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Luca Siliquini-Cinelli *Editor*

Legal Positivism in a Global and Transnational Age

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How Post-Positivism Sheds Light on Treaty Interpretation: Celebrating the VCLT Rule of Interpretation

Christian Djeffal

Abstract What does post-positivism reveal about the Vienna Convention on the Law of Treaties (VCLT) rule of interpretation? This chapter argues that post-positivism can uncover the justificatory function of the VCLT rule of interpretation. Post-positivism delivers a hypothesis with explanatory value that is in line with international legal practice. It, therefore, provides further insights to the rule of interpretation. Post-positivism is characterised by a move away from the presumptions of positivism. Yet, it also remains in the tradition of positivism. This can be seen from reflection on the VCLT rule of interpretation. Post-positivism moves from ascertainment to argument. To structure communicative and argumentative processes becomes more important than hermeneutical guidance. Post-positivism leads to a potential pluralisation of actors. What is more, post-positivism is open for transdisciplinary insights. All these elements are visible in the reconstruction of the VCLT rule of interpretation.

1 Street Lights, Successful Practice and International Legal Don Quixotism

The street light metaphor goes back to a simple story. At night, a police officer approaches a gentleman who is on his knees under a street light and feverously looking for something. "What are you looking for?," asks the policeman. "I have lost my keys," answers the gentleman, still crawling on the ground. After a little while, the policeman asks "Sir, are you sure that you lost your keys here? I cannot see them." "I'm positive I lost them in the park." "Then why are you looking here?" "This is where the light is." Theories of science apply this street light metaphor to describe the behaviour of scientists regarding method and object of their research. It refers to the cognitive biases that lead researchers to inquire where it is easiest to

C. Djeffal (✉)
Munich Center for Technology in Society and TUM School of Governance, Technical University of Munich, Munich, Germany
e-mail: christian.djeffal@tum.de

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look.[1] The street light metaphor can be applied to the reflection of the issues concerning the rule of interpretation as enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Most authors assume that the function of the VCLT rule of interpretation is to ascertain the meaning of a treaty. They do not look at its justificatory function. The basic argument of this chapter is that, although international legal scholars have not appreciated this fact, the VCLT rule of interpretation guides the process of international legal argument. Scholars criticise the rule of interpretation for reasons that are besides the actual function of the rule of interpretation. The chapter argues that this becomes apparent when we leave the streetlight that means the theoretical discourses of positivist, natural law and sociological approaches and focus on post-positivist approaches to international legal interpretation. The general hypothesis of this chapter builds upon Gilbert Ryle's statement that "[e]fficient practice precedes the theory of it."[2] Therefore, the successful practice of the VCLT rule of interpretation is best to be understood in the light of a new theory.

If one were to look at the practice of treaty interpretation, the VCLT rule of interpretation is an apparent success. It is enshrined in a treaty that is accepted by a large part of the international community[3] without reservations. It is frequently referred to in diplomatic practice. More importantly, it is generally applied by international courts and tribunals.[4] Courts have also extended its scope of application beyond the Vienna Convention as a treaty. The International Court of Justice found that the rule of interpretation was customary law dating back hundreds of years.[5] The European Court of Human Rights (ECtHR) found that the Court itself was bound by the rule of interpretation despite the fact that the European Convention on Human Rights (ECHR) falls outside of the VCLT's temporal scope.[6] The Court argued that the rule of interpretation was to be considered as customary international law. Scholars rarely consider what the customary law status of the VCLT rule of interpretation actually means. The conviction of the court is that the VCLT rule of interpretation applies in practice universally and uniformly. Furthermore, the status of customary international law signifies the belief that these rules ought to be followed as a matter of law. Courts and tribunals indeed adhere to these rules. The International Law Commission has taken the issue up several times.[7] It relied on

[1] Kaplan (1964), p. 11; Freedman (2010).

[2] Ryle (2009), p. 19.

[3] An overview over the parties to the treaty can be found here: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003902f&clang=_en.

[4] Gardiner (2012), pp. 114–126.

[5] *Legality of the Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections) [2014] ICJ Rep 279, 318 para. 100. *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] ICJ Rep 213, 237 para. 47.

[6] For a review of the respective jurisprudence see Djeffal (2015), pp. 274–275.

[7] In recent years, this applies specifically to the projects *Fragmentation of International Law: Difficulties Arising from the diversification and Expansion of International Law*, *Reservations to*

Article 31(3)(c) VCLT in its report on fragmentation. It also gave guidance on how to use Article 31(3) (a)-(b) VCLT.

Who would have thought that Articles 31 and 32 would have such a sweeping success in international legal practice in 1969? The rules of interpretation were not at all popular in the process leading to the VCLT. Three special rapporteurs of the International Law Commission had not included any rule on treaty interpretation.[8] It was only Humphrey Waldock who drafted a provision that was critically assessed throughout the drafting process.[9] Considering that the VCLT works in practice it is surprising that academia is so focussed on its shortcomings. Lawyers and legal academics are actually trained to solve questions of pathology in the same way like doctors. They always try to understand where problems are and why things go wrong. Very seldomly, they are explaining why a legal institution works well. The provocative assumption at the outset of this chapter is that post-positivism shows us that very good doctors keep trying to cure a healthy patient. They keep asking why the Convention does not work and how it should be amended and updated. This chapter argues that instead, we should be asking why and how the VCLT works so well in comparison to other provisions in the VCLT.[10] It also argues that post-positivism is a powerful lamp helping us to leave the streetlight in order to find the key. It will be argued that the VCLT updated the approach to treaty interpretation in a way that can be acknowledged to fit into post-positivist thinking. The VCLT shifted the game from putting limits and substantive assumptions on interpreters to providing a frame for effective argumentation and communication. This coincides with changed needs of an increasing judicialisation of the international legal order. What the VCLT rule of interpretation basically did was to update international legal interpretative method in creating one aspect of general international law. It forces the interpreter to give reasons for a certain interpretation in a structured way. This enables an effective communication in the decision-making process. Authoritative interpreters are bound by the VCLT, yet several mechanisms allow for sufficient flexibility to develop their own approach. One of those mechanisms is that each interpreter has to solve issues of interpretation of the VCLT rule of interpretation her- or himself. While the VCLT provides for a common frame, it can be adapted not only through specific treaty provisions but also through the stance taken by certain fora.

Despite the fact that the VCLT rule is generally used in practice, it is frequently criticised in international legal discourse. Elements of post-positivist theory are apt to reveal and allude to aspects that are not present in the debate about the VCLT rule of interpretation. In this light, the VCLT rule of interpretation has a function that is

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Treaties, and *Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties*.

[8]Yet, they treated the issue in other contexts. Lauterpacht (1950a, b) and Fitzmaurice (1956).

[9]At the Vienna Conference, the US Delegation, headed by Myres McDougal famously tried to insert another proposal, see: McDougal (1967).

[10]One obvious example would be rule on the conflict of norms as enshrined in Article 30 VCLT.

different from what many scholars in international legal discourse assume. The different currents of post-positivism reveal that some of the arguments addressed at the VCLT look like Don Quixote tilting at windmills and believing he is fighting knights. Like a windmill, the VCLT rule of interpretation breaks down arguments through interpretative techniques and turns them into flour that can be weighed and balanced in order to arrive at a decision in the respective dispute. To understand the rule of interpretation in the VCLT not as a tool in the context of justification but in the context of discovery of the meaning of words is like attacking a windmill and taking it for a knight. In contrast, theoretical currents of post-positivism can show how the windmill actually works. Yet, post-positivism is a theory in the making. Therefore, it is necessary to delve deeper into what post-positivism is assumed to mean in the context of international legal interpretation.

2 Post-Positivism, Geology, Cubism

Post-positivism could be considered as an evolutive interpretation of positivism.[11] It abides by the spirit but not by the letters of positivism. It takes the general aim of positivism and its weaknesses seriously and tries to overcome it while being faithful to it at the same time.[12] This means that insights from positivism remain of interest and positivism retains its status as a productive legal theory.[13] Post-positivism tries to transcend positivism since it considers its basic assumptions regarding the theory of science outdated.[14] From this perspective, its rigid epistemological standard and its focus on ascertainment seem to be outdated.[15] In international relations theory, there was a huge debate in which post-positivists played an important role.[16] In legal theory, there have been similar currents in different jurisdictions.[17] Yet, post-positivist approaches differ to a large extent and there will be a need for further reflection before a consolidated theory can be developed. In an attempt to visualise the relationship between positivism and post-positivism, we found the following geological sketch to be the apt representation of the evolution of this theory. It could look like this[18]:

[11]Djeffal (2015), Bjorge (2014), Venzke (2012) and Distefano (2011).

[12]Forgó and Somek (2009), pp. 253–254.

[13]This is argued explicitly by Petroski (2011), pp. 684–685.

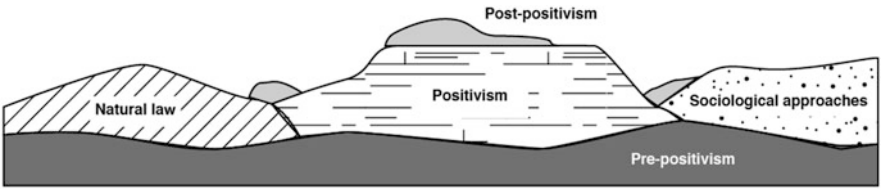
[14]Siltala (2000), pp. 17–21.

[15]Susen (2015), pp. 40ff.

[16]Fluck (2017), pp. 33ff.

[17]Singh (2014).

[18]The author thanks Larissa Wunderlich for the help with conceptualising this drawing and putting it into practice.



In an attempt to visualise the genesis and place of post-positivism, this section draws upon the metaphor of a geology[19] of international legal theory: International theory develops in different layers that vary vertically and horizontally but also overlap. In nature, they are much fuzzier and much more intertwined than this abstract picture shows. In every layer, there are corresponding materials relating to each other. In the case of positivism, these layers were natural law and social theory. Such a metaphor does justice to international legal theory since currents of positivism remain vibrant and central voices in the discussion. Positivists keep producing new insights about late thinkers of international legal positivism[20] and new insights about legal positivism.[21] The change in the vertical relationship between positivism does not signify a temporal sequence or a hierarchy of relevance. It signifies that the next layer is different from the previous one. Patterson describes the move of post-modernism away from modernism as a move away from the central axis of thinking and therefore the central research questions and approaches of modernism.[22] This also means that post-positivist theory transcends positivism in certain regards and changes the focus areas. It will be argued that with regard to questions relevant for understanding treaty interpretation, post-positivism transcended positivism in three regards that are relevant in this context. It went beyond ascertainment, beyond internationality, and beyond disciplinarity.

2.1 Beyond Ascertainment

Like any legal theory, legal positivism focusses on certain issues while leaving other issues aside. Common threads[23] in positivist thinking have been the grounding of legal norms, for example in social facts or in a *Grundnorm*. Another recurrent topic has been the separation of laws and morals. Less importance on a conceptual level is given to the interpretation of treaties.[24] This is not to say that positivists have made

[19] Weiler (2004).

[20] Fassbender (2013), von Bernstorff (2010). See also the respective contributions in Kammerhofer and d'Aspremont (2014).

[21] See recent works by Kammerhofer (2010) and d'Aspremont (2011).

[22] Patterson (1996), pp. 158–169.

[23] Coleman and Leiter (2010).

[24] For an analysis of traditional positivist doctrine in that regard see Hernández (2014).

no contributions to questions of interpretation. Many of the proponents of positivism—from Hans Kelsen,[25] to HLA Hart,[26] to Joseph Raz[27]—have worked on interpretation. Their approaches in that regard have been more elaborate and nuanced as it sometimes admitted. Kelsen, for example, linked his theory of interpretation to the Merkelian notion of a hierarchy of the legal order, in which the lower norms derive their validity from the higher norms and can only exist within a certain margin of appreciation.[28] But he also included realist elements in his theory of interpretation.[29] When it comes to interpretation, this margin of appreciation signified the relative freedom of the interpreter to choose between several possible alternatives. In the *Concept of Law*, Hart observed several problems of interpretation.[30] For example, he discussed the problem that the rules of interpretation are themselves be subject to interpretation. This would lead to an infinite circle. All positivist accounts of interpretation deal with important issues of interpretation and provide for a deeper understanding. Yet, for positivists, interpretation never acquired a central status. In contrast to ascertainment of legal norms, interpretation was not conceived of as a fundamental issue.

For post-positivist approaches, interpretation and argumentation was a central driving force. This becomes very clear by looking at one post-positivist current in German-speaking academia associated with the University of Heidelberg.[31] These theorists did not focus on the ascertainment of the law and on distinctions of rules and principles. Instead, the focus was on the process of the law and the communicative utterances between actors. Reasoning and justification became the important categories that were highlighted. For them, the law was what happened in the process. The aim of post-positivist theory for this current was to structure the social practices in a way that makes them better understandable and improvable at the same time. This current of thinking paid great attention to questions of interpretation and looked into the rules and the process of interpretation in great detail.[32] They conceived of legal interpretation as a "field of argumentation"[33] in which the text of the law was a starting point, yet only one of the many arguments to be considered. This is only one modification of a broader shift that is described by Siliquini-Cinelli's contribution in this book.

[25]Kelsen, for example, uses interpretation to ascertain the legality of an act, denotes the norm as scheme of interpretation in order to extrapolate the objective meaning. Kelsen (2002), pp. 2–4.

[26]Hart (1994), p. 124.

[27]Raz (1996), Raz (2009), pp. 225ff.

[28]Römer (2009).

[29]Bezemek (2016).

[30]Hart (1994), p. 126.

[31]The main proponents have been Friedrich Müller, Ralph Christensen and Hans Kudlich. See for example Müller (2007), Christensen and Kudlich (2010) For a summary Forgó and Somek (2006).

[32]Müller and Christensen (2004).

[33]Christensen and Kudlich (2010), p. 196.

2.2 Beyond Internationality

A feature that is particular to international legal positivism not by definition but by association is its focus on the nation state and its acts. In the beginning of the twentieth century, objectivist and subjectivist theories of international law took the consent of states to be either a building block or the exclusive building block of international law.[34] In the case of interpretation, especially in the nineteenth century, the goal of interpretation was described as to find the intentions of the parties of a treaty. National approaches to international law still guide international legal scholarship on different levels and have gained attraction in recent years.[35] At the same time, to think about the law in terms of national or cultural divides has been criticised on several occasions.[36]

In theory, the notion of what makes a state or nation has shifted substantially. Constructivist theory views nation states as 'imagined communities.'[37] Nation states are conceived as imagined and real at the same time. They are social facts that can be observed in the real world and have real consequences, they are based on imagination and a certain understanding that helps to build strong intersubjective ties between individuals.[38] The constructivist approaches neglect neither the existence of nations state nor their importance. What they highlight is merely the contingency of the concept, because it is actively constructed by human beings rather than being an *a priori* category. This insight does not challenge the value of seeing international law as being law between states and of according a very high priority to those states. Yet, acknowledging the contingency of the nation state opens up new possibilities and ways to think about international law. It also highlights the responsibility of international lawyers, since their ideas can influence imagined communities. Take, for example, the idea of an invisible college of international law.[39] This idea might have a descriptive value, yet, it also has the potential to change how international lawyers think about their profession and how they act. It also calls into question some assumptions that may or may not prove true: does "subsequent practice" in Article 31 sec (3) subsec (b) automatically mean subsequent practice of states?[40] In fairness, it has to be mentioned that many positivists would themselves question assumptions that international law has an inherent connection to the nation state. Hans Kelsen famously equated the state with the law and developed a monist theory

[34]Phillimore (1855), p. 97; Oppenheim (1912), p. 582.

[35]Roberts (2017).

[36]Lauterpacht (1931).

[37]Anderson (2006).

[38]A summary for the international legal context Djeffal (2014), pp. 146ff. See Anderson (2006); Breuilly (1993), Hastings (2007), Hobsbawm (2012).

[39]Schachter (1977–1978).

[40]See on this problem for example ILC, Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, A/CN.4/671, pp. 4ff.

in which national law derived its validity from an international *Grundnorm*.[41] Acknowledging the contingency of the nation state opens up a wide variety of possibilities that transcend much of the preconceived assumptions linking law to the nation state.

2.3 Beyond Disciplinarity

One central goal of several positivists was to create a specific method in order to describe the law in a coherent way. This is in line with the general anti-metaphysical and scientific standpoint of positivism.[42] It was of crucial importance to have not only coherent results, but coherent methods to arrive at these results. This is very apparent from the works of Hans Kelsen, who even described his approach as "pure theory."[43] In several publications, he opposed idiosyncratic styles of reasoning and the mixing of methods. Kelsen used sociological and anthropological methods himself in many publications. But he put great emphasis on the separation of methods. This was very much in line with positivist thinking in the theory of science. This monodisciplinarity is an excellent example of how post-positivism, as the present author understands it, builds upon positivism while leaving its central premises intact. As concerning methods of science, a specific critical approach evolved that opposed the general approach and advocated a more liberal and free understanding of methods. Post-positivism is transdisciplinary in nature. In my understanding, it necessarily takes a cubist stance.[44] In order to make a statement, different scholarly and scientific perspectives are linked and intertwined so that there is a common picture from different angles.[45] This approach could be compared to a cubist painting, showing one object from different angles at once. This requires to look at the problem from specific disciplinary views, but at the same time also the capacity to link and merge those views. Therefore, post-positivism is by its nature transdisciplinary.

[41] Kelsen (1958).

[42] Kelsen (2009).

[43] In German "Reine Rechtslehre."

[44] Djeffal (2014).

[45] Koskenniemi (2012) and Djeffal (2014).

3 Lessons for and from the VCLT

The general aspects of post-positivism are reflected in the VCLT rule of interpretation. In order to highlight the argumentative, transnational and transdiciplinary nature of the VCLT, it is necessary to give a brief account of how the VCLT rule of interpretation generally works.[46]

In order to apprehend how the VCLT works, it is important to appreciate that it is a binding obligation on the interpreter that offers wide discretion.[47] The VCLT structures the process of argumentation through techniques of interpretation. This means that the VCLT describes certain classes of arguments like the ordinary meaning of the treaty or the object and purpose of the treaty. The interpreter is obliged to take those techniques of interpretation into account. This basically means that she or he has to collect all arguments that can be associated with the means mentioned in Art. 31 VCLT. They have significant more argumentative weight than arguments from other techniques of interpretation. What the VCLT rule asks of the interpreter is to weigh all arguments and balance them against each other. This process of weighing and balancing must be transparent to others. It does not rely on traditional maxims, presumptions or material principles in order to suggest specific outcomes. It is rather a procedural obligation for international legal argument. In the context of justification, it helps to weigh and balance the arguments derived by the techniques enshrined in Article 31 VCLT. It organises the legal arguments. The difference between Articles 31 and 32 VCLT is significant in that the VCLT does not exclude supplementary means of interpretation but attaches more argumentative weight to arguments derived from the techniques established in Article 31 VCLT. By establishing this argumentative hierarchy, it is open but gives precedence to certain argumentative techniques. On the basis of this brief description, it is possible to see how the VCLT rule of interpretation can be reconstructed from a post-positivist perspective.

3.1 From Ascertainment to Argument

The same way that the ascertainment of norms as legal norms plays a big role for positivism, the ascertainment of the meaning of a treaty played a major role in international legal accounts on treaty interpretation. The metaphor of geology works well in this respect. Looking at the different approaches to interpretation in international legal scholarship, there are clearly different layers over time, but they are not clear cut. Many of the ideas of classical international law are still reflected in today's scholarship. We can distinguish three phases of scholarly reflection on treaty

[46]For a detailed treatment of this view see Djeffal (2015).

[47]Nolte (2013), p. 2.

interpretation[48]: During the mechanical phase, scholars tried to develop canons of interpretation that would guide the interpreter to determine a specific meaning of a treaty. Hugo Grotius, for instance, provided for a refined system of different means of interpretations like presumptions and principles that should guide the interpreter in all circumstances.[49] Authors later attacked the canons which they found inflexible.[50] Rules considered an obstruction in the inquiry into the intentions of the parties. In a third phase, legal scholars were again more focussed on providing rules; they did so by drafting codifications.[51]

It was within the phase of codification that a most important shift took place. The Harvard Draft Convention on the Law of Treaties contained a draft provision on treaty interpretation that mentioned several factors influencing interpretation. Manley Hudson, who guided and organised the research of the students at Harvard stressed that the "function of interpretation" was not aimed at a "preexisting meaning."[52] The interpreter was actively giving meaning to a text. In such a scenario, rules of interpretation have an ex-post facto function of justifying an interpretative result. The Harvard draft openly moved from ascertainment to argumentation.

This chapter argues that the same is true for the rule of interpretation as contained in the VCLT. As a guide for ascertainment, it is not really useful. It obliges the interpreter to take certain techniques of interpretation into account. If the interpreter must justify her or his interpretation, the function of this obligation becomes much more important. This makes it necessary to look at the effect the VCLT has in that regard. While the justificatory function is not limited to judicial proceedings, it is best visible in this settings. The parties would frame their submission according to the structure laid out in Articles 31 and 32 VCLT and the Court would respond to the arguments and add its own considerations. The Vienna Convention effectively prompts the parties to make arguments and frame them in a certain way. It is not a hermeneutical code to solve all problems of interpretation but rather a part of the structure of the process of interpretation.

3.2 Transnational Interpretation

The VCLT can also be seen to bring a transnational dimension to treaty interpretation. The concept of transnational law was coined by Philip Jessup in a series of lectures and has since then attracted considerable attention in international legal

[48]For a detailed description, see Djeffal (2015), pp. 83–108. Other views of the history of interpretation include Bederman (2001) and Ehrlich (1928).

[49]Grotius (1925), pp. 409ff.

[50]Lawrence (1925), p. 326; Hall (1924), p. 2.

[51]See for example Bluntschli (1868), pp. 245 and 253; Field (1872), pp. 311 and 507.

[52]Hudson (1934), p. 551; Hudson (1943), p. 641.

scholarship.[53] It mainly focussed on problem-oriented thinking with the aim "[t]o include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."[54]

Transnational law is more inclusive as concerning the areas and the subjects of law. The argument could be made that the VCLT is made as an effort to enhance communication in a problem-oriented way without trying to determine the outcomes. This also makes the VCLT an inclusive instrument. In order to understand and fully appreciate the function of the VCLT in that regard, it is important to look at the context in which the VCLT was negotiated: It was at a time of the cold war in which there was increasing and decreasing bloc confrontation in which the western and the eastern blocs stood opposed to each other and formed their own theories about international law. Several doctrines of international law were not recognised mutually. Soviet scholars like Tunkin brought forward ideas of peaceful coexistence.[55] In the process of decolonisation, an increasing number of new states came into existence that in many cases did not feel represented by any block and developed their own legal ideas. It was in this scenario of vastly differing ideologies, languages and cultures that a common rule on how to interpret treaties was sought. The rule of interpretation had to pass through several rounds of discussion in the 6th Committee of the General Assembly of the United Nations and the Vienna Conference. It's "only chance for survival" was to provide some value in the process of legal argumentation without containing any preferences that could be attributed to one of the opposing blocks or interest groups. The rule of interpretation had to be as neutral as it can be. The VCLT had to be inclusive.

The most important transnational feature of the VCLT is that it created a framework for argumentation and hence, for mutual understanding. The rule of interpretation assumes that communication within a legal system is possible, if a certain procedure is followed and certain classes of arguments (techniques) are considered. The rule of interpretation offers a structure that facilitates that process. It is, therefore, an important building block of creating a general international legal interpretative community that is "a way of thinking, a form of life, shares us, and implicates us in a world of already-in-place objects, purposes, goals, procedures, values, and so on."[56] It is of course true that the VCLT cannot have these effects in clinical isolation. But especially in settings with third-party involvement, an argumentative structure can bear fruit. This is certainly true for mediation but even more for proceedings before courts and arbitral tribunals. Even if the assumptions of the parties differ, the VCLT provides for possibilities to make the differing assumptions visible and to justify a specific solution. The need for justification helps to pinpoint

[53]See generally Zumbansen (2012). On the notion Tietje and Nowrot (2006), Djeffal (2013), pp. 26ff.

[54]Jessup (1956), p. 2.

[55]Tunkin (1974), p. 14.

[56]Fish (1980), pp. 131–132.

real disagreements. Parties can, for example, construe the object and purpose of a treaty quite differently. Such a disagreement is easily uncovered when using the VCLT.

Another feature that is often underrated is the flexibility of the VCLT in taking account of actors applying the treaty and even of actors that are not tied to nation states. This is specifically true for the technique of subsequent practice in the application of the treaty. In a large project, the International Law Commission and its Special Rapporteur Georg Nolte have addressed this issue and shown under what circumstances other actors like international organisations or even private actors' practice could be acknowledged in the process of treaty interpretation. Considering that the VCLT is open to different interpretative stances, it would be even possible to give it a more open reading. It might be possible to include the practice to which the treaty applies in the process of treaty interpretation.[57] This would make it even more apt for transnational constellations.

Another aspect is that the VCLT is not tied to specific areas or subjects of the law. To a certain extent, the object and purpose allows to import some specificities of certain treaties into the process of treaty interpretation. Yet, this does not come automatically. It is clearly established that the VCLT applies to the treaties establishing the WTO, to the Treaty of Rome and the UN Charter. Less attention is paid to the fact that even other treaties that are international by nature but have transnational consequences have to be interpreted according to the VCLT. Take, for example, the United Nations Convention on Contracts for the International Sales of Goods. While this is an international treaty, it is directly relied upon by private entities in international trade. The rudimentary rules on interpretation as contained in Article 7(1) are not sufficient to interpret the treaty.

3.3 Transdisciplinary Interpretation

It is a myth that the rule of interpretation as contained in the VCLT is legalistic and excludes other disciplinary views from entering into the process of treaty interpretation.[58] This myth might date back to a brilliant speech of Myres McDougal, in which he attacked the rule for being textualist and excluding other argument.[59] The proposal he presented was rejected by states at the Vienna Conference, but he managed to frame the perception of the VCLT rule eversince. A closer look shows that the VCLT opens up legal interpretation for transdisciplinary activities in different respects.

[57]This would contrast, however, the jurisprudence of the ICJ, especially in Kasikili Sedudu Island (Botswana v. Namibia) (Judgment) 10914f.

[58]Practical examples are also to be found in Tourkochoriti's chapter in this book.

[59]McDougal (1967).

The VCLT gives precedence to legal techniques of interpretation like the ordinary meaning of the text. This does not mean, however, that it does not allow contextual information gained by interdisciplinary methods to enter the process of treaty interpretation. In fact, Article 32 VCLT opens the process of treaty interpretation for all possible techniques. The illustrative examples mentioned in Article 32 themselves point to the context of the law and invite transdisciplinary dialogue. This was discussed in international legal scholarship for a long time.[60] The "context of the conclusion of the treaty" is quite open and could include "political, social and cultural factors."[61] In principle, any other consideration could find its way into the process of treaty interpretation. Especially in cases in which such a transdisciplinary interpretation could illuminate aspects that are not conceivable with the techniques mentioned in Article 31 VCLT, this could have great advantages. One possible example is an economic analysis in world trade or investment law. This economic analysis could highlight potential effects of differing interpretations and reveal what a suitable meaning for the parties could be.

Other techniques of treaty interpretation are at least open for transdisciplinary elements. The object and purpose of a treaty, for example could be determined by a broader understanding of what the treaty represents. One current of international legal thinking attaches a constitutional status to treaties[62] which could also inform its object and purpose. Another example is subsequent practice as enshrined in Article 31(3)(b) VCLT. Actual legal practice, as manifested in the opinions of courts or statements by the government can be acknowledged in the process of interpretation. But subsequent practice can also extend to the general situation to which the treaty applies.[63] This widens the context again for interdisciplinary inputs.

In another sense, the VCLT rule opens up the whole process of treaty interpretation for interdisciplinary analysis. Considering that it is a general structure for the process of argumentation which categorises arguments and attributes more weight to a certain class of arguments comparable to rhetorical *topoi*.[64] The fact that arguments are structured is not only advantageous in legal proceedings. It makes legal arguments explicit. This allows for qualitative and quantitative observations of legal argumentative practice. The VCLT-rule of interpretation provides a structure for interpreters and observers. As a structure, this is particularly helpful when using methods of content analysis. In the case of qualitative analysis, it is interesting to see how specific techniques are being used. This relates to question such as the definition of the object and purpose or what practice counts as subsequent practice.

Yet, the VCLT rule can also aid a quantitative analysis by revealing argumentative patterns and frequencies. This is specifically interesting in the case of the ECtHR since it deals with many cases. In 32 instances until 2014, judicial mechanisms[65] had

[60] Bernhardt (1963), pp. 163–168.

[61] Villiger (2009), p. 126.

[62] Fassbender (2009) and Kleinlein (2012).

[63] Djeffal (2015), pp. 166–167.

[64] Kratochwil (1991), pp. 234–236.

[65] Excluding the Commission.

to decide whether the text in the ECHR is to be interpreted in a static or dynamic fashion.[66] The judicial mechanisms decided in 22 instances to interpret evolutively and in 10 times to interpret dynamically. The provisions most often referred to were Article 2 ECHR (5 times) and Article 12 ECHR (4 times). The technique used most often was the context as provided in Article 31(1) VCLT, which was referred to 20 times.[67] This technique was used 9 times to support a static solution and 8 times to support a dynamic solution of the dispute whereas it was considered to be inconclusive 3 times. Apart from these general numbers, it is very interesting how the court argued specifically. Looking at the literature, evolutive interpretations are often associated with the object and purpose of a provision. Looking at the frequency of arguments, it is interesting that when the ECtHR used the object and purpose of a provision, it always did so as an argument in favour of evolutive interpretation. Yet, the court referred to it only 9 times while it referred to the context 20 times and to subsequent practice 18 times. The relevant rules as enshrined in Article 31(3)(c) VCLT were used 15 times. They were used exclusively to support an evolutive reading of treaties.[68] Another interesting aspect concerning the relevant rules is that they had a 100% success rate. When the court found evidence for relevant rules, the argument it derived from them was always successful in the sense that it matched the final result. One specific learning is that evolutive interpretations are based on different techniques and must not be equated with purposive interpretation. This equation is wrong in as far as it suggests that the ECtHR would frequently use the object and purpose in order to justify evolutive interpretations. As stated above, the object and purpose has only been used 9 times out of 32 instances. In contrast, the context has been used 20 times, subsequent practice 18 times, relevant rules 15 times and ordinary meaning 14 times. Therefore, the majority of cases we dealt with without looking at the object and purpose at all. In one instance, the court also decided for a static interpretation despite the fact that it looked into the object and purpose.

4 A Cubistic Conclusion

This chapter has argued that post-positivism can help to go beyond the regular research questions in order to assess the function and the inner workings of the VCLT rule of interpretation. Post-positivism can add new dimensions to international legal scholarship without necessarily invalidating other theories or discourses. It is a new layer, a set of new questions and ideas. Whereas other theories define themselves by distinguishing themselves from other approaches, the cubistic post-positivism envisaged here is different. It acknowledges legal theories and their

[66] Djeffal (2015), pp. 298–300.

[67] See Djeffal (2015), p. 325.

[68] In three instances, the court did not arrive at any conclusion at all.

weaknesses at the same time. It does not mix theoretical approaches while also not treating them separately. It is an attempt to see something from all angles at the same time.[69] Theories can never be understood in isolation but only in the discourse surrounding them. Cubism tries to understand all theories by indiscriminate internal associations with each theory. Yet, it also actively tries to transcend them and complement them with new questions and views that have not been asked and taken before. Such perspectives can be innovative or follow new insights in other fields such as the theory of science or the philosophy of language. In the case of the VCLT rule of interpretation, post-positivism can look at a rule of interpretation as a tool for communication and exchange of arguments. The VCLT rule carries no presumptions or material requirements for the actual of meanings. It operates on another level. Furthermore, it works irrespective of whether states can agree on specific interpretative preferences. It leaves room for authoritative interpreters like courts and tribunals to find their own interpretative stance.

The VCLT is much more open than many scholars admit. While the means enshrined in Article 31 VCLT take precedence and have more argumentative weight, there are still the supplementary means of interpretation in Article 32 VCLT. This is an open list of means that can be resorted to whenever the interpreter deems they can add to the interpretative issue. This opens the process of interpretation for transdisciplinary insights. One could say that the VCLT starts out at a certain point with a specific perspective. Yet, it has the potential to engage in a cubistic exercise as well.

It is far from easy to take such a cubistic view, in many respects it also comes at a cost. Monodisciplinary and monotheoretical stances convey their ideas in a clear way and picture even complex problems from their perspective. In contrast, it is very hard and sometimes impossible to picture everything at the same time. This can be learned from the cubistic painters in the beginning of the twentieth century. They tried to picture something from every side at once. Difficult, however, does not mean impossible. 360°-photography and virtual-reality applications teach us that it is possible to view something from different perspectives if you have the right tools to do so. The tools can be found in different methods. In this sense, cubism is not anti-disciplinary, but one discipline is hardly ever enough. In this constant methodical movement lies the great potential of cubism. It has the potential to quickly bring light to places that had been dark before.

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[69] An impressive approach to allow for different approaches and perspectives on interpretation was recently made by Bianchi et al. (2015).

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