

Interpretation of Regional Human Rights Conventions and Originalism: Different Context, Same Myths

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Abstract: *Originalismo e interpretazione delle convenzioni sui diritti umani di area regionale: contesti differenti, stessi miti* – Both the European and the Inter-American courts of human rights have mostly refused to give an originalist reading to regional human rights conventions. This position is based on a series of misrepresentations concerning the demands of both the interpretative rules of the Vienna Convention of the Law of Treaties and originalism. In this context, the author concludes that a new debate between true originalism and living interpretation must take place within the boundaries of international human rights law.

Keywords: Originalism, Evolving interpretation, Regional human rights courts.

1. Introduction

In the statement that Professor Lawrence Solum presented to the Judiciary Committee of the Senate during the nomination hearings of Judge Gorsuch for the U.S Supreme Court, he defined as *myths* some misunderstandings about what originalism is and what it entails. Those myths do not only exist in the field of American constitutional law; they also permeate the fundamental mechanisms of interpretation of human rights treaties in international law. In this context, I will specify some of the myths surrounding originalism in this area and why they misrepresent the true requirements of this theory of interpretation that Professor Solum prominently defends.

This paper will be structured in two sections. The first will describe the way in which the most relevant regional courts of human rights—the European Court of Human Rights (hereafter, ECHR) and the Inter-American Court of Human Rights (hereafter, IACHR)—have applied the rules contained in the Vienna Convention on the Law of Treaties (hereafter, VCLT). This analysis concludes that both the ECHR and the IACHR seem to reject originalism in principle. In the second part, I will argue that the “living constitutionalism” approach adopted by both the ECHR and the IACHR is not necessarily required by the VCLT, but derives from misrepresentations concerning the originalist position. This justifies renewing the debate about interpretation in the field of international human rights law.

2. Regional human rights courts and evolving interpretation

Both the ECHR and the IACHR have understood that they have to interpret human rights conventions according to the rules contemplated in the VCLT.¹ Now, Article 31.1 contains the basic rule, which demands that any interpretation of a treaty provision must be pursued “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. On the other hand, Article 32 establishes that material preparatory to the treaty may only serve as supplementary means of interpretation; it can only “confirm the meaning resulting from the application of article 31”. Exceptionally, those preparatory works can be used “to determine the meaning” of the text when the interpretive standard of Article 31 is unable to render a proper interpretation for a treaty provision.²

Both the ECHR and the IACHR have employed these rules to interpret regional human rights conventions. In doing so, they have emphasized the context and purpose of the treaty as the critical factor to be considered under Article 31.1. By prioritizing this element, both the ECHR and the IACHR have adopted a purposive approach to interpretation that conceptualizes treaties as *living instruments* to be read according to “the present day conditions”.³

Let us consider first the approach adopted by the ECHR. According to this Court, the VCLT demands from it “to ascertain the ordinary meaning to be given to the words [of the Convention] in their context and in the light and purpose of the provision from which they are drawn”.⁴ That context requires the court to consider the treaty as an instrument created “for the effective protection of individual human rights”⁵, which “must be read as a whole”.⁶ In this context, the ECHR focuses principally on the context and purpose of the treaty to identify the ordinary meaning of the words of the Convention and not on the original public meaning of the text or on the meaning its framers intended to give to it.

Indeed, the ECHR considers that the context and purpose of the Convention demands the text of the treaty to be read in a way that maximizes human rights protections of European citizens. Therefore, any interpretation of rights and

¹ E.g. *Golder v. United Kingdom*, App. No 4451/70, (Eur. Ct. H.R. Febr. 2, 1975), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “4451/70”; then follow case “Golder v. UK”), ¶ 29; “Restriction to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights”, Advisory Opinion OC-3/83 (Sept. 8, 1983), ¶ 48.

² According to Article 32, this situation occurs when the application of Article 31: “(a) leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable”.

³ *Tyrer v. United Kingdom*, App. No 5856/72, (Eur. Ct. H.R. Apr. 25, 1978), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “5856/72”; then follow case “Tyrer v. United Kingdom”), ¶ 31.

⁴ *Saadi v. United Kingdom*, App. 13229/03, (Eur. Ct. H.R. Jan. 29, 2008), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “13229/03”; then follow case “Saadi v. United Kingdom”), ¶ 31.

⁵ *Id.* at ¶ 31.

⁶ *Id.* at ¶ 31.

freedoms has to be consistent “with the general spirit”⁷ of the Convention. In this respect, the ECHR has ruled that “the interpretation of the Convention must be dynamic in the sense that it must be interpreted in the light of developments in social and political attitudes”⁸, therefore “its effects cannot be confined to the conceptions of the period when it was drafted or entered into force”.⁹ In consonance with this, the ECHR “very rarely inquire[s] into what was thought to be acceptable state conduct when the [European] Convention was drafted, or into what specific rights the drafters of the Convention intended to protect”.¹⁰

The ECHR appeals to the living character of the European Convention in two ways. Firstly, the Court has employed the concept of evolving interpretation to read new rights into the European Convention. Some of those rights have been implied by the ECHR from the very text of the Convention.¹¹ But on occasions, when appealing to a living interpretation of that instrument, the Court has read into the Convention rights that the framers not only never imagined that the text of the treaty would support, but rights which the framers expressly sought to exclude from it.¹² Secondly, the ECHR appeals to the living character of the European Convention when it seeks to overturn a previous decision. As one of its judges has pointed out, the main consequence of the living nature of the treaty is that all “legal questions which arise under Convention always remain open and may be revisited”.¹³ Therefore, the ECHR when creating new legal standards under the Convention usually argues that the emergence of new circumstances justifies it.¹⁴

⁷ *Khamtokhu and Aksenchik v. Russia*, App. 60367/08 and 961/11, (Eur. Ct. H.R. Jan. 24, 2017), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “60367/08”; then follow case “Khamtokhu and Aksenchik v. Russia”), ¶ 87.

⁸ F.G. Jacobs, R.C.A. White, C. Ovey, *The European Convention on Human Rights*, 2012, 74.

⁹ *Id.* at 74.

¹⁰ G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, (Sept. 14, 2017, 2:50 pm), p. 2, papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836

¹¹ E.g. *Demir and Baykara v. Turkey*, App. 34503/97, (Eur. Ct. H.R. Nov. 12, 2008), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “34503/97”; then follow case “Demir and Baykara v. Turkey”); *Pichkur v. Ukraine*, App. 10441/06, (Eur. Ct. H.R. Nov. 7, 2013), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “10441/06”; then follow case “Pichkur v. Ukraine”).

¹² E.g. *Young, James and Webster v. The United Kingdom*, App. 7601/76 and 7806/77 (Eur. Ct. H.R. Oct. 18, 1982), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “7601/76”; then follow case “Young, James and Webster v. The United Kingdom”); *Sigurður A. Sirgurjónsson v. Iceland*, App. 16130/90 (Eur. Ct. H.R. Jun. 30, 1993), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “16130/90”; then follow case “Sigurður A. Sirgurjónsson v. Iceland”); *Matthews v. The United Kingdom*, App. 24833/94 (Eur. Ct. H.R. Feb. 18, 1999), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “24833/94”; then follow case “Matthews v. United Kingdom”).

¹³ *R.B. v. Hungary*, App. 64602/12 (Eur. Ct. H.R. Apr. 12, 2016), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “64602/12”; then follow case “R.B. v. Hungary”), dissenting opinion of Judge Wojtyczek, ¶ 7.

¹⁴ E.g. *Christine Goodwill v. The United Kingdom*, App. 28957/95 (Eur. Ct. H.R. Jul. 7, 2002), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “28957/95”; then follow case “Christine Goodwill v. The United Kingdom”); *Stafford v. The United Kingdom*, App. 46295/99 (Eur. Ct. H.R. May 28, 2002), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search

While the ECHR has invoked promoted an evolving interpretation to authorize new rights or expansive interpretations of those already established, it has struggled to define limits for the operation of such interpretation. One limit the ECHR has offered is that any change of circumstances that potentially justifies a more progressive reading of the Convention must be based on a common practice of States. As Judge Wildhaber has described it, the social evolution in question must be “reflected in the law and practice of a majority of the Contracting States”.¹⁵ The role of the Court should not be “to engineer changes in society or to impose moral choices”.¹⁶ As a result, when the ECHR cannot establish the existence of an European consensus embodied in the practice of the States, it refuses, in principle, to read new rights or modify its precedents.

For its part, the IACHR has in many respects followed the criteria developed by the ECHR about evolving interpretation.¹⁷ Therefore, the Court has applied the rules of the VCLT in a way which is consistent with the living character it attributes to the American Convention on Human Rights. Consequently, the IACHR has stated that “human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current conditions”.¹⁸ Thus, “when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights in said treaty, based on the principle of the rule most favorable to human beings.”¹⁹ By applying a living understanding of the Convention, the IACHR has read new rights into the text of the treaty.²⁰ Likewise, the IACHR has created the *conventionality control* doctrine by

“Application Number” for “46295/99”; then follow the case “Stafford v. The United Kingdom”); *Bayatyan v. Armenia*, App. 23459/03 (Eur. Ct. H.R. Jul. 7, 2011), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “23459/03”; then follow case “Bayatyan v. Armenia”); *Magyar Helsinki Bizzottság v. Hungary*, App. 18030/11 (Eur. Ct. H.R. Nov. 8, 2016), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “18030/11”; then follow case “Magyar Helsinki Bizzottság v. Hungary”).

¹⁵ Luzius Wildhaber, *The European Court of Human Rights in Action*, 21 *Ritsumeikan Law Review* 83, 86 (2004).

¹⁶ *Id.* at 86.

¹⁷ M. Fitzmaurice, *Interpretation of Human Rights Treaties*, in D. Shelton *The Oxford Handbook of International Human Rights Law*, 2013, 739, 766; J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2013, 12-13; L. Burgorgue-Larsen, A. Úbeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary*, 2011, 58-59.

¹⁸ *Case of “Maripipán Massacre” v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 106 (Sept. 15, 2005).

¹⁹ *Id.* at ¶ 106.

²⁰ E.g. *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.79, ¶ 148 (Aug. 31, 2001); *Comunidad Indígena Yakye Axa v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 137 (Jun. 17, 2005); *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 150 (Sept. 26, 2006); *Gelman v. Uruguay*, Merits and Reparations, Judgment Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 222 (Feb. 24, 2011); *Atala-Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91 (Febr. 24, 2012); *Artavia-Murillo et. al v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 314 (Nov. 28, 2012); *Duque v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310, ¶ 124 (Febr. 26, 2016).

tacitly appealing to evolving standards of interpretation.²¹ Basically, this doctrine empowers domestic institutions—mainly courts—to disapply national legislation when it goes against the text of the American Convention as interpreted by the IACHR.²²

However, the IACHR approach to living interpretation has exhibited an important difference from that of the ECHR. For the ECHR, an evolving interpretation is inoperable in the absence of a matching regional consensus regarding a specific practice. The IACHR has not followed this pattern. On the contrary, this Court has generally refused to deem consensus a relevant factor when deciding about the demands placed by the American Convention on the Contracting States. Effectively, “the notion of a regional consensus has played a much smaller role in the evolving jurisprudence of the Inter-American Court than in that of the European Court”.²³ Indeed, “regional consensus has played a negligible role in the jurisprudence of the (...) Inter-American Court”.²⁴ Nonetheless, Alberto Pérez and Eduardo Vío—both judges of the IACHR—have criticized the practice of implying new rights from the American Convention without regard for the existing practice of the Contracting States.²⁵ In this respect, it seems that the IACHR is less concerned than its European peer about the limits of an evolving interpretation.

In conclusion, both the ECHR and the IACHR characterize regional conventions on human rights as living instruments so as to (a) to read new rights into the text of the treaties, and (b) to overturn their precedents. Finally, while the ECHR employs the notion of regional consensus as a mean to limit the scope of evolving interpretation, the IACHR acknowledges no such impediment.

3. Why evolving interpretation? The myths and realities of living instruments

From the foregoing it may seem that a living approach to interpretation has functionally been adopted by both the ECHR and the IACHR. The question that now emerges is why both tribunals have made this interpretative choice. Neither court provides much substantive explanation for why a living approach should be

²¹ N. Sagüés, *Derechos Constitucionales y Derechos Humanos. De la Constitución Nacional a la Constitución Convencionalizada*, in H. Nogueira, *La Protección de los Derechos Humanos y Fundamentales de acuerdo a la Constitución y el Derecho Internacional de los Derechos Humanos*, 2014, 1, 16.

²² For a critical approach to the conventionality control doctrine, see: A.E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 *Texas International Law Journal*, 2015, 45, 64–69.

²³ G.L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 *The European Journal of International Law*, 2011, 101, 107.

²⁴ M. Killander, *Interpreting Human Rights Treaties*, 13 *Sur International Journal of Human Rights*, 2010, 145, 151. For an opposite view, see: L. Lixinski, *The Consensus Method of Interpretation by the Inter-American Court of Human Rights*, 3 *Canadian Journal of Comparative and Contemporary Law*, 2017, 65.

²⁵ See, for example: *Atala-Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, partially dissenting opinion by Judge Pérez-Pérez, ¶¶ 20–23 (Febr. 24, 2012); *Artavia-Murillo et. al v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, dissenting opinion by Judge Vío-Grossi, pp. 17–21 (Nov. 28, 2012); *Duque v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310, dissenting opinion by Judge Vío-Grossi, pp. 7–8 (Febr. 26, 2016).

preferred to an originalist one.²⁶ Nonetheless, there are some possible answers to evaluate.

Firstly, both the ECHR and the IACHR presume that the rules of interpretation in Article 31 of the VCLT require them to reject an originalist approach to human rights conventions. Therefore, a purposive, evolutionary approach would then seem the only acceptable manner to read treaty provisions. But this position misrepresents the demands of the VCLT. In effect, Article 31.1 of the VCLT does not clearly require that regional human rights courts give a purposive interpretation to human rights treaties. Indeed, as Pieter van Dijk and Fried van Hook have written, “the rules of the Vienna Convention do not provide clear-cut solutions to all problems of treaty interpretation. In fact, those rules themselves are not unequivocal”.²⁷ That is, there seems to be an inner tension in Article 31. On one side, treaty provisions must be interpreted according to the “ordinary meaning to be given to the terms of the treaty”. As such, the rule places on the interpreter the duty to understand the treaty in a manner consistent with the meaning of its text. From this perspective, it seems that the Convention emphasizes a sort of textually-bounded interpretation mostly associated with originalism. Yet the same rule also asks the interpreter to consider the ordinary meaning of the text “in the light of its object and purpose”. That seems to require that the interpreter employ a kind of purposive interpretation. This inner tension between an originalist and a purposive interpretation is not resolved in any meaningful way by the VCLT. Precisely because of this, Michael Waibel has opined that the VCLT “le[aves] substantial leeway for idiosyncratic approaches to interpretation within the bounds staked out by [its] broad interpretative principles”.²⁸

Therefore, when regional human rights courts favor a kind of purposive method of interpretation—from which the evolutionary posture is derived—they make an interpretative choice not absolutely required by the VCLT. That interpretive pursuit must derive from reasons found elsewhere. In sum: it is inaccurate to argue that Article 31 of the VCLT places an obligation on courts to reject originalism.

Indeed, Article 31 of the VCLT has not represented an obstacle for either the ECHR or the IACHR to follow an originalist approach to interpretation in some few cases. For example, in *Johnston and Others v. Ireland*²⁹, the ECHR refused to read a right to divorce into Article 12 of the Convention, which recognized a right to marry in clear-cut terms. Even more: the ECHR expressly refused to endorse an evolutionary approach arguing that “the Court cannot, by means of evolutive interpretation, derive from these instruments a right that was not included therein

²⁶ E.g.: A. Mowbray, *The Creativity of the European Court of Human Rights*, 5 Human Rights Law Review, 2005, 57, 71; F. Matscher, *Methods of Interpretation of the Convention*, in R.St.J. Macdonald, F. Matscher, H. Petzold, *The European System for the Protection of Human Rights*, 1993, 63, 69-70.

²⁷ P. van Dijk, F. van Hoof, *Theory and practice of the European Convention on Human Rights*, 1998, 72.

²⁸ M. Waibel, *Demystifying the Art of Interpretation*, 22 The European Journal of International Law, 2011, 571, 573.

²⁹ *Johnston and Others v. Ireland*, App. 9697/82 (Eur. Ct. H.R. Dec. 18, 1986), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “9697/82”; then follow case “Johnston and Others v. Ireland”).

at the outset”.³⁰ Adopting this originalist approach, the ECHR later refused to read a right to assisted suicide into the Convention.³¹ Additionally, there have been some cases in which the ECHR has interpreted the text of the Convention in the light of the intention of the Contracting Parties, preventing Article 3 from prohibiting the death penalty³² and refusing to expand the territorial jurisdiction of the Court.³³ Correspondingly, the IACHR followed an originalist approach when dismissing a petition asserting the existence of an unenumerated right to truth in the text of the American Convention.³⁴ That Court also rejected on similar grounds a petition made by the Inter-American Commission on Human Rights to condemn Colombia under the rules of the Geneva Conventions.³⁵ As such, both the ECHR and the IACHR have shown themselves willing to look at treaties through an originalist lens, Article 31 presenting no impediment.

What *normative* reasons might have induced regional courts of human rights to refuse an originalist interpretive method to human rights conventions? Let us consider three of them.

A first reason suggests that “a failure by the [ECHR] to maintain a dynamic and evolving approach would risk rendering it a bar to reform or improvement”.³⁶ This proposal tacitly assumes that originalism forbids adopting human rights conventions to new social or political environments. This is a myth. An originalist approach to interpretation does not deprive the Contracting States of their power to amend human rights conventions when they observe changes in social, cultural, and political practices. Originalism only limits the ability of courts to do so. Indeed, the Contracting States have expanded the scope of human rights protections by establishing new treaties and enacting new protocols that complement the basic protections provided by both the European and the American conventions on human rights.³⁷

³⁰ *Id.* at ¶ 53.

³¹ *Pretty v. The United Kingdom*, App. 2346/02 (Eur. Ct. H.R. Jul. 29, 2002), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “2346/02”; then follow case “Pretty v. The United Kingdom”), ¶ 74.

³² *Soering v. The United Kingdom*, App. 14038/88 (Eur. Ct. H.R. Jul. 7, 1989), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “14038/88”; then follow case “Soering v. The United Kingdom”), ¶ 103.

³³ *Bankovic and Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, App. 52207/99 (Eur. Ct. H.R. Dec. 12, 2001), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “52207/99”; then follow case “Bankovic and Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom”), ¶¶ 64–65.

³⁴ *Castillo-Paéz v. Perú*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 86 (Nov. 3, 1997). In respect of the right to truth, the IACHR changed its view on this issue later. See, for example: *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

³⁵ *Las Palmeras v. Colombia*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 33 (Febr. 4, 2000). For further implications of this decision, see: Gonzalo Candia, *El Estado de Derecho y la Corte Interamericana de Derechos Humanos*, 24 *Dikaion* 225, 247–248 (2015).

³⁶ Wildhaber, *supra* note 15, at 86. See also: George Letsas, *A Theory of Interpretation of the European Court of Human Rights* 69 (2007).

³⁷ Regarding new European instruments, see for example: Council of Europe, Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1953, E.T.S 9 and Council of Europe, Protocol No. 6 to the Convention for the Protection of Human

A second reason assumes that originalism would demand regional human rights courts to inquire what the framers of conventions would have thought about the dispute in question at the time of agreeing to the text of a treaty. This is tantamount to myth number one described by Professor Sollum in his paper. Originalism focuses not on the mental states of the framers who drafted those conventions almost fifty years ago, but on what the text of the conventions says. Of course, originalism logically considers what the framers did or said, but only with the purpose of achieving a better understanding of the public meaning of the text at the moment when it was written. Text and not authorial intentions control the decision of any case in an originalist world. In this respect, originalism is consistent with the demands placed by Article 32 of the VCLT. Effectively, the rule in question considers the intentions of the framers only as a supplementary means of interpretation, directed to discovering the ordinary meaning of the text. This focus derives the idea that it is the final text of the treaty, not the intentions of the framers, that expresses the object of States' agreement. Therefore, if regional courts of human rights become more originalist in their reading of treaties, they will not infringe upon the prescriptions of Article 32 of the VCLT.

A third reason proposed to reject originalism in human rights treaty interpretation amounts to myth number two brought forward by Professor Sollum in his paper. Under this view, originalism makes human rights conventions useless because originalists cannot apply them to new circumstances. Again, this assumption represents a myth. Let us consider, for example, the attitude adopted by both the ECHR and the IACHR to cases concerning a new kind of slavery: human trafficking. In this regard, the fact that human trafficking was a new reality did not prevent either the ECHR or the IACHR from applying the European and American conventions on human rights to this new type of cases. In doing so, courts did not adopt a living approach; they only made an effort to comprehend what were the factual elements that defined any form of slavery. Consequently, the ECHR understood in *Rantsev v. Cyprus and Russia*³⁸ that Article 4 of the European Convention, which prohibited slavery and forced labor, also proscribed the practice of human trafficking.³⁹ Similarly, the IACHR recently considered human trafficking as a contemporary type of slavery, condemning the state in the case *Trabajadores da Fazenda (Hacienda) Brasil Verde v. Brasil*.⁴⁰

There is a final myth that has a particular Latin American flavor. Some authors suggest that Article 29 of the American Convention compels the Court to adopt a purposive-evolving reading of it. Article 29 reads as follows:

“No provision of this Convention shall be interpreted as:

Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Apr. 28, 1983, E.T.S 114. In respect of new human rights instruments in the Americas, see note No. 44.

³⁸ *Rantsev v. Cyprus and Russia*, App. 25965/04 (Eur. Ct. H.R. Jan. 7, 2010), available at www.echr.coe.int/echr/en/hudoc (follow “HUDOC Database” hyperlink; then search “Application Number” for “25965/04”; then follow case “Rantsev v. Cyprus and Russia”).

³⁹ *Id.* at ¶ 281.

⁴⁰ *Trabajadores da Fazenda (Hacienda) Brasil Verde v. Brasil*, Preliminary Exceptions, Merits, Judgment and Costs, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶¶ 276-277 (Oct., 20, 2016).

- a. Permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein (...)
- c. Precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government (...)

According to certain commentators this provision would impose on the IACHR the duty to dismiss any “interpretation [of the Convention] (...) according to the ordinary meaning of its words (...) or any traditional canon of interpretation, instead directly serving the teleology of the instrument”.⁴¹ Others have further proposed that this rule empowers the IACHR to introduce new rights into the text of the American Convention.⁴² Nonetheless, Article 29 of the American Convention requires no such thing.

First, let us consider Article 29 (a). The American Convention does not protect human rights in just any manner. On the contrary, the Convention provides safeguards to rights and freedoms in a way that is consistent with a number of legal and political choices that Contracting States made when they drafted and ratified the treaty. The text of the Convention precisely expresses those choices. Therefore, when this instrument is judicially applied according to its textual requirements, interpreters can neither “restrict [rights and freedoms] to a greater extent than is provided for herein” nor “suppress” them. On the contrary, an originalist understanding of the American Convention implements rights and freedoms in consonance with the legal and political choices embodied by the instrument. Consequently, an originalist reading of the Convention, far from infringing it, it advances the enforcement of this instrument.

In this respect, what seems truly problematic under Article 29 (a) is an interpretation of the American Convention that, seeking to advance the object and purpose of the treaty, maximizes an individual right without due consideration for other treaty guarantees whose scope will be threatened by this unduly expansive reading. In fact, such a purposive interpretation maximizes one right at the cost of ignoring other rights and freedoms that may be “restrict[ed] (...) to a greater extent than is provided for herein”, or, even worse, “suppress[ed]” by this approach. In both cases, a clear violation of Article 29 (a) follows. Furthermore, any purposive interpretation of rights made under Article 29 (a) runs the risk of failing to properly elucidate the object and purpose of the American Convention as a whole. The fact is that “most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes”.⁴³ Then, judges should be cautious when extending individual rights oriented only by a vague generalization of the object and purpose of the Convention. Such vagueness

⁴¹ L. Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 *The European Journal of International Law*, 2010, 585, 588.

⁴² E.g: H. Gros-Espiell, *Los Derechos Humanos No Enunciados o No Enumerados en el Constitucionalismo Americano y en el Artículo 29. c) de la Convención Americana sobre Derechos Humanos*, 4 *Anuario Iberoamericano de Justicia Constitucional*, 2000, 145, 171; L. Burgorgue-Larsen, *El Contexto, las Técnicas y las Consecuencias de la Interpretación de la Convención Americana de los Derechos Humanos*, 12 *Estudios Constitucionales*, 2014, 105, 125.

⁴³ I. Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, 130.

may facilitate an interpretation of those rights based in their own ideologies rather than the treaty as such, which it is their duty to enforce.⁴⁴

Second, consider Article 29 (c). This provision must be read in the context of the whole American Convention. Subsection (c) does not empower the IACHR to add new rights into the Convention through a living interpretation of the treaty. On the contrary, this provision has two specific purposes.⁴⁵ First, it rules out any reading of the Convention that would limit the power of Contracting States to protect new and different rights within their own domestic legislation. In this regard, Article 29 (c) serves the same purpose as the Tenth Amendment in the context of American Constitutional Law. Second, Article 29 (c) supports the power that Contracting States have under Articles 76 and 77 to expand the list of rights protected by the American Convention. In this regard, according to Article 77, the Contracting States can “gradually includ[e] other rights and freedoms within (...) [the] system of protection”. In fact, this is what the Contracting States have effectively done by subsequently ratifying a series of new protocols and treaties that have enlarged human rights protections in the Americas during the last years.⁴⁶

In conclusion: when regional courts of human rights refuse an originalist approach to interpretation, they do so under mistaken assumptions about what originalism is and requires, as well as its practical relation to the treaties they are charged with applying.

4. Conclusion

Regional courts of human rights usually conceptualize human rights conventions as living instruments and, therefore, incompatible with originalism as a theory of interpretation. In doing so, those courts tend to rely on the VCLT rules of interpretation. Nonetheless, those rules can support either a living or an originalist approach to interpretation. As a result, other normative reasons to favor living interpretation over originalism are required. Most of those proposed reasons, however, reveal a generalized misunderstanding about what originalism amounts to. Consequently, it is necessary to open a new debate concerning interpretation in the field of international human rights law, a debate that properly considers a fresh and demystified version of originalism.

⁴⁴ I. Buffard, K. Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 *Austrian Review of International & European Law*, 1998, 311, 341-342.

⁴⁵ G. Candia, *Derechos Implícitos y Corte Interamericana de Derechos Humanos: Una Reflexión a la Luz de la Noción de Estado de Derecho*, 42 *Revista Chilena de Derecho*, 2015, 873, 893-895.

⁴⁶ E.g: Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador”, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 *I.L.M* 156 (1989); Organization of American States, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Aug. 6, 1990, O.A.S.T.S. No. 73; Organization of American States, Inter-American Convention to Prevent and Punish Torture, Sept. 12, 1985, O.A.S.T.S. No. 67; Organization of American States, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women “Convention of Belem do Para”, Sept. 6, 1994, 33 *ILM* 1534 (1994).