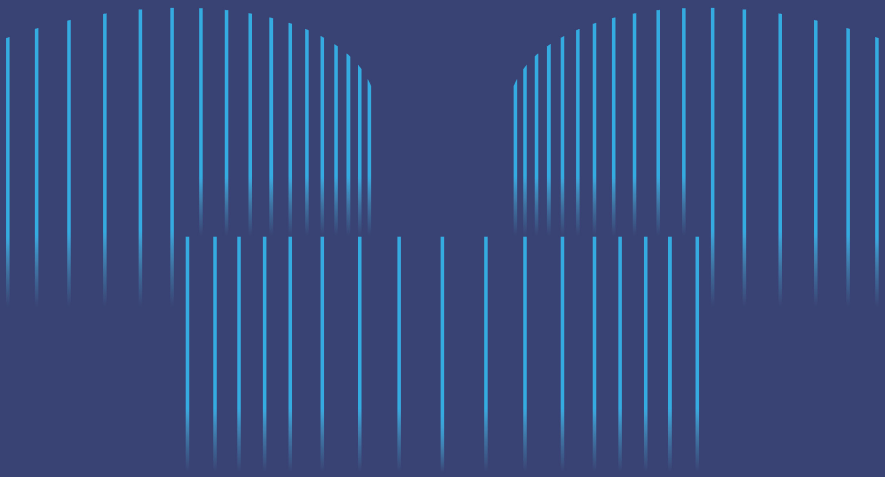
Adam Wiśniewski

THE INTERPRETATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS



WYDAWNICTWO UNIWERSYTETU GDAŃSKIEGO

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Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950, in Rome, is without doubt the most important convention to have been adopted by the Council of Europe, being the most important regional instrument in the field of human rights in Europe. This Convention provided the basis for establishing the European Court of Human Rights, an institution which can certainly be considered unique – in both European and international terms. It has been described as the most effective human rights court in the world, since it has issued more than 23,000 judgments,[1] the majority of which have been enforced by states.

By adjudicating on the basis of the generally formulated, open and framework standards of the Convention and its protocols, the Court shapes European human rights standards and thereby develops the law of the Convention. In the process of interpreting and applying the provisions of the ECHR, the Court employs various interpretative tools. With their help, the Court makes creative interpretations of the Convention, broadens the scope of the protected rights and, consequently, extends the obligations of the States Parties.[2]

It is therefore not surprising that one of the key issues associated with the functioning of the ECHR is the problem of the Strasbourg Court's interpretation of the Convention. Article 32(1) of the ECHR grants the Court a general power to interpret its provisions.[3] However, the Convention does not contain

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[1] *Overview 1959–2020. ECHR, European Court of Human Rights*, August 2021, https://www.echr.coe.int/Documents/Overview_19592020_ENG.pdf [accessed: 20.09.2021], p. 3.

[2] Cf., *inter alia*, A. Mowbray, *The Creativity of the European Court of Human Rights*, "Human Rights Law Journal" 2005, vol. 5 no. 1, pp. 57–58; J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, Manchester 1995, pp. 12–21.

[3] In the strict sense, "interpretation of law" means the understanding of legal texts and the process associated with this activity. In Polish legal theory, the terms "wykładnia" (interpretation, explication, clarification) and "interpretacja" (interpretation) are treated as synonymous. However, legal theorists point out that lawyers tend to use the term

any norms that indicate what methods of interpretation should be employed to interpret the provisions of the ECHR and its Protocols, apart from the references in the Preamble to the Convention to the principle of subsidiarity and the margin of appreciation enjoyed by the States Parties to the Convention when exercising the rights and freedoms protected by the Convention, as introduced by Protocol 15.[4] The Strasbourg jurisprudence therefore remains the principal source for investigating how the Court interprets the ECHR.

Treaties for the protection of human rights, such as the ECHR, are not typical international agreements. With such instruments we have to consider twofold obligations: horizontal, i.e. between states, and vertical, i.e. concerning the relationship between the state and the individual.[5] This undoubtedly affects the way in which such treaties are interpreted, and this also applies to the ECHR *par excellence*. The literature on the subject proposes a division of the rules of interpretation applied by ECHR into classical ones, which are stipulated in the Vienna Convention on the Law of Treaties, and specific rules, the application of which is not provided for by this Convention.[6] It is held that these specific rules not only enrich the content of the classical rules, but also complement them, or even partially or completely modify them.[7] The classical methods of interpretation applied by the ECtHR primarily include the methods of literal, systematic and teleological interpretation. Specific methods include

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"wykładnia," especially if they mean interpretation in a broad sense, i.e. including legal conclusions For the purposes of this study it may be assumed that the "wykładnia" (interpretation) of substantive norms of the ECHR and its protocols refers to activities related to determining the meaning of these norms, the scope of rights protected by them and, consequently, the scope of obligations of the State Parties. Cf. J. Zajadło, *Leksykon współczesnej teorii i filozofii prawa*, C.H. Beck, Warszawa 2007, pp. 350–357; M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Wydawnictwo Prawnicze Lexis Nexis, Warszawa 2002; K. Opałek, J. Wróblewski, *Prawo. Metodologia. Filozofia. Teoria prawa,* Państwowe Wydawnictwo Naukowe, Warszawa 1991.

[4] Protocol No. 15 entered into force on August 1, 2021.

[5] Cf., *inter alia*, C. Mik, *Metodologia interpretacji traktatów z dziedziny ochrony praw człowieka*, "Toruński Rocznik Praw Człowieka i Pokoju" 1992, no. 1, p. 11.

[6] C. Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*, Wydawnictwo Comer, Toruń 1994, pp. 226–239. See also: F. Ost, *The Original Canons of Interpretation of the European Court of Human Rights* [in:] M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*, Martinus Nijhoff Publishers, Dordrecht–Boston–London 1992, p. 305.

[7] C. Mik, *Koncepcja normatywna*…, p. 226.

the methods of dynamic and autonomous interpretation, the doctrine of the margin of appreciation, the principles of effectiveness, proportionality and fair balance, and the comparative method. Some authors also consider balancing to be a distinct method of interpretation.[8] When broadly defined, the collection of instruments employed in the interpretation of the ECHR also encompasses the concept of positive obligations,[9] the concept of implied rights and implied limitations, the principle of non-discrimination, and the principles of legality, the rule of law and procedural fairness.[10]

The problem of the interpretation of the ECHR is an increasingly popular subject of scholarly inquiry. This topic has taken on even greater significance due to the fact that in the process of applying and interpreting the Convention the Court has assigned this treaty the status of "a constitutional instrument of European public order (ordre public)."[11] In turn, the Court has increasingly assigned itself a constitutional role, asserting that it should focus on issuing "judgments of principle," and thereby actually decide on matters of public policy.[12]

Studies on the interpretation of international human rights instruments are conducted in various ways. On the one hand, there is an approach that tackles issues associated with the interpretation of human rights treaties as a whole, thus encompassing both universal and regional instruments.[13] The second approach focuses on the ways of interpreting a single human rights treaty. In terms of the number of studies published which follow the latter approach,

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[8] See, e.g., B. Çali, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions,* "Human Rights Quarterly 2007, vol. 29, no. 1, pp. 251–270.

[9] Cf., *inter alia*, E.H. Morawska, *Zobowiązania pozytywne państw-stron Konwencji o chronie praw człowieka i podstawowych wolności*, Katedra Ochrony Praw Człowieka i Prawa Międzynarodowego Humanitarnego, Wydział Prawa i Administracji Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie, Warszawa 2016.

[10] B. Çali, *Balancing Human Rights? Methodological Problems*…, pp. 251–270.

[11] See, *inter alia*, the Commission decision in *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, 4 March 1991, application no. 15299/89 and others, § 22 and the judgment in the case of *Loizidou v. Turkey*, 23 March 1995, application no. 15318/89, § 75.

[12] L. Wildhaber, *A Constitutional Future for the European Court of Human Rights*, "Human Rights Law Review" 2002, no. 21, p. 406.

[13] See, for example, T. Jasudowicz, *Ewolucja interpretacji międzynarodowo chronionych praw człowieka. W pięćdziesięciolecie Powszechnej Deklaracji Praw Człowieka*, "Ethos" 1999, no. 45–46, pp. 213–239; C. Mik, *Metodologia interpretacji*…, pp. 11–35.

the first place is plainly occupied by those that deal with the interpretation of the ECHR. This is understandable, as the Strasbourg system is considered to be the most developed one, given the Court's enormous jurisprudential activity.[14] For this reason, authors conducting theoretical research on a particular issue in the field of human rights tend to focus on the Strasbourg jurisprudence as the subject of their research, while acknowledging that the results of such research are not necessarily representative for other systems of human rights protection.[15]

The problem of the interpretation of the ECHR is a staple component of general studies on the Convention. By way of example, we may mention the monograph by P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*,[16] or that of D. Gomien, D. Harris and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*,[17] where separate chapters are devoted to the ECtHR's interpretation. There are also chapters in collective works, numerous articles in legal journals, and monographs devoted to the ECtHR's interpretation. The level of detail varies. Apart from the general presentation of the methods of interpretation applied by ECtHR,[18] there are also detailed studies,

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[14] The ECtHR has already issued over 23,000 judgments. See *50 Years of Activity. The European Court of Human Rights Some Facts and Figures*, Council of Europe, Strasbourg, www.echr.coe.int, p. 3.

[15] See C. Mik, *Teoria obowiązków pozytywnych państw-stron traktatów w dziedzinie praw człowieka na przykładzie Europejskiej Konwencji Praw Człowieka* [in:] J. Białkocerkiewicz, M. Balcerzak, A. Czeczko-Durlak (eds), *Księga Jubileuszowa Prof. dra hab. Tadeusza Jasudowicza*, Towarzystwo Naukowe Organizacji i Kierownictwa, Toruń 2004, p. 257.

[16] P. van Dijk., G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Intersentia, The Hague–Boston–London 2006.

[17] D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, Strasbourg 1998.

[18] See, for example, F. Matscher, *Methods of Interpretation of the Convention* [in:] R.St.J. Macdonald, F. Matscher, H. Petzold (eds), *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht–Boston–London 1993; R. Bernhardt, *Thoughts on Interpretation of Human Rights Treaties* [in:] F. Matscher, H. Petzold (eds), *Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Wiarda*, Carl Heymanns Verlag KG, Köln–Berlin–Bonn–München 1990, and in the Polish literature on the subject, e.g. C. Mik, *Koncepcja normatywna prawa europejskiego praw człowieka*, Wydawnictwo Comer, Toruń 1994, pp. 226–239.

including monographs, devoted to a single method or principle of interpretation, e.g. the conception of positive obligations,[19] the principles of proportionality[20] and fair balance,[21] the balancing method,[22] and the doctrine of the margin of appreciation.[23] In this context, the monograph by George Letsas entitled *A Theory of Interpretation of the European Convention on Human Rights*, published by the Oxford University Press publishing house in 2007, which will be discussed in more detail in Chapter 7 of this study, can certainly be considered exceptional.

The work on this monograph devoted to the interpretation of the European Convention on Human Rights grew out of the conviction that there is still a need for in-depth theoretical investigations in this field. The aim of this study is not to discuss in a comprehensive and detailed way all the rules of interpretation employed by ECHR, but rather to look from the theoretical perspective at what are, in the author's opinion, the main problems associated with this interpretation. Therefore, particular chapters are devoted to such issues as: the application by the Strasburg Court of the methods of interpretation stipulated in the VCLT, since the Convention is an international agreement; the principles of interpretation of the ECHR which should play a leading role in the process of interpretation; the main methods or doctrines of interpretation – the method of proportionality, dynamic interpretation (the living instrument), autonomous interpretation, and the doctrine of the

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[19] A. Mowbray, *The Development of Positive Obligations under the European Convention Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford 2004.

[20] See, for example, J. McBride, *Proportionality and the European Convention on Human Rights* [in:] E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Bloomsbury Publishing, Oxford–Portland 2000, pp. 23–35.

[21] See, for example, A. Mowbray, *A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights*, "Human Rights Law Review" 2010, no. 10, pp. 289–317.

[22] J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Martinus Nijhoff Publishers, Leiden–Boston 2009.

[23] H.Ch. Yourrow *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Law International, The Hague–Boston–London 1996; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* Intersentia Uitgevers N.V, Antwerp–Oxford–New York 2002; A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2008.

margin of appreciation. Separate chapters deal with the problem of the order in which the different methods should be applied, the determinants of the Court's interpretation of the ECHR, and the question of the constitutional character attributed to the Convention and to the Court. In this study, the author puts forward the research hypothesis that there is a significant correlation between, on the one hand, the way the ECtHR interprets the Convention and, on the other, the level of legitimacy enjoyed by this judicial body and the level of success achieved in the process of its constitutionalization.

The book is a creative development of considerations undertaken in some of the author's earlier publications on the interpretation of the Convention.[24] However, the monograph also contains a considerable amount of new content devoted to the problems of interpretation of the ECHR. The ambition of this work was to present an in-depth theoretical analysis of the problem of interpretation of one of the most important human rights conventions in the world, primarily with a view to inspiring further much-needed studies and discussions on the subject.

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[24] A list of the author's previous publications that are used in this study is included in the bibliography.

Chapter 1

The application of the rules of interpretation provided for in the VCLT by the ECtHR

Introduction

The European Court of Human Rights, along with other international courts, employs the rules of interpretation elaborated in the Vienna Convention on the Law of Treaties of 23 May 1969 for the interpretation and application of the provisions of the European Convention on Human Rights. However, reference to these rules is relatively rare in the Strasbourg jurisprudence. This leads to the question of why this is the case, though this is not the only research problem associated with this issue. Indeed, the real role played by these directives in the process of the "interpretation and application" of the Convention referred to in Article 32 of the ECHR needs to be clarified. The question also arises of the relationship between the interpretative directives of the VCLT and the original methods and interpretative techniques developed by the Strasbourg Court, which were mentioned in the preface. Last but not least, the question of the function and meaning of the interpretative methods of the Vienna Convention in the Strasbourg jurisprudence also needs to be answered.

Although these questions are of obvious interest to authors dealing with issues associated with the interpretation of the ECHR, not many studies have been devoted to the application of the Vienna Convention's rules of interpretation by the Strasbourg Court.[25] Meanwhile, it seems that these issues are

[25] See, for example, M.E. Villiger, *Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights* [in:] J. Bröhmer et al. (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Reiss zum 70 Geburstag am 21. January 2005*, Carl Heymanns Verlag KG, Cologne 2005, pp. 317–330; H. Golsong, *Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties?* [in:] R.St.J. Macdonald, F. Matscher, H. Petzold (eds), *The European System…*, pp. 147–162. However, the issue of the application of the rules of interpretation from VCLT by the ECtHR is more

very important for providing a scholarly clarification of the ECtHR's approach to the interpretation of the European Convention and its Protocols.

After discussing the general characteristics of the VCLT's rules of interpretation, an analysis of their application in specific rulings will be presented. Then, on the basis of this analysis, the application of these rules in the Strasbourg jurisprudence and their function in that jurisprudence will be analyzed. The relation of the VCLT's rules to other interpretative methods applied by the Court will also be considered.

1.1. An outline of the rules of interpretation provided for in the Vienna Convention

The rules for the interpretation of domestic law are rather rarely codified, since they are the product of legal traditions and cultures.[26] The codification of these rules in the Vienna Convention is thus a feature which distinguishes international law.[27]

The Vienna Convention of 1969, which codified the customary norms already in force in the field of the law of treaties, adopted a special solution – a general rule of interpretation binding on the parties. According to Article 31(1) VCLT, "a treaty shall be interpreted in good faith in accordance with the normal meaning given to the terms of the treaty in their context and in the light of its object and purpose."

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often undertaken within the framework of studies devoted to the interpretation of VCLT as one of the issues in this respect. See, *inter alia*, C. Mik, *Metodologia interpretacji…*, p. 28, C. Mik, *Koncepcja normatywna…*; G. Letsas, *A Theory of Interpretation of the European Convention of Human Rights*, Oxford University Press, Oxford 2007. See also an extensive chapter devoted to this issue in a monograph on the application of international law by the ECtHR: M. Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford University Press, New York 2010, pp. 26–71.

[26] See L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora," Toruń 2002, p. 77.

[27] Attention is drawn to this fact by L. Leszczyński, *Konwencja Europejska w argumentacjach interpretacyjnych polskiej praktyki sądowej*, "Biuletyn Biura Informacji Rady Europy" 2003, no. 3, p. 66.

This general rule is considered to be a compromise between different approaches to interpretation. It tends towards a textual approach, but takes into account the teleological approach and allows for some elements of the intentional approach.[28]

As explained by the ILC, Article 31(1) VCLT contains three rules: "the first – interpretation in good faith – results directly from the principle of *pacta sunt servanda*. The second rule constitutes the heart of the textural approach: it is assumed that the parties had the intent resulting from the ordinary meaning of the expressions they use. The third rule is a rule of both common sense and good faith: the ordinary meaning of an expression cannot be determined in abstract terms, but has to be grounded in the context of the treaty and in the light of its object and purpose."[29]

Subsequently, Article 31(2) clarifies that "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty,
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

According to Article 31(3), together with the context, account shall be taken of any subsequent agreement between the parties regarding the interpretation or application of the treaty; any subsequent practice in the application of the treaty which establishes the parties' agreement regarding its interpretation; and any relevant rules of international law applicable in the relations between the parties.

However, according to Article 31(4), a special meaning should be assigned to a word where it is established that the parties so intended.

Article 32 on supplementary means of interpretation provides that recourse may be had to such measures, together with the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the mean-

[28] M. Frankowska, *Prawo traktatów*, Szkoła Główna Handlowa, Warszawa 2007, p. 123.
[29] Cited by A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa 2006, p. 335.

ing resulting from the application of Article 31, or to determine the meaning when an interpretation based on Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

The rule of Article 31 VCLT therefore requires the use of the grammatical--linguistic and logical method to clarify the content of the treaty for determining "the ordinary meaning of terms used in the treaty." However, the Vienna Convention does not specify what is meant by the "ordinary meaning of words." It is considered that this refers to "the current, normal and everyday use of language."[30] It also requires the use of the systematic method, since the text of the provision must be read in the light of its context and of the teleological and functional methods, in terms of the prescription to interpret the concepts of the treaty "in the light of the object and purpose" of the treaty. Each of these methods may be supported by the historical method, in accordance with Article 32 VCLT.[31]

The doctrine of international law draws attention to four features of the solution adopted in the Vienna Convention. Firstly, the general rule of interpretation provided for in Article 31 has the status of binding law. Secondly, this rule in fact adopts a mixed method – literal-systematic-purposive. Thirdly, subjective interpretation is supplementary in nature. Fourthly, it is indicated that interpretation should also take into account subsequent agreements between the parties, the subsequent practice of applying the treaty, and the relevant rules of international law applicable between the parties, which amounts to allowing dynamic interpretation of the rules of international law.[32]

What is at issue, however, is the question of the hierarchy of the different methods of interpretation and the rules for resolving conflicts between them, where different interpretative directives lead to different results. According to Stanisław Edward Nahlik, the International Law Commission has assigned priority to textual interpretation, as this type of interpretation prevails in modern practice and in the doctrine.[33] However, Anna Wyrozumska observes that Article 31 does not concern the application of a hierarchical sequence of tests, but rather a single overall principle of interpretation which encom-

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[30] See, *inter alia*, M.E. Villiger, *Articles 31 and 32 of the Vienna Convention*…, pp. 317, 324.

[31] C. Mik, *Metodologia interpretacji*…, p. 28.

[32] See A. Wyrozumska, *Umowy międzynarodowe*…, p. 332.

[33] S.E. Nahlik, *Kodeks prawa traktatów*, Państwowe Wydawnictwo Naukowe, Warszawa 1976, p. 178.

passes several different elements.[34] The view here is that the lack of hierarchy is confirmed by the use of the singular form in the title of Article 31: "General rule of interpretation."

Although the general rule of interpretation contained in Article 31 VCLT is customary in nature, courts such as the International Court of Justice began to invoke the rules of interpretation contained in the Vienna Convention at a relatively late stage. The general rule of interpretation contained in Article 31 VCLT, and the rule of Article 32, were confirmed in the jurisprudence of the ICJ as norms of customary law (e.g. in the rulings on the Oil Platforms case other wise know as *Islamic Republic of Iran v. United States of America*, and in the case of *Legrand, Germany v. USA*). The jurisprudence of the ICJ has shown a definite tendency to assign primacy to textual interpretation.[35] However, the position of the ICJ, like that of other international courts, is not unambiguous. The case law of the Permanent Court of Arbitration, on the other hand, states that the interpretation cannot be confined to literal interpretation, and that other elements of interpretation cannot be disregarded.[36] It is worth recalling in this connection the statement of the Permanent Court of Arbitration in the *Lake Lanoux* case, namely that "international law does not sanction any absolute and rigid method of interpretation."[37]

It is also worth noting that in its commentary on these articles the International Law Commission noted that Articles 31 and 32 should work in conjunction and should not lead to a rigid line being drawn between a "general rule" and "supplementary means of interpretation." At the same time, the

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[34] A. Wyrozumska, *Umowy międzynarodowe…*, p. 332.

[35] See, e.g. the judgment on territorial sport between Libya and Chad, in which the ICJ stated that the interpretation should primarily be based on the text of the agreement itself," International Court of Justice Reports 1994, § 41. On the other hand, in the opinion on the membership of states in the UN, the ICJ recognized that if the natural and ordinary meaning of the words does not give cause for doubt, the interpretation should cease. As the ICJ concluded in the judgment in the case of 21 November 1991 on the sea borders between Guinea-Biossau and Senegal, only when the result of textual interpretation is ambiguous or leads to an irrational result should other methods of interpretation be used. See also: L. Morawski, *Zasady wykładni prawa*, Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora," Toruń 2010, p. 286.

[36] A. Wyrozumska, *Umowy międzynarodowe…*, p. 336.

[37] The judgment in the case *Spain v. France*, from16 November 1957, Recueil des sentences arbitrales, vol. XII, p. 281.

distinction itself was justified because all the elements of interpretation in Article 31 refer to an agreement between the parties when (or after) they have been authenticated in the text. The preparatory work does not have the same nature of authentic expression however, it may be useful to verify the meaning contained in the text.[38]

Attention should also be paid to certain specificities of systematic interpretation at the international level. In view of the horizontal nature of this legal system and the fact that, in general, there is no hierarchy of norms here, whereas such a hierarchy exists in domestic law, the principles of systematic interpretation apply to the horizontal aspect of this legal system.[39] This means that when interpreting the rules of international law, it is forbidden to interpret them in isolation and in such a way that would lead to contradictions and loopholes. Moreover, as with the interpretation of domestic law, the emphasis is on the obligation to interpret the rules of international law in accordance with general principles.[40] An instance of systematic rules of interpretation is Article 31(1) VCLT on interpreting of the rules of international law in their context, and Article 31(2) defining what the context for the interpretation of the treaty comprises. Article 31(3), which states that, together with the context, account shall be taken of subsequent agreements between the parties concerning the interpretation or application of the treaty, the practice of applying the treaty and the relevant rules of international law applicable between the parties, is also relevant here.

Functional interpretation under international law is taken to mean not only teleological interpretation, but also subjective interpretation, intentional interpretation, the principle of effectiveness, and the prohibition of interpretation which leads to results that are obviously unfair or irrational.[41] In the case of Article 31 VCLT, functional interpretation is evident not only in the obligation to interpret the treaty in the light of its object and purpose, but also the obligation to interpret treaties in good faith. This is considered to be an interpretative prescription – one which is in accordance with the will

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[38] Yearbook of International Law Commission 1966, vol. II, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf [accessed: 20.06.2020], pp. 219–220.

[39] L. Morawski astutely draws attention to this point, *Zasady…*, pp. 290–291.

[40] *Ibidem*.

[41] *Ibidem*, p. 291.

of the contracting parties, takes their legitimate interests into account and leads to an interpretation which is fair to all the parties.[42]

Article 31 VCLT does not specify the rules for resolving conflicts when different interpretative directives lead to different interpretative results. There are two stances which seek to clarify this state of affairs. According to the first, the parties to the Vienna Convention who were unable to agree on their choice of appropriate directives thereby decided to submit this problem to international adjudication, and in particular to the jurisprudence of international courts. According to the second stance, Article 31(1) VCLT intentionally avoided establishing any hierarchy of interpretation between directives, since it was considered that all directives should be applied in a complementary manner, and the interpreter should strive for the interpretative result which would harmonize the results of their application to the greatest possible extent.[43]

A specific feature of the interpretation of international agreements is that their texts are drawn up in two or more languages. The Vienna Convention addresses this problem in Article 33 by providing that "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail." It is also presumed that the words used in the treaty have the same meaning in each of the authentic texts.

It is important to mention that the Vienna Convention does not cover all the rules of interpretation. For example, the principle of effectiveness is omitted, according to which an interpretation that renders the norm meaningless or ineffective is not acceptable. During the preparatory work on the Vienna Convention it was recognised that this principle is contained in the principle of good faith and resulted from the implicit reference of the Convention to the object and purpose of the treaty. As A. Wyrozumska points out, the International Law Commission opted not to introduce this principle in order to avoid an excessively broad interpretation of a treaty.[44]

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[42] *Ibidem*.

[43] See *ibidem*, p. 285.

[44] A. Wyrozumska, *Umowy międzynarodowe*…, p. 347.

1.2. The Court's decision to apply Articles 31–33 of the VCLT in the interpretation of the ECHR – the Golder case

In principle, the Vienna Convention applies to all types of international treaties, irrespective of their nature. However, in the discussion on the application of the Vienna Convention to the interpretation of the ECHR, it has been argued that the former entered into force on 27 January 1980, while the ECHR was concluded on 4 November 1950 and entered into force on 3 September 1953. On the basis of Article 4 VCLT, it can therefore be inferred *a contrario* that the VCLT is not formally applicable to the ECHR since it is a treaty concluded before its entry into force.

The decision to apply the interpretative rules of the VCLT to the interpretation of the provisions of the ECHR was taken by the Court in the 1975 case of *Golder v. United Kingdom*. It was in this case that the Court referred to Article 31 VCLT for the first time. It should be noted, however, that Judge Verdross had previously referred to Article 33 (4) in his separate opinion to the case of *Ringeisen v. Austria*.[45]

The *Golder* case concerned a prisoner's right to a fair trial, and thus an important question arose, namely does Article 6 (1) of the Convention guarantee the right to a fair trial only in relation to ongoing proceedings, or does it also imply the right to a fair trial with regard to the intention to initiate proceedings?

It is worth noting that the issue of using the Vienna Convention for the interpretation of the ECHR was raised in the submissions of the Government and the Commission. The Court therefore stated that it was "prepared to consider […] that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties."[46]

The Court noted that the VCLT had not yet entered into force at the time of the *Golder* ruling and that, pursuant to Article 4, it did not have retroactive effect. However, it noted that the Convention confirms the "generally accepted principles of international law to which the Court has already referred on occasion." The Court further stated that it would take into account

[45] See the judgment in *Ringeisen v. Austria*, 16 July 1971, application no. 2614/65.

[46] The judgment in the case *Golder v. The United Kingdom*, 21 February 1975, application no. 4451/70, § 29.

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