in order to raise the possibility of conflict. Conflicts between norms do not arise solely at the level of substance but rather at the stage of compliance.¹⁵¹ For example, if Rule X obliges a State to turn right and Rule Y obliges a State to turn left, there is no conflict where State A is bound only by Rule X and State B only by Rule Y. In such a situation, A must turn right, and B must turn left. However, where State A is bound by both Rules X and Y, it would be required to turn both right and left at the same time and therefore could not comply with both obligations simultaneously. This illustrates that the possibility of normative conflict exists only where the same State is simultaneously bound by both rules.¹⁵²

¹⁴⁷ See similar case *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) (n 145).

¹⁴⁸ Joost Pauwelyn (n 4) 165-166, 364-367.

¹⁴⁹ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 487.

¹⁵⁰ *Al-Adsani v the United Kingdom* (n 145) para 52.

¹⁵¹ Joost Pauwelyn also points out that norms can be conflict there must be overlap on *ratione materie* *ratione persone* and *ratione temporis*. See Joost Pauwelyn (n 4) 165-166.

¹⁵² *ibid* 165.



With regard to other aspects of relevancy, terminological and intertemporal considerations are not determinative in this context. For norms to be in conflict, they do not depend on a linguistic relationship, as a norm may be textless in nature, such as the principle of State immunity under customary international law. Similarly, from a temporal perspective, whether a rule was in force at the time of the treaty's conclusion or at the time of interpretation does not preclude the possibility of conflict, provided that both norms are capable of being applied simultaneously.

4.2.3 Intention-based Argument

An intention-based argument is reflected in Alexy's work, where he refers to it as the genetic argument. In the context of domestic law, this argument is primarily grounded in the idea that interpretation should correspond to the intention of the legislator. It maintains that the meaning of a provision should reflect what the lawmaker intended or remain consistent with the objectives they intended to achieve.¹⁵³ In the practice of the ECtHR, there is an argument based on the intention not of the drafters but of the present State parties, which exists in the form of European consensus,¹⁵⁴ which can be found through Article 31(3)(c) of the VCLT.¹⁵⁵ In this sense, the consensus approach functions as an intention-based argument grounded not in the intention of the original drafters, but in the current intentions of the State parties.

According to the practice of the Court, the intention-based argument is very decisive, as the Court occasionally relies primarily on European consensus without referring to other interpretative elements or methods.¹⁵⁶ An intention-based argument focuses on shared parties relevancy, as its effectiveness depends on the degree of proximity among State parties as it reflects their views on the matter. A greater degree of overlap among the parties increases the chance that such rules will be relied upon in interpretation,¹⁵⁷ whereas limited overlap may weaken support for that outcome.

¹⁵³ Robert Alexy (n 11) 236-237.

¹⁵⁴ European consensus is the interpretation that refer to commonly accepted standard among the parties of ECtHR See Malgosia Fitzmaurice, 'Interpretation of Human Right Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 768; See also Christian Djefal (n 8) 315.

¹⁵⁵ For example, *Magyar Helsinki Bizottság v Hungary* (n 80) para 124; *Demir and Baykara v Turkey* (n 5) para 85.

¹⁵⁶ See *V v The United Kingdom* App no 24888/94 (ECtHR, 16 December 1999); *Demir and Baykara v Turkey* (n 5); The Court only relied on European Consensus in interpreting the ECHR.

¹⁵⁷ See *Demir and Baykara v Turkey* (n 5) para 76.

European consensus manifests in varying degrees of strength. The weakest form is emerging consensus, which arises where the Court takes into account rules of international law that have been ratified by only a small number of States parties to the ECHR. For example, in *Magyar Helsinki Bizottság v Hungary*, the Court considered the Council of Europe Convention on Access to Official Documents, which at the time had been ratified by only seven parties to the ECHR.¹⁵⁸ The Court observed that there was only a “definite trend toward European consensus,” rather than the existence of full consensus. This type of consensus is generally not decisive on its own and must be considered alongside other interpretative elements.¹⁵⁹ Where the Court finds that consensus has not yet been established, it may refrain from relying on this argument.¹⁶⁰

Another aspect of relevancy that is important for this argument is intertemporal relevancy, as it determines whose intention is being considered. If the Court relies on rules that were in force at the time of the treaty’s conclusion, the focus is on the intention of the drafters. By contrast, where the Court considers rules applicable at the time of interpretation, the emphasis shifts to the present intentions of the State parties. The Court often relies on the latter to justify its evolutionary interpretation.¹⁶¹

4.2.4 Teleological Argument

A teleological argument is an interpretation that places significant emphasis on giving effect to the object and purpose of the treaty.¹⁶² The object and purpose of the ECHR are often stated in a vague and generic sense, such as “*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.*”¹⁶³

¹⁵⁸ *Magyar Helsinki Bizottság v Hungary* (n 80) para 145.

¹⁵⁹ *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) para 105; See also Christian Djéffal (n 8) 315-316.

¹⁶⁰ See *V v The United Kingdom* (n 156) paras 73-74; See also *ibid* (n 8); *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 103.

¹⁶¹ For example, see *Magyar Helsinki Bizottság v Hungary* (n 80) paras 138-148; *Demir and Baykara v Turkey* (n 5) paras 67-68; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) paras 274-282.

¹⁶² Gerald Fitzmaurice (n 40) 208.

¹⁶³ *Soering v the United Kingdom* (n 160) para 87; See also Isabelle Buffard and Karl Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3 *Austrian Review of International and European Law* 311, 341-342.

This emphasizes the importance of interpreting the ECHR in light of its object and purpose.¹⁶⁴ According to that statement, the object and purpose of the ECHR are to ensure the protection of individual rights, and any interpretation in favour of the protection of rights is considered to be in line with the object and purpose of the ECHR¹⁶⁵ and *vice versa*. When the Court considers the object and purpose, it must take into account relevant rules which form the background of the legal question before the matter.¹⁶⁶ When the Court refers to the object and purpose, it often results in an expansive interpretation of the ECHR.¹⁶⁷

In cases where the Court takes into account other relevant rules of international law that provide a broader or higher standard of human rights protection, harmonizing the two norms can result in the ECHR adopting the same obligations as the external rules, thereby expanding its protection and leading to a teleological interpretation. For example, in *Magyar Helsinki Bizottság v Hungary*, the Court took into account Article 19 of the ICCPR. In the practice of the ECtHR, the right to seek information had not previously been recognized under Article 10 of the ECHR,¹⁶⁸ whereas this right is explicitly referred to in Article 19 of the ICCPR. In this case, harmonizing the two norms could lead to an expansion of the scope of protection under the ECHR to encompass similar protections to those recognized under the ICCPR.

In this case, the Court stated that if the right of access to state-held information is not protected under Article 10 of the ECHR in certain circumstances, because it is part of the right to receive and impart information, it will render the right to receive and impart information ineffective.¹⁶⁹ This can be seen as the relevant rules pointing in the direction of expanding the rights protected under the ECHR, and the Court followed such guidance by reasoning that the protection is implicitly contained within Article 10. This led to the expansion of Article 10 of the ECHR. Such an interpretation, favouring the protection of human rights, would be consistent with the object and purpose of the ECHR and would represent a teleological interpretation.

For rules of international law to be used in this argument, they must differ in substance in a way that promotes the object and purpose of the ECHR. The Court

¹⁶⁴ See Christian Djéffal (n 8) 326.

¹⁶⁵ See *Soering v the United Kingdom* (n 160) paras 87-90. See also Shai Dothan (n 55) 791.

¹⁶⁶ *Demir and Baykara v Turkey* (n 5) para 76.

¹⁶⁷ As discussed in 3.2.1 Fill the gaps of the ECHR above; See also Shai Dothan (n 55) 791.

¹⁶⁸ *Magyar Helsinki Bizottság v Hungary* (n 80) paras 126-129.

¹⁶⁹ *ibid* para 155.

will then seek to harmonize the ECHR with such rules in order to enhance the protection of human rights. Such differences in substance are related to terminological and subject-matter relevancy.

Terminological relevancy is illustrated by *Magyar Helsinki Bizottság v Hungary*, as mentioned earlier. With regard to subject-matter relevancy, a prime example is *Demir and Baykara v Turkey*, where the Court considered Article 6(2) of the European Social Charter and Article 28 of the Charter of Fundamental Rights of the European Union. Both provisions concern the right to collective bargaining and do not concern exactly the same subject matter as Article 11 of the ECHR, which protects the right to freedom of assembly and association. In earlier case law, the scope of Article 11 did not include the right to collective bargaining.¹⁷⁰

In that case, the Court considered the relevant rules alongside subsequent practice and other international instruments in order to establish a European consensus on the matter. It concluded that the right to collective bargaining had become an essential element of the rights protected under Article 11 of the ECHR.¹⁷¹ As a result of harmonizing the ECHR with other rules of international law that provide a higher level of protection, the level of protection under the Convention was enhanced.

With regard to the other aspects of relevancy, namely, intertemporal relevancy, the Court often considers rules that are in force at the time of interpretation in order to interpret the Convention evolutively, ensuring that it remains effective in present-day conditions. In terms of shared parties relevancy, a purely teleological argument does not necessarily depend on this aspect, as the Court does not always consider whether there is an overlap in parties between the two rules.¹⁷² However, teleological arguments often appear alongside intention-based arguments as a form of European consensus. In such cases, a greater degree of shared parties proximity strengthens support for that interpretation.

¹⁷⁰ *Swedish Engine Drivers' Union v Sweden* App no 5614/72 (ECtHR, 6 February 1976) para 39.

¹⁷¹ *Demir and Baykara v Turkey* (n 5) paras 153-154.

¹⁷² For example, in *X and Others v Bulgaria*, App no 22457/16 (ECtHR, 2 February 2021) para 127, the Court merely examined the shared parties of both norms. The Court sometime state that the relevant rules had been ratified by the respondent State. However, upon closer examination, it becomes apparent that the international rules referred to in those cases were in fact binding on the majority of the ECHR Contracting States.

4.2.5 The Minimum Requirements of Relevancy

The argument-based catalogue of relevancy developed above focuses on the function of relevant rules once they enter the interpretative process, and therefore emphasises those aspects of relevancy that are connected to particular forms of argument. However, according to Djeflal, not every argument can enter the interpretative process, only those that qualify may enter.¹⁷³ Therefore, even if a rule is capable of generating an argument, this does not automatically render it relevant unless it satisfies the minimum requirements of Article 31(3)(c) of the VCLT in order to qualify as a relevant rule and enter the interpretative process. As mentioned earlier, Article 31(3)(c) of the VCLT, as an interpretative technique, has two functions: a guidance function and a parameter function. The argument-based relevancy in each type focuses on certain aspects of relevancy, such as semantic arguments, which focus primarily on the terminological aspect, but leave out other aspects that still need to satisfy certain criteria. This section turns to the latter by determining four aspects of relevancy at the minimum threshold. As discussed above, relevancy cannot be measured quantitatively but can instead be framed as a set of conditions.

First, terminological relevancy. There is no minimum threshold here because Article 31(3)(c) of the VCLT includes non-textual rules such as customary¹⁷⁴ and general principles of international law.¹⁷⁵ As such, the terminological aspect cannot constitute a condition of relevancy since the terminological relationship between them cannot be examined. In addition, when the ECtHR takes into account treaties, it sometimes does not pay attention to textual relevancy between the norms and does not appear to be concerned with their differences.¹⁷⁶

Second, subject-matter relevancy. The ECtHR takes into account various types of rules. The most flexible type is where such rules do not necessarily govern human rights, let alone the right at issue. They can govern other subjects of international law, but must have material overlap with the ECHR, which makes them applicable to the same facts.¹⁷⁷

¹⁷³ Christian Djeflal (n 8) 124-125.

¹⁷⁴ For example, see *Al-Adsani v The United Kingdom* (n 145) where the Court take into account principle of State immunity.

¹⁷⁵ For example, see *Golder v The United Kingdom* (n 72) para 35.

¹⁷⁶ See *X and Others v Bulgaria* (n 172) where the Court take into account Article 11, 12, 13, and 20 of the Hague Convention which have difference use of term compared to Article 8 of the ECHR.

¹⁷⁷ For example, see *Al-Adsani v The United Kingdom* (n 145); *Hassan v The United Kingdom* (n 145). Both case the relevant rules can be applied to the same fact as the ECHR and raise the possibility of conflict.

Third, shared parties relevancy. This is the most important threshold of relevancy because of the phrase “applicable in the relations between the parties”. Even if a rule can generate an argument, if it does not apply to the parties, it cannot fall under the scope of Article 31(3)(c) of the VCLT.. As mentioned earlier, McLachlan suggests that the word “parties” can be interpreted in at least four ways. As shown in ECtHR’s practice, the Court takes into account rules that do not bind all of the parties to the ECHR but only bind the parties to the dispute¹⁷⁸ or are implicitly accepted or tolerated by all parties to the treaty (in the form of European consensus),¹⁷⁹ corresponding with the third and the fourth interpretations of McLachlan. In this sense, in the eyes of the ECtHR, for rules to pass the minimum threshold, they must either bind the parties to the treaty or be implicitly accepted or tolerated by all parties to the treaty.

Lastly, temporal relevancy. The drafters of Article 31(3)(c) of the VCLT intended to leave the temporal aspect open, which allows both rules in force at the time of the conclusion and rules in force at the time of interpretation to fall under the scope of Article 31(3)(c) of the VCLT.¹⁸⁰ This is still manifested in the practice of the ECtHR. Even though the Court favours the latter, it also considers the former.¹⁸¹ This reflects the intertemporal openness of Article 31(3)(c) of the VCLT.

This demonstrates that the minimum threshold of relevancy in the eyes of the ECtHR is determined by two main elements. First, the rules must have at least material overlap. Second, the rules must either bind the disputing parties or be implicitly accepted or tolerated by all parties to the treaty as a minimum requirement.

In conclusion, the relevancy of a rule cannot be determined solely by proximity or distance. It must be assessed in light of the type of argument that the rule contributes to the interpretative process, as this determines how it can guide interpretation and reach the relevancy threshold, particularly in terms of subject-matter and shared parties relevancy. I therefore propose this argument-based approach as a

¹⁷⁸ For example, see *Demir and Baykara v Turkey* (n 5) paras 42, 43.

¹⁷⁹ For example, see *ibid* paras 86, 149. The European Social Charter have not been ratified by respondent state but ratified by the majority of the parties of the ECHR. It can demonstrate “the common ground in modern society.”

¹⁸⁰ See above in intertemporal consideration at 10.

¹⁸¹ In *Hassan v United Kingdom* (n 145), the Court took into account the Third and Fourth Geneva Conventions which entered into force on 21 October 1950, shortly before the conclusion of the European Convention on Human Rights (4 November 1950).

framework for interpreters to construct their arguments under Article 31(3)(c) of the VCLT and as a method for studying this provision.

The argument-based types of relevancy under Article 31(3)(c) of the VCLT still cannot produce an absolute result of interpretation. A prime example is *Magyar Helsinki Bizottság v Hungary*, where the Court took Article 19 of the ICCPR into account as a relevant rule. As shown above, Article 19 of the ICCPR can support both a terminological comparison, as a semantic argument, and a teleological argument, each potentially leading to different results.¹⁸² This demonstrates that Article 31(3)(c) still leaves room for the interpreter to determine how relevant rules are to be read in the course of interpretation. Rules of interpretation can only diminish, but cannot eliminate, the uncertainty of the law. They therefore leave room for interpretative discretion, requiring the interpreter to make a choice among the open alternatives.¹⁸³

5. Conclusion

Article 31(3)(c) of the VCLT is a useful tool in treaty interpretation. Through this article, we have explored the functions of Article 31(3)(c). As an interpretative technique, it acts as a filter or parameter for arguments; in this respect, we can see that only norms possessing a binding force can be taken into account in the interpretative process.

With regard to relevancy, this study has demonstrated that it cannot be determined solely by proximity or measurable degrees of closeness between norms. Although the proximity criteria provide useful descriptive insight into patterns of interaction between legal rules, they do not fully explain how the Court determines which rules are relevant in practice. Instead, relevancy must be assessed in light of the type of argument that a rule is capable of generating within the interpretative process. In this sense, relevancy is not a matter of distance, but of argumentative function. Moreover, this study has also identified the minimum threshold of relevancy that rules must satisfy in order to fall within the scope of Article 31(3)(c) of the VCLT.

Concerning its guidance function, we have explored the different forms of argument that may arise when relevant rules are taken into account. Engagement with such rules may lead to semantic arguments, systemic arguments, conflict-avoidance arguments, intention-based arguments through consensus, or teleological arguments aimed at enhancing the effective protection of rights. These argumentative pathways

¹⁸² See also *Johnston v Ireland* (n 141) paras 51-54.

¹⁸³ HLA Hart (n 3) 127.

demonstrate that Article 31(3)(c) does not mechanically determine interpretative outcomes in a mathematical sense. Rather, it functions as a tool through which the interpreter constructs arguments, while still leaving room for choice and discretion. Accordingly, understanding Article 31(3)(c) through an argument-based approach provides a more accurate account of the Court's practice and offers a coherent framework for its application in international human rights law.