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# Particular Reasoning versus universal human rights: A case of China

JINGJING WU

*Tilburg University, Law School*

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# A Perspective of Objectivity in the Human Rights Arguments

JINGJING WU

*European and International Public Law, TLS  
Tilburg University  
Warandelaan 2, 5037 AB Tilburg  
Netherlands  
j.wu\_1@uvt.nl*

**Abstract:** In this paper, I argue that there is objectivity in the international human rights law, against which the justifiability of arguments can be determined and the universality vs. relativity of human rights debate could be taken a step further. I propose an optimising approach for treaty interpretation, point out that there is epistemic objectivity residing in this approach, and analyse China's relativism arguments on Article 1 of the Convention against Torture to elaborate above points.

**Keywords:** China, Convention against Torture (CAT), Gustav Radbruch, international human rights law, objectivity, universality, relativity, shared intention, speech act, treaty interpretation

## 1. Introduction

This paper poses the following question: is there objectivity in the international human rights law (hereinafter as IHRL) against which the justifiability of arguments can be determined? To approach this question, two preconditions shall be established: first, what do I mean by 'objectivity' in this context; and second, what can the answer to this question contribute to the current human rights discourse?

To answer the first question, I shall note beforehand that this paper, although it resorts to several philosophic ideas along the way, aims to contribute to a legal discussion. That is: can we set out criteria for the justifiability of arguments in international human rights instruments? Considering the scope of this paper, I would rather refrain from the rich discussion on the concept of 'objectivity' in philosophy. Instead, in this paper I refer to 'objectivity' as a more practical account situated in social institutions, which is to set out criteria for justifications that shall not be influenced by individual intentions. This sense of objectivity, in a way, is what Professor John Searle called 'epistemic objectivity', as opposed to 'ontological objectivity' (Searle 2010, pp. 17-18). This perspective of 'objectivity', in my view, could help to reach justifiable conclusions in certain situations that remain undecided (or even undecidable) in the current human rights discourse. This leads me to the second question. The importance of introducing the perspective of objectivity into human rights arguments should be considered in the broader background of arguably the most debated topic in the human rights discourse, that is the debate on universality vs. relativity of human rights. In other words, I propose that if there is indeed objectivity in IHRL against which the justifiability of arguments could be determined, it could take the debate on universality vs. relativity of human rights a step forward.

In the first part of this paper, I introduce the debate on universality vs. relativity of human rights and argue that a perspective of objectivity could contribute to this (seemly ever-lasting) debate. Then I propose an optimising approach for treaty interpretation in the second part. In the third part, I argue that there is a degree of objectivity in the treaty interpretation. In the fourth part I investigate China's relativism argument concerning Article 1 of the Convention against Torture and analyse its justifiability based on earlier conclusions on objectivity in treaty interpretation. I

conclude this paper by addressing that although this approach could be applied to any international treaty, it is most pertinent to IHRL given the on-going debate on universality vs. relativity of human rights.

## 2. Human rights: universal or relative?

The question whether human rights are universal or relative has haunted human rights scholars for decades. Four sorts of opinions have been put on the table so far: the first two argue for either the universal or relative character of human rights; the third tries to find a ‘mid-way’ and reach for a reconciliation; and the fourth asks to abandon the whole universality vs. relativity debate. In this part, I briefly introduce each of the groups and then propose my approach to this debate.

For the purpose of consistency, I first introduce (and dismiss) the approach that asks for abandoning the whole debate. They do nevertheless address the question where the debate could possibly go wrong (Peerenboom 2003, Goodhart 2008). However, abandoning the debate, burying the question, and hoping to direct attention to other ‘practical’ (as those who embrace this approach usually suggested) approaches would only make this question a ‘pink elephant’ and in a way even more obvious and salient. The reason here is that as ‘one of the most invoked concepts in contemporary political discussion’ (Sen 2004, p. 315), the basic character of human rights—universal or relative—underpins almost all the other arguments concerning human rights issues. Therefore, although ‘changing focus’ may seem (temporarily) refreshing, the question on universality vs. relativity of human rights will always come back (presumably sooner rather than later) and shall be dealt with at some point. The other three groups are indeed dealing with this question.

In the paper ‘The Relative Universality of Human Rights’ (2007), Professor Jack Donnelly identified different types of universality and relativity arguments in the human rights discourse. Given its comprehensiveness, I thereby use his categories to present the ideas of both the universality and relativity groups. In the group that argues for the universality of human rights,<sup>1</sup> there is historical or anthropological universality, which holds that the ideas of human rights could be traced back to ancient history (not only in Europe, but also in Asia, Africa, and Islam) (Donnelly 2007, p. 284); functional universality, which takes human rights as ‘attractive remedies for some of the most pressing systemic (modern)<sup>2</sup> threats to human dignity’ (Donnelly 2007, p. 288); international legal universality, which is endorsed by the Universal Declaration of Human Rights (UDHR) and IHRL in general (Donnelly 2007, p. 288); overlapping consensus universality, deriving from Rawls’ theory on overlapping consensus, it focuses on the practical preference of human rights in the current international society (Donnelly 2007, pp. 289-291); and ontological universality, which implies that human rights has ‘[a] single trans-historical foundation’ (Donnelly 2007, p. 292). Although these are different views of universality, they do share a commonality, that is by providing varying grounds for the universality of human rights they posit a link between

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<sup>1</sup> It is noted that Donnelly also differentiated the conceptual and substantive universality. However, I consider that this differentiation, although it was relevant in the original context, is overlapping with the other schools of universality ideas. To avoid confusion, I therefore do not mention these two types of universality in this part. It is also noted that Donnelly made his judgments rather clear in his paper. That is approving the functional universality, international legal universality, and overlapping consensus universality; while criticising the historical/anthropological universality and ontological universality. It is for the purpose of the current discussion that I deliberately skip these comments.

<sup>2</sup> Added by me.

the universality of human rights and its legitimacy.<sup>3</sup> As for the group that argues for the relativity of human rights, there are three main types involved in the debate: the cultural relativism argument, the self-determination and sovereignty argument, and the post-colonial/critical argument. Cultural relativism, as Donnelly commented, is the ‘most common argument for relativity’ (Donnelly, 2007 p. 293). This idea demands ‘respect for cultural differences’ and claims that human rights norms are relative in regard to divergent cultural traditions. Hence ‘practice is to be evaluated...by the standards of the culture in question’ (Donnelly 2007, p. 294).<sup>4</sup> For the self-determination and sovereignty argument, by invoking the protection of self-determination and international legal sovereignty in international law, it asks for non-intervention to the States on human rights issues (Donnelly 2007, pp. 296-297). The post-colonial/critical argument, addressing the context of globalisation, bases its tenets on ‘the civilizationally asymmetrical power relations embedded in the international discourse’ (Donnelly 2007, p. 297), and asks for a critical approach to prevent ‘imperial humanitarianism’ (Donnelly 2007, p. 298). It is seen that apart from some extremist cultural relativism (which seldom becomes the main focus of the debate), relativism arguments mostly do not aim to challenge the legitimacy of the idea of human rights in general, but rather pose the following inquiry: given cultural, political, or structural particularities, in what sense (this is mostly to post-structural arguments) and to what extent (this appeals mostly to cultural relativism and sovereignty arguments) can the relativity of human rights be justified over and against abstract universal norms?

This question to some extent has been captured by the last approach, that is to reconcile these two characterisations of human rights and to find a (all-encompassing) solution. One of the representative ideas in this group is Donnelly’s relative universality approach. He argued that ‘human rights are (relatively) universal at the level of the *concept*,’ while for ‘particular rights concepts...relativity is not merely defensible but desirable’ (Donnelly 2007, p. 299). This reconciling perspective has been used to argue for the possibility of the co-existence between human rights systems and the states or regions that usually invoke relativism arguments on this matter (see O’Sullivan 2000). This idea also to large extent echoes with the ‘thin’ and ‘thick’ concepts of rights.

It is therefore noted that, in a way, the approach that I am about to propose goes with the last group in the sense that I also try to find a solution for the co-existence of the two characterisations of human rights. My proposition herein is: There is (a degree of) objectivity in the interpretation of IHRL, which provides criteria for justifying relativism arguments in the context of IHRL. Nonetheless, this approach also differs from most approaches of the last group in a number of aspects. First, I put this debate in the particular context of IHRL. Given that not only the UDHR has universal implications,<sup>5</sup> but all UN member states have ratified at least one of

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<sup>3</sup> In the debate between Donnelly and Goodhart, Goodhart pointed out this link while Donnelly expressed his objection. See Donnelly (2008). However, I do think the link with legitimacy has its position (implicitly or explicitly) in each of the universality arguments.

<sup>4</sup> It is noted that the cultural relativism idea presented here is the ‘substantive normative doctrine’ as Donnelly put in his paper. There was another stream of cultural relativism—methodological cultural relativism, which was held by some anthropologists as to against the invasion of modern western values. However, since this point of view has rarely been mentioned in the human rights debate, I decide not to include it in the current discussion.

<sup>5</sup> The universal implication of UDHR could be seen not only from its preamble that it is ‘a common standard of achievement for all peoples and nations’, but also from the fact that it was adopted by UN General Assembly without a dissenting vote. See Shaw, pp. 278-279.

the core international human rights instruments,<sup>6</sup> I consider that this context does not change the overall focus of the debate, but gives it a more concrete vantage point. Second, from the perspective of objectivity, I can give the above question—in what sense or to what extent could the relativism arguments be justified against the universal human rights norms—a rather straightforward answer, whereas most approaches of the group do not reach this level of certainty. This is because by putting the whole debate in an IHRL context, I do not respond to the ontological aspect of the question, *i.e.* is (or in what sense) human rights a universal or relative concept. Instead I rather take an epistemic vein to approach this debate by proposing an (epistemic) objectivity in IHRL. Lastly, reconciliation is neither the method nor the purpose of my approach. Given the fact that there are both universalism and relativism arguments in international human rights instruments, and that the debate of universality vs. relativity of human rights has created much confusion when it comes to justify these two kinds of arguments, the aim of my approach is to search for the criteria against which the justifiability of these arguments could be determined in the context of IHRL.

### 3. Treaty interpretation: is an art is a science is...?<sup>7</sup>

Before investigating the objectivity in the arguments of IHRL, it is necessary to lay out some basic understandings of treaty interpretation in general and my approach to this topic in particular. In fact, there is ‘extensive doctrinal dispute’ on this particular topic (Sinclair, p. 114). Such dispute, as Sir Sinclair put it, could be perceived from the vantage point of taking treaty interpretation as a spectrum. At the one end of the spectrum is the idea to take treaty interpretation as an art, whereas at the other end is to consider it as a science (Sinclair, p. 114). For those who hold that treaty interpretation is nothing more than mastering an art, they reject that there is any rule or principle to govern treaty interpretation. In their opinion, the ‘application (of such rules and principles) is merely an *ex post facto* rationalisation of a conclusion reached on other grounds or serves as a cover for judicial creativeness’ (Sinclair, p. 114). For those who take treaty interpretation as a science, they believe that there are general rules as guidance for a universal application (as far as the jurisdiction goes). Nonetheless, few scholars have taken either of the ends to its extreme. This is because on the one hand, treaty interpretation as a human linguistic practice could never be perfectly scientific (Merkouris, p. 6). On the other hand, if we are satisfied with taking treating treaty interpretation as a pure matter of art that entirely relies on the skills and virtues of the interpreter, we risk sacrificing one of the most fundamental characteristics of the rule of law, *i.e.* legal certainty. In this sense, I suppose that referring to treaty interpretation as an ‘art’ or a ‘science’ cannot be understood strictly, but rather as a metaphorical way to formulate the following question. That is: to what extent can treaty interpretation be guided by universal rules?

Although the wording varies, it is agreed that there are three schools of treaty interpretation: the textual (also called objective) school, the intentional (or subjective) school, and the teleological (or object and purpose) school. The textual school ‘centres on the actual text of the agreement and emphasises the analysis of the words used’ (Shaw, pp. 932-933). The intentional school ‘looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions’ (Shaw,

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<sup>6</sup> ‘There are nine core international human rights treaties...[A]ll UN Member States have ratified at least one core international human rights treaty, and 80 percent have ratified four or more.’

See: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

<sup>7</sup> The inspiration for this title as well as the wording of ‘art’ and ‘science’ as to describe the spectrum of treaty interpretation is from the work of Panos Merkouris (2010).

pp. 932-933). As for the third school, it holds that the object and purpose of the treaty should be 'the most important backcloth against which the meaning of any particular treaty provision should be measured' (Shaw, pp.932-933). In other words, the teleological school requests the interpreter to decide the purpose and object of a treaty in the first place and then 'interpret it so as to give effect to that object and purpose' (Sinclair, pp. 114-115). Although each school turns to different sources for determining interpretation, neither of them claims to entirely abandon interpreting rules and principles nor do they hold that there would be no deviation of interpreting under certain rules. It is therefore fair to say that each of the three schools stands somewhere between the 'art' and 'science' of the interpreting spectrum.

Although the three schools existed long before the adoption of 1969 Vienna Convention of Law of Treaties (hereinafter as VCLT) (Klabbers, pp. 28-29), the 1969 VCLT was the first and the only attempt so far to give treaty interpretation a set of universal codified rules (Orakhelashvili, p. 287). Therefore a further discussion of the two Articles regarding treaty interpretation in the VCLT, *i.e.* Articles 31 and 32, is necessary.<sup>8</sup> In the context of this paper, I analyse the following main concepts included in these two Articles that are pertinent to treaty interpretation in general and IHRL in particular.<sup>9</sup>

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<sup>8</sup> Section 3 of VCLT, which includes Articles 31-33, is about interpretation of treaties. However, Article 33 of VCLT concerning 'interpretation of treaties authenticated in two or more languages' deals with a rather independent and technical issue in regard to the treaty interpretation. On the other hand, Article 31 deals with 'general rule of interpretation', while Article 32 indicates 'supplementary means of interpretation'. Therefore, this paper takes Article 31 and 32 together as the general rules of interpreting international treaties, while leaves Article 33 out of the current discussion.

<sup>9</sup>The text of Articles 31 and 32:

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:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection 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.

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

- ‘The good faith’

The principle of good faith flows directly from the rule *pacta sunt servanda* (Sinclair, p. 119). In this sense, it is primarily ‘the good faith of the parties to the treaty’ (Sinclair, p. 119). This is to say that this rule is to guarantee that ‘[w]here a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith which should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up’ (Sinclair, p. 120). Therefore, the principle of good faith represents the idea from the *intentional* school of interpretation.

- ‘Ordinary meaning’

To read a treaty text in its ‘ordinary meaning’ as requested in Article 31 does not mean that every text should be read literally or be subjected to pure grammatical analysis (Sinclair, p. 121); but rather that ‘the true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonable flow from the text’ (Sinclair, p. 121). In Special Rapporteur Fitzmaurice’s view, this principle also implies the ‘principle of contemporaneity,’ which means ‘the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded’ (Sinclair, p. 124). Hence the principle of ordinary meaning resonates with the *textual* school of interpretation.

- ‘Object and purpose’

There is some controversy when it comes to applying ‘object and purpose’ to treaty interpretation. According to the original wording of Article 31, the phrase ‘object and purpose’ is used within the context of searching for the ‘ordinary meaning’ of the text. Moreover, from the way of putting the phrase (‘In the light of its object and purpose’), Sinclair even suggested that the reference to the object and purpose of a treaty was ‘a secondary or ancillary process in the application of the general rule on the interpretation’ (Sinclair, p. 130). However, this strict way of reading has been refuted by several decisions from international courts and tribunals, which mostly concern human rights issues. In some situations the emphasis on the object and purpose of a treaty even triumphed over the principle of contemporaneity (Sinclair, p. 130). There are several possible reasons for such prevailing use of ‘object and purpose’ rules in international human rights courts. One is that unlike other international treaties, in which the object and purpose are either vaguely put or diluted in contracting parties’ intentions, human rights treaties usually have clear and focused goals, *i.e.* protecting the human rights in question. It is therefore easier to identify the object and purpose and use them as source for interpretation. Another reason, probably a more important one, is that compared to other international treaties, human rights treaties have a normative agenda. Therefore, human rights courts may think it is important to protect such normative core whereas other international courts or tribunals do not have such concern (or do not consider it of paramount importance). Nonetheless, this element with its increasing importance clearly creates a room for the *teleological* approach of treaty interpretation.

- ‘Context’:

Paragraphs 2 and 3 of Article 31 are about the context for the interpretation. Such context includes any agreement, instrument, subsequent agreement, and subsequent practice relating to the treaty between the parties. This element represents the *intentional* approach of interpretation, for the

contracting parties' agreements, instruments, as well as subsequent practices are usually the results of their established intentions.

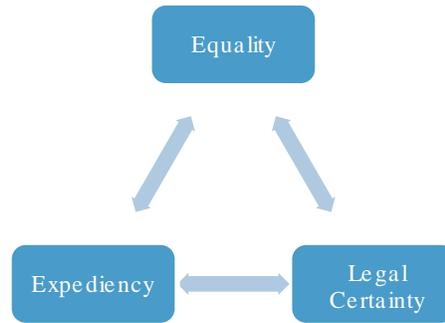
- 'Supplementary means of interpretation'

It is clear from the text that the *travaux préparatoires* and the circumstances of the conclusion have their importance in treaty interpretation. However, the fact that they are put in Article 32 as supplementary means also shows that their permissibility is contingent on 'carefully controlled circumstances' (Sinclair, p. 142). Although some scholars suggest that Articles 31 and 32 should be taken as a set of rules and therefore should not take Article 31 as more important than Article 32, it is still important to bear in mind that according to Article 32, the meaning resulting from taking into account the *travaux préparatoires* as well as the circumstances of the conclusion shall not lead to contradictory understandings with the result of the application of Article 31 (Sinclair, pp. 141-147). Nevertheless, resorting to the *travaux préparatoires* and the circumstances of the conclusion is mainly to establish the *intentions*.

It is therefore shown that the VCLT interpretation rules are absorbing all three schools of interpretation. This 'all-encompassing' approach has been criticised for its attempt to compromise the three schools as well as for its vagueness on the priorities of applying the different rules, which leads to its uselessness in practice. For instance, in the first article of the compilation *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, Professor Jan Klabbers argued that, among other deficits, 'the rule(s) of Articles 31 and 32 are... a compromise between various approaches which itself goes back to a compromise concerning the various distinct activities that treaty interpretation signifies—and it will be obvious that not too much ought to be expected from Article 31 and 32 as such. While it goes too far to suggest that "anything goes" under these provisions, still, "quite a bit goes" would be a fairly accurate synopsis' (Klabbers, p. 34). At last he suggested abandoning the VCLT rules but embracing the virtuous approach of interpretation.

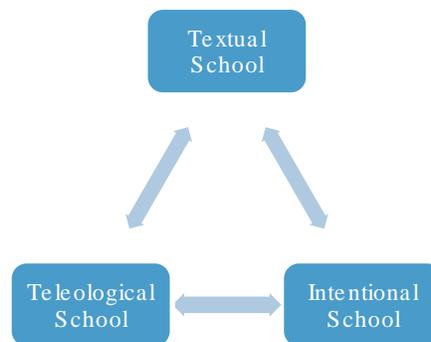
However, is this all-encompassing VCLT approach only a compromise of different interpretation schools and therefore practically not useful? On this question, I hold a different opinion than the criticisms. I do think that the VCLT interpretation rules capture the intertwinement between the three approaches of interpretation, therefore unwrapping this relationship is key to the application of the VCLT rules. This is to say that not only the *raison d'être* for the VCLT interpretation rules goes deeper than a mere compromising of different schools, but also that these rules are in fact practically applicable. To reach this understanding, I take the inspiration from Gustav Radbruch and his theory of the antinomies of the idea of law.

In his work on legal philosophy, Radbruch proposed that the essence for the rule of law was constituted by equality, expediency, and legal certainty (Radbruch, pp. 47-224). (As shown in diagram 1). In his view, equality is of distributive justice: to treat like cases alike and different cases differently; expediency addresses the purpose of the law; whereas legal certainty requires the law to be positive (Radbruch, pp. 107-108).



(Diagram 1) (Professor Bert van Roermund, personal communication, October 19, 2015)

Herein, it is probably more than a coincidence that the three schools of interpretation respectively represent each of the element in Radbruch's theory: the textual school embodies the equality element. This is because this school emphasises that the original treaty text should be taken the way it is. The ordinary meaning of the text should be treated as the general background against which the interpretation shall be made. This approach is basic to guarantee that equals are treated equally. The idea of intentional school is resonant with the legal certainty. The intentional approach focuses on the authority of the interpretation by resorting to the intentions of the contracting parties *qua* 'legislators' (such as *travaux préparatoires*, subsequent States practices and so on and so forth). In other words, this approach implies that by investigating the contracting parties' intentions, a certain interpretation gains its authority and therefore should be right. This is also curbing judicial legislation. The teleological school, as a third pillar, represents the expediency aspect given that it turns to the purpose and object of a treaty to seek the apt interpretation. In this sense, there is also a triangle relationship between the three schools of interpretation that corresponds with Radbruch's original formula, which could be expressed as following (Diagram 2):



(Diagram 2)

In his work, Radbruch further explained the relationship between these three elements. On the one hand, these three elements contribute to each other. Equality requires expediency as the vantage point wherein the substance of equality can be decided; expediency demands legal certainty since expediency is subject to disagreements between the views of individuals and therefore cannot sustain a legal order. On the other hand, they also undermine each other.

Expediency ‘is bound to individualize as far as possible’ and thus ‘every inequality remains essential’ (Radbruch, p. 109); while legal certainty demands positivity without regard to either equality or expediency (Radbruch, p. 109). Hence, these three elements, namely equality, expediency, and legal certainty, are relative to each other— ‘yet at the same time they contradict one another’ (Radbruch, pp. 109-111). This relationship also applies to the three schools of interpretation as the way that Articles 31 and 32 of VCLT are represented: all the three schools are embodied in the two Articles while no rule to determine the priority means that these three schools of interpretation are in constant tension in their application. This relation can be easily found in court decisions. For instance, in the case *Golder v. United Kingdom*, the European Court of Human Rights decided whether there was the right to access to court under Article 6 of European Convention of Human Rights (ECHR) on the right to fair trial with following reasoning: on the one hand, the Court ‘not only rejected the view, defended by the United Kingdom, that lack of an explicit provision in the text constitutes a reason against granting an unenumerated right. It also stressed that the question whether to grant an unenumerated right is not a question whether we should stick to the actual text or read words into the text’ (Letsas 2010). On the other hand, the Court also ‘felt confident that “the object and purpose” of the ECHR contains the ideal of the rule of law which leaves no ambiguity (which triggers resort to supplementary means under Article 32 VCLT)’ (Letsas 2010). Hence it is seen from this case that the Court made its decision by taking all three elements into consideration while inclining to the teleological readings over the other two approaches. Therefore, instead of simply taking the VCLT rules as a result of compromise, it is probably more accurate to take them as a fair representation of this relative while contradicting relationship among the three schools of interpretation. The difference between these two sorts of understandings is that the former takes the VCLT rules as a vague abstraction that has limited practical meaning, whereas the latter considers the VCLT rules as a way to represent the complicated reality when dealing with treaty interpretation, in which case none of these elements should be neglected from the discussion. Therefore, this ‘cocktail’ approach as represented in Articles 31 and 32 of VCLT, in my opinion, is not a weakness, but rather a faithful way of representing the relationship of different elements when interpreting a treaty.

Following this idea, I propose that there is an optimising way to conduct treaty interpretation under the guidance of VCLT rules. That is to take treaty interpretation as a manoeuvre among the three elements, namely equality as suggested by the textual school, certainty as proposed by the intentional school, and expediency as represented by the teleological school. It is the interpreter’s job to master the balance between these three elements. This is to say that it is also in the interpreter’s power to make the manoeuvre among the three elements. In other words, as long as human language has not achieved its logical perfection, there is always room for manoeuvring and therefore arguing in regard to treaty interpretation. However, this does not mean that all the power is in the hands of the interpreter or that all the arguments of interpretation are acceptable. The bottom line is: the interpretation shall not contradict any of the three elements and be supported by one particular approach. This bottom line marks the threshold for the justifiability of arguments on treaty interpretation. This is, as I suggest, a practical way to apply the VCLT rules, which also keeps the merits of prudence residing in these rules. In fact, this approach also reflects the ultimate principle of interpretation, *i.e. pacta sunt servanda*. In this regard, I do to some extent agree with the virtuous approach as suggested by Klabbers. However, such approach, in my view, is perfectly reflected in the Articles 31 and 32 of VCLT. Moreover, bearing virtue (or applying the principle of *pacta sunt servanda*) when interpreting a treaty does not mean that interpreting is just a matter of art that is one hundred percent in the control of the interpreter. The

power of the interpreter resides in his or her manoeuvre among the three elements, whereas what the interpreter cannot justify is to contradict any of the element or ignore these three elements completely. Hence, treaty interpretation, just as any other legal practice—is a craftsmanship; neither fully art nor pure science, but comes with bottom-line rules and practical skills.

### 3. But, what about objectivity?

In the previous part, I came to an optimising approach of conducting treaty interpretation. In this part, I argue that objectivity resides in all three approaches of treaty interpretation. Hence there is an account of objectivity in treaty interpretation.

#### 3.1. Objectivity in the intentional approach of treaty interpretation

Objectivity of the intentional approach could be established by taking intentions of a treaty as *shared* intentions. This is to say that an international treaty represents shared intentions among the participating parties. Therefore, reading the intention of a treaty is to search for shared intentions rather than each State's individual intentions that lie behind the text.

A shared intention, according to Professor Margaret Gilbert, is established, 'when and only when' people in concern 'are jointly committed to intend as a body to do such-and-such in the future' (Gilbert, p. 167). In her paper 'Shared Intention and Personal Intentions' (2009) Gilbert further constructed three criteria of adequacy for an account of a shared intention, namely the disjunction criterion, the concurrence criterion, and the obligation criterion. These three criteria together are necessary and sufficient conditions for establishing a shared intention (Gilbert, p.171). Therefore, an international treaty represents a shared intention among the participating parties could be understood both from the perspective of joint commitment and the three criteria of a share intention.

First, a shared intention is a joint commitment. A joint commitment is created when: 1) each party is individually ready for this; and 2) each party expresses this readiness (Gilbert, p. 180).<sup>10</sup> 'Once the concordant expressions of all have occurred and are common knowledge between the parties, the joint commitment is in place' (Gilbert, p. 180). This feature of joint commitment is in fact well represented in the principle of 'consent to be bound' for treaty participation. According to VCLT Article 2(1)b 'the international act...whereby a State establishes on the international plane its consent to be bound by a treaty'. Under this principle, States are bound by showing their consent to the given treaty.<sup>11</sup> According to Articles 11-16 of VCLT, States show their consent to be bound via signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession, or any other means if so agreed. It is reasonable to deduce that by showing their consent to be bound via any of the above mentioned gestures, State parties express their *readiness* to join the treaty in question. In this sense, an international treaty is a joint commitment. A state's participation to a treaty is to enter (or in the case of drafting States, to establish) the joint commitment, in which a shared intention is formed. In addition, it is seen that once a treaty is created, it should be taken as a whole to achieve the object and purpose of the treaty. For instance, the purpose of the VCLT itself is to provide an understanding of the nature and characteristics of treaties; the purpose of Convention against Torture is to protect basic human

<sup>10</sup> Herein Gilbert used the word 'personally', which I adapt into 'individually', for it is an abstract account of 'party' rather than 'person' is concerned here.

<sup>11</sup> The exception exists in the case of customary international law, which is out of the purview of the current discussion.

rights in regards to preventing torture; and so on and so forth. This means that State parties to a treaty could be taken as *a body* to do what the treaty is set out to do. In other words, a treaty is what Gilbert called ‘jointly committed to intend as a body to do A’ (Gilbert, 179).

Second, one necessary condition of a shared intention is the disjunction criterion, which as Gilbert put it, is ‘... not necessarily the case that for every shared intention, on that account, there be correlative personal intentions of the individual parties’ (Gilbert, p. 172). In other words, a shared intention is ‘logically possible...to exist in the absence of correlative personal intentions of the participants’ (Gilbert, p. 182). Hence a shared intention exists as an autonomous relationship, relatively independent of the intentions of each participant. This criterion is embodied in the fact that ‘treaties are binding upon the parties to them and must be performed in good faith’ (Shaw, p. 903). The principle of ‘good faith’ is a way to prescribe that State parties refrain from invoking individual intentions to deviate from shared intentions established in the treaty. Furthermore, the binding character implies that shared intentions of a treaty shall be conformed to by State parties regardless of States’ individual intentions. In other words, despite individual intentions of each State party, the treaty’s intention shall be self-sufficiently construed.

Third, another necessary condition for a shared intention is the concurrence criterion. It is to say that: ‘absent special background understandings, the concurrence of all parties is required in order that a given shared intention be changed or rescinded, or that a given party be released from participating in it’ (Gilbert, p. 173). This criterion is well reflected respectively in the process of making treaty reservation, amendment and modification, as well as treaty termination and suspension. Each of the action is either guided by the relevant provisions in a given treaty; or in the case of absence of such provision, guided by relevant Articles of VCLT (Articles 19-23, 39-41, 54-64). In either case, the concurrence of all parties is required in principle, albeit it may be adapted to suit practical concerns.

Fourth, the last necessary condition for a shared intention is the obligation criterion, which suggests that ‘each party to a shared intention is obligated to each to act as appropriate to the shared intention in conjunction with the rest’ (Gilbert, p. 175). To further elaborate this criterion, Gilbert pointed out ‘in referring to the obligations covered by this criterion I may refer to a given party’s having an obligation to *conform* to the shared intention’ (Gilbert, p. 175). This criterion can be found in Articles 26, 31, 46, and 69 of VCLT, which articulate the character of bindingness of a treaty. Thus this is a rather obvious trait for a treaty, given that a treaty is to set out binding obligations (Shaw, p. 905), and therefore State parties’ conformity is obliged.

Is applying Gilbert’s theory of shared intention to international treaties a stretch of the original theory which only concerns shared intentions among individuals? It certainly is. However, from the above discussion, I have made the point that an international treaty can also be taken not only as a joint commitment but also as satisfying all the three criteria of establishing a shared intention. Therefore, I consider this stretch justified. It now suffices to say that since a treaty represents a shared intention among State parties, reading the intention of a treaty is to search for *the shared intention* rather than each States’ individual intentions. In this sense, there is objectivity residing in the intentional approach of treaty interpretation.

### **3.2. Objectivity in the textual approach of treaty interpretation**

To investigate objectivity in the textual approach of treaty interpretation is to ask the question for what reason do State parties have to read the treaty text as it is. The answer to this question, in my view, could be found from the perspective of (collective) speech act theory.

A speech act, is the act characteristically performed by uttering expressions in accordance with certain constitutive rules (Searle 1969, p.37). Paradigmatic examples of a speech act are ‘I promise that p’, ‘I order that p’, ‘I assert that p’, and ‘I declare that p’ (Meijers, p. 93). In its traditional analysis, a speech act is performed between a singular speaker and a singular hearer. Professor Anthonie Meijers, in his paper ‘Collective Speech Acts,’ extends this traditional approach to a collective approach. Herein, ‘collective speech acts’ means that the acts are ‘performed by collective agents or addressed to collective agents’ (Meijers, p. 93). This kind of collective speech acts cannot be reduced to individual speech acts, for collective intention cannot be reduced to individual intentions (Meijers, pp. 96-101).

In this sense, an international treaty, containing a set of (regulative and constitutive) rules to declare legal obligations among State parties, is a (set of) speech act, or more precisely, a collective speech act. From this vantage point, the objectivity in treaty text could be construed from the following three aspects.

First, a treaty text is independent from the drafters’ interpretation of the given treaty. An important characteristic of collective speech acts, as Meijers pointed out, is that ‘a collective speaker cannot literally utter sentences. Only individuals can do that. Collective speech acts are therefore performed by individual speakers *on behalf of the group*’ (Meijers, p. 101, italic added). He further elaborated that: ‘Individuals usually don’t have to make an extra effort to know their illocutionary intentions when performing a speech act...Groups, on the other hand, do not have the type of epistemic access that individuals have. In order to know what a group’s intention is, a conscious effort need to be made by the speaker who acts *on behalf of the group*’ (Meijers, p. 102, italic added). This characteristic of a collective speech act explains why a treaty text, although it was drafted by a group of delegates, shall be taken as speaking for the *whole* group of drafting parties. It is because the drafters of the treaty, as a delegation, cannot utter the sentence regardless of the intentions of drafting State parties *as a whole body*. Hence objectivity here resides in representation: the actors *qua* delegates are bound by the intentions of the authors *qua* States they represent and should not act in their own intentions.

Second, a treaty text is independent from the interpretation of the State parties as either participating or drafting parties. Herein, I shall point out that, in the case of drafting an international treaty, the drafting State parties act as a collective speaker, whereas the participating State parties are not a collective hearer, but individual hearers. This is because all the participating State parties are not construing the treaty text in question collectively *qua* as a body, but individually. Nonetheless, some of the participating State parties are also the drafting State parties. This is to say that, in the scenario of States participating to an international treaty, it is the drafting parties as a collective speaker that addresses the participating parties as individual hearers, wherein a part of the individual hearers also constitute the collective speaker. It is now clear that a treaty text *qua* collective speech act shall be construed independently from the interpretation of State parties that are not part of the collective speaker, for they are the hearers of the speech act. Then, is the treaty text also independent from the State parties that are also drafting parties? The answer is yes, because the speaker is collective and therefore cannot be reduced to any of the drafting parties.

Third, a treaty text is *in practice* independent from the interpretation of drafting parties as a whole body. It is established that the drafting States as a whole are the collective speaker of the treaty *qua* collective speech act. In principle, they have the capacity to determine the meaning of the text *as a body*. However, in practice, the moment that a treaty was created, the ‘drafting States

as a whole body' disappeared and transformed into individual hearers.<sup>12</sup> Therefore, it is almost impossible to ask all the drafting parties to act as a whole body again and give the meaning of a particular text after the treaty is created—at least the possibility is so low that in fact it never happened in international legal practice. In this sense, the text has its *practical* independence from the drafting States as a whole.

Given the above three accounts, a treaty text shall be read as being (practically) independent from the interpretations of drafters, participating State parties, as well as drafting States as a whole. It is in this sense that objectivity is found in the textual approach of treaty interpretation.

### 3.3. Objectivity in the purpose and object approach in treaty interpretation

The purpose and object of a treaty first and foremost represents a shared intention of the State parties. Therefore, as discussed above, a party could not opt out from this joint commitment without breaking its commitment. This is the very logic behind the basic assumption of international law that 'in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other' (Shaw, p. 904). Moreover, this shared intention itself, as aforementioned, cannot be reduced to individual intentions and therefore possesses a certain objectivity. Now the question follows: does the objectivity of the purpose and object of a treaty in any interesting way differentiate from the objectivity residing in shared intentions of a treaty? I incline to answer yes for two reasons.

First, the purpose and object of a treaty is the fundamental shared intention among participating parties. In other words, it is a core joint commitment. This is to say that if all the participating parties could only agree on one thing and still intend to establish a treaty, that should be the purpose and object of the treaty. Therefore, when contradictory interpretations are found in the purpose and object of a treaty and other shared intentions, it is justifiable to give the interpretation based on purpose and object more weight. Second, the purpose and object of a treaty is a declaration, whereas not all the shared intentions in a treaty are as such. A declaration, as a special kind of speech act, has the power to change the reality 'by declaring that a state of affairs exist and thus bringing that state of affairs into existence' (Searle 2010, p. 13). Hence, given this characteristic, the criteria for satisfying the purpose and object of a treaty is to fulfil this speech act; while to fulfil this speech act is to bring the utterance of that speech act into reality. It therefore brings another dimension of objectivity into the picture. That is the participating parties are obliged to satisfy the purpose and object of the treaty, which is objectively observable. In other words, participating parties should be mutually seen to further the common cause. Therefore, a certain sense of transparency is required. This is also reflected in the monitoring activities of treaty bodies.

I can now explain the implications of the perspective of objectivity on applying Articles 31 and 32 of VCLT in practices. From the intentional approach, firstly, concerning the principle of 'the good faith',<sup>13</sup> it shall be established that where a third party is called upon to interpret the treaty, his or her obligation is to draw inspiration from the good faith which should animate the

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<sup>12</sup> This is given that the drafting states have also showed their consent to be bound by the treaty after the creation of the treaty according to relevant procedures.

<sup>13</sup> As mentioned above, '[w]here a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith which should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up' (Sinclair, p. 120).

parties if they were themselves called upon *as a whole body* to seek the meaning of the text which they have drawn up. Secondly, considering the ‘context’ for interpretation, which includes the subsequent agreements, instruments, as well as practices that relate to the treaty between parties, it shall then concern *all* relating parties. Last but not least, regarding the use of *travaux préparatoires* in treaty interpretation, the content to search for is not any party’s interpretation regarding the given issue, but the interpretation that has been documented as the *common (shared)* understanding that all (or count as all by given process) parties agreed upon in the process of treaty creation and decided collectively to ascribe to such understanding. From the textual approach, it could be drawn that interpreters certainly can dive into the *travaux préparatoires* searching for the original intentions of the drafting states as a source for interpreting. However, not all the issues are discussed and documented in the *travaux préparatoires*, nor do all the issues that have been found there have a clear-cut answer. This is why the principle of ‘ordinary meaning’ is one of the most important elements in treaty interpretation. This principle makes it clear that a treaty text, to large extent, should be independent from the intentions of any of the drafters, the participating States, and even the drafting parties as a whole and therefore be taken as it is. Lastly, the objectivity in the teleological approach implies that there is a fundamental shared intention in each international treaty, to which the State parties jointly committed themselves. It follows that when it comes to particular arguments on the object and purpose of a treaty, there is also a shared presupposition that the truth-value of the purpose and object is taken for granted (otherwise the State is expected not to join the treaty in the first place) and therefore the arguments should focus on the satisfaction of the object and purpose *qua* declaration.

As discussed in the earlier part, a justifiable argument of treaty interpretation under VCLT rules shall be conducted in the way that not contradicting any of the three approaches while being supported by one of them. Now I can add that since there is a perspective of objectivity residing in each of the approach, this objectivity can also be transferred into the whole process of treaty interpretation. In the next part, I will elaborate how this perspective could help us to determine the justifiability of relativism arguments in regards to IHRL by a brief case study.

#### 4. Now, a brief case study

The case study I choose here is China’s relativism arguments regarding Article 1 of Convention against Torture (hereinafter as CAT) on the definition of torture in the States’ session of the CAT committee.<sup>14</sup> I would like to illustrate how the objectivity in treaty interpretation could help to determine the justifiability of relativism arguments.

There were two relativism arguments that China used concerning CAT Article 1.<sup>15</sup> One is about the Committee’s request to incorporate the definition of torture as stated in Article 1 into

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<sup>14</sup> State’s session is the procedure when an international human rights treaty committee discusses the State’s report with the State’s delegation and issues concluding observations and comments.

<sup>15</sup> Article 1 of CAT concerns the definition of torture, which reads as:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other

domestic law; the other is about China using ‘seriousness’ to distinguish torture in its report. For the former issue, in the 1990 national session, Committee member Ms. Chanet pointed out that ‘no specific definition of torture had been included in Chinese legislation so as to ensure that torture was an offence under criminal law’ (CAT/C/SR.51, para. 36). As a response, the Chinese delegation argued as following: ‘[d]efinition of torture varied, so that what in the Chinese view was positive might be considered negative elsewhere’ (CAT/C/SR.51, para. 50). This response, as one of China’s earliest opinions regarding the interpretation of CAT, was an obvious relativism argument. It argues for a different view of torture than the one enshrined in CAT. Hence firstly it is not only not supported but to some extent contradictory with the text of the definition of torture as set out in Article 1. Secondly, China’s argument did not refer to the purpose or object of the Convention to justify such deviation. Thirdly, from the intentional perspective, albeit that Chinese delegation expressed their own point for holding a different view of torture, they did not resort to the shared intention in the Convention to support their point. In addition, as argued above, China’s individual intention could not be invoked as a source for treaty interpretation. Therefore, it could be concluded that this relativism argument was not a justifiable argument. In fact, in later sessions, the Chinese delegation fully changed this relativism position. Instead they listed several provisions from the Chinese Penal Code (CAT/C/SR.145/Add.2, para. 12), and argued that the definition of torture was included in Chinese domestic law but in a diffused manner. This change of arguments in a way shows the un-justifiability of the former argument.

For the latter issue, China intended to defend its distinction between *serious* and *especially serious* cases of torture with a relativism argument, which reads as following:

Concerning the distinction made by judicial bodies between acts of torture constituting minor, serious or particularly serious offences, all acts of torture were prohibited and punished under Chinese law. Given its *cultural and legal specificity*, however, China believed that minor offences were part of administrative law and should consequently be subject to administrative punishment... In Chinese law, that procedure was consistent with the *principle of proportionality*... In the case of relatively minor offences with less serious consequences, the procuratorate would make recommendations to the competent departments with a view to the imposition of disciplinary and administrative punishments (CAT/C/SR. 846, para. 19).

This argument is to distinguish the ‘seriousness’ of torture in China’s interpretation, which according to the argument, was mainly based on China’s particular cultural and legal tradition. Thus it is also a relativism argument concerning the definition of torture. To investigate its justifiability, firstly from the textual reading of the Article 1, it is seen that torture is by definition a serious crime (CAT/C/SR. 844, para 64). In this sense, categorising torture into ‘relatively minor offences with less serious consequences’ (as the Chinese delegation mentioned) contradicts the definition of torture, *i.e.* a serious crime. Secondly, from an intentional perspective, according to the *travaux préparatoires*, there was an intense debate between delegations about distinguishing between torture and cruel and inhuman treatment (Norwak, McArthur et al., pp. 30-50). As a result

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person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

See: <http://www.unhcr.org/49e479d10.html>

of this debate, the ‘severity’ of torture is one of the essential elements for establishing torture. This further proves the textual reading that torture is a serious crime by definition and therefore cannot be applied to the principle of proportionality wherein ‘minor offences’ are considered as an option. In addition, since the object and purpose of CAT is to prevent torture in any form, to distinguish grades of seriousness in torture also goes against this purpose of full prevention. Therefore, since this relativism argument contradicts all three elements of interpretation, the given argument cannot be justified.

## 5. Conclusion

Now I can come back to the question that has been posed by different schools of relativism, that is: in what way or to what extent could relativism arguments be justified against universal norms of human rights? The answer to this question is closely related to the question that I posed at the beginning of this paper: is there objectivity in IHRL against which the justifiability of arguments can be determined? The answer to both questions that this paper has reached is: insofar as IHRL and its interpretation are at issue, relativism arguments are justifiable if they do not contradict the intentional, textual, or teleological reading of the treaty in question and be supported by one of them. In addition, such criteria for justifiability have epistemic objectivity and therefore won’t be trapped in the uncertainty suggested by the universality vs. relativity debate. This is because it circumvents the bias that the debate of universality vs. relativity of human rights is by nature an ontological debate. Although some schools of thoughts try to take ontological characteristic out of their claims (such as the ideas of historical universality, overlapping consensus universality, or functional universality), it is still largely believed that claiming ‘human rights is universal’, no matter what preconditions are given, is ontological and cannot be taken otherwise. As far as the theory in question is still making an ontological point, universality and relativity cannot co-exist in the same space and timeframe. Therefore, a boundary shall be drawn, which is most approaches in the reconciliation group are concerned with. However, these ‘line-drawing’ efforts are usually too vague to be applied practically. In this paper, on the other hand, I propose to explore the epistemic side of the story and find out that this approach can give the question a clearer answer by focusing on objectivity in treaty interpretation in IHRL. In other words, objectivity (in its epistemic sense), as an alternative perspective, provides a substantial vantage point to deal with the universality vs. relativity debate in the human rights discourse, without being trapped in its ontological difficulty.

Indeed, this approach could be applied to any international treaty and arguments conducted in that given institution. Nonetheless, I consider this perspective most pertinent to the human rights discourse. One of the reasons is that the debate of the universality vs. relativity of human rights has made the relativism arguments seem more appealing than they actually could be justified. Therefore those arguments are invoked more often (than they should be) by the States that intend to justify their deviations from IHRL. In this sense, it is important to point out that insofar as IHRL is concerned, there is a perspective of objectivity in the interpretation, which should be resorted to when it comes to justifying arguments in IHRL, especially those relativism arguments.

Finally, does this approach limit the original debate by putting it in a legal context? It probably does. Have I changed an ontological focus on universality vs. relativity of human rights into an epistemic objectivity of determining arguments on universality vs. relativity in IHRL? I certainly have. Yet when the original debate is so fundamental while discordant, I think ‘one certainty at a time’ is a preferred approach. This is not to say that the debate on the universality vs.

relativity of human rights is unsolvable in an ontological sense; but that before we reach that level of knowledge, it is probably desirable to take the debate a step forward even only in the legal context via epistemic objectivity.

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