



FACULTY OF LAW  
Lund University

Adriana Caballero-Pérez

*Disability and the “art” of interpretation:*

**Treaty interpretation methods followed by the Inter-American Court of Human Rights in the Gonzales Lluy et al. v. Ecuador case**

JAMM07 Master Thesis

International Human Rights Law

30 higher education credits

Supervisor: Anna Bruce

Term: Spring 2019

## Contents

Acronyms and Abbreviations.....	6
Introduction.....	8
1. Research question and purpose.....	9
2. Methodology and materials .....	10
2.1. Analysis of treaty interpretation methods used by the Inter-American Court of Human Rights: .....	10
2.2. Analysis of the judgment in Gonzales Lluy et al. v. Ecuador:.....	12
Chapter 1: Theoretical framework on treaty interpretation.....	13
1.1. What is the meaning of legal interpretation? .....	13
1.2. Legal interpretation as an “art” .....	14
1.3. Is interpretation a component of the overall operation of international treaties?.....	14
1.4. What are the rules set for in Articles 31 and 32 VCLT?.....	15
1.5. Who are the interpreters of treaties?.....	17
1.6. What are the functions of judges as interpreters? .....	18
1.7. Judicial discretion as theoretical ground for treaty interpretation .....	18
Chapter 2: The Inter-American System of Human Rights and its corpus iuris.....	21
2.1 The organs of the Inter-American System.....	21
2.1.1 The Inter-American Commission on Human Rights .....	21
2.1.2 The Inter-American Court of Human Rights .....	22
2.2. What is the corpus iuris regarding disability rights of the Inter-American System?.....	23
Chapter 3: General methods of treaty interpretation applied by the Court .....	27
3.1 Applicability of the rules of the VCLT .....	27
3.1.1 Literal interpretation .....	27
3.1.2 Systematic interpretation.....	28
3.1.3 Teleological interpretation .....	31
3.1.4 Evolutionary interpretation.....	33
Chapter 4: The case of Gonzales Lluy et al. v Ecuador .....	36
4.1 Factual framework.....	36
4.2 Proceedings before the Inter-American Court of Human Rights and its considerations.....	37

4.2.1 Proceedings about the right to life and the right to personal integrity.....	38
4.2.2 Proceedings about the right to education .....	39
4.2.3 Proceedings about the judicial guarantees and judicial protection .....	39
<b>Chapter 5: Analysis of the judicial discretion in the Gonzales Lluy case: procedural and interpretation standards .....</b>	<b>41</b>
5.1 What procedural standards did the Court apply? .....	41
5.1.2 Partial conclusions .....	49
5.2 What interpretation-standards did the Court apply? .....	50
5.2.1 The Court used the principle of systematic integration to enable normative dialogue between legal regimes .....	50
5.2.2 The Court used an evolutionary interpretation in light of a systematic interpretation to enable normative dialogue between legal regimes .....	55
5.2.3 Partial conclusions.....	58
<b>Chapter 6: Conclusions.....</b>	<b>60</b>
<b>Bibliography .....</b>	<b>63</b>
<b>Annex 1. Case law of the Inter-American Court of Human Rights selected for this study .....</b>	<b>65</b>
<b>Annex 2. Inter-American Human Rights Treaties and status of ratification by Ecuador .....</b>	<b>68</b>

## Acknowledgements

As a scholarship holder, I would like to offer my special thanks to the Swedish Institute. My personal and professional experiences from living and studying in Sweden are invaluable.

I would like to express my deep gratitude to Anna Bruce, my supervisor, for her patient guidance and enthusiastic encouragement. Most of all, thank you for your confidence in me.

Gracias a mi familia. Ustedes son el apoyo máspreciado.

## Summary

This study is focused on the relationship between treaty interpretation methods and the protection granted to the plaintiffs by the Inter-American Court of Human Rights in its judgment of *Gonzales Lluy et al. v. Ecuador*. Based on a case law analysis of the Courts jurisprudence, this study explores judicial interpretation and the possible consequences of this landmark judgment in the protection of disability rights.

Structurally, the study includes a theoretical approach to the concept of judicial discretion and pre-established rules of treaty interpretation in Chapter One. Chapter Two, explains the Inter-American System for the protection of human rights and its *corpus iuris*, predominantly in the form of legal instruments concerning disability rights. The third Chapter analyses the general methods of treaty interpretation followed by the Court its case law. Chapter Four presents the *Gonzales Lluy* case; its factual circumstances and proceedings before the Court. The analysis of the case is the core content of Chapter 5, which answers two questions: *What procedural standards did the Court apply?*; and, *What interpretation standards did the Court apply?* Finally, Chapter 6 sets out the main conclusions of this study.

Findings suggest that in the *Gonzales Lluy et al. v. Ecuador* case, the Court applied objective procedural-standards to limit the sphere of its judicial freedom with critical results, such as the expansion of the alleged human rights violations against Talía Gonzalez Lluy (main plaintiff), and the incorporation of Talía's mother and brother into the realm of protection by law. Moreover, the study found that since the American Convention does not contain explicit references to the human rights of persons with disabilities, the concept of discrimination or the Court's competence to rule on the violation of the right to education, the Court reached its conclusions by interpreting the American Convention in light of the regional and universal *corpus iuris*. In so doing, the Court reinforced the concept of legal interpretation as an "art" since it exercised its "creation" power using different means of interpretation in a particular mixed operation.

**Key words:** treaty interpretation; Inter-American Court of Human Rights; disability.

## Acronyms and Abbreviations

<b>American Convention</b>	American Convention on Human Rights
<b>American Declaration</b>	American Declaration of the Rights and Duties of Man
<b>CEDAW</b>	UN Committee (or Convention) on the Elimination of Discrimination Against Women
<b>CESCR</b>	UN Committee on Economic, Social and Cultural Rights
<b>Charter</b>	of the Organization of American States
<b>Child Convention</b>	Convention on the Rights of the Child
<b>CRC</b>	Committee on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>UN CRPD Committee</b>	Committee on the Rights of Persons with Disabilities
<b>DIS</b>	Department of Social Inclusion
<b>DPO</b>	Disabled people's organization
<b>ECHR</b>	European Court of Human Rights
<b>HIV</b>	Human Immunodeficiency Virus
<b>HRC</b>	Human Rights Council,
<b>The Commission or ICHR</b>	Inter-American Commission on Human Rights
<b>The Court or ICtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>Inter-American System</b>	Inter-American System for the protection of human rights
<b>Istanbul Protocol</b>	Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<b>Convention of Belem Do Pará</b>	Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
<b>CIADDIS</b>	The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities
<b>CEDDIS</b>	Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities
<b>OAS</b>	Organization of American States
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>Protocol of San Salvador</b>	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
<b>Rules of Procedure</b>	Rules of Procedure of the Inter-American Court of Human Rights
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>VCLT</b>	Vienna Convention on the Law of Treaties

## Introduction

In order to perform legal obligations correctly, legal subjects must understand what the obligations mean and require. Determining these meanings and requirements necessitates interpretation of rules and norms establishing the legal obligations. This means that issues of interpretation are consubstantial with the law. It is a function of law applying-agents to give meaning to words because of their tendency towards vagueness. This study claims that there is no application of legal rules without interpretation and that interpretation is always about giving meaning to a rule, obligation or right.

In international law, even though, legal instruments are meant to be clear enough to be understood, the meaning of wording of international human rights treaties may be dynamic and open to different constructions. Thus, legal interpretation is an essential component of the overall operation of international treaties.

In international judicial proceedings, the adjudicator, described by H.L.A. Hart as a legal actor with the “sharpened awareness”, is the international judge.<sup>1</sup> The judge’s role is to assess the facts, interpret and apply the relevant procedural and substantive relevant rules, and render a decision on the dispute based on the foregoing. The notion of the judge as an interpreter is recognised by different scholars who have claimed that judges have a “law-creative power” to choose their approach in interpreting norms.<sup>2</sup> Judicial discretion is accepted by both legal positivism’s proponents and its critics as essential to every act of adjudication.<sup>3</sup>

The premise of this study is that when ruling on cases concerning international treaties, judges conduct interpretations within their scopes of discretion, leading to different consequences for the protection of plaintiffs. The purpose of this research is to examine the relationships between treaty interpretation methods followed by the

---

<sup>1</sup> H.L.A. Hart, ‘The Concept of Law’, (3<sup>rd</sup> edn, Oxford University Press 2012), p. 235.

<sup>2</sup> H. Lauterpacht, ‘The Function of Law in International Community’, (first published 1933, Oxford University Press, 2011), p. 34; M. Stone, ‘Legal positivism as an idea about morality’, (Univ Tor Law J, 2011)

<sup>3</sup> R. Dworkin, ‘Taking rights seriously’, (Duckworth, 1977), p. 57; See also M. Klatt, ‘Taking rights less seriously: a structural analysis of judicial discretion’ 4(20) (1977), p. 506-30.



Inter-American Court of Human Rights (*the Court*) and the protection of the plaintiffs in *Gonzales Lluy et al. v. Ecuador*.<sup>4</sup>

This case was selected for being a judgment in which the Court interprets *disability* from the point of view of social barriers that any person, depending on her impairments or health status, such as HIV infection, might face and the result affecting her full participation in society.

Moreover, it is the first judgment in which the Court used the concept of *intersectionality* to analyse the discrimination to which Gonzales Lluy had been subjected. The Court held that the discrimination against her was associated with factors such as her sex/gender, her status as a person experiencing disability owing to social barriers that emerged around her because of her HIV infection, her status as a minor, and her socio-economic status. Moreover, the Court declared for the first time in its history a violation of Article 13 (right to education) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (*Protocol of San Salvador*).

By using an analysis of the Court's case law to establish a framework for the exploration of relevant procedural standards and treaty interpretation methods, this study seeks to explore the possible consequences of this landmark judgment in the protection of disability rights via judicial interpretation. Its findings will provide insight into how the Court has built up its impact in, and commitment to, the defense of the human rights of persons with disabilities.

## 1. Research question and purpose

This study aims to answer the following research question: *What are the consequences of treaty interpretation methods and procedural standards used by the Inter-American Court of Human Rights for the protection granted the plaintiffs in the case Gonzales Lluy et al. v. Ecuador?*

---

<sup>4</sup> *Gonzales Lluy et al. v. Ecuador* (2015) ICtHR, Preliminary Objections, Merits, Reparations and Costs, Judgement of 1 September 2015, Series C No. 332.

By recognising treaty interpretation as a means to expand the scope of judicial discretion, this study will examine the relevance of the judgment in *Gonzales Lluy et al. v. Ecuador* for the protection of persons with disabilities.

As such, the purpose of the present research is threefold. First, it describes the procedural standards followed by the Court that have a critical influence on the outcome. Second, it identifies methods of treaty interpretation used by the Court. Third, it explicates the interplay between proceedings, methods of treaty interpretation, and protection of the plaintiffs.

## 2. Methodology and materials

This study relies on case law analysis to identify how rules of treaty interpretation set in the VCLT have been applied by the Court in its jurisprudence. The main research technique applied for this was content analysis designed to provide a systematic and replicable technique for compressing the text of judgments into a few content categories based on rules of coding.<sup>5</sup>

The study includes two parts:

### 2.1. Analysis of treaty interpretation methods used by the Inter-American Court of Human Rights:

- Selection of case law:

By choosing a sample of cases randomly, from a total of 306 cases in the Court's database, 44 cases were selected. (See annex 1) All countries over which the Court has jurisdiction were included. The temporal framework for the sampling was set from 1988 to 2015, 1988 being the year in which the VCLT entered into force, and 2015 being the year in which the ruling in *Gonzales Lluy et al. v. Ecuador* was handed down.

---

<sup>5</sup> B. Berelson, 'Content Analysis in Communication Research' (Glencoe, Free Press 1952), p. 34; K. Krippendorff, 'Content Analysis: an introduction to its methodology' (Sage 1980), p. 12-25; R. Weber, Basic 'Content Analysis' (2nd edn, Sage 1990), p. 26-31.

- Methods and tools to approach the case law:

The case law analysis was conducted using a qualitative data analysis program called Nvivo.<sup>6</sup> The coding process included categories linked to four forms of interpretation: literal, systematic, teleological and evolutionary. Furthermore, different codes were used to classify, sort and arrange information concerning procedural standards followed by the Court, as it is explained further in the study.

Finally, notes were made to include quotations and extracts from the text of the judgments.

- Other sources of information:

In order to reduce the risk of omitting relevant elements of treaty interpretation in the Court's judicial practice, secondary sources of data are included, being: (i) rapid review of the following terms in HeinOnline and Human Rights Studies Online databases: "treaty interpretation and Inter-American Court of Human Rights"; "judicial discretion and Inter-American Court of Human Rights"; and, "VCLT and the Inter-American Court of Human Rights"; (ii) customised searches of the abovementioned terms on the Google search engine; and, (iii) consultation with experts on disability research and advocacy.<sup>7</sup>

---

<sup>6</sup> NVivo is a qualitative data analysis (QDA) computer software package produced by QSR International. See Kath Mcniff, 'What is Qualitative Research?' (Qsrinternational, 09 November 2016) <<http://www.qsrinternational.com/nvivo/nvivo-community/the-nvivo-blog/what-is-qualitative-research>> accessed 19 February 2019

<sup>7</sup> Regarding the dialogue with experts, on 24 October 2018 a Zoom Teleconference took place at Raoul Wallenberg Institute (RWI in Lund, Sweden, between the working group on disability rights and some experts on the Inter-American human rights system: Agustina Palacios; Sofía Galván Puente; Eric Rosenthal; Renata Bregaglio; Priscila Rodríguez; Facundo Capurro; Andrea Parra; Juan Sebastián Jaime; Anna Bruce, Gerard Quinn and Alejandro Fuentes. The purpose of the conversation was to have an open discussion about approaches and judicial practice within the Inter-American system regarding segregation as a form of discrimination against persons with disabilities. Information from the teleconference was systematized by Bárbara Marcondes and the author of this study in a non-published internal paper at the RWI, aiming to contribute to an amicus brief to be presented to the European Committee of Social Rights in 2019 in collective complaint No. 168 submitted by European Disability Forum and Inclusion Europe. Some of the information gathered during the Zoom Teleconference has been enshrined in the analysis presented in this section.

## 2.2. Analysis of the judgment in *Gonzales Lluy et al. v. Ecuador*:

Following a systematic content analysis (SCA), based on the principles of content analysis but oriented towards establishing correlations between codes, the text of the judgment was compressed into content categories based on the same codes established in the first stage of this study.<sup>8</sup> Nvivo was also used for this stage.

The point of using SCA was to draw inferences from the judgments and find points of correspondence between the articles of legal instruments cited in its text and the three main categories of disability, discrimination and education.

---

<sup>8</sup> M. Salehijam, 'The value of systematic content analysis in legal research' 23(34) (1980) *Tilbog Law Rev* <<http://doi.org/10.5334/tlir.5>> accessed 27 February 2019.

# Chapter 1: Theoretical framework on treaty interpretation

## 1.1. What is the meaning of legal interpretation?

*Interpreting* a piece of a writing implies revealing its meaning. Scholars define interpretation as a *hermeneutical* task for the explanation, elucidation or understanding of the meanings in a writing.<sup>9</sup>

Legal interpretation is the result of following pre-established rules and encompasses the whole process of reasoning undertaken by the judge. Judges may settle on interpretative approaches based on theoretical decisions, both legal and non-legal, and, in some cases, based on reasons outside the law, such as political or moral ones.<sup>10</sup> This means that judges may choose their approach strategically to achieve the result they deem favorable. They may even combine different methods of interpretation in the same case to find answers to the questions of law.

The method used by judges is an explanation of their interpretative process.<sup>11</sup> When a treaty interpretation is based on Articles 31 to 33 of the Vienna Convention on the Law of Treaties (“VCCLT”), it is considered a matter of science since it follows the method established by law. Following the methods set out in the VCCLT is a *conditio sine qua non* for legitimacy in interpretation. Conversely, when a treaty interpretation is associated with the “creation of understanding”, it is considered an “art”.<sup>12</sup> Legal interpretation as an “art” corresponds to seeing it as a meaning formation process.

---

<sup>9</sup> The term “hermeneutic” comes from Hermes, the Greek messenger of legend who acted as a “bridge” of understanding between the gods and mortals. After the 17<sup>th</sup> century, hermeneutics were increasingly associated with the interpretation of texts. Relevant theologians and philosophers used hermeneutics, e.g. Dilthey, Gadamer, Heidegger, Ricoeur, and Schleiermacher, among others. See R. Suryapratim, ‘Privileging (some forms of) interdisciplinary and interpretation: Methods in comparative law’, 13(3) (Int. Journal Const Law, 2014), p. 787-807.

<sup>10</sup> HP. Graver, ‘Judges against justice: on judges when the rule of law is under attack’, (Springer, 2015), p. 54.

<sup>11</sup> U. Linderfalk, ‘Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making’, 26(1) (2015), Eur J Int Law, p. 169-89.

<sup>12</sup> R. Jennings, ‘General course on principles of international law’, 121(1) (1967) Collect Courses Hague Acad Int Law, p. 323-6; See also C.F. Amerasinghe, ‘Interpretation of Texts in Open International Organizations’ 65(1) (1995) Yearb Int Law < <https://doi.org/10.1093/bybil/65.1.175>> accessed 23 March 2019

## 1.2. Legal interpretation as an “art”

In the *art* of legal interpretation, there is a permanent tension between asserting that on the one hand, interpretation is about faithfully finding the original intent of the rule’s author at the time of its drafting and, on the other hand, using interpretation to discover what a rule should achieve, i.e. what its purpose and reasoning are.

This tension between interpretation as a historical task and interpretation as a teleological task is ever present when interpreting legal texts.<sup>13</sup> Without aiming to resolve this tension, this study proposes that interpretation is not only determining what a rule is presumed to require from the moment it came into existence, but it is also making sense of what the rule requires in the moment of its application, depending on the factual circumstances of every case.

In a legal context, by reaching full comprehension of a rule, the interpreter reveals the meaning of rights, obligations and consequences of the actions prescribed by a norm.<sup>14</sup> Thus, interpreting a legal document or instrument is no more than assigning meaning to norms or terms, through a creative process, when they are unclear.

## 1.3. Is interpretation a component of the overall operation of international treaties?

International treaties are international agreements to which States and/or international organisations are parties. They are instruments of international law described by Article 38(1) of the Statute of the International Court of Justice (ICJ) as “international conventions”.<sup>15</sup> All Parties to a treaty are bound by its rules and obligations, which may cover different thematic areas, like trade, maritime borders, or the protection of human rights.

The language of treaties is not supposed to have “hidden” messages. Their provisions may convey understandings of those provisions. In all cases, clarifications and

---

<sup>13</sup> D. Pierre, ‘Sources and the Legality and Validity of International Law What Makes Law ‘International’?’ (The Oxford Handbook of the Sources of International Law, 2017), p. 541–60.

<sup>14</sup> M. Herdegen, ‘Interpretation in International Law’, (Oxford University Press, 2012), p. 58.

<sup>15</sup> Charter of the United Nations 1945.

understandings of treaty provisions are based on specific pre-established rules. Treaties are governed by international law, primarily the VCLT, otherwise known as the “treaty on the law of treaties”.<sup>16</sup>

The rules on interpretation that exist in international law are provide for in Articles 31 and 32 VCLT. Since the VCLT is also considered a codification of customary international law, its provisions might extend also to States Parties that have not ratified it. Its authority to guide treaty interpretation arises from being the most clear formulation and systematization of rules of international law.

#### 1.4. What are the rules set for in Articles 31 and 32 VCLT?

Articles 31 and 32 VCLT read as follows:

##### General rule of interpretation

###### Article 31

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*

---

<sup>16</sup> Vienna Convention on the Law of the Treaties, 22 May 1969.

- 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.*

### **Supplementary means of interpretation**

#### **Article 32**

*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.*

Article 31 envisages the general rule of interpretation. Paragraph 1 defines four elements to interpretation: (i) good faith; (ii) ordinary meaning to be given to terms of the treaty; (iii) context and; (iv) it's the treaty's object and purpose. Paragraph 2 defines what delimits the context of a treaty, paragraph 3 states that the practice of Parties to a treaty shall also be considered relevant for interpreting it, and paragraph 4 contains an exception to paragraph 1 for those cases in which the parties agreed to substitute the ordinary meaning of a term by a special meaning

Article 32 lays the foundation for interpreting an international treaty by referring to its *travaux préparatoires*. This only happens when the application of the methods established in Article 31 leads to an ambiguous or obscure meaning or a manifestly absurd or unreasonable result.

Building on the above, it must be reaffirmed that purposes of applying the rules in Articles 31-32 VCLT is to remove the unclearness, vagueness and incompleteness in treaties and to strike a balance between the historical and teleological approaches to interpretation.



## 1.5. Who are the interpreters of treaties?

As law-applying agents, adjudicators and internal actors of the law, judges use their judicial discretion to apply methods on treaty interpretation in international law. Robert Alexy refers to this kind of discretion as a “sphere of judicial freedom” to emphasise that the law itself allows judges to choose between different, equally possible, rules or terms.<sup>17</sup> Judges are capable of reaching a privileged understanding of those legal rules and terms because of their role as interpreters.

This study argues that the “art” of treaty interpretation arises when is performed by judges when deciding the ways to apply the general methods of interpretation set out in the VCLT. Thus, the pre-established rules act as the “limits” within which judges exercise their creative power.

This relationship between judges and the law may be explained by construing judges as actors or agents with the *capability* and *knowledgeability* to reflect upon the approach to adopt in every particular case.<sup>18</sup> Based on their understandings and resources, including legal instruments, judges may choose between different, but equally legal, possibilities when interpreting a norm or a term. H. Lauterpacht argued that the creative powers of judges are the result of the modern concept of the individual with a self-reflecting identity.<sup>19</sup> Judges are capable of perceiving themselves and their surroundings. They have a reflecting capacity based on a “cognitive map” or a set of understandings and perceptions that guide their choices. When they preside over a case, they draw on their experiences in the sense that those experiences have determined their understandings and built up their reflexivity.

---

<sup>17</sup> R. Alexy, ‘Theory of Constitutional Rights’, (Oxford University Press, 2002), p. 323.

<sup>18</sup> Anthony Giddens defines *capability* as the faculty of the agent to act differently in every situation and *knowledgeability* as a critical component of his or her agency. A. Giddens explains that agency “refers not to the intentions people have in doing things but to their capability of doing those things in the first place.” See A. Giddens, ‘New Rules of Sociological Method’, (2nd edn, Stanford University Press, 1993), p. 9.

<sup>19</sup> H. Lauterpacht, ‘The Function of Law in International Community’, (first published 1933, Oxford University Press, 2011), p. 45.

## 1.6. What are the functions of judges as interpreters?

International judges remove the unclear and vague aspects of treaties so that the disputing parties can follow clear rules. In some cases, judges interpret rules to remove loopholes, which arise primarily when the judges find incompleteness in treaty law creating gaps between rules and regulated subject matters.

Judges may rely on contextual interpretation to reconcile conflicting provisions and make them consistent with each other. They may also combine various interpretation methods to remove the external conflict between certain rules, for instance when simultaneously applying international and regional legal instruments to the same set of circumstances.<sup>20</sup>

Judges may exercise the freedom provided by their judicial discretion to choose their approach in interpreting norms. They engage in exercises of interpretation activities based on the scope of their discretion. It is therefore possible that different judges may have different views on the “proper” interpretation of certain rules and terms, as is constantly revealed in the dissenting and concurring judicial opinions by judges.

## 1.7. Judicial discretion as theoretical ground for treaty interpretation

Some of the most prominent exponents of the theory of judicial discretion are H.L.A. Hart and Ronald Dworkin, although they disagreed on its extent and scope of practice.<sup>21</sup> Hart rejected the conception of the judge as an “automaton”. He claimed that the judge does not subsume a particular case within a generic case or utilise a regulatory solution without exerting his or her judgment and reasoning. He asserted that the aims, social policies and purposes to which judges appeal when rendering rulings should be considered part of the *law* in its wider sense.

---

<sup>20</sup> Chang-fa Lo, ‘Treaty Interpretation Under the Vienna Convention on the Law of Treaties. A new round of codification’ (Springer Nature Singapore Ltd, 2017), p. 3-48.

<sup>21</sup> See M. Klatt, ‘Taking rights less seriously: a structural analysis of judicial discretion’ 4(20) (1977), p. 506-30; H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, 71(4) (1958) Harv Law Rev, p.593-629.

Hart cautioned against the difficulty of resolving certain cases in the society because of the inapplicability of the wording of relevant rules. He explained that there is a *penumbra* of debatable cases in which the meaning of the words is not obvious. This category of cases is opposed to the core cases of settled meaning in which the words in rules are applicable and obviously ruled out. In penumbra cases, the judge or the “classifier”, as was so-called by Hart, makes a decision on words that cover or not a case.<sup>22</sup> Based on those decisions, the legal rule can be applied.

One critical argument of Hart’s theory to understand the exercise of judicial discretion through the “art” of treaty interpretation is that when he recognises that judges discover and use different means to guide their decisions, he implies that judicial decisions do not come from logical deduction. It means, judges do not deduce understandings of norms from premises because the law in controversial cases is fundamentally incomplete. It simply provides no answer.

Hart’s point supports the idea that judges do not apply methods of treaty interpretation by following a unique or “strict” formula. In controversial cases, as those where treaty provisions are not clear enough or require further development, judges use their discretion when applying VLCT rules. They do not deduce understandings of treaties’ norms from the pre-established rules as premises or as “static” methods. Those rules are put in motion by judges, so judges harmonise legal interpretation rules by their reasoning and “creative” power.

In brief, when Hart insists that when facing problems of the *penumbra*, judges rely on their judicial discretion to bridge “the gap” of the law, his theory might be applied to justify how judges exercise their discretion to use, combine and exclude certain methods of treaty interpretation.

Conversely, Dworkin objects that there are issues in law granting judges complete freedom from legal standards. To Dworkin, the law is never incomplete or indeterminate, and judges do not render decisions by applying extra-legal standards,

---

<sup>22</sup> To Hart the denial of the judiciary facing the problems of the penumbra is an error. The error makes judges base their decisions only in logic [(1) p. 610]. Furthermore, he argued that by following logic, judicial interpretation is “blind” of social values and consequences; H.L.A. Hart, ‘The Concept of Law’, (3<sup>rd</sup> edn, Oxford University Press 2012), p. 611.

even in controversial or difficult cases.<sup>23</sup> Rather, the legal duty of judges in such cases is to seek out and give effect to existent legal rights.

Nevertheless, Dworkin argues that the judge does not apply legal standards mechanically. In so doing, he recognises the existence of judicial discretion. To Dworkin, discretion has two meanings: “judgment” and “finality”. They both are called “weak senses of discretion”. Judgment concerns the reasoning process made by the judge when applying legal standards. In this case, according to Dworkin, the law is never incomplete or indeterminate, therefore, judges never adopt extra-legal standards to decide over a case. Secondly, “finality” means that judges have the last authority to rule a case. Judges’ decisions are not reconsidered by other officials (except in appeal or review procedures).<sup>24</sup>

In this respect, just like Hart’s theory, Dworkin’s theory recognises some level of judicial discretion when judges seek out and put in motion legal principles to solve cases. Dworkin argues that all answers are within the law itself. This is his main objection to Hart’s theory. However, certain studies have discussed that when Hart asserts that judges appeal to aims, social policies and purposes when rendering rulings, he implies that those “other” reasons are part of the law in its wider sense.

This study adheres to the view that the concept of law is intrinsically linked to morals. The link between law and morals makes all standards which judges apply, when following a legal purpose, legal ones. Thus, judges are entitled to take into account social, moral and political standards when ruling over cases since those standards are legal ones from a wider sense of what “law” means.

The use of legal standards do not extend judges’ freedom. Judges cannot use subjective opinions or personal views instead of objective procedures. In this sense, legal standards act as limits of their discretion. When interpreting legal provisions, judges have an authority and standards against which their area of freedom is measured. Judicial discretion has limits which stem from the law itself: What does the law command? What does it permit? This study argues that to interpret treaties, judges are free **within** a “sphere of interpretation freedom” and that VCLT rules are part of that sphere.

---

<sup>23</sup> M. Klatt, ‘Taking rights less seriously: a structural analysis of judicial discretion’ 4(20) (1977), p. 506-30.

<sup>24</sup> Ibid, p. 525.

## Chapter 2: The Inter-American System of Human Rights and its corpus iuris

### 2.1 The organs of the Inter-American System

The Organization of American States (OAS) is a regional organisation that brings together all 35 independent states of the Americas.<sup>25</sup> The OAS came into being in 1948 with the signing of the Charter of the OAS, which aims to achieve an order of peace and justice and to defend sovereignty, territorial integrity and independence.<sup>26</sup> According to Article 53 of the Charter, the OAS accomplishes its purpose through organs, such as (i) the General Assembly; (ii) the Commission; and (iii) the Court, among others.

The Commission and the Court are the two main entities of the Inter-American System for the protection of human rights. It is important to note that additional bodies of the Inter-American System do focus on specific human rights or specific population groups, e.g. the Department of Social Inclusion (DIS) of the OAS, which is responsible for promoting disability rights.

#### 2.1.1 The Inter-American Commission on Human Rights

The OAS created the Inter-American Commission on Human Rights (*the Commission*) in 1959. Its mandate stems from the Charter of the OAS. (23)<sup>27</sup> The Commission's mission is to promote and protect human rights in the Americas based on three main pillars: (i) the individual petition system; (ii) monitoring human rights situations in Member States; and (iii) devoting attention to priority thematic areas.<sup>28</sup>

---

<sup>25</sup> The 35 Member States of the OAS are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela.

<sup>26</sup> Charter of the Organization of American States, 30 April 1948.

<sup>27</sup> The Commission's headquarters are in Washington, DC, United States. It is composed by seven independent members, who serve in their personal capacity.

<sup>28</sup> American Convention on Human Rights, Article 106, 22 November 1969.

Individuals, groups of individuals or organisations may submit individual petitions before the Commission alleging violations of the human rights guaranteed in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights (*the American Convention*), or other inter-American human right treaties, provided the States challenged are parties to those treaties.<sup>29</sup> For OAS Member States not party to the American Convention, aggrieved parties may claim violations of rights contained in the American Declaration.

If the Commission determines that a Member State of the OAS is responsible for violating human rights set out in applicable treaty provisions, it issues a report that may include recommendations to the State. The Commission may, refer cases to the Court only for the States involved that have ratified the American Convention and recognised the Court's contentious jurisdiction. It is, however, possible for States to accept the Court's jurisdiction only for a specific case.<sup>30</sup>

### 2.1.2 The Inter-American Court of Human Rights

The American Convention was adopted in 1969 and entered into force on 18 July 1978.<sup>31</sup> The Court was created by Article 33b of the American Convention and was established in 1979 as an autonomous judicial organ of the OAS.<sup>32</sup> The objective of the Court is to interpret and apply the American Convention and other inter-American human rights treaties, in particular by issuing judgments and consultative opinions. In respect of the latter, the Court interprets the articles of the Convention and other treaties to provide an in-depth guide about the provisions and has the power to adopt provisional measures. Thus, the two main functions of the Court are adjudicatory and advisory.<sup>33</sup>

---

<sup>29</sup> The State may be responsible for violating human rights by (i) *action* – as a result of an act by the State or its agents; (ii) *acquiescence* – as a result of the tacit consent of the State or its agents; or (iii) *omission* – as a result of the State or its agents failing to take action when they should have done so. See ICHR, 'Petition Petition and Case System' (2010) <[http://www.oas.org/es/cidh/docs/folleto/CIDHFolleto\\_eng.pdf](http://www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf)> accessed 27 February 2019.

<sup>30</sup> Other working mechanisms of the Commission are (i) *reports on site visits* to Member States to observe the human rights situation on the ground, based on Articles 48(d) of the American Convention and 18(g) of the Statute of the Commission, and (ii) *precautionary measures* to ensure a rapid response by the Commission in serious and urgent situations where there is an imminent risk of irreparable harm to persons or groups of persons in OAS Member States, according to Article 25 of the Rules of Procedure of the Commission.

<sup>31</sup> American Convention on Human Rights, 22 November 1969.

<sup>32</sup> The Court has its headquarters in Costa Rica, and it is composed of seven judges from OAS Member States elected in their personal capacity.

<sup>33</sup> According to Articles 63 and 64 of the American Convention on Human Rights, respectively.

According to Article 61(1) of the American Convention, only the Commission and State Parties to the American Convention who have accepted the Court's contentious jurisdiction may submit cases to the Court. Individuals do not have direct access to the Court. They must submit their petitions first to the Commission, which may then refer their cases to the Court.

## 2.2. What is the corpus iuris regarding disability rights of the Inter-American System?<sup>34</sup>

Although the American Convention does not contain an explicit reference about the rights of persons with disabilities, Article 29(b) of the Convention allows both the Commission and the Court to use international treaties and standards other than those emanating from the Inter-American System to interpret its provisions through the principle of systemic integration.<sup>35</sup> This principle is a tool established in international law by Article 31(3)(c) of the VCLT to enable normative dialogue between legal regimes.

Through the principle of systemic integration, the organs of the Inter-American System have addressed the relationships between disability rights-specific provisions in the Protocol of San Salvador, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

Article 18 of the Protocol of San Salvador, which dictates that every person experiencing physical or mental disability is "entitled to receive special attention" which would "help them achieve the greatest possible development of his

---

<sup>34</sup> The total scope of regional human rights treaties, including their status of ratification by Ecuador, are included in annex 2.

<sup>35</sup> See R. Bregaglio, 'La incorporación de la discapacidad en el Sistema Interamericano. Principales regulaciones y estándares post-Convención. Red de derechos humanos y educación superior', (2014) <<https://e-archivo.uc3m.es/handle/10016/19794>> accessed 12 November 2018; See also S. Galván, 'The progressive implementation of the right of persons with disabilities to live independently and be included in the community', (National Human Rights Commission, 2015), p.8; A. Palacios, 'The social model in the international convention on the rights of persons with disabilities', (2015) <<http://www.socialjustice.nic.in/pdf/conventiondd.pdf>> accessed 26 October 2018.

personality”.<sup>36</sup> The Protocol also includes provisions on the rights to work and education of persons with disabilities under Articles 6(2) and 13(3)(e), respectively.

Article 9 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará), establishes that special measures adopted by States Parties must take “special account” of the vulnerability of, *inter alia*, women with disabilities.<sup>37</sup>

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (“CIADDIS”), adopted in 1999, reaffirms that persons with disabilities have the same human rights and fundamental freedoms as persons without disabilities, and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person.<sup>38</sup>

Article 1(1) of CIADDIS defines disability as “a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment”. One of its critical elements is its censure of all of the possible grounds of discrimination by State Parties against persons on the basis of their actual or perceived disabilities. Article 1(2)(a) of CIADDIS’ conception of possible grounds of discrimination is notably broad. It recognises that a person with disability may experience “distinction, exclusion or restriction” on the basis of their disability, a record of it, a condition resulting from a previous disability, or the mere perception of disability, and even on the ground of a past or present disability.

Article 6 CIADDIS provides for the establishment of a Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS). CEDDIS is composed of one representative and two alternates appointed by each State Party. Its main function is to examine the implementation of the CIADDIS through reviewing reports filed by States Parties. Moreover, CEDDIS adopts guidelines to States Parties and draws conclusions, general observations and recommendations.

---

<sup>36</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, 17 November 1988.

<sup>37</sup> The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belem do Pará”) is the first international bill of rights for women that defines what constitutes violence against women.

<sup>38</sup> Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 08 June 1999.



CIADDIS is part of those inter-American human rights treaties over which the Court has no jurisdiction. This significantly reduces means for its enforcement. Nevertheless, after its entry into force, the OAS Member States created a second instrument of an operational nature to guide public policies aimed at the social inclusion of persons with disabilities, the Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (PAD). The PAD represents the commitment of the State Parties to take substantive progressive action towards building inclusive societies.<sup>39</sup>

Among *soft law* instruments in the Inter-American System, there are the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (“the Principles”) approved by the Commission in 2008. The Principles recognise the critical situations of violence, overcrowding, and inhumane living conditions in several places in the Americas, where there are deprivations of liberty. They also recognise the particular vulnerability of persons with mental disabilities, who are deprived of liberty in psychiatric hospitals and prisons.<sup>40</sup>

Principle III(3) proclaims special measures for persons with mental disabilities. It provides States to implement alternative service models that facilitate treatment procedures with a community-based approach. Moreover, Principle III(3) claims for avoiding unnecessary deprivation of liberty as such in hospitals and psychiatric institutions.

As an interpretative tool, Principle III(3) affirms the right of persons with disabilities to live independently and be included in the community. It reflects attempts to interpret regional human rights treaties in light of international standards, mainly Article 19 of the CRPD.

More recently, the Inter-American Convention against all forms of Discrimination and Intolerance, which was adopted in June 2013 but has not yet entered into force, recognises the inherent dignity and equality of all members of the human family as foundational principles. It also recognises that discrimination may be based on

---

<sup>39</sup> The areas of action of the PAD are social awareness; health; education; employment; accessibility; political participation; participation in sports and cultural; artistic and recreational activities; welfare and social assistance; and international cooperation. See ‘Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities’ (2007), Resolution AG/RES.2339 (XXXVII O/07).

<sup>40</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 14 March 2008.

disability.<sup>41</sup> Moreover, the Inter-American Convention against Racism, Racial Discrimination and related forms of Intolerance develops the concept of discrimination, and establishes that racial discrimination may take place in any area of public or private life.<sup>42</sup> It builds up on the concept of multiple discrimination, and highlights the concept of indirect discrimination as well as special measures of affirmative action to ensure equal enjoyment in the exercise of human rights. However, the Convention Against Racism, Racial Discrimination and related forms of Intolerance owing to its recent entry into force needs further implementation.

---

<sup>41</sup> Inter-American Convention against all forms of Discrimination and Intolerance, 05 June 2013.

<sup>42</sup> Inter-American Convention against Racism, Racial Discrimination and related forms of Intolerance, 05 June 2013.

## Chapter 3: General methods of treaty interpretation applied by the Court

### 3.1 Applicability of the rules of the VCLT

Articles 31 and 32 of the VCLT, as explained in the first section of this study, establish the general methods of treaty interpretation. The Court has asserted in its case law the applicability of the rules of the VCLT. In *Ivocher Bronstein v. Peru*, the Court recalled Article 31(1) of the VCLT by stating:

*“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.”*<sup>43</sup>

The application of the general methods of treaty interpretation by the Court has been studied profusely. Various authors coincide in asserting that the Court, as its case law reflects, uses (i) literal; (ii) systematic; (iii) teleological; and, (iv) evolutionary interpretation.<sup>44</sup>

#### 3.1.1 Literal interpretation

According to M. Villiger, the interpretation of a treaty begins with the ordinary meaning of its terms.<sup>45</sup> The Court has understood that *literal interpretation* is

---

<sup>43</sup> *Ivocher Bronstein v. Peru* (2001) ICtHR, Merits, Reparations and Costs, Judgment of February 6, 2001. Series C No 74, para. 38.

<sup>44</sup> R. Bregaglio, ‘La incorporación de la discapacidad en el Sistema Interamericano. Principales regulaciones y estándares post-Convención. Red de derechos humanos y educación superior’, (2014) <<https://e-archivo.uc3m.es/handle/10016/19794>> accessed 12 November 2018; See also S. Galván, ‘The progressive implementation of the right of persons with disabilities to live independently and be included in the community’, (National Human Rights Commission, 2015), p.10; Lixinski L, ‘Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law’, 21(3) (2010) Eur J Int Law, p. 585–604; Lixinski L, ‘The Consensus Method of Interpretation by the Inter-American Court of Human Rights’ 3(1) (2017) J Comp Contemp Law, p. 65–95; Contesse J, ‘Contestation and Deference in the Inter-American Human Rights System’, (2016) <http://ssrn.com/abstract=2799476%0A> accessed 21 MArch 2019; Djefal C, ‘Establishing the Argumentative DNA of International Law: A Cubistic View on the Rule of Treaty Interpretation and its Underlying Legal Culture(s)’, 5(1) (2015) Transnatl Leg Theory, p. 28–57.

<sup>45</sup> M.E. Villiger, ‘Commentary on the 1969 Vienna Convention on the Law of Treaties’, (Martinus Nijhoff Publishers, 2008), p. 426.

interpretation made in good faith in accordance with the ordinary meaning to be given to the terms used. In *Artavia Murillo et al. (In vitro fertilisation) v. Costa Rica*, and *Mohamed v. Argentina*, the Court used literal interpretation when considering the meaning of some expressions and terms in the American Convention and other treaties:

*“(...) In this regard, in the instant case, the parties also forwarded as evidence a series of scientific articles and expert opinions that will be used in the following paragraphs to determine the scope of the literal interpretation of the terms “conception,” “person” and “human being.” In addition, the Court will refer to the literal meaning of the expression “in general” in Article 4(1) of the Convention.”<sup>46</sup>*

However, as argued by G. Schwarzenberger, when considering the ordinary meaning of words, words can have several ordinary meanings.<sup>47</sup> Therefore, a word cannot be interpreted in an isolated fashion. The Court has taken into account the *context* in which the word appears as the relevant element to determine its ordinary meaning.<sup>48</sup> This approach leads on to the following method of interpretation.

### 3.1.2 Systematic interpretation

Systematic interpretation involves establishing the standard meaning of a treaty by its relation to the whole text, and/or to the legal institution or other provisions in international law.<sup>49</sup>

In *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, the Court took into account some instruments in the universal system of human rights and other regional systems of protection, such as the European and the African systems:

*“In this case, the Constitutional Chamber and the State based their arguments on an interpretation of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (hereinafter “ICCPR”), the Convention on*

---

<sup>46</sup> *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica* (2012) ICtHR. Preliminary Objections, Merits, Reparations and Costs, Series C No. 257, para 178.

<sup>47</sup> G. Schwarzenberger, ‘Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties’ 22(1) (1969) *Curr Leg Probl* <<https://doi.org/10.1093/clp/22.1.205>> accessed 17 April 2019.

<sup>48</sup> *Mexico v. United States of America* (2004) ICJ; *Ethiopia v. South Africa* (1962) ICJ; See also R. Gardiner, ‘Treaty Interpretation’, (Oxford University Press, 2008), p. 165; R. Bernhardt, ‘Interpretation and Implied (Tacit) Modification of Treaties’, 27(1) (1967) *ZaöRV*, p.491-506.

<sup>49</sup> J. Maftei & V. Coman, ‘Interpretation of Treaties’, 8(2) (2012) *Acta Univ Danubius Juridica*, p. 16-30.

*the Rights of the Child, and the 1959 Declaration on the Rights of the Child. In particular, the State affirmed that treaties other than the American Convention require the absolute protection of prenatal life. The Court (...) will analyze: (i) the inter-American system; (ii) the universal system; (iii) the European system, and (iv) the African system.”<sup>50</sup>*

Furthermore, in light of a systematic interpretation of Articles 26, 31, and 77 of the American Convention,<sup>51</sup> Judges Roberto F. Caldas and Eduardo Ferrer Mac-Gregor Poisot, in their Joint Concurring Opinion in *Canales Huapaya et al. v. Peru*, asserted that it is necessary to have a different interpretation of the relationship between “treaties” and their “protocols”.<sup>52</sup> According to the Judges, under international human rights law, protocols additional to treaties may be construed as establishing regulations that supplement matters developed in the respective treaty. Thus, protocols are not restricted to establishing new rights, as is commonly argued. Underlining a systematic interpretation, the Judges gave examples related to Protocols Additional to the European Convention on Human Rights and the ICCPR.<sup>53</sup>

In the context of systematic interpretation, the Court has applied soft law instruments, other human rights instruments and non-human rights documents when interpreting legal provisions.

#### *Applicability of other human rights instruments*

The Court uses other human rights instruments when interpreting. In its judgment in *Claude-Reyes et al. v. Chile*, the Court stressed:

*“(...) In the same way as the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the*

---

<sup>50</sup> *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, (2012) ICtHR, para. 192.

<sup>51</sup> American Convention on Human Rights. Chapter III –Economic, Social, and Cultural Rights- Article 26 (Progressive Development); Article 31 (Recognition of Other Rights); and, Article 77: “*In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.*”

<sup>52</sup> *Canales Huapaya et al. v. Peru*, (2015) ICtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 296, Concurring Opinion of Judges Roberto F. Caldas and Eduardo Ferrer Mac-Gregor Poisot.

<sup>53</sup> *Ibid.* Paras. 26 to 29.

*International Covenant on Civil and Political Rights, establish a positive right to seek and receive information.”<sup>54</sup>*

### ***Applicability of soft law instruments***

The Court applies soft law instruments as guidelines for interpretation.

In *Cabrera García and Montiel Flores v. Mexico*, the Court stated:

*“Similarly, the judicial authorities have a duty to guarantee the rights of the detainee, which implies obtaining and protecting any evidence that may prove alleged acts of torture. The State must also guarantee the independence of the medical and health care personnel responsible for examining and providing assistance to those who are detained so that they can freely carry out the necessary medical assessments, respecting the standards established for their professional practice.”<sup>55</sup>*

In that case, applying a systematic method, the Court referred to provisions of the Istanbul Protocol.<sup>56</sup>

### ***Applicability of non-human rights documents***

Paragraphs 173 to 218 of the judgment in *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* illustrate the use of non-human rights documents:

*“(…) This Court has made a difference between the rights of the shareholders of a company and those of the company itself, indicating that domestic laws grant shareholders certain direct rights, such as the right to receive the agreed dividends, to attend and vote at general meetings, (…)”<sup>57</sup>*

---

<sup>54</sup> *Claude-Reyes et al. v. Chile*, (2006) ICtHR, Merits, Reparations and Costs, Series C no. 151, para 76.

<sup>55</sup> *Cabrera García and Montiel-Flores v. Mexico*, (2010) ICtHR, Preliminary objections, Merits, Reparations and Costs, para. 135.

<sup>56</sup> ‘Istanbul Protocol’ Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, 09 August 1999.

<sup>57</sup> *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, (2007) ICtHR, Preliminary Objections, Merits, Reparations, and Costs, Serie C-170, para 181.

“(…) The Code of Criminal Procedure in force at that time authorized the judge to issue, as a material precautionary measure, the prohibition to dispose of, impound, retain and embargo property.”<sup>58</sup>

“(…) Under Ecuadorean law, when a possession has been the object of a precautionary measure, its return is in order when there has been an acquittal. The NDPSA regulates the return of property as follows: (…).”<sup>59</sup>

However, despite the fact that the Court has relied on *systematic interpretation* to maintain that norms must be interpreted as part of a whole, it has also used factual considerations relevant to certain treaties when determining their object and purpose.<sup>60</sup> This is a “combined” method that overlaps the systematic interpretation with the following method.

### 3.1.3 Teleological interpretation

To conduct a teleological interpretation, the object and purpose of a treaty are the key elements. In this regard, the ICJ has argued that the object and purpose of a treaty are its *raison d'être* and *ratio legis*.<sup>61</sup>

The Court has analysed the purpose of the norms involved in the interpretation.<sup>62</sup> An example of the applicability of this method, in conjunction with a systematic interpretation, is the judgment in *Furlan and Family v. Argentina*. The Court analysed the compatibility of CIADDIS and the CRPD.

---

<sup>58</sup> Ibid, para 185.

<sup>59</sup> Ibid, para 200.

<sup>60</sup> L. Jardón, ‘The Interpretation of Jurisdictional Clauses in Human Rights Treaties’, Vol XIII (2012), Anuario Mexicano de Derecho Internacional, p. 99-143;; I. Buffard and K. Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’, 3(1) (1998), Austrian Rev Int Eur Law p. 311-43; A. Pellet, ‘Tenth report on reservations to treaties’ (2005) < [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_558.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_558.pdf)>; France v. United States of America, (1952) ICJ.

<sup>61</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, (1951) ICJ, p. 15-21

<sup>62</sup> G. Fitzmaurice, ‘Vae Victis or Woe to the Negotiators? Your Treaty or Our “Interpretation” of it?’ 65(2) (1971) Am J Int Law p. 359-73.

*“Since the creation of the Inter-American System, in the American Declaration on the Rights and Duties of Man, adopted in 1948, the rights of persons with disabilities have been protected.”*<sup>63</sup>

The Court also compared the concepts of disability proposed by the two Conventions to conclude that both treaties are compatible based on their purposes:

*“In this regard, the Court notes that in the aforementioned Conventions the social model for disability is taken into account, which implies that disability is not only defined by the presence of a physical, mental, intellectual or sensory impairment, but is interrelated with the barriers or limitations that exist socially for persons to exercise their rights effectively. The types of limitations or barriers commonly encountered by people with functional diversity in society are, among others, physical or architectural types of barriers, communication, attitudinal or socioeconomic barriers.”*<sup>64</sup>

When judges apply the teleological interpretation method, they must conduct a factual and normative analysis to determine the object and purpose of the treaty. When doing so, another interpretation tool arises: the *pro homine* principle.

### **3.1.3.1 *Pro homine* principle in the context of teleological interpretation**

Scholars argue that the *pro homine* principle proposes that human rights should be interpreted and applied extensively in all that favours the human being and his or her full enjoyment of rights and, conversely, they should be interpreted restrictively in everything that impairs such enjoyment of rights.<sup>65</sup> The *pro homine* principle is used as a means of reaching the purpose of the treaty. Besides, as previously explained in this text, Article 29 of the American Convention is the conventional interpretative guide of the *pro homine* principle.

The *pro homine* principle of interpretation therefore requires that, in a situation of rule conflict, the solution must always favour individuals the most. The Court has

---

<sup>63</sup> *Furlan and family v. Argentina*, (2012) ICTHR, Preliminary Objections, Merits, Reparations and Costs, para 128.

<sup>64</sup> *Ibid*, para 133.

<sup>65</sup> L. Jardón, ‘The Interpretation of Jurisdictional Clauses in Human Rights Treaties’, Vol XIII (2012), *Anuario Mexicano de Derecho Internacional*, p. 99–143; M.E. Ventura, ‘Los principales aportes del Juez Rodolfo E. Piza Escalante a la Corte Interamericana de Derechos Humanos(1979-1988)’, (2003), p. 253–86.



frequently asserted that the American Convention and other instruments should be given a *pro homine* interpretation. For instance, in its judgment in *Ricardo Canese v. Paraguay*, the Court stated:

*“It should be recalled that, on several occasions, the Court has applied the principle of the most favorable norm to interpret the American Convention, so that the most favorable alternative for the protection of the human rights enshrined in this Convention should always be chosen. As this Court has established, if two different norms are applicable to a situation, the norm most favorable to the individual must prevail.”*<sup>66</sup>

Likewise, in *Herrera-Ulloa v. Costa Rica*, the Court expressed:

*“The Court has already stated that this decision is not discretionary, but rather should be based on the alternative most favourable for the protection of the human rights established in the Convention.”*<sup>67</sup>

The Court has applied the *pro homine* principle in accordance with Article 31(1) of the VCLT. By doing so, judges deal with the needs of the States that led to the adoption of the treaty. Those needs, however, may be different or may have changed by the treaty has to be interpreted. In this scenario, interpreters, as the judges of the Court have done, take into account the dynamic character of society and even new areas of social activity to apply the evolutionary interpretation method.

### 3.1.4 Evolutionary interpretation

Evolutionary interpretation views human rights treaties as living instruments. This method exists because treaty interpretation must be consistent with the passage of time and the recognition of the current living conditions of persons within societies.<sup>68</sup>

---

<sup>66</sup> *Ricardo Canese v. Paraguay*, (2004) ICtHR, Merits, Reparations and Costs, Series C No. 110, para 181.

<sup>67</sup> *Herrera-Ulloa v. Costa Rica*, (2004) ICtHR, Preliminary Objections, Merits, Reparations and Costs, Series C no.107, para 184.

<sup>68</sup> E. Bjorge, ‘Evolutionary Interpretation. The Convention is a Living Instrument’, in E. Bjorge (ed), *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford Scholarship Online, 2015), p. 131-54.

By adopting evolutionary interpretation, Courts recognise that meanings of rights change from the meanings they had when treaties were adopted.

The Court has followed the *evolutionary theory of interpretation*, as reflected in *Sawhoyamax Indigenous Community v. Paraguay*:

*“In analyzing the content and scope of Article 21 of the Convention in relation to the communal property of the members of indigenous communities, the Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system considering the development that has taken place regarding these matters in international human rights law.”<sup>69</sup>*

In *Artavia Murillo et al. (In vitro fertilisation) v. Costa Rica*, the Court highlighted the relevance of taking present-day considerations into account when interpreting the American Convention:

*“In the instant case, the evolutive interpretation is particularly relevant, bearing in mind that IVF is a procedure that did not exist when the authors of the Convention adopted the content of Article 4(1) of the Convention. [...] Therefore, the Court will analyze two issues in the context of the evolutive interpretation: (i) the pertinent developments in international and comparative law concerning the specific legal status of the embryo, and (ii) the regulations and practice of comparative law in relation to IVF.”<sup>70</sup>*

By using *evolutionary interpretation*, the Court has given particular relevance to comparative law in the sense that the Court has used domestic law or the case law of domestic courts when examining specific disputes in contentious cases. In this sense, consensus interpretation is another tool of interpretation used by the Court.

---

<sup>69</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*, (2006) ICtHR, Merits, Reparations and Costs, Series C No 146, para 177.

<sup>70</sup> *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, para 246.

### 3.1.4.1 Consensus interpretation in the context of evolutionary interpretation

Consensus is often based on reliance on other international treaties. L. Lixinski affirms that this kind of consensus is used by the Court often in isolation, but increasingly also in conjunction with the domestic law of State Parties.<sup>71</sup> In *Kawas-Fernández v. Honduras*, the Court used a combination of non-inter-American treaties, domestic law of States Parties, and regional legal instruments to establish its jurisdiction over environmental matters:

*[...] "Furthermore, in accordance with the case law of this Court and the European Court of Human Rights, there is an undeniable link between the protection of the environment and the enjoyment of other human rights. (...) It should also be noted that a considerable number of States Parties to the American Convention have adopted constitutional provisions (...) These advances towards the development of human rights in the continent have been incorporated into the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador.""*<sup>72</sup>

By using international treaties and domestic law as a means of identifying consensus, the Court works in updating the meaning of the provisions of the American Convention.

---

<sup>71</sup> K. Dzehtsiarou, 'European Consensus: a way of reasoning' (2009) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1411063](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411063)> accessed 27 April 2019.

<sup>72</sup> *Kawas-Fernández v. Honduras*, (2009) ICtHR, Merits, Reparations and Costs, para 148.

## Chapter 4: The case of Gonzales Lluy et al. v Ecuador

### 4.1 Factual framework

The plaintiffs were Talía Gabriela Gonzales Lluy, her mother (Teresa) and her brother (Iván).<sup>73</sup> In June 1998, at the age of three, Talía was diagnosed with a hemorrhagic disorder and required multiple blood transfusions. The transfusion was performed in a private health clinic, where medical personnel used untested blood from the Red Cross Blood Bank.<sup>74</sup> As a result, Talía was infected with HIV.

The causal nexus between the blood transfusion and the HIV infection is related to the following proven facts in the case: (i) On 22 June 1998, Talía needed a transfusion of blood and platelets urgently; (ii) the same day, Talía's mother went to the Red Cross Blood Bank where they told her that she needed to bring donors; (iii) the Red Cross Blood Bank received the blood of Mr. HSA; (iv) Mr. HSA's blood was used in Talía's transfusion the same day; (v) Mr. HSA's blood only underwent testing on 23 June 1998, the day after Talía's transfusion; and, (vi) a few days later, Mr. HSA was informed that he was infected with HIV.<sup>75</sup>

During the subsequent criminal investigation, Talía's mother, father and brother had to undergo HIV tests to prove to the Fourth Criminal Court of Azuay that neither of them were infected with HIV.<sup>76</sup> The criminal investigation excluded sexual transmission as the source of infection. In 2001, the presiding Judge ordered a highly sophisticated genetic test to compare the blood samples of Talía and Mr HSA. The report indicated that the two blood samples were identical. This specific evidence showed that the only way HIV could have been transmitted to Talía was through the blood transfusion.

---

<sup>73</sup> The Commission submitted this case to the Court under the name "*TGGL and family v. Ecuador*". When presenting their pleadings and arguments, the representatives of the plaintiffs advised that, since Talía Gabriela Gonzales Lluy was now of age, she had decided not to maintain the confidentiality of her identity. The title of the case was thus changed during the procedure before the Court to "*Gonzales Lluy et al. v. Ecuador*".

<sup>74</sup> The private clinic was *Pablo Jaramillo Humanitarian Clinic Foundation of Cuenca*, Province of Azuay, Ecuador.

<sup>75</sup> In 1998, the 1986 *Law* on the supply and use of blood products, amended in 1992, was in force in Ecuador. The law determined that the Red Cross had exclusive competence to manage blood banks and even that the Ministry of Public Health, the Ecuadorian Social Security Institute, and the Armed Forces would manage blood banks and deposits under the regulatory control and coordination of the Ecuadorian Red Cross. *Gonzales Lluy et al. v. Ecuador*, para 74.

<sup>76</sup> A gynaecological examination performed on Talía, indicated that there were no traumatic lesions in Talía's external genitalia. *Gonzales Lluy et al. v. Ecuador*, para 92.

After delays in judicial proceedings, the criminal action prescribed in 2005. By that time, the civil action filed by Talía's mother had been declared inadmissible. Talía's mother and brother faced stigma because they were related to a person with HIV. The whole family was forced to move home on numerous occasions. Her mother was fired from several jobs, and was diagnosed with "emotional diabetes" because of her nervous tension and emotional conflict. Talía's brother had to quit school to start working. He developed depression and an anxiety disorder.

Talía was expelled from her first kindergarten because of her HIV infection and she had serious issues finding a new school where she could continue her studies. Furthermore, she did not receive timely and appropriate medical treatment, and faced obstacles to obtaining medication. The Ecuadorian State denied its responsibility for all of this.

## **4.2 Proceedings before the Inter-American Court of Human Rights and its considerations**

On 18 March 2014, the Commission submitted the case to the Court, requesting that the Court find and declare the international responsibility of Ecuador for the violations set out in the Merits Report and to order the State to comply with the reparatory recommendations included in that report.

As a preliminary consideration, the Court reiterated the facts in the Merits Report and accepted them as the factual framework of the proceedings before it. However, the Court asserted that it was not restricted by the probative assessment and the classification of the facts made by the Commission. It held that in each case, it is for the Court to make its own determination of the facts, and assess the evidence provided by the Commission and the parties and any other evidence requested.<sup>77</sup>

The Court noted Ecuador's concession that the State should not have delegated administration and regulation of the national blood system to a private entity.<sup>78</sup> However, the Court adverted that it would link this acknowledgement to the nature and severity of the violations alleged.

---

<sup>77</sup> *Gonzales Lluy et al. v. Ecuador*, para 38.

<sup>78</sup> *Ibid*, para 44.

## 4.2.1 Proceedings about the right to life and the right to personal integrity

### *What did the Court examine?*

- I. The rights to life, personal integrity and health in relation to the obligation to regulate, monitor and supervise the services provided by private health care centres;
- II. The availability, accessibility, acceptability and quality of health care in the context of the rights to life and personal integrity of Talía;
- III. The right to personal integrity of Teresa and Iván Lluy.

### *What did the Court conclude?*

- I. The Court concluded that Ecuador was responsible for the violation of the obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and of the obligation not to endanger life. The State thus violated Articles 4 and 5 of the American Convention in relation to Article 1(1) of the same instrument.<sup>79</sup>
- II. The Court concluded that, on some occasions, Talía's healthcare did not include access to a safe and friendly environment. From time to time, there were also problems of availability of the viral load test, and disputes on geographical accessibility. However, this was insufficient to establish State responsibility for a violation of the rights to life and personal integrity.
- III. The Court concluded that despite the particular vulnerability of Talía, her mother and brother, the State did not take the necessary measures to ensure access to their rights without discrimination. Therefore, the State's acts and omissions constituted discriminatory treatment. Talía's mother and brother were affected physically and emotionally by the stigma and discrimination discussed above. Thus, the Court found the State responsible for the

---

<sup>79</sup> American Convention on Human Rights. Article 4 (Right to Life); Article 5 (Right to Humane Treatment); and Article 1(1) (Obligation to Respect Rights).

violation of Teresa and Iván's right to personal integrity, under Article 5(1) of the American Convention, read with Article 1(1).<sup>80</sup>

## 4.2.2 Proceedings about the right to education

### *What did the Court examine?*

The dispute about the possible violation of the right to education, taking into account Talía's expulsion from one school owing to the assumption that she could endanger the integrity of her companions. The Court considered:

- I. The relevant implications of the right to education; and,
- II. The violation of the right to remain in the education system, the right not to be discriminated against, and adaptability in relation to the right to education.

### *What did the Court conclude?*

The Court concluded that Talía suffered discrimination because of her HIV status, her disability, her age, her gender and the fact that she lived in poverty. The Court held that the State violated Talía's right to education under Article 13 of the Protocol of San Salvador, as read with Articles 19 and 1(1) of the American Convention.<sup>81</sup>

## 4.2.3 Proceedings about the judicial guarantees and judicial protection

### *What did the Court examine?*

The Court analysed: (i) the arguments and considerations in relation to the alleged violation of Article 8 of the American Convention;<sup>82</sup> and (ii) the arguments and considerations in relation to the alleged violation of Article 25

---

<sup>80</sup> American Convention on Human Rights. Article 5(1) (Right to Humane Treatment).

<sup>81</sup> Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador". Article 13 (Right to Education). American Convention on Human Rights. Article 19 (Rights of the Child)

<sup>82</sup> American Convention on Human Rights. Article 8 (Right to a Fair Trial, judicial guarantees).

of the American Convention.<sup>83</sup> The Court also examined the alleged violation of Article 19 in relation to Article 8(1) of the American Convention.<sup>84</sup>

*What did the Court conclude?*

- I. The Court concluded that in the criminal investigation and proceedings, Ecuador violated the judicial guarantees of due diligence and a reasonable time established in Article 8(1) of the American Convention in relation to Articles 19 and 1(1) of the same instrument, to Talía's detriment.
- II. The Court concluded that the State did not violate the judicial guarantees of due diligence and a reasonable time in processing the civil proceedings.
- III. The Court found that concerning the application for constitutional protection (*amparo*), the State did not violate the right to judicial protection established in Article 25(1) of the American Convention, as read with Article 1(1) of the same instrument.<sup>85</sup>

In brief, the Court declared that Ecuador was responsible for the violation of (i) Talía's right to life (Article 4) and humane treatment (Article 5) in relation to Article 1(1) of the American Convention; (ii) Talía's right to education contained in Article 13 of the Protocol of San Salvador, in relation to Articles 19 and 1(1) of the American Convention; and (iii) Talía's judicial guarantees of due diligence and reasonable time in criminal proceedings set in Article 8(1) in relation to Articles 19 and 1(1) of the American Convention.

Furthermore, in relation to Talía's mother and brother, the Court concluded that the State was responsible for the violation of the right to personal integrity, recognized in Article 5(1) in relation to Article 1(1) of the American Convention.

---

<sup>83</sup> American Convention on Human Rights. Article 25 (Right to Judicial Protection).

<sup>84</sup> American Convention on Human Rights. Article 8(1): "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."; Article 19 (Right of the Child).

<sup>85</sup> American Convention on Human Rights. Article 25(1): "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."



## Chapter 5: Analysis of the judicial discretion in the Gonzales Lluy case: procedural and interpretation standards

### 5.1 What procedural standards did the Court apply?

*The Court took an independent approach to the factual framework:*

Although the facts in the Merits Report submitted to the Court's consideration constituted the factual framework before the Court, based on Article 38(2) of the Rules of Procedure, the Court has the legal faculty to assess the evidence and factual framework of the case independently.<sup>86</sup> In *Gonzales Lluy et al. v. Ecuador*, the Court followed the same practice.<sup>87</sup>

To avoid being restricted by the probative assessment and the classification of the facts made by the Commission, the Court exercised its discretion to assess the evidence provided by the Commission and the parties. The Court made its own determination of the facts of the case. This practice in the *Gonzales Lluy* case was conducive to three critical results: (i) the Court considered the claim concerning the right to education although the Commission had not included this claim explicitly in its Merits Report; (ii) the Court incorporated in its analysis considerations regarding the rights of persons with disabilities. The Commission did not make any comments on disability rights in its Merits Report; and (iii) Iván Lluy, Talía's brother, was presumed an alleged victim although the Commission did not explicitly include his name as a subject of reparations.

---

<sup>86</sup> This approach has been followed previously, for example, in *Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, Preliminary objection, merits, reparations and costs judgment of November 14, 2014, Series C No. 287, para. 48; *Yvon Neptune vs Haiti*. Merits, reparations and costs judgment of May 6, 2008, Series C No. 180, para. 19; and *Fairén Garbi and Solís Corrales v. Honduras*, Merits judgment of March 15, 1989, Series C No. 6, paras. 153 to 161.

<sup>87</sup> *Gonzales Lluy et al. v. Ecuador*, paras. 37 and 38.

***The Court conducted a thorough assessment of the State’s acknowledgements:***

Based on Articles 53(2) and 55 of the Rules of Procedure, the Court is entitled to assess the State’s acknowledgments of responsibility in connection with substantive aspects or merits of alleged human rights violations.<sup>88</sup>

This approach was adopted also in *Gonzales Lluy*. Ecuador acknowledged the fact that it should not have delegated the function of administering the national blood system to a private entity. The Court considered that even though the State did not relate this presumed responsibility to the violation of specific norms, its acknowledgement had to be analysed in the context of the alleged violations, and that it would have implications on factors associated with the case’s facts and merits.<sup>89</sup>

The Court related the acknowledged responsibility of the State to the violation of specific norms in the American Convention. Thus, the Court could connect the State’s acknowledgement to the nature and severity of the alleged violations, the demands and interests of justice, and the particular circumstances of the case which means that the Court connected State’s acknowledgment with specific human rights violations against Talía.

***The Court conducted a systematic assessment of statements made by the plaintiffs:***

In accordance with established case law, and based on Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, the Court took into account the entire body of evidence and arguments submitted in order to assess statements made by the parties.<sup>90</sup> In the *Gonzales Lluy* case, the Court did this.<sup>91</sup>

The Court followed this approach to find further information on presumed violations against Talía and their consequences. This practice was critical to avoid assessing the statements of Talía, her mother and brother in isolation. By doing so,

---

<sup>88</sup> The Court had followed this approach in *Veliz Franco et al. v. Guatemala*, Preliminary objections, merits, reparations and costs judgment of May 19, 2014, Series C No. 277, para. 24.

<sup>89</sup> *Gonzales Lluy et al. v. Ecuador*, para. 50.

<sup>90</sup> *Loayza Tamayo v. Peru*, Merits judgment of September 17, 1997, Series C No. 33, para. 43; “*White Van*” (*Paniagua Morales et al.*) *v. Guatemala*, Merits judgment of March 8, 1998, Series C No. 37, para 76; *J. v. Peru* (Preliminary Objection), Merits, reparation and costs judgment of November 27, 2013, Series C No. 275, para. 49.

<sup>91</sup> *Gonzales Lluy et al. v. Ecuador*, para. 63.

the Court identified and analysed the interplay between multiple forms of discrimination against the family.

***The Court used a thorough approach to analyse State's erga omnes obligation of respecting and ensuring rights and freedoms:***

In line with Article 1(1) of the American Convention, the Court recalled the *erga omnes* obligation of States to respect, protect and ensure the effectiveness of human rights.<sup>92</sup> As in previous judgments, the Court assessed both the passive obligation (to respect the rights and freedoms) and the active obligation (to adopt all appropriate measures to ensure rights) of States.<sup>93</sup>

Moreover, regarding Ecuador's active obligations, the Court considered that there were irregularities in monitoring and supervising the whole functioning of the Red Cross Blood Bank by Ecuadorian State. To the Court, the active obligation of the State was to supervise and monitor the public service offered by the Red Cross Blood Bank, however, the State breached its duty. In consequence, the inadequate supervision by the State resulted in irregular conditions of operation of the Blood Bank that endangered the life of Talía.

The assessment of the positive obligation led the Court to conclude that it was not sufficient that the State had abstained from violating Talía's rights. There was a serious omission by the State to adopt positive measures to ensure Talía's rights to life and personal integrity, such as the monitoring and supervision of the provision of health care services.

Furthermore, regarding the obligation to ensure rights,<sup>94</sup> and in line with previous case law, the Court has asserted that States have an obligation to (i) take the necessary measures to establish an adequate legal framework to dissuade any threat to the rights; and (ii) prevent third parties, in the private sphere, from violating the protected legal rights.<sup>95</sup>

---

<sup>92</sup> *Gonzales Lluy et al. v. Ecuador*, para. 168.

<sup>93</sup> *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs Judgment of September 15, 2005, Series C No. 134, para. 111; *Suárez Peralta v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs Judgment of May 21, 2013, Series C No. 261, para. 127; *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations and Costs Judgment of November 16, 2009, Series C No. 205, para. 243.

<sup>94</sup> Articles 1(1) and 2 of the American Convention.

<sup>95</sup> *Gonzales Lluy et al. v. Ecuador*, para. 170. This point was also made by the Court in *Ximenes Lopes v. Brazil*, Merits, Reparations and Costs Judgment of July 4, 2006, Series C No. 149, paras. 99 and 125; *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs. Judgment of September 15, 2005, Series C No. 134, para. 111.

In Gonzales Lluy's case, the Court verified the specific circumstances of the case and considered the implementation of the duty to ensure rights. By doing so, the Court assessed the obligation on the State to supervise and monitor all activities relating to the healthcare provided to persons under its jurisdiction. It held that the State failed its obligation to supervise and inspect the private institutions which caused a harm to Talía's health.

***The Court reaffirmed the interdependence and indivisibility of human rights:***

Based on the UN Chapter II and Chapter III of the ICESCR, and recalling the UN human rights practice (such as the General Comments and Concluding Observations of the CESCR), the Court has reaffirmed the interdependence and indivisibility of all human rights when ruling cases.<sup>96</sup>

By adopting this approach, the problems of supervision and monitoring of the health service represented a failure of the State's obligation to protect Talía's right to health and constituted a threat to her right to life. Furthermore, under this same approach, the Court concluded that the decision by the national authorities to dismiss Talía from school, supposedly to protect the life of her classmates, represented that the right to life of Talía's classmates prevailed over her right to education. To the Court, the authorities' decision was against the principle of indivisibility and interdependence of human rights, and constituted differentiated treatment without a reasonable justification.

***The Court conducted a thorough analysis of the impact of human rights violations on the integrity of those who surrounded Talía***

Based on the American Convention (Articles 17; 24; and 25, among others) and in light of the "*iura novit curia*" principle, the Court assessed the possibility that the relatives of a victim become victims themselves given the stigma faced by Talía's

---

<sup>96</sup> *Gonzales Lluy et. al. v. Ecuador*, paras. 172 and 234. This principle was previously upheld in *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru* (Preliminary Objection), Merits, Reparations and Costs Judgment of July 1, 2009, Series C No. 198, para. 101; *Suárez Peralta v. Ecuador* (Preliminary Objections), Merits, Reparations and Costs Judgment of May 21, 2013, Series C No. 261, para. 131.

mother and brother as people associated with an HIV+ person.<sup>97</sup> The Court has held in previous case law, that these family members experience insecurity, uncertainty and negative effects on their mental and emotional wellbeing because of a State's actions or omissions.<sup>98</sup>

The Court acknowledged that Teresa and Iván's right to mental and moral integrity was violated due to the suffering they endured because of the acts and omissions of State authorities. Through this analysis, the Court concluded that Talía's next of kin were also victims and entitled to reparations in the case if reparations were ordered.

***The Court reaffirmed that in the prohibition of discrimination, the burden of proof is reversed***

The Court has stressed that, in the case of a ban on discrimination based on one of the protected categories established in Article 1(1) of the American Convention, the possible restriction of a right requires rigorous and substantial justification.<sup>99</sup> In the *Gonzales Lluy* case, the Court followed the same practice and asserted that the burden of proof was shifted, and it was for the State to establish that its decision was not discriminatory in either purpose or effect.<sup>100</sup>

This reversal of the burden of proof applied to the prohibition of discrimination based on Talía's health status. The Court stated that the determination of harm to Talía's classmates had to be supported by technical evidence and reports from experts in order to reach decisions that were not discriminatory.

---

<sup>97</sup> *Gonzales Lluy et al. v. Ecuador*, para. 211. The *Iura novit curia* principle, commonly translated as "the judge knows the law", is a fundamental principle of legal procedure.

<sup>98</sup> *Suárez Peralta v. Ecuador* (Preliminary Objections), Merits, Reparations and Costs Judgment of May 21, 2013, Series C No. 261, para. 156; *The Girls Yean and Bosico v. Dominican Republic* (Preliminary Objections), Merits, Reparations and Costs Judgment of September 8, 2005, Series C No. 130, para. 204.

<sup>99</sup> *Atala Riffo and daughters v. Chile*, Merits, Reparations and Costs Judgment of February 24, 2012, Series C No. 239, para. 124; *Granier et al. (Radio Caracas Television) v. Venezuela* (Preliminary Objections), Merits, Reparations and Costs Judgment of June 22, 2015, Series C No. 293, para. 228. The Court has grounded its considerations on the prohibition of discrimination without rigorous assessment by recalling the case law of the European Court of Human Rights (ECtHR). For instance, in *Atala Riffo and daughters v. Chile*, the Court stated: "As regards the prohibition of discrimination based on sexual orientation, any restriction of a right would need to be based on rigorous and weighty reasons. Furthermore, the burden of proof is inverted, which means that it is up to the authority to prove that its decision does not have a discriminatory purpose or effect" para 124.

<sup>100</sup> *Gonzales Lluy et al. v Ecuador*, para. 257.

In consequence, based on Court's analysis, Ecuadorian authorities had the responsibility to prove that neither the purpose nor the effect of their decisions were discriminatory. This is the "reversed" obligation to proof:

*"In conclusion, the Inter-American Court observes that since, in abstract, the "collective interest" and the "integrity and life" of children is a legitimate objective, merely referring to this without specifically proving the risks and harm that could be caused by the health status of a child who is in the school with other children, cannot be an adequate reason to restrict a protected right."*<sup>101</sup>

According to the Court, the State failed to prove its legitimate objective. Furthermore, it did not justify the risks and harm that Talía's health status supposedly represented even though the objective to protect other children at the school of Talía was a legitimate one. Thus, the Court concluded that the reasons relied on by the State to implement differentiated treatment were not substantiated by exhaustive reasoning.

*The Court used the rule of proportionality to examine the justification of differentiated treatment, within the framework of the strict assessment of equality*

The Court has asserted that the State's measures must be supported by the American Convention. Moreover, the Court has affirmed in its case law that such measures must pursue a legitimate aim, and follow the requirements of suitability, necessity and proportionality.<sup>102</sup> In this regard, the Court in the *Gonzales Lluy* case affirmed that it would use the rule of proportionality to assess the State's justification for Talía's expulsion in the "strict assessment of equality".<sup>103</sup>

Interestingly, the Court introduced the notion of "strict assessment of equality" in its judgment. In order to determine whether the discriminatory treatment against Talía violated her right to education, the Court followed a model of analysis that

---

<sup>101</sup> *Ibid*, para 265.

<sup>102</sup> *Kimel v. Argentina*, Merits, Reparations and Costs Judgment of May 2, 2008, Series C No. 177, para. 84; *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* (Preliminary Objections), Merits, Reparations and Costs Judgment of November 21, 2007, Series C No. 170, para. 93; *Usón Ramírez v. Venezuela* (Preliminary Objection), Merits, Reparations and Costs Judgment of November 20, 2009, Series C No. 207, paras. 72 and 80.

<sup>103</sup> *Gonzales Lluy et al. v Ecuador*, para. 257.

integrated the assessment of proportionality (or “European” test) and the test of equality (from the contributions of the United States).

The Court followed the methodological stages of the European test, and looked at the different levels of measures’ “intensity” when applying equality tests.<sup>104</sup> Thus, in the *Gonzales Lluy* case, the Court examined if the Ecuadorian measure of dismissing Talía from school was suitable, necessary, and proportional. In addition, the Court assessed the levels of the measure: was it strict, intermediate or flexible?

The Court concluded that the general objective of protecting the life and personal integrity of the children who attended school with Talía was a legitimate and essential objective. However, considerations grounded on stereotypes owing to Talía’s HIV status were inadmissible.

The Court held that the determination of the risk and the decision to give greater weight to the right to life and integrity of other students were erroneous. They were based on unfounded and stereotypical presumptions regarding the possible risk of HIV transmission. The Court also emphasised that the means chosen by the authorities to protect the integrity of the other children at the school were the most harmful and disproportionate of those available to meet the objective. In consequence, the Court concluded that the State’s conduct constituted discriminatory treatment against Talía. The limitation of the right to education was not compatible with the American Convention since the authorities made an extreme decision based on abstract and stereotyped arguments.

### *The Court used specific criteria to examine the reasonable character of the time of domestic criminal proceedings*

Based on Article 8(1) of the American Convention regarding the elements of due process, the Court has analysed the presumed failure of the State to comply with judicial guarantees of a reasonable time in the criminal proceedings. To do so,

---

<sup>104</sup> The “European” test or proportionality assessment includes the following stages of analysis: (i) the Court examines whether the measure is suitable, i.e. is it an appropriate means to achieve a legally-valid end?; (ii) it analyses whether the different treatment is necessary or essential; and (iii) it analyses the proportionality in its strict sense, i.e. does the unequal treatment sacrifice legal values or principles that have greater relevance than those achieved through different measures? [(6) Para. 256. Footnote 303] The levels of intensity include (i) strict: is the different treatment a necessary measure to achieve a legally essential objective; (ii) intermediate: is the end of the measure a legally important one? Are the means conducive to achieve the objective?; and (iii) flexible: is the measure potentially suitable to achieve the objective? [(6) Para. 256. Footnote 303]

taking into account the factual circumstances of every case, the Court has examined four relevant criteria: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities; and, (iv) the general effects on the legal situation of the person involved in the proceeding.

In this context, the Court in *Gonzales Lluy* considered the criminal proceedings, and asserted:

*“It is for the State to justify, based on these criteria, the reason why it has required the time elapsed to process the case and, if it does not demonstrate this, the Court has broad powers to form its own opinion in this regard.”*<sup>105</sup>

Based on the analysis of reasonableness, following the abovementioned criteria, the Court was of the view that the State did not justify the time elapsed to process the case. The Court found that there was also a delay in ordering the specific test required in Talía’s case (the viral genotype and the sequential analysis of HIV nucleotides by hybridization techniques, in the blood of Mr. HSA and of Talía). Also, to the Court, the numerous closures of the preliminary investigation caused delays in the criminal proceedings. The judicial authority did not ensure, diligently, that the reasonable time rule was respected during the process. Moreover, local authorities, according to the Court, did not take into account the vulnerable condition of Talía and her family. Notably, the progressive character of her health status was not assessed as a criterion of priority for the authorities.

***The Court considered that any violation of an international obligation entailed an obligation to make adequate reparation***

By adopting the principle “*restitutio in integrum*” and following the right to adequate reparation established in Article 63(1) of the American Convention, the Court has included in its judgments the fundamental principles of contemporary international law on State responsibility.<sup>106</sup> Moreover, the Court has emphasised, in conjunction with the aim of full restitution, the irreversible nature of damage

---

<sup>105</sup> *Gonzales Lluy et al. v Ecuador*, para 298.

<sup>106</sup> The obligation to respect, ensure respect and implement international human rights law and international humanitarian law includes, inter alia, the duty to provide effective remedies to victims, including reparation. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005, General Assembly resolution 60/147



suffered by victims.<sup>107</sup> In the *Gonzales Lluy* case, the Court asserted that all the plaintiffs were injured parties entitled to reparations.<sup>108</sup> In consequence, the Court ordered specific measures of restitution, rehabilitation, satisfaction, and guarantees of non-repetition in support of Talía, and some restitution and rehabilitation measures in favour of Teresa and Iván Lluy.

### 5.1.2 Partial conclusions

The Court exercised its discretion within a certain framework of procedural standards. Among the most relevant features of the Court's ruling, with an explanatory value towards its decision, are the incorporation of certain legal principles that guided its analysis, such as the interdependence and indivisibility of all human rights, the "*iura novit curia*" principle, the *erga omnes* obligations on States, and the principle "*restitutio in integrum*."

Moreover, the Court, as supported by its case law, affirmed that State's measures should pursue a legitimate aim, and follow the requirements of suitability, necessity and proportionality. In the *Gonzales Lluy* case, the Court included an analysis of the ban on discrimination based on one of the protected categories established in Article 1(1) of the American Convention through the methodological stages of the European test, and the different levels of intensity when applying the equality tests (strict assessment of equality). Thus, the Court assessed not only the nature of the measures adopted by the national authorities but their level of intensity meaning their legitimacy and effectiveness in meeting their objectives.

---

<sup>107</sup> *Velásquez Rodríguez v. Honduras*, Interpretation of the Judgment of Reparations and Costs, August 17, 1990, Series C No.9, para. 27; *Ticona Estrada et al. v. Bolivia*, Merits, Reparations and Costs Judgment of November 27, 2008, Series C No. 191, para. 110.

<sup>108</sup> *Gonzales Lluy et al. v. Ecuador*, para. 345.

## 5.2 What interpretation-standards did the Court apply?

In this sub-chapter, which focuses on the Court's considerations regarding the human rights violations against Talía, including her rights to life and health. Moreover, special emphasis has been put on the analysis of the right to education for two reasons: (i) disability law was only incorporated into the analysis of the right to education by the Court; and (ii) the justiciability of the right to education was supported on a robust interpretation task performed by the Court.

### 5.2.1 The Court used the principle of systematic integration to enable normative dialogue between legal regimes

The Court used the principle of systematic integration, which, as explained in Chapter I, finds conventional reflection in Article 29(b) of the American Convention, to explain and analyse the impact of the multiple human rights violations in Talía's life.

#### *Interpretations regarding Talía as a child:*

The Court recognised Talía's condition as a child to examine the fulfilment of the State's obligation to regulate, monitor and supervise the services provided by private health care centres. Specifically, the Court took into consideration Article 24 of the Convention on the Rights of the Child.<sup>109</sup> The Court included several provisions of other human rights instruments and soft law instruments to characterise the concept of the "highest attainable standard of health" in connection with Talía's particular conditions, such as her social vulnerability.

In so doing, the Court recalled the measures to ensure the right to health, based on the Protocol of San Salvador and, based on the ICESCR, the Court emphasised the Ecuadorian State's obligation to guarantee the satisfaction of Talía's health needs, as an individual member of a high risk group, owing to her living conditions in poverty and vulnerability. Also, the concept of the "highest attainable standard of

---

<sup>109</sup> *Gonzales Lluy et al. v Ecuador*, para. 174.

health” from the CESCR General Comment No. 14 was incorporated by the Court in its analysis.<sup>110</sup>

To highlight the State’s obligation to ensure Talía’s right to health as a child living with HIV, the Court included specific considerations of international bodies, such as the “*International Guidelines on HIV/AIDS*” of the OHCHR and the Joint United Nations Programme on HIV/AIDS. Moreover, the Court noted the statements made by CRC: in General Comment No. 3 on HIV/AIDS, specifically concerning the rights of children with disabilities and the need to ensure that children do not suffer discrimination.<sup>111</sup>

***Interpretations regarding Talía as child experiencing disability:***

The Court interpreted Talía’s right to education in light of the CRPD to assess the legitimacy and effectiveness of the State’s measure to expel her from school. The Court grounded its analysis on the idea that people infected with HIV lose or have limited opportunities to participate in normal community life on an equal level with others due to external barriers. Based on a social approach to disability, primarily on the recognition of the concept of “barriers” or external factors that interact with a particular impairment, the Court explained how people infected with HIV, or even perceived to be infected with it, may be considered to have a disability:

*“The relationship between this type of barrier and a person’s health status justifies the use of the social model of disability as a relevant approach to assess the scope of some of the rights involved in this case.”<sup>112</sup>*

The Court used the underpinning values of the CRPD to promote a broader concept of disability:

*“The Court notes that, historically, persons with HIV have been discriminated against owing to different social and cultural beliefs that have stigmatized the illness. Thus, the fact that a person is living with HIV/AIDS, or even the mere*

---

<sup>110</sup> CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the CESCR, 11 August 2000 (Contained in Document E/C.12/2000/4)

<sup>111</sup> *Gonzales Lluy et al. v. Ecuador*, para 199.

<sup>112</sup> *Gonzales Lluy et al. v. Ecuador*, para 236.

*assumption that he or she has HIV/AIDS, may create social and attitudinal barriers to that person having equal access to all his or her rights.”<sup>113</sup>*

Under this interpretation, the Court asserted that any person could be subjected to particular exclusion or oppression because of a particular health status. In its interpretation, the Court opted for an “*affirmatory use*” of the CRPD. It affirmed the paradigm shift propounded by the CRPD from a narrow understanding of disability, often linked to construing disability as an individual or medical issue, to a broader one in which disability is a concept closer to a social construct.

In this context, the Court proposed that any person, based on her or his long-term physical, mental, intellectual or sensory impairments, can be affected in his or her participation in society, when facing barriers, primarily social and attitudinal ones.

In this regard, the Court asserted:

*“Therefore, in some situations, persons living with HIV/AIDS may be considered persons with disabilities as conceived in the Convention on the Rights of Persons with Disabilities.”<sup>114</sup>*

From this approach, the Court interpreted Talía’s rights in light of the CRPD. It concluded that Talía was a person with disability not because of her health status *per se* but because she had faced multiple social barriers that hindered her participation on an equal basis. In so doing, the Court vindicates the dignity and value of a HIV positive person who face social barriers:

*“Thus, living with HIV is not per se a situation of disability. However, in some circumstances, the attitudinal barriers faced by those living with HIV mean that the circumstances around them place them in a situation of disability.”<sup>115</sup>*

Nevertheless, it is important to note that only few CRPD provisions received interpretative analysis in the judgment. The Court only considered the paragraph (e) of the Preamble, stating disability as an evolving concept, and Article 1 (second

---

<sup>113</sup> Ibidem.

<sup>114</sup> *Gonzales Lluy et al. v Ecuador*, para 238.

<sup>115</sup> According to Lawson and Waddington, the term “*expressive value*” is explained as “*a legal norm’s potential to influence behaviour by altering broader social perceptions and conventions.*” See L. Waddington & A. Lawson, ‘The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts’, (Oxford Scholarship Online, 2018), p. 568.

paragraph), regarding disability as a social construction. These provisions, were drawn on by the Court to guide its reasoning towards a comprehensive understanding of disability.

***Interpretations on barriers in the educational system:***

The fact that the Court drew upon paragraph (e) of the Preamble together with Article 1 CRPD was fundamental to clarify that the right to education has particular elements in cases concerning persons living with medical conditions that could result in disability, such as HIV/AIDS.

The Court highlighted that, in the educational system, differential treatment based on a medical condition must be reasonably justified to not constitute discrimination. To conduct its discrimination analysis, the Court made references to the notion of discrimination based in its *corpus iuris* and followed a systematic interpretation, mainly because the American Convention does not provide a definition of discrimination.

The Court took into account the definitions of discrimination in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 1(1) of the Convention of Belem do Pará; and Article 2(a) of the CIADDIS. Consequently, the Court asserted that discrimination amounts to:

*“Any distinction, exclusion, or restriction based on specific reasons, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other social condition, which has the intention or effect of nullifying or impairing the equal recognition, enjoyment or exercise of the human rights and fundamental freedoms of all human beings.”<sup>116</sup>*

Under this definition of discrimination, the Court considered that HIV was a condition on the basis of which discrimination was prohibited under the term “*any other social condition*” established in Article 1(1) of the American Convention.<sup>117</sup>

Extending its understanding on disability from a social approach, the Court argued that persons with HIV, in addition to the physical effects of the infection, face economic, social and other barriers that affect their participation in society. To the

---

<sup>116</sup> *Gonzales Lluy et al. v Ecuador*, para. 253.

<sup>117</sup> *Gonzales Lluy et al. v. Ecuador*, para. 255.

Court, the protection against discrimination under “*any other social condition*” included the situation of persons with HIV as an aspect that may lead to disability. In this regard, the Court asserted

*“The direct legal effect of the fact that a condition or characteristic of a person falls within the categories included in Article 1(1) of the Convention is that judicial scrutiny should be stricter when assessing differences in treatment based on these categories. The authorities have a limited possibility of differentiating based on such questionable criteria (...).”<sup>118</sup>*

As explained in subsection 5.1, the Court adopted a strict judicial scrutiny approach to assess the “necessity” of expelling Talía from the school. As stated previously, the Court concluded that differential treatment against Talía constituted discrimination against her. Moreover, the Court concluded that the educational environment did not demonstrate any adaptability to Talía’s situation.

The analysis of the concept “adaptability” was supported on the integration of soft law instruments regarding the purposes of education as a public service. The Court used CESCR General Comment 13 on the right to education and CRC-General Comment No. 1 on the Aims of Education- to conclude that the Ecuadorian educational system had the obligation to adapt its operational conditions to the needs of students recognizing their diverse social and cultural settings.<sup>119</sup>

The applicability of human rights instruments and soft-law instruments guided the Court to its conclusion. More importantly, under this broad set of legal instruments, the Court introduced the concept of “*intersectionality*” to explain the connection between discriminatory factors operating against Talía.<sup>120</sup> The Court asserted that various intersecting elements of vulnerability and risk of discrimination were Talía’s youth, and her being a female person, a person living with a disability, and a person living with HIV in poverty.<sup>121</sup> The Court explained that the discrimination experienced by Talía was caused not only by these numerous factors acting individually, but also from the intersection between them. The Court expressed:

---

<sup>118</sup> *Gonzales Lluy et al. v. Ecuador*, para. 256.

<sup>119</sup> *Gonzales Lluy et al. v. Ecuador*, para. 262-264.

<sup>120</sup> The Court interpreted provisions from CEDAW, CRC, CRPD, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW, and General Comment No. 3 of the CRC on HIV/AIDS.

<sup>121</sup> *Gonzales Lluy et al. v. Ecuador*, para. 285.

*“If one of those factors had not existed, the discrimination would have been different.”<sup>122</sup>*

The analysis of discrimination against Talía was guided by systematic interpretation. As explained, the Court took into account provisions from different instruments and interpreted them as part of a whole with critical results in the case, such as considering a health status, HIV infection, as a prohibited ground of discrimination. Furthermore, as shall be demonstrated below, the Court followed a mixed interpretation methods and also adopted evolutionary interpretation to reach its judicial decision.

### **5.2.2 The Court used an evolutionary interpretation in light of a systematic interpretation to enable normative dialogue between legal regimes**

The Court ruled in favour of the direct justiciability of the right to education by making an evolutionary interpretation of Article 26 of the American Convention in relation to Articles 1(1) and 2, together with Article 29 of the same instrument and, in light of a systematic interpretation, with Articles 4 and 19(6) of the Protocol of San Salvador.

#### ***Interpretation of article 26 of the American Convention***

Article 26 of the American Convention concerns the progressive development of economic, social, and cultural rights. It establishes that State Parties must adopt measures to achieve progressively the full realisation of rights implicit in the economic, social, educational, scientific, and cultural standards outlined in the Charter of the Organization of American States (*“the Charter”*). The Court relied on evolutionary interpretation to include the right to education in its scope of Article 26, since the provision does not establish a list of rights but refers directly to the Charter.

Since there was no direct reference to the right to education in either the American Convention or by the Charter, the Court adopted an evolutionary interpretation, in

---

<sup>122</sup> Ibid, para 290.

light of a systematic interpretation to take into account, and include, Article 13 (right to education) of the Protocol of San Salvador, and provisions from other relevant human rights instruments and soft law instruments within the scope of Article 26.<sup>123</sup>

The Court recalled that Article 29 of the American Convention establishes that provisions of the Convention shall not be interpreted in a manner that restricts the enjoyment or exercise of any right or freedom under the laws of any State Party or by another convention to which the State is a party. Thus, in line with Article 29 of the American Convention, the Court updated the normative meaning and scope of Article 26.

Moreover, the Court interpreted Article 26 in connection with Articles 1(1) and 2 of the American Convention to conclude that Ecuador was not allowed to restrict or curtail Talía's right to education. The Court reached its conclusion through its interpretation of Article 1(1) of the American Convention: Article 1(1) establishes the obligation of State Parties to respect rights and ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination. Article 2 of the American Convention dictates that State Parties must adopt all necessary legal or other measures to give effect to the rights or freedoms established in the American Convention.

The Court's competence to rule on the violation of the right to education by Ecuador arose from the interpretation of Article 26 of the American Convention in connection with Article 4 of the Protocol of San Salvador,<sup>124</sup> which establishes the inadmissibility of restrictions. Article 26 of the American Convention was also read with Article 19(6) of the Protocol of San Salvador. Article 19(6) recognises that at any instance in which the right established in its article 13 (right to education) is violated by State action or is directly attributable to a State Party, the Court's jurisdiction is triggered.

Based on the clarification of its legal competence to rule on violation of the right to education, the Court used the Protocol of San Salvador as an interpretative

---

<sup>123</sup> *Gonzales Lluy et al. v. Ecuador*, para. 234.

<sup>124</sup> Protocol of San Salvador. Article 4 (Inadmissibility of Restrictions): "A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree."



reference to develop the American Convention in light of the human rights *corpus iuris*. In so doing, the Court assessed the relationship between legal provisions from the Protocol of San Salvador and the American Convention applicable to the case as a dynamic interaction.

Thus, the Court adopted the evolutionary interpretation method to promote the object and purpose of the American Convention. The Court construed the American Convention as a living instrument. Therefore, its Article 26 had to be interpreted in order to accommodate changing circumstances in society, and, primarily, enhance the interdependent and indivisible nature of human rights. Based on this consideration, the Court ruled in favour of the direct justiciability of economic, social, and cultural rights through the application of Article 26.

#### **5.2.2.2 The Court used consensus interpretation to reinforce its evolutionary interpretation method**

The Court took into account international case law and the case law of domestic courts in the region to support its analysis. For instance, the Court recalled the case of *Kiyutin v. Russia* of the ECHR. In this case, the ECHR concluded that the term *disability* should be used to analysis any distinction based on a health status against a person.<sup>125</sup>

Moreover, the Court recalled that some States and constitutional courts, such as the United States through the Americans with Disabilities Act of 1990 and the Peruvian Constitutional Court have stated that persons with HIV are protected under disability legal instruments.<sup>126</sup>

The Court also considered statements made by some constitutional courts and used the *corpus iuris* of international human rights law to support the use of the strict assessment of equality upon measures adopted by national authorities to establish whether or not those measures constituted unjustified discrimination.<sup>127</sup>

Thus, through consensus interpretation, the Court tried to find common denominators in international and domestic human rights practice. By doing so,

---

<sup>125</sup> *Gonzales Lluy et al. v. Ecuador*, para. 239.

<sup>126</sup> *Gonzales Lluy et al. v. Ecuador*, para. 239. Footnote. 272.

<sup>127</sup> *Gonzales Lluy et al. v. Ecuador*, Para. 256.

the Court implemented a means to reinforce its evolutionary interpretation and update the scope of article 26 of the American Convention and the meaning of terms like “disability” and “discrimination”.

### 5.2.3 Partial conclusions

The analysis of the treaty interpretation methods applied by the Court in Gonzales Lluy’s case shows that systematic and evolutionary interpretation methods were closely linked to each other.

The Court used the principle of systematic integration to enable normative dialogue between legal regimes. The Court interpreted the American Convention in light of other human rights instruments, soft-law instruments, and non-human rights instruments to broadly interpret critical concepts, such as disability, discrimination and intersectionality, which were determinant to reach its conclusions.

By using different legal provisions in light of the American Convention, the Court analysed and explained the impact of the multiple human rights violations committed against Talía. Primarily, the breach of the legal responsibility by the Ecuadorian State to ensure Talía’s rights and prevent any threat against her life were supported in the conventional reflection set in Article 29(b) of the American Convention; the principle of systematic integration.

Under this principle, the Court upheld the CRPD as the most comprehensive and relevant international instrument to understand how Talía’s health status when interacting with social barriers hindered her rights to education and participation. In so doing, the Court incorporated provisions on disability into its *corpus iuris* that were missing from the American Convention and other regional human rights instruments.

The affirmatory use of the CRPD made by the Court in Gonzales Lluy’s case, sets a relevant precedent to future litigation based on disability rights. Moreover, by adopting an evolutionary interpretation in light of a systematic interpretation, the Court ruled in favour of the direct justiciability of the right to education. The Court characterised the American Convention as a living instrument that needed to be

adapted to new circumstances, and held that Article 26 of the American Convention should have practical effects.

Furthermore, the Court reinforced its evolutionary interpretation approach by incorporating the regional domestic case law and international case law.

## Chapter 6: Conclusions

This research has generated a qualitative grounded study on judicial discretion in the different forms of objective procedures and treaty interpretation methods applied by the Court, particularly, in *Gonzales Lluy et al. v. Ecuador*. The premise of this study was that when judges rule on cases concerning international treaties, they conduct their interpretations within the scope of their discretion, which leads to different consequences for plaintiffs.

The central question posed by this study was: *What are the consequences of treaty interpretation methods and procedural standards used by the Inter-American Court of Human Rights for the protection granted the plaintiffs in the case Gonzales Lluy et al. v. Ecuador?*

To answer this question, the research was based on a case law analysis of the Court to identify and analyse the “sphere of discretion” in terms of procedural and interpretation standards.

The case law analysed shows itself to be relevant to understand the relation of discretion and legal interpretation since judicial freedom guided the applicability of the VCLT rules and the unique procedural-standards with explanatory value towards the outcomes reached by the Court.

The practice followed by the Court when ruling over cases, reveals that the Court is aware that the *corpus-iuris* of the Inter-American System of Human Rights, mostly the American Convention, is not a “perfect” treaty. Its provisions and terms give rise to doubts as to their scope or actual meaning. Besides, there are regional legal instruments, such as CIADDIS, over which the Court has no jurisdiction. Thus, the Court recourse to treaty interpretation methods for understanding, applying and implementing American Convention’s rules when presiding over cases.

In the *Gonzales Lluy et al. v. Ecuador* case, the Court did not act legally free. It applied procedural-standards to limit the sphere of its judicial freedom. Objective standards guided the Court’s analysis to expand the alleged human rights violations against Talía and, most importantly, were determinant for two concrete results. First, the incorporation of Talía’s mother and brother into the realm of protection by law, and second, the discussion on the right to education from a human rights perspective.

Moreover, in its judgment, the Court reinforced the concept of legal interpretation as an “art” since it exercised its “creation” power using different means of interpretation in a particular mixed operation. It combined methods of treaty interpretation, reiterated in its case-law, to support its conclusions.

The two main techniques of treaty interpretation used by the Court were systematic interpretation and evolutionary interpretation. Notwithstanding that the Court could look for the ordinary meaning of the terms of the American Convention, the Court faced the absence of some terms in the text of the treaty, such as discrimination and disability, that were relevant to guide its reasoning. Besides, the Court did not opt for determining the object and purpose of the whole American Convention. It focused on specific provisions of it, such as the right to life; right to humane treatment; and judicial guarantees.

When ruling, the Court used systematic integration to enable normative dialogue between legal regimes, update provisions of the American Convention and harmonise itself with general international law. Notably, the study found that since the American Convention does not contain explicit references to the human rights of persons with disabilities, the concept of discrimination or the Court’s competence to rule on the violation of the right to education, the Court reached its conclusions by interpreting the American Convention in light of the regional and universal *corpus iuris*.

The case analysed has demonstrated that the Court ruled in favour of the direct justiciability of the right to education by making an evolutionary interpretation of Article 26 of the American Convention. Moreover, the Court implemented consensus interpretation as part of the evolutionary method to update certain terms, such as the right to education, disability and discrimination.

Importantly for the purposes of this study, the Court used the CRPD provisions to interpret disability as an evolving concept and a social construction. In so doing, the Court affirmed the paradigm shift propounded by the CRPD and used the CRPD to emphasise a broad concept of disability unattached to a medical or individualised perspective.

The relevance of the Court’s interpretation of the concept of disability in the *Gonzales Lluy* case is having interpreted that any person, based on her health status may be

affected in her participation in society when facing social and attitudinal barriers. This interpretation contributes to understanding three distinctive elements when considering disability rights: (i) long-term physical, mental, intellectual or sensory impairments; (ii) interaction between an individual (with a health condition) and their contextual factors; and (iii) the impact of that interaction over the individual's participation in society.

From this broad interpretation of the concept of disability, the Court has made clear how disability and impairment are independent terms and that their relation arises from the social and attitudinal barriers faced by persons with long-term impairments that result in their exclusion from society. Based on this interpretation of disability, the Court contributes to shape domestic constitutional debates, litigation strategies, judicial thinking and practice concerning the rights of persons with disabilities.

Further studies concerning the Court's interpretation of the concept of disability, as revealed in the *Gonzales Lluy* case will determine the scope of the Court's discretion in the field of disability rights and the potential for protection of persons with disabilities.

## Bibliography

### Books

- H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press, 2012).
- H. Lauterpacht, *The Function of Law in the International Community* (first published 1933) (reprinted Oxford University Press 2011).
- R. Dworkin, *Taking rights seriously* (Duckworth, 1977).
- B. Berelson, *Content Analysis in Communication Research* (Glencoe Free Press, 1952)
- K. Krippendorff, *Content Analysis: An Introduction to Its Methodology* (Sage, 1980)
- R. Weber, *Basic Content Analysis* (2nd edn Sage, 1990).
- H.P. Graver, *Judges against justice. On judges when the rule of law is under attack* (Springer, 2015).
- D. Pierre, *Sources and the Legality and Validity of International Law* in S. Besson, J. D'Aspremont, S. Knuchel (eds), *What Makes Law 'International'?* (The Oxford Handbook of the Sources of International Law, 2017).
- M. Herdegen, *Interpretation in International Law* (Oxford University Press, 2012)
- R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002).
- Chang-fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties. A new round of codification* (Springer, 2017).
- M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2008).
- R. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008).
- M.E. Ventura Robles, *Los principales aportes del Juez Rodolfo E. Piza Escalante a la Corte Interamericana de Derechos Humanos (1979-1988)* (Corte Interamericana de Derechos Humanos, 2003).
- E. Bjorge, *Evolutionary Interpretation. "The Convention is a Living Instrument"* in E. Bjorge (ed), *Domestic Application of the ECHR: Courts as Faithful Trustees*, (Oxford Scholarship Online, 2015).
- A. Giddens, *New Rules of Sociological Method*. (2nd edn, Stanford University Press, 1993).
- L. Waddington, A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (ed), (Oxford Scholarship Online, 2018).

## Journal articles

- M. Stone, Legal Positivism as an idea about morality (2011) *Univ Tor Law J* 61(2).
- M. Klatt, Taking Rights less Seriously. A Structural Analysis of Judicial Discretion. (2007) *Ratio Juris* 20(4).
- R. Suryapratim, Privileging (some forms of) interdisciplinarity and interpretation: Methods in comparative law (2014) *Int J Const Law* 13(3).
- U. Linderfalk, Is Treaty Interpretation an Art or a Science? *International Law and Rational Decision Making* (2015) *Eur J Int Law* 26(1).
- R. Jennings, General course on principles of international law (1967) *Collect Courses Hague Acad Int Law* 121.
- L. Lixinski, Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law (2010) *Eur J Int Law* 21(3).
- L. Lixinski, The Consensus Method of Interpretation by the Inter-American Court of Human Rights (2017) *J Contemp Law*. 3(1).
- H.L.A. Hart, Positivism and the Separation of Law and Morals (1958) *Harv Law Rev* 71(4).
- C. Djeflal, Establishing the Argumentative DNA of International Law: A Cubistic View on the Rule of Treaty Interpretation and its Underlying Legal Culture(s) (2015) *Transnatl Leg Theory* 5(1).
- G. Schwarzenberger, Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties (1969) *Curr Leg Probl* 22(1).
- R. Bernhardt, Interpretation and Implied (Tacit) Modification of Treaties (1967) *ZaöRV* 27(1).
- J. Maftei, V. Coman, Interpretation of Treaties (2012) *Acta Univ Danubius Juridica* 8(2).
- L. Jardón, The Interpretation of Jurisdictional Clauses in Human Rights Treaties (2012) *Anuario Mexicano de Derecho International* Vol XIII.
- I. Buffard, K. Zemanek, The “Object and Purpose” of a Treaty: An Enigma? (1998) *Austrian Rev Int Eur Law* 3(1).
- G. Fitzmaurice, Vae Victis or Woe to the Negotiators. Your Treaty or Our “Interpretation” of it? (1971) *Am J Int Law* 65(2).



## Annex 1. Case law of the Inter-American Court of Human Rights selected for this study

1. *Cabrera García and Montiel-Flores v. Mexico*, (2010) Preliminary objections, Merits, Reparations and Costs, Judgment of November 26, 2010, Series C No 220.
2. *Iocher-Bronstein v. Peru*, (2011) Merits, Reparations and Costs, Judgment of February 6, 2001. Series C No 74.
3. *Mohamed v. Argentina*, (2012) Preliminary objection, merits, reparations and costs, Judgment of November 23, 2012, Series C No. 255
4. *Claude-Reyes et al. v. Chile*, (2006), Merits, Reparations and Costs, Judgment of September 19, 2006. Series C No 151.
5. *Garcia and Montiel Flores v. Mexico*, (2009) Preliminary Objections, Merits, Reparations and Costs, Judgment 26 November 2009, Series C No 220.
6. *Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, (2007) Preliminary Objections, Merits, Reparations and Costs, Judgment of November 21, 2007, Series C No. 170.
7. *Canales Huapaya et al. v. Peru*, (2015) Preliminary Objections, Merits, Reparations and Costs, Judgment of June 24, 2015, Series C No. 296.
8. *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, (2012) Preliminary Objections, Merits, Reparations and Costs, Judgment of November 28, 2012, Series C No. 257.
9. *González et al. ("Cotton Field") v. Mexico*, (2009) Preliminary Objection, Merits, Reparations and Costs, Judgment of November 16, 2009, Series C No. 205.
10. *Furlan and family v. Argentina*, (2012) Preliminary Objections, Merits, Reparations and Costs, Judgment of August 31, 2012, Series C No. 246.
11. *Ricardo Canese v. Paraguay*, (2004) Merits, Reparations and Costs, Judgment of August 31, 2004, Series C No. 110.
12. *Herrera-Ulloa v. Costa Rica*, (2004) Preliminary Objections, Merits, Reparations and Costs, Judgment of July 2, 2004, Series C-107.
13. *Sawhoyamaya Indigenous Community v. Paraguay*, (2006) Merits, Reparations and Costs, Judgment of 29 March 2006, Series C No 146
14. *Díaz Peña v. Venezuela*, (2012) Preliminary objection, merits, reparations and costs. Judgment of June 26, 2012. Series C No. 244.
15. *Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, (2014) Preliminary objection, merits, reparations and costs, Judgment of November 14, 2014, Series C No. 287.
16. *Fairén Garbí and Solís Corrales v. Honduras*, (1989) Merits, Judgment of March 15, 1989, Series C No. 6.
17. *Yvon Neptune vs Haiti*, (2008) Merits, reparations and costs, Judgment of May 6, 2008, Series C No. 180.
18. *Veliz Franco et al. v. Guatemala*, (2014) Preliminary objections, merits, reparations and costs, Judgment of May 19, 2014, Series C No. 277.
19. *"White Van" (Paniagua Morales et al.) v. Guatemala*, (1998) Merits, Judgment of March 8, 1998, Series C No. 37.

20. *Tarazona Arrieta et al. v. Peru*, (2014) Preliminary Objection, merits, reparations and costs, Judgment of October 15, 2014, Series C No. C No. 286.
21. *Loayza Tamayo v. Peru*, (1997) Merits, Judgment of September 17, 1997, Series C No. 33.
22. *J. v. Peru*, (2013) Preliminary Objection, Merits, reparation and costs, Judgment of November 27, 2013, Series C No. 275.
23. *Mapiripán Massacre v. Colombia*, (2005) Merits, Reparations and Costs, Judgment of September 15, 2005, Series C No. 134.
24. *Suárez Peralta v. Ecuador*, (2013) Preliminary Objections, Merits, Reparations and Costs, Judgment of May 21, 2013, Series C No. 261.
25. *Velásquez Rodríguez v. Honduras*, (1988) Merits, Judgment of July 29, 1988, Series C No. 4.
26. *Ximenes Lopes v. Brazil*, (2006) Merits, Reparations and Costs, Judgment of July 4, 2006, Series C No. 149.
27. *Pueblo Bello Massacre v. Colombia* (2006) Merits, Reparations and Costs, Judgment of January 31, 2006, Series C No. 140.
28. *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*, (2009) Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2009, Series C No. 198.
29. *Vargas Areco v. Paraguay* (2006) Merits, Reparations and Costs, Judgment of September 26, 2006, Series C No. 155.
30. *Vera et al. v. Ecuador*, (2011) Preliminary Objection, Merits, Reparations, and Costs, Judgment of May 19, 2011, Series. C No. 226.
31. *Bámaca Velásquez v. Guatemala*, (2002) Reparations and Costs, Judgment of February 22, 2002, Series C No. 91.
32. *Baldeón García v. Peru*, (2006) Merits, Reparations and Costs, Judgment of April 6, 2006, Series C No. 147.
33. *Girls Yean and Bosico v. Dominican Republic*, (2005) Preliminary Objections, Merits, Reparations and Costs, Judgment of September 8, 2005, Series C No. 130.
34. *Atala Riffo and daughters v. Chile*, (2012) Merits, Reparations and Costs, Judgment of February 24, 2012, Series C No. 239.
35. *Granier et al. (Radio Caracas Television) v. Venezuela*, (2015) Preliminary Objections, Merits, Reparations and Costs, Judgment of June 22, 2015, Series C No. 293.
36. *Kimel v. Argentina*, (2008) Merits, Reparations and Costs, Judgment of May 2, 2008 Series C No. 177.
37. *Castañeda Gutman v. Mexico*, (2008) Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 6, 2008, Series C No. 184.
38. *Usón Ramírez v. Venezuela*, (2009) Preliminary Objection, Merits, Reparations and Costs, Judgment of November 20, 2009, Series C No. 207.

39. *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, (2014) Merits, Reparations and Costs, Judgment of May 29, 2014, Series C No. 279.
40. *Valle Jaramillo et al. v. Colombia*, (2008) Merits, Reparations and Costs, Judgment of November 27, 2008, Series C No. 192.
41. *Anzualdo Castro v. Peru*, (2009) Preliminary Objection, Merits, Reparations and costs, Judgment of September 22, 2009, Series C No. 202.
42. *Genie Lacayo v. Nicaragua* (1997) Merits, Reparations and Costs, Judgment of January 29, 1997, Series C No. 30.
43. *Cruz Sánchez et al. v. Peru*, (2015) Preliminary Objections, Merits, Reparations and Costs, Judgment of April 17, 2015, Series C No. 292.
44. *Ticona Estrada et al. v. Bolivia*, (2008) Merits, Reparations and Costs, Judgment of November 27, 2008, Series C No. 191.

## Annex 2. Inter-American Human Rights Treaties and status of ratification by Ecuador

Inter-American human right treaty	Adopted	Entered into force	Date of Signature by Ecuador	Date of Ratification by Ecuador
American Convention on Human Rights, "Pact of San José, Costa Rica"	22 November 1969	18 July 1978	22 November 1969	08 December 1977
Inter-American Convention to Prevent and Punish Torture	9 December 1985	28 February 1987	30 May 1986	30 September 1999
Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights, "Protocol of San Salvador"	17 November 1988	16 November 1999	17 November 1988	10 February 1993
Protocol to the American Convention on Human Rights to Abolish the Death Penalty	8 June 1990	This Protocol shall enter into force among the States that ratify or accede to it when they deposit their respective instruments of ratification or accession (Article 4)	27 August 1990	05 February 1998
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará"	9 June 1994	05 March 1995	10 January 1995	30 June 1995
Inter-American Convention on Forced Disappearance of Persons	9 June 1994	28 March 1996	08 February 2000	07 July 2006
Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities	8 June 1999	14 September 2001	08 June 1999	01 March 2004
Inter-American Convention against all Forms of Discrimination and Intolerance	5 June 2013	This Convention shall enter into force the thirtieth day after the date of deposit of the second instrument of ratification or accession to the Convention.	06 June 2013	It has not been ratified
Inter-American Convention Against Racism, Racial Discrimination and related forms of Intolerance	5 June 2013	11 November 2017	06 June 2013	It has not been ratified