

“Treaty Interpretation”

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“As the object of interpretation is to arrive at the intention which existed when the agreement was recorded, it follows that words or phrases must be given that meaning which they bore at the time when the instrument in question was executed.”

- Judge Van Wyk

Abstract:

“A treaty is an agreement under international law entered into by actors in international law, namely sovereign states and international organizations. A treaty may also be known as an international agreement, protocol, covenant, convention, pact, or exchange of letters, among other terms. Regardless of terminology, all of these forms of agreements are, under international law, equally considered treaties and the rules are the same. Treaties can be loosely compared to contracts, both are means of willing parties assuming obligations among themselves, and a party to either that fails to live up to their obligations can be held liable under international law.”¹

“Vienna Convention on Law of Treaties (VCLT) is a means which assists in interpreting a disputed word, provision, etc. VCLT is not exhaustive. The VCLT Convention quickly reveals that it covers all the topics traditionally regarded as falling within the framework of the law of treaties, that is to say, the conclusion and entry into force of treaties (including reservations), the observance, application and interpretation of treaties, the amendment and modification of treaties, and the invalidity, termination and suspension of operation of treaties. The Convention, in addition, lays down procedural rules concerning depositaries, notifications, corrections and registration.² But as of now, we are confined only to the interpretation of treaties.”

INTRODUCTION:

A treaty is an agreement made by actors in international law. *“Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”³*

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¹ Wikipedia, International Treaty, (July 26, 16:00 Hrs.), en.wikipedia.org.

² Oxford Law, Interpretation of Treaties, (July 26, 2018, 20:04 Hrs.), www.law.ox.ac.uk.

³ Vienna Convention on Law of Treaties, 1969, Article 2(1) (a).

We are around the era of treaties, such as bilateral and multilateral written covenants which are increasingly used for developing internal legal standards between States. The usage of customary international law is decreased in regulating legal matters due to political reasons. An ever-growing international exchange made it essential for a flexible international law which cannot be met by customary international law. These written agreements made States avoid difficulties which are intrinsic in customary international law. For this reason, States concluded an increasing number of treaties. *Is that enough?* Here, while applying all these treaties, there arises a question as to up to what extent a treaty is applied. At this point courts or any authorities should be cautious with regard to treaty interpretation. Interpretation of international treaty is a difficult and contradictory matter on the applier's agenda.

An international treaty has different meanings according to the opinion of different States. So, here applier is directed to settle such dispute because separate opinions are common in international judicature. Interpretation of a treaty in an aggressive way leaving other party State effected will be arbitrary. Until 1970, there is no law governing the interpretation of international treaties. From 1969, the *Vienna Convention on the Law of Treaties* aided in this field. This convention not only deals with the interpretation part but also other matters such as the formation of treaties, etc.

“Vienna Convention on Law of Treaties (VCLT) is a means which assists in interpreting a disputed word, provision, etc. VCLT is not exhaustive. The VCLT Convention quickly reveals that it covers all the topics traditionally regarded as falling within the framework of the law of treaties, that is to say, the conclusion and entry into force of treaties (including reservations), the observance, application and interpretation of treaties, the amendment and modification of treaties, and the invalidity, termination and suspension of operation of treaties. The Convention, in addition, lays down procedural rules concerning depositaries, notifications, corrections and registration. But as of now, we are confined only to the interpretation of treaties.”⁴

The Articles regarding the interpretation of international treaties are as follows:

Section 3. Interpretation of Treaties

Article 31, General Rule of Interpretation

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

⁴ Oxford Law, Interpretation of Treaties, (July 26, 2018, 20:04 Hrs.), www.law.ox.ac.uk.

(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.

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

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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

4. A special meaning shall be given to a term if it is established that the parties so intended.”⁵

Article 31 assists applicer in understanding the interpreted treaty where such provisions are found unclear.

Article 32. Supplementary Means of Interpretation

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure, or

(b) Leads to a result which is manifestly absurd or unreasonable.”⁶

Article 32 is applied when Article 31 is not sufficient to define an interpreted treaty provision. It is used when after applying Article 31, the meaning is ambiguous or absurd or unreasonable or obscure.

Article 33. Interpretation of Treaties Authenticated in Two or More Languages

“1. 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.

⁵ Vienna Convention on Law of Treaties, 1969, Article 31.

⁶ Vienna Convention on Law of Treaties, 1969, Article 32.

2. *A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.*

3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*

4. *Except where a particular text prevails in accordance with paragraph 1 when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”⁷*

Article 33 is applied when an interpreted text is authenticated in two or more languages. It says which text to be considered. When there is a difference of meaning in two authenticated texts.

After the commencement of the Vienna Convention on Law of Treaties, 1969 (Article 31 to 33), many controversies with the international treaties are resolved. These prescribe certain norms and obligations which are equal for all treaties and from now there are no distinct rules for interpretation of treaties. Vienna Convention on Law of Treaties, 1969 is not obligatory unless it is ratified by the signatories. Vienna Convention on Law of Treaties, 1969, is not retroactive.⁸ Even after the effect of VCLT, it does not provide for how to understand a treaty during interpretation but it only provides a means of interpretation for an applier during the interpretation process. Interpretation should be governed by rules of law but not political judgment. Because we are subject to the law but not law is subject to us.

JUDICIAL APPROACH

Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another⁹

A Chinese asylum seeker was denied refugee status. Her ground was well-founded fear persecution by forcible sterilisation for belonging to a particular social group. Here, the particular social group is that the fathers who produced one child, sterilisation will be done to them on the ground of “One child policy” of China. Here the issue arouses as to whether forcible sterilisation is regarded as well-founded fear persecution.

Article 1A(2) of Convention on Status of Refugees, 1951

“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a

⁷ Vienna Convention on Law of Treaties, 1969, Article 33.

⁸ Vienna Convention on Law of Treaties, 1969, Article 4 .

⁹ [1997] HCA 4.

nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Article 31(1): General rule of interpretation

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Court held that one child policy is not persecution because it is for birth control and it has its own rewards. Even **Article 1A(2) of Convention on Status of Refugees** cannot be upheld here because it is not universal and limits the humanitarian scope. **Article 31(1) of VCLT** is applied here and interpreted persecution that one child policy is not included within the term according to the ordinary meaning of the term in the light of object and purpose of the convention.

Regina v Immigration Appeal Tribunal and Another ex parte Shah¹⁰

Two citizens of Pakistan were falsely accused of adultery. They went to the UK as visitors for 6 months and thereafter they claimed for asylum on the basis of abandonment by their husbands, lack of any male protection, and condemned by the local community for sexual misconduct. The persecution they feared is that they would suffer from physical and emotional abuse. Claim for asylum was rejected on the ground that they didn't form a particular social group under the Refugee Convention. Here the issue raised that whether they form a particular social group under the convention.

Article 1A(2) of Convention on Status of Refugees, 1951

*“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of **race, religion, nationality, membership of a particular social group or political opinion**, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*

Article 31(3): General rule of interpretation

“There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

¹⁰ (1999) 2 All ER 545 (HL).

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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

Here the court held that the definition of **Article 1A(2) of Convention on Status of Refugees** does not mention women as a social group but the draftsman mentioned grounds only which are apparent at that time. In UDHR it was mentioned that colour and sex are also forms of discrimination. Here court applied **Article 31(3) of VCLT** and held that it was within the context of the convention. The court further held by applying **Article 32(b) VCLT** that the discrimination on the ground of women is *pari materia* to discrimination on the ground of race.

Fothergill v Monarch Airlines Ltd¹¹

The plaintiff flew to Luton from Rome and his ticket incorporated baggage check. The plaintiff noticed torn baggage and made a complaint but after seven days he noticed that some articles were missing and he made a complaint. The authorities only admitted for the damage to the baggage but not to the loss of articles because the time period is crossed. Here plaintiff claimed that damage includes loss of contents, so, notice given for damage to the baggage is deemed to be for the loss of contents and no further notice is required. Here the issue is, whether the word damage includes loss of contents under **Article 26(2) of the Warsaw Convention**.

Article 26(2) Warsaw Convention

“In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods.”

33(4) of the Vienna Convention on the law of treaties

“Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”

Court held that there is a difference of meaning in two authenticated texts (French and English). French text includes loss of contents in damage but not English text. So, the court applied **Article 33(4) of Vienna Convention on the law of treaties** and upheld English text as it reconciles the purpose of Article 26 of the Convention which was to ensure prompt notice to take necessary steps in case of damage to baggage or loss of contents.

¹¹ 2 [1981] AC 251.

King v Bristow Helicopter Limited¹²

A helicopter while onboard its two engines were failed and landed on helideck amidst smoke and panic. Mr.King, a passenger of helicopter got post-traumatic stress disorder and suffered peptic ulcer. Here the issue is whether his injuries can be brought into bodily injury under **Article 17 of the Warsaw Convention**.

Article 17 of the Warsaw Convention

“The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

Article 31(1): General rule of interpretation

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Court held by applying **Article 31(1) of VCLT** that his injury was damage to the brain which is a physical part. So, the purpose of the convention is to award damages to physical injuries, the court held that his injuries were successfully brought under physical injuries. He was entitled to damages.

Morris v KLM Royal Dutch Airlines¹³

Ms.M while travelling in a flight, fell asleep and awoke suddenly as a man was touching her thigh. So, she claimed damages for her depression. She brought an action against airlines but the same was declined. Here the issue is whether her injury is a bodily injury under **Article 17 of the Warsaw Convention**.

Article 17 of the Warsaw Convention

“The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

Article 31(1): General rule of interpretation

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

¹² [2002] UKHL 7.

¹³ (2002) 2 ALL ER 565 (HL).

Court held that by applying *Article 31(1) of VCLT*, under *Article 17 of Warsaw Convention* damages can be recovered only for bodily injury. So, some physical injury is required to fulfil the phrase bodily injury under *Article 17 of the Warsaw Convention*. Therefore she is not entitled to damages.

Laroche v Spirit of Adventure (UK) Ltd¹⁴

“In August 2003, the claimant went on a hot air balloon flight organised by the defendant. The arrangement was that a vehicle would follow the balloon with a view to collecting the balloon and passengers from wherever they landed. The claimant suffered injuries during a sudden landing. In August 2006, he brought an action against the defendant, seeking damages for his injuries. The defendant asserted that the claim was subject to Article 1 and that, in consequence, any right to damages arising from the incident was extinguished two years after the date of the accident. Here the issue is whether hot air balloon is an aircraft and whether the claimant is a passenger.”

Article 1, Warsaw Convention

“This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.”

Article 17, Warsaw Convention

“The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

Article 31(1): General rule of interpretation

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

“Here *Article 31(1) of the Vienna Convention on the law of treaties* is applied. Hot air balloon is considered as aircraft by giving an ordinary meaning to aircraft with a reference dictionary. Claimant is also considered as a passenger because he is nowhere involved in contribution to flight as a pilot. Therefore the 2 years limitation period for claiming damages was successfully applied.”

¹⁴ [2009] 2 All ER 175 (CA).

CONCLUSION:

Vienna Convention on the law of treaties (VCLT) is signed by many countries like *UK, Australia, Cuba*, etc. *India* is not a party to *VCLT*. India is governed by transformation theory. So, *VCLT* is not applied here. From the above case analysis it can be said that *VCLT* played a major role in interpretation of statutes where dispute arose. **Article 31, 32 and 33 of VCLT** assisted in interpretation of a word when it turns ambiguous, absurd, difference of meaning in two authenticated texts. Primarily it says that a convention to be interpreted in good faith according to object and purpose of the convention. From various instances in case analysis we can note the grounds on which an ambiguous or absurd word is interpreted like interpretation of the word refugee, physical injury, other charges, etc. In every possible instance court referred to *VCLT* in full-fledged for accurate interpretation. This interpretation is according to interpreter's discretion. Under **Article 31** a convention is interpreted according to the judges reasoning. As we know that opinion differs from person to person. **Article 31 of VCLT** is appropriate to reduce uncertainty in interpretation of international treaty, but that an overemphasis on systemic consistency as an objective of treaty interpretation involves risks. If we note one of the above case, *King v Bristow Helicopter Limited*¹⁵, where a different approach was taken by the bench because in almost all cases mental injury is not included under physical injury but in this case court took medical and scientific evidence and held that the injury caused is affecting brain which is physical and awarded damages. So, it can be said that the opinion differs from judge to judge. It doesn't mean the judge is wrong but it is his way of interpretation. The *VCLT* is adopted for interpretation of a statute if and only if the country is signatory to the convention.

¹⁵ [2002] UKHL 7.