# SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

[Agenda item 4]

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## Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur[*]

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| North Atlantic Treaty (Washington, D.C., 4 April 1949) | United Nations, *Treaty Series*, vol. 34, No. 541, p. 243. |
| Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) | *Ibid*., vol. 213, No. 2889, p. 221. |
| Convention relating to the Status of Refugees (Geneva, 28 July 1951) | *Ibid*., vol. 189, No. 2545, p. 137. |
| Convention relating to the Status of Stateless Persons (New York, 28 September 1954) | *Ibid*., vol. 360, No. 5158, p. 117. |
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| International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) | *Ibid*., vol. 993, No. 14531, p. 3. |
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| Convention on Psychotropic Substances (Vienna, 21 February 1971) | *Ibid.*, vol. 1019, No. 14956, p. 175. |
| Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (New York, 8 August 1975) | *Ibid*., vol. 976, No. 14152, p. 105. |
| Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) | *Ibid*., vol. 1249, No. 20378, p. 13. |
| Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980) | *Ibid*., vol. 1343, No. 22514, p. 89. |
| United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) | *Ibid*., vol. 1833, No. 31363, p. 3. |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) | *Ibid*., vol. 1465, No. 24841, p. 85. |
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| Convention on the Rights of the Child (New York, 20 November 1989) | *Ibid*., vol. 1577, No. 27531, p. 3. |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990) | *Ibid*., vol. 2220, No. 39481, p. 3. |
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| Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997) | *Ibid*., vol. 2303, No. 30822, p. 162. |
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| International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006) | *Ibid*., vol. 2716, No. 48088, p. 3. |

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## Introduction

1. In 2012, the International Law Commission placed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" on its current programme of work.[1] The topic originated from previous work of the Commission's Study Group on treaties over time.[2]

[1] *Yearbook ... 2012*, vol. II (Part Two), chap. X, p. 77.

[2] *Yearbook ... 2008*, vol. II (Part Two), annex I, p. 152; *Yearbook ... 2009*, vol. II (Part Two), chap. XII, p. 148; *Yearbook ... 2010*, vol. II (Part Two), chap. X, p. 194; *Yearbook ... 2011*, vol. II (Part Two), chap. XI, p. 168.

2. During its sixty-fifth session, in 2013, the Commission considered the first report on the topic[3] and provisionally adopted five draft conclusions with commentaries.[4] States generally reacted favourably to the work during the debate in the Sixth Committee on the report of the Commission on its sixty-fifth session.[5]

3. During its sixty-sixth session, in 2014, the Commission considered the second report on the topic[6] and provisionally adopted five additional draft conclusions with commentaries.[7] During the debate in the Sixth Committee in 2014, delegations generally welcomed the adoption of the five draft conclusions and considered them to be balanced and in line with the overall objective of the work on the topic.[8]

4. During its sixty-seventh session in 2015, the Commission considered the third report on the topic[9] and provisionally adopted draft conclusion 11 with commentaries.[10] In the course of the debate on the work in the Sixth Committee in 2015, delegations generally welcomed the adoption of draft conclusion 11.[11] Some States considered that the distinction between paragraphs 2 and 3 of draft conclusion 11 should be formulated more clearly.[12] Other States expressed the view that the relationship between an "established practice of the organization" and the subsequent practice of international organizations generally should have been elaborated upon.[13] Some States specifically agreed that the practice of an organization might contribute to the identification of the object and purpose of a constituent treaty, while others called that position into question.[14] It was suggested that the difference between the practice of States acting as such and States acting as members of a plenary organ of an international organization should be emphasized.[15] It was also pointed out that the distinction should be observed between subsequent practice that establishes the agreement of the parties and such practice that does not.[16]

5. Some delegations would have preferred to see more examples of cases envisaged in paragraph 4 of draft conclusion 11.[17] The European Union in particular proposed to have its practice covered more specifically in the commentary, as Jamaica did with regard to the case law of the Caribbean Court of Justice.[18] Different positions were voiced with regard to the question of whether a constituent treaty of an international organization could be modified as a result of subsequent practice, a question with regard to which the draft conclusion does not take a position.[19]

6. Some States proposed that the Commission modify draft conclusions 1, paragraph 4, and 4, paragraph 3, in order to take account of the practice of international organizations as a form of "other subsequent practice".[20] The inclusion of a draft conclusion regarding treaties adopted within an international organization was also proposed.[21]

7. At its sixty-seventh session, in 2015, the Commission requested that, by 31 January 2016, States and international organizations provide it with:

(*a*) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and

(*b*) any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.[22]

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[3] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/660, p. 51.

[4] *Ibid.*, vol. II (Part Two), pp. 51 *et seq.*, paras. 38–39.

[5] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666; available from the website of the Commission, documents of the sixty-sixth session), para. 4.

[6] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/671, p. 111.

[7] *Ibid.*, vol. II (Part Two), pp. 107 *et seq.*, paras. 75–76.

[8] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session (A/CN.4/678; available from the website of the Commission, documents of the sixty-seventh session), para. 20.

[9] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/683, p. 37.

[10] *Yearbook ... 2015*, vol. II (Part Two), pp. 54 *et seq.*, paras. 128–129.

[11] See A/C.6/70/SR.19 to A/C.6/70/SR.23: statements by Austria (A/C.6/70/SR.20, para. 34), Australia (A/C.6/70/SR.22, para. 52), Belarus (A/C.6/70/SR.21, para. 34), Chile (A/C.6/70/SR.22, para. 87), Czech Republic (A/C.6/70/SR.20, para. 60), El Salvador (A/C.6/70/SR.22, para. 106), Germany (A/C.6/70/SR.22, para. 16), Greece (A/C.6/70/SR.20, para. 52), Iran (Islamic Republic of) (A/C.6/70/SR.23, para. 68), Italy (A/C.6/70/SR.22, para. 113), Jamaica (A/C.6/70/SR.22, para. 23), Malaysia (A/C.6/70/SR.23, para. 50), Netherlands (A/C.6/70/SR.21, para. 44), New Zealand (A/C.6/70/SR.22, para. 33), Poland (A/C.6/70/SR.21, para. 69), Portugal (A/C.6/70/SR.22, para. 62), Republic of Korea (A/C.6/70/SR.23, para. 58), Romania (A/C.6/70/SR.21, para. 80), Russian Federation (A/C.6/70/SR.23, para. 22), Singapore (A/C.6/70/SR.21, para. 60), Spain (A/C.6/70/SR.22, para. 96), Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8), United Kingdom of Great Britain and Northern Ireland (A/C.6/70/SR.23, para. 33), United States of America (A/C.6/70/SR.22, paras. 42–43), with certain reservations regarding paragraph 3), and European Union (A/C.6/70/SR.19, para. 87); see, generally, topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session (A/CN.4/689; available from the website of the Commission, documents of the sixty-eighth session), paras. 38–51.

[12] Australia (A/C.6/70/SR.22, para. 54), Czech Republic (A/C.6/70/SR.20, paras. 61–62), Italy (A/C.6/70/SR.22, para. 114), Romania (A/C.6/70/SR.21, para. 80), the Russian Federation (A/C.6/70/SR.23, para. 22) and Spain (A/C.6/70/SR.22, para. 98); the Netherlands, however, pointed out that it is often difficult to distinguish between the practice of the organization and that of States, regardless of the formulation (A/C.6/70/SR.21, para. 45).

[13] Austria (A/C.6/70/SR.20, para. 36), Belarus (A/C.6/70/SR.21, para. 34), El Salvador (A/C.6/70/SR.22, para. 106), Greece (A/C.6/70/SR.20, para. 54), Italy (A/C.6/70/SR.22, paras. 114–115) and Portugal (A/C.6/70/SR.22, para. 62).

[14] Germany (A/C.6/70/SR.22, para. 16), Greece (A/C.6/70/SR.20, para. 53) and Romania (A/C.6/70/SR.21, para. 80); but see the Russian Federation (A/C.6/70/SR.23, para. 22) and the United States (A/C.6/70/SR.22, para. 44).

[15] Belarus (A/C.6/70/SR.21, para. 34) and Republic of Korea A/C.6/70/SR.23, para. 59).

[16] Iran (Islamic Republic of) (A/C.6/70/SR.23, para. 68).

[17] Czech Repubic (A/C.6/70/SR.20, paras. 60 and 63), Germany (A/C.6/70/SR.22, para. 16) and Portugal (A/C.6/70/SR.22, para. 62); see also Italy (A/C.6/70/SR.22, para. 115).

[18] European Union (A/C.6/70/SR.19, paras. 87–89); in this sense, see also Germany (A/C.6/70/SR.22, para. 16) and Jamaica (A/C.6/70/SR.22, paras. 24–26).

[19] Chile (A/C.6/70/SR.22, para. 87), Malaysia (A/C.6/70/SR.23, para. 49), Netherlands (A/C.6/70/SR.21, para. 45), New Zealand (A/C.6/70/SR.22, para. 33) and Singapore (A/C.6/70/SR.21, para. 60).

[20] Austria (A/C.6/70/SR.20, para. 38) and Malaysia (A/C.6/70/SR.23, para. 51).

[21] El Salvador (A/C.6/70/SR.22, para. 107) and Malaysia (A/C.6/70/SR.23, para. 50).

[22] *Yearbook ... 2015*, vol. II (Part Two), p. 14, para. 26.

8. As at the date of submitting the present report, responses have been received from eight States.[23] Further contributions are welcome at any time.

9. The first two reports on subsequent agreements and subsequent practice in relation to the interpretation of treaties considered general aspects of the topic.[24] The third report addressed the role of subsequent agreements and subsequent practice in relation to the interpretation of constituent instruments of international organizations.[25] The present report concerns the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts.[26]

[23] By 7 March 2016, Australia, the Czech Republic, Germany, Paraguay, Spain and the International Labour Organization (ILO) had submitted information in writing (available from the website of the Commission, under the analytical guide to the current topic). Singapore (statement of 6 November 2015; see also A/C.6/70/SR.21, para. 62), Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8) and the United States (A/C.6/70/SR.22, para. 46) made comments in response to the request in their statements to the Sixth Committee in 2015.

[24] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/660, and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/671.

[25] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/683.

[26] During the debate in the Sixth Committee, Singapore (A/C.6/70/SR.21, para. 62), Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8) and the United States (A/C.6/70/SR.22, para. 46) encouraged the Commission to deal with pronouncements of expert bodies.

## Chapter I

## Pronouncements of expert bodies

10. Treaties are applied in various ways. They are applied, first and foremost, by the States parties themselves, including by their courts. In many cases, international organizations contribute to the application of treaties, in particular to the application of their own constituent instruments.[27] There are also treaties which establish bodies that have the task of monitoring or contributing in other ways to the application of such treaties, including bodies consisting of experts who serve in their individual capacity (see sect. A below). Treaty bodies consisting of such experts adopt pronouncements (see sect. B below) as a form of practice, which contributes to the application of the treaty and which may be relevant for the purpose of interpretation of the treaty (see sect. C below). The best-known expert bodies are those established under human rights treaties (see sect. D below). But there are also other such bodies (see sect. E below).

### A. Types of expert bodies

11. Most bodies established by treaties either consist of States or are organs of international organizations. The output of a treaty body composed of State representatives (and which is not an organ of an international organization) is a form of practice by those States that thereby act collectively within the framework of the treaty body. That is true, in particular, for decisions of Conferences of States Parties, with respect to which the Commission has already provisionally adopted draft conclusion 10.[28] The output of a treaty body that is an organ of an international organization (and which may or may not consist of States) is, in the first place, attributed to the organization.[29] Such output may, however, under certain circumstances also be attributed, for the purpose of interpretation, to the States represented therein.[30]

12. The present report is neither concerned with treaty bodies that consist of States, nor with bodies that are organs of an international organization.[31] Rather, it deals with treaty bodies that consist of experts who serve in their individual capacity.[32] The best-known examples for such bodies are the committees established under various human rights treaties at the universal level (the International Convention on the Elimination of All Forms of Racial Discrimination,[33] the International Covenant on Civil and Political Rights,[34] the International Covenant on Economic, Social and Cultural Rights,[35] the Conven-

[27] See *Yearbook ... 2015*, vol. II (Part Two), para. 128, draft conclusion 11, at p. 55.

[28] *Yearbook ... 2014*, vol. II (Part Two), paras. 75–76, at pp. 107 *et seq.*

[29] Art. 6, para. 1, of the articles on the responsibility of international organizations, General Assembly resolution 66/100 of 9 December 2011, annex (the draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), at pp. 40 *et seq.*, paras. 87–88); the Working Group on Arbitrary Detention is an example of a body of experts serving in their personal capacity that is mandated by the Human Rights Council under its resolution 24/7 of 26 September 2013, and therefore a subsidiary organ of the Council, see www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.

[30] See draft conclusion 12 [13] (Resolutions of international organizations and international conferences) of the draft conclusions on the identification of customary international law, provisionally adopted by the Drafting Committee (A/CN.4/L.869; available from the website of the Commission, documents of the sixty-seventh session); see also *Europäische Schule München v. Silvana Oberto, Barbara O'Leary*, Cases C464/13 and C465/13C, Judgment, 11 March 2015, European Court of Justice, Fourth Chamber, paras. 57–67, on the effects of decisions of the Complaints Board under the Statute of the European Schools.

[31] The Committee of Experts on the Application of Conventions and Recommendations of ILO is an important example of an expert body that is an organ of an international organization. It was established in 1926 to examine Government reports on ratified conventions. It is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the governing body of ILO for three-year terms: see www.ilo.org and information provided by ILO to the Commission (available from the website of the Commission, under the analytical guide to the current topic).

[32] See, e.g., art. 28, para. 3, of the International Covenant on Civil and Political Rights; the members of such bodies are often called "independent experts" (see Tomuschat, *Human Rights: Between Idealism and Realism*, p. 219); treaties do not, however, usually specify what the term "serving in their individual capacity" means apart from freedom from governmental instruction, which does not exclude that members have a formal connection with the Government that has nominated them.

[33] International Convention on the Elimination of All Forms of Racial Discrimination, arts. 8–14.

[34] International Covenant on Civil and Political Rights, arts. 28–45.

[35] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, arts. 1–15; the Committee was

tion on the Elimination of All Forms of Discrimination against Women,[36] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[37] and others).[38] But there are also expert bodies established under other treaties. Important examples include the Commission on the Limits of the Continental Shelf under the United Nations Convention on the Law of the Sea,[39] the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change,[40] the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[41] and the International Narcotics Control Board under the Single Convention on Narcotic Drugs.[42] The members of such bodies are not necessarily lawyers, but some treaties require that, as far as the composition of the expert body is concerned, "consideration [is to be] given to the usefulness of the participation of some persons having legal experience".[43]

13. The pronouncements of such expert bodies[44] are not a form of State practice in the application of a treaty and those pronouncements are not usually attributed to an international organization. Their possible significance, for the purpose of the interpretation of a treaty, is the subject of the present chapter.

### B. "Pronouncements"

14. The official designation in treaties of the forms of action of expert bodies varies (e.g., "views",[45] "recommendations",[46] "comments",[47] "measures",[48] "consequences"[49]). The present report employs, for the purpose of the present topic, the generic term "pronouncements".[50] Other generic terms in use include "findings",[51] "jurisprudence"[52] and "output".[53] The expression "findings" may be misunderstood as being limited to factual determinations, whereas the work of expert bodies often consists of action which is, explicitly or implicitly, declaratory (of law). The term "jurisprudence", on the other hand, may be mistaken as implying that the action of an expert body possesses a judicial quality, which is usually not the case. The term "output", although neutral, may be too broad. The expression "pronouncements", on the other hand, is sufficiently neutral and is able to cover all relevant factual and normative assessments by such expert bodies.

### C. Legal effect of pronouncements of expert bodies generally

15. The legal effect of pronouncements by an expert body depends, first and foremost, on the applicable treaty itself. The effect must be determined by way of applying

originally established by the Economic and Social Council, in its resolution 1985/17 of 28 May 1985, to monitor compliance with International Covenant on Economic, Social and Cultural Rights.

[36] Convention on the Elimination of All Forms of Discrimination against Women, arts. 17–22.

[37] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 17–24.

[38] See Rodley, "The role and impact of treaty bodies", pp. 622–623.

[39] The Commission on the Limits of the Continental Shelf was established under article 76, paragraph 8, of the United Nations Convention on the Law of the Sea and annex II to the Convention.

[40] The Compliance Committee under the Kyoto Protocol was established under article 18 of the Protocol and decision 24/CP.7 on procedures and mechanisms relating to compliance under the Kyoto Protocol, adopted by the Conference of the Parties serving as meeting of the Parties to the Kyoto Protocol, contained in Report of the Conference of the Parties on its Seventh Session, held at Marrakesh, from 29 October to 10 November 2001, Addendum, Part Two: Action taken by the Conference of the Parties, vol. III (FCCC/CP/2001/13/Add.3).

[41] The Compliance Committee under the Aarhus Convention was established under article 15 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) and decision I/7 on review of compliance, adopted by the first Meeting of the Parties, in 2002, contained in Report of the First Meeting of the Parties, Addendum (ECE/MP.PP/2/Add.8).

[42] The International Narcotics Control Board was established under article 5 of the Single Convention on Narcotic Drugs.

[43] International Covenant on Civil and Political Rights, art. 28, para. 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 26, para. 1. See also: decision 24/CP.7 (footnote 40 above), annex, sect. V, para. 3; decision I/7 on review of compliance (footnote 41 above), annex, para. 2.

[44] Further relevant expert bodies include the Compliance Committee established under article 34 of the Cartagena Protocol on Biosafety and decision BS-I/7 on establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety adopted by the First Meeting of the Conference of the Parties serving as Meeting of the Parties to the Cartagena Protocol on Biosafety, Kuala Lumpur, 23–27 February 2004, available from www.cbd.int/decisions/mop.

[45] International Covenant on Civil and Political Rights, art. 42, para. 7 (*c*); Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, para. 4; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 9, para. 1.

[46] International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, para. 2; Convention on the Elimination of All Forms of Discrimination against Women, art. 21, para. 1; Convention on the Rights of the Child, art. 45, subpara. (*d*); International Convention for the Protection of All Persons from Enforced Disappearance, art. 33, para. 5; United Nations Convention on the Law of the Sea, art. 76, para. 8.

[47] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19, para. 3; International Covenant on Civil and Political Rights, art. 40, para. 4; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 74, para. 1.

[48] Decision I/7 on review of compliance (see footnote 41 above), annex, paras. 36–37; Single Convention on Narcotic Drugs, art. 14.

[49] Decision 24/CP.7 (footnote 40 above), annex, sect. XV.

[50] *Yearbook ... 2015*, vol. II (Part Two), p. 14, para. 26; see also International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 626–627, para. 15; European Commission for Democracy through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of courts, adopted by the Venice Commission at its 100th plenary session (Rome 10–11 October 2014), study No. 690/2012, document CDL-AD (2014)036, p. 31, para. 78.

[51] International Covenant on Civil and Political Rights, art. 42, para. 7 (*c*); International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 16.

[52] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, *I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; Rodley, "The role and impact of treaty bodies", p. 640; Andrusevych, Alge and Konrad, *Case Law of the Aarhus Convention Compliance Committee (2004–2011)*; United Nations Economic Commission for Europe, Compilation of findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date, available from www.unece.org/fileadmin/DAM/env/pp/compliance/Compilation_of_CC_findings.pdf.

[53] Van Alebeek and Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", p. 402; Rodley, "The role and impact of treaty bodies", p. 639; Mechlem, "Treaty bodies and the interpretation of human rights", p. 908.

the rules on treaty interpretation according to articles 31 and 32 of the Vienna Convention on the Law of Treaties. The ordinary meaning of the term by which a treaty designates a particular form of pronouncement mostly indicates that such pronouncements are not legally binding.[54] That is true, for example, for the terms "views" (art. 5, para. 4, of the Optional Protocol to the International Covenant on Civil and Political Rights), "suggestions and recommendations" (art. 14, para. 8, of the International Convention on the Elimination of All Forms of Racial Discrimination) and "recommendations" (art. 76, para. 8, of the United Nations Convention on the Law of the Sea). Sometimes treaties use terms that, as such, are unclear as to whether they imply a legally binding effect, but whose context contributes to identifying possible legal effects.[55] Therefore, treaties usually make it clear, by the terms they use to characterize pronouncements and by providing context, that pronouncements by expert bodies are not, as such, legally binding.[56]

16. That does not exclude the possibility, however, that such pronouncements might be relevant for the interpretation of a treaty as a form of practice subsequently arrived at under the treaty.[57] That possible effect is usually not explicitly addressed by the respective treaties. There are, however, authoritative indications and debates regarding the legal significance, for the purpose of the interpretation of a treaty, of pronouncements of expert bodies.[58] They mostly concern the significance of the pronouncements of expert bodies under human rights treaties (see sect. D below), but also those of expert bodies in other areas (see sect. E below).

### D. Expert bodies under human rights treaties

17. Pronouncements by expert bodies under human rights treaties are usually adopted in reaction to State reports (e.g., "concluding observations"), or in response to individual communications (e.g., "views"), or regarding the implementation or interpretation of the respective treaties generally (e.g., "general comments").[59] The relevance of such pronouncements for the interpretation of the respective treaties is often assessed in general terms.[60]

18. The Human Rights Committee under the International Covenant on Civil and Political Rights did at one stage attempt to explain the relevance of its own pronouncements for the interpretation of the Covenant in terms of the Vienna Convention on the Law of Treaties. In its draft general comment No. 33, the Committee submitted the proposal, for comment by States, that its "general body of jurisprudence", or the acquiescence by States to that jurisprudence, constituted subsequent practice under article 31, paragraph 3 (*b*):

> In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the sense of article 31 (3) (*b*) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States parties in those determinations constitutes such practice.[61]

19. The United States of America, in its comment to draft general comment No. 33, strongly criticized the proposal:

> The views of the Committee cannot as a legal matter constitute the "subsequent practice" of the States Parties to the Covenant … The provision referred to in this case, article 31 (3) (*b*), has never been interpreted, so far as the United States is aware, to include the views of expert bodies. The "subsequent practice" referred to in this provision is generally understood to mean the actual practice of the States Parties, provided that such practice is consistent and is common to, or accepted by, all the Parties. The "subsequent practice" of the States Parties cannot be the views of experts that "serve in their personal capacity" as to what the practice of States Parties *should* be in carrying out their rights and obligations under the Covenant.[62]

20. Ultimately, the Human Rights Committee adopted general comment No. 33 without an explicit reference to article 31, paragraph 3 (*b*), or to the possible significance of its views, and the reactions of States parties to them, as a form of subsequent practice.[63] The Committee, rather, concluded:

> While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the

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[54] This is generally accepted in the literature, see Rodley, "The role and impact of treaty bodies", p. 639; Tomuschat, *Human Rights: Between Idealism and Realism*, pp. 233 and 267; Shelton, "The legal status of normative pronouncements of human rights treaty bodies", p. 559; Keller and Grover, "General comments of the Human Rights Committee and their legitimacy", p. 129; Venice Commission, Report on the implementation of international human rights treaties … (footnote 50 above), p. 30, para. 76.

[55] This is true, for example, for the term "determine" in article 18 of the Kyoto Protocol and decision 24/CP.7 (see footnote 40 above): see Ulfstein and Werksmann, "The Kyoto compliance system: towards hard enforcement", pp. 55–56.

[56] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 18; Rodley, "The role and impact of treaty bodies", p. 639.

[57] Rodley, "The role and impact of treaty bodies", p. 639; Tomuschat, *Human Rights: Between Idealism and Realism*, p. 267.

[58] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 626–630, paras. 15–27; Rodley, "The role and impact of treaty bodies", p. 639; Keller and Grover, "General comments of the Human Rights Committee …", pp. 129–133; Ulfstein, "Individual complaints", pp. 92–93; Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 409–411; Ulfstein, "Treaty bodies and regimes"; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 929–930.

[59] Kälin, "Examination of State reports"; Ulfstein, "Individual complaints"; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 922–930. The legal basis for general comments under the International Covenant on Civil and Political Rights is article 40, paragraph 4, but this practice has been generally accepted also with regard to other expert bodies under human rights treaties: see Keller and Grover, "General comments of the Human Rights Committee …", pp. 127–128.

[60] E.g., Rodley, "The role and impact of treaty bodies", p. 639; Shelton, "The legal status of normative pronouncements of human rights treaty bodies", pp. 574–575; Boyle and Chinkin, *The Making of International Law*, p. 155.

[61] Draft general comment No. 33 on the obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights (Second revised version as of 18 August 2008) (CCPR/C/GC/33/CRP.3), para. 18. This position has also been put forward by several authors: see Keller and Grover, "General comments of the Human Rights Committee …", pp. 130–132 with further references.

[62] United States, "Comments of the United States on the Human Rights Committee's 'Draft general comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant Civil and Political Rights'", 17 October 2008, para. 17. Available from www.ohchr.org/en/calls-for-input/general-comment-no-33-obligations-states-parties-under-optional-protocol.

[63] Human Rights Committee, general comment No. 33 (2008) on obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40*, vol. I (A/64/40 (Vol. I)), annex V.

Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.[64]

…

The Views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These Views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.[65]

21. The fact that the Committee did not pursue its proposal to consider its views, individually or collectively, to be a "general body of jurisprudence" and a form of subsequent practice under article 31, paragraph 3 (*b*), does not, however, necessarily lead to the conclusion that its pronouncements are irrelevant in the context of the present topic.

22. The question of the legal significance of pronouncements of expert bodies under human rights treaties, for the purpose of their interpretation, has been considered by international and national courts as well as by scientific bodies and many authors.[66] Among authors, the views range from those who consider the value of such pronouncements to be minimal[67] to those who consider that they possess an authoritative character[68] and thereby tend to transform them into legally binding obligations.[69]

23. The final report on the impact of findings of the United Nations human rights treaty bodies, which the International Law Association adopted in 2004, provides a good point of departure.[70] The report is based on a comprehensive collection of court decisions from a broad range of States, decisions by international courts and publications that were reasonably retrievable at the time of the report, as well as the deliberations of members of the International Law Association committee concerned. The report proceeds from the generally recognized position that pronouncements of expert bodies under human rights treaties "do not themselves constitute binding interpretations of the treaties".[71] The report also emphasizes that:

Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty.[72]

24. In support, the report quotes a statement by Norway as an example:

While the recommendations and criticism of the monitoring committees are not legally binding, the Norwegian authorities attach great importance to them and they constitute important guidelines in the continuous efforts to ensure the conscientious implementation of the human rights conventions.[73]

25. On that basis, the report then addresses the "more difficult question" of whether pronouncements of expert bodies under human rights treaties "fit into the traditional sources of international law, whether for the purposes of treaty interpretation or as a source relevant to the development of customary international law".[74] The report distinguishes between two possible approaches:

If one adopts a traditional approach to interpretation of the human rights treaties—an approach strongly endorsed by the International Law Commission and some States parties in the specific context of reservations—the findings of the committees themselves would not amount to State practice … However, the responses of individual States or of the States parties as a whole to the findings of the committees would constitute such practice.[75]

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[64] *Ibid.*, para. 11.

[65] *Ibid.*, para. 13.

[66] See footnote 58 above, as well as Alston and Goodman, *International Human Rights*, pp. 834–835; Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, pp. 77–78; Tomuschat, *Human Rights: Between Idealism and Realism*, pp. 233–237 and 266–268; O'Flaherty, "The concluding observations of United Nations human rights treaty bodies", p. 35; Hanski and Scheinin, *Leading Cases of the Human Rights Committee*, pp. 23–24.

[67] E.g., Ando, "L'avenir des organes de supervision: limites et possibilités du Comité des droits de l'homme", p. 186; Dennis and Stewart, "Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health", pp. 493–495; information of 3 February 2004 provided by the Special Rapporteur on the right to education, Katarina Tomasevski, for the first session of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (23 February–5 March 2005) (E/CN.4/2004/WG.23/CRP.4, para. 8) ("Another important issue for the Working Group to consider is the impact of general comments of the Committee on Economic, Social and Cultural Rights on the prospects for an optional protocol to the ICESCR. The Committee has adopted various general comments which reach far beyond the text of the ICESCR. … While this practice would support a rights-based rather than treaty-based human rights approach, it undermines the principle of legal security by reading into a legal text a contents which simply is not there. A helpful interpretative principle may therefore be a focus on the legal meaning of economic, social and cultural rights as affirmed in international and domestic jurisprudence.").

[68] E.g., Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, p. 893; Hanski and Scheinin, *Leading Cases of the Human Rights Committee*, p. 23; Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, p. 265.

[69] Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 384–385; see also Ulfstein, "Individual complaints", pp. 92–93.

[70] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies.

[71] *Ibid.*, p. 626, para. 15; see also Tomuschat, *Human Rights: Between Idealism and Realism*, pp. 233 and 267.

[72] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 16.

[73] *Ibid.*, footnote 19, citing Norway, Ministry of Foreign Affairs, "Human rights in Norway", White Paper to the Storting, No. 21 (1999–2000); comments by the Government of the United States on the concluding observations of the Human Rights Committee, 12 February 2008 (CCPR/C/USA/CO/3/Rev.1/Add.1), pp. 8–9; views of the Government of Australia on draft general comment No. 35 on article 9 of the International Covenant on Civil and Political Rights—Right to Liberty and Security of Person and Freedom from Arbitrary Arrest and Detention, May 2014, available from www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/Submissions/AustralianGovernment.doc, para. 6 ("Australia regards the views of the Committee on the interpretation of the rights under the Covenant as authoritative, however, it does not consider that they are determinative of the nature and scope of those obligations"); statement of the Canadian delegation during the discussion of the Human Rights Council's report on Canada, press release, 8 July 2015 ("the committee's views were not legally binding, but Canada had accepted its views in a majority of cases"), available from www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16215&LangID=E; observations by the Government of the United Kingdom on Human Rights Committee general comment No. 24 (1995) ("The United Kingdom is, of course, aware that the General Comments adopted by the Committee are not legally binding.").

[74] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 17.

[75] *Ibid.*, pp. 628–629, para. 21.

26. According to the second, alternative approach:

> The reference in article 31 to subsequent practice—as with so many other provisions in the [Vienna Convention on the Law of Treaties]—is written as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other's compliance and to react to non-compliance. Human rights treaties are different in some important respects from the presumed ideal type of a multilateral treaty which underpins the formulation of the individual provisions of the [Vienna Convention on the Law of Treaties]. Given these differences it appears arguable that in interpreting these types of treaties … relevant subsequent practice might be broader than subsequent *State* practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties.[76]

27. The report, without explicitly taking a position as to which of the two positions is the correct one, pursues its own analysis by describing the practice of States parties in reaction to pronouncements of human rights bodies. It focuses in particular on how national and international courts have considered such pronouncements for the purpose of interpretation. It is indeed appropriate, before raising the question of whether human rights treaties call for special methods of interpretation,[77] to look at which positions international courts and States parties, and in particular their courts, have adopted regarding the interpretative relevance of pronouncements of human rights expert bodies.

### 1. International courts

28. The International Court of Justice has confirmed, in particular in 2010 in the case *Ahmadou Sadio Diallo* that pronouncements of the Human Rights Committee are relevant for the purpose of the interpretation of the International Covenant on Civil and Political Rights:

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".
>
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[78]

29. The final report of the International Law Association comes to a similar conclusion regarding international courts.[79] Regional human rights courts have also used pronouncements of expert bodies as a possible source of inspiration, but they have not treated them as binding.[80]

30. As with other international courts, the International Court of Justice did not, however, explain the relevance of "the interpretation adopted by this independent body" in terms of the rules of interpretation under the Vienna Convention on the Law of Treaties.[81]

### 2. Domestic courts

31. The final report of the International Law Association found a large number of decisions in which national courts have referred to pronouncements of human rights bodies.[82] The report, while recognizing certain "limitations of its data collection and analysis",[83] nevertheless provides a broad and regionally rather representative collection of decisions that does not seem to have been replaced by a richer specific analysis.[84]

32. In the large majority of the decisions, the domestic courts considered that pronouncements by expert bodies under human rights treaties were not legally binding on them as such;[85] reasons included the fact that such bodies were not courts[86] or that there was no legal basis in do-

[76] *Ibid.*, p. 629, para. 22.

[77] Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 263–266.

[78] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (see footnote 52 above), pp. 663–664, para. 66; see also *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, *I.C.J. Reports 2012*, p. 10, at p. 27, para. 39; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136, at pp. 179–181, paras. 109, 110 and 112, and at pp. 192–193, para. 136, in which the Court referred to various pronouncements of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, pp. 422–423, at p. 457, para. 101, referring to pronouncements of the Committee against Torture when determining the temporal scope of the Convention against Torture.

[79] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 683–684, para. 175.

[80] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 28 August 2013, Inter-American Court of Human Rights, Series C, No. 268, paras. 189 and 191; *Civil Liberties Organisation et al. v. Nigeria*, Communication No. 218/98, Decision, African Commission on Human and Peoples' Rights, Twenty-ninth Ordinary Session, Tripoli, Libya, May 2001, para. 24 ("In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. This Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the [United Nations] treaty bodies."); *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision, African Commission on Human and Peoples' Rights, Thirtieth Ordinary Session, Banjul, the Gambia, October 2001, para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic[,] Social and Cultural Rights [in its in general comment No. 7]"); *Margus v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48–50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, European Court of Human Rights, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107–108, 147–151, 155 *et seq.* and 158; *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70–72; see more broadly regarding regional courts, International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 662–675, paras. 116–155.

[81] See International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 627, para. 17.

[82] *Ibid.*, pp. 639–659, paras. 46–109.

[83] *Ibid.*, p. 685, para. 180, and p. 631, para. 28, footnote 29.

[84] The collection *Oxford Reports on International Law in Domestic Courts* of the International Law in Domestic Courts service contains a number of relevant cases, see https://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts.

[85] See the decisions quoted in the report of the Venice Commission, Report on the implementation of international human rights treaties … (footnote 50 above), p. 30, para. 76 (Ireland, *Kavanagh (Joseph) v. Governor of Mountjoy Prison and Attorney General*, Supreme Court, [2002] IESC 13, para. 36; France, *Hauchemaille v. France*, 11 October 2001, Council of State, para. 22).

[86] France, *Hauchemaille* (see previous footnote), para. 22; Sri Lanka, *Singarasa (Nallaratnam) v. Attorney General, Application for judicial review*, 15 September 2006, Supreme Court, SC Spl (LA) No. 182/99, para. 21; New Zealand, *Wellington District Legal Services*

mestic law.[87] Most courts did, however, recognize that such pronouncements nevertheless "deserve[d] to be given considerable weight in determining the meaning of a relevant right and the existence of a violation".[88] The German Federal Administrative Court has set forth the following on that approach:

These texts are not binding under international law. But the concluding observations give indications of what is generally consented in State practice. General comments authoritatively articulate the standards in the practice of the Committee on Economic, Social and Cultural Rights, and thus serve as means of interpretation and contribute to shaping the understanding of the terms of the treaty by the States parties.[89]

33. It was only exceptionally that a domestic court either considered a pronouncement of a human rights body to be "authoritative"[90] or, on the contrary, to have "no value".[91] A more recent analysis has confirmed that picture.[92] The final report of the International Law Association summarized its findings thereon as follows:

While national courts have generally not been prepared to accept that they are formally bound by committee interpretations of treaty provisions, most courts have recognised that, as expert bodies entrusted by the States parties with functions under the treaties, the treaty bodies' interpretations deserve to be given considerable weight in determining the meaning of a relevant right and the existence of a violation.[93]

34. That conclusion, however, is not incompatible with the fact that there are also decisions of domestic courts that do not refer to treaty bodies, although relevant pronouncements exist, a fact that led Van Alebeek and Nollkaemper to conclude:

In brief, as a consequence of the non-binding nature of these decisions, national courts seem to generally approach treaty body output in a pick-and-choose manner. If courts are convinced by the interpretation of State obligations found in the treaty body output, they refer to its authoritative status. If not, its non-binding nature is emphasised.[94]

35. When considering such pronouncements and referring to them, domestic courts have only rarely attempted to explain the legal basis for their assessment that such pronouncements, while not legally binding as such, should or need to be taken into account. They have mostly merely referred to those pronouncements in passing.[95]

### 3. Previous work of the Commission

36. In its Guide to Practice on Reservations to Treaties,[96] the Commission addressed the question of the legal effect, for the purpose of treaty interpretation, of pronouncements of expert bodies under human rights treaties. Guideline 3.2.1 reads:

*Competence of the treaty monitoring bodies to assess the permissibility of reservations*

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

37. The guideline assumes that pronouncements of treaty monitoring bodies that assess the permissibility of reservations produce the same effect as, and therefore have no greater effect than, such pronouncements generally. The carefully crafted guideline does not address the question of which exact legal effect, for the purposes of

*Committee v. Tangiora* [1998], Court of Appeal, 1 *New Zealand Law Reports* 129, 137; Spain, Case No. STC 70/2002, Judgment of 3 April 2002, Constitutional Court, sect. II, para. 7 (*a*).

[87] Canada, *Ahani v. Canada (Attorney General), Revised February 12, 2002*, Ontario Court of Appeal, para. 33 ("To give effect to Ahani's position, however, would convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result."); Ireland, *Kavanagh (Joseph)* (see footnote 85 above), para. 42 ("The terms of the Covenant have not been enacted into Irish law. They cannot prevail over the provisions of the Offences against the State Act, 1939 or of a conviction by a court established under its provisions. For the reasons already stated, the views of the Committee cannot be invoked to invalidate that conviction without contravening the terms of article 29, section 6[,] article 15, section 2 (1) and article 34 section 1 of the Constitution."). But see Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 367–371, who quote decisions by domestic courts that have enabled the taking into account and implementation of pronouncements of expert bodies under human rights treaties in dualist legal systems, at pp. 379–380.

[88] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 683–684, para. 175.

[89] Germany, Federal Administrative Court, Judgment, 29 April 2009, *Entscheidungen des Bundesverwaltungsgerichts*, vol. 134, p. 1, at p. 22, para. 48 (translation by the author; original: "*Diese Texte sind völkerrechtlich nicht verbindlich. Jedoch können den abschließenden Bemerkungen Hinweise auf die allgemeine konsentierte Staatenpraxis entnommen werden. Die allgemeinen Bemerkungen beschreiben in autorisierter Form die Standards in der Praxis des Sozialausschusses, dienen damit als Interpretationshilfe und prägen so das Verständnis der vertraglichen Rechtsbegriffe durch die Vertragsstaaten mit*.").

[90] South Africa, High Court Witwatersrand, *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*, 2002 (6) *Butterworths Constitutional Law Reports*, p. 625, at p. 629 ("general comments have an authoritative status under international law"); Hong Kong, China, Court of Appeal, *R v. Sin Yau-ming*, 30 September 1991, (1991) 1 *Hong Kong Public Law Reports*, p. 88, at p. 89, para. 3 ("considerable weight"); Canada, Supreme Court, *Suresh v. Canada*, 11 January 2002, [2002] 1 *Supreme Court Reports* 3, 2002 SCC 1, para. 67 ("clear import of the [International Covenant on Civil and Political Rights]"); New Zealand, Court of Appeal, *R. v. Goodwin (No. 2)*, [1990–1992] 3 *New Zealand Bill of Rights Reports*, p. 314, at p. 321 ("considerable persuasive authority"); Netherlands, Central Appeals Tribunal, *Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank*, 21 July 2006, LJN: AY5560 (stating that even though the views of the Committee were not binding they have considerable weight for the interpretation and departure from them is only permissible if there are overriding reasons of public interest); Belize, Supreme Court, *Cal and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment & Coy and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment*, 18 October 2007, ILR, vol. 135 (2009), p. 77.

[91] United Kingdom, House of Lords, *Jones v. Saudi Arabia, 14 June 2006*, [2006] UKHL 26 (2007) 1 AC 270, para. 57 ("no value"); Japan, Tokyo District Court, Judgment of 15 March 2001, 1784 *Hanrei Jiho*, p. 67, at p. 74 ("the General Comment neither represents authoritative interpretation of the [International Covenant on Civil and Political Rights] nor binds the interpretation of the treaty in Japan").

[92] Van Alebeek and Nollkaemper, "The legal status of decisions …", pp. 397–404.

[93] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 683–684, para. 175.

[94] Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 402, also p. 403.

[95] *Ibid.*, p. 401; one of the few judgments in which this was the case is High Court of Osaka, Judgment of 28 October 1994, 1513 *Hanrei Jiho* 71, p. 87, also available from *Japanese Annual of International Law*, vol. 38 (1995), p. 109, at p. 118; Germany, Federal Administrative Court, Judgment (see footnote 89 above).

[96] *Yearbook ... 2011*, vol. II (Part Three), p. 30.

interpretation of the treaty, such pronouncements produce. That question is, however, addressed more directly in guideline 3.2.3:

*Consideration of the assessments of treaty monitoring bodies*

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.[97]

38. In its commentary to that guideline, the Commission stated:

[T]here is no doubt that contracting States or contracting organizations have a general duty to cooperate with the treaty monitoring bodies that they have established—which is what is evoked by the expression "shall give consideration" in the guideline. Of course, if such bodies have been vested with decision-making power, the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts. In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers. Consequently, their conclusions are not legally binding, and States parties are obliged only to "give consideration" to their assessments in good faith.[98]

39. The commentary by the Commission is not limited to pronouncements of treaty monitoring bodies regarding the permissibility of reservations. It is formulated in general terms and on the basis of considerations that are generally applicable to pronouncements of such bodies in the fulfilment of their mandate. The commentary makes a statement not only regarding the legal effect of a pronouncement of a monitoring body as such, but also, by necessary implication, regarding their effect for the interpretation of the treaty itself.

40. Like most international and national courts, the Commission has not explained its position in terms of the general rules of interpretation under the Vienna Convention on the Law of Treaties. It is to that question that the present report now turns.

4. Relevance of pronouncements according to the rules of interpretation of the Vienna Convention on the Law of Treaties

41. Some authors have questioned whether it is appropriate to interpret human rights treaties according to the general rules of interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties, invoking a supposed special nature of such treaties.[99] Other authors have defended the applicability of articles 31 and 32 to human rights treaties by pointing out, *inter alia*, that the provisions leave room for eventual specific aspects of human rights treaties.[100] The Commission itself, when considering draft conclusion 1 of the present topic, left the question open as to whether it should refer to the "nature" of a treaty as a relevant consideration for its interpretation, but agreed that all questions of treaty interpretation can be resolved within the framework of articles 31 and 32 of the Vienna Convention.[101] There is indeed no reason why articles 31 and 32 would be insufficient to deal with particular aspects of human rights treaties. The provisions, and the Vienna Convention generally, are not only suitable for a limited "ideal type" of multilateral treaty,[102] but they were even elaborated when the existence of expert bodies within the emerging human rights regime was already well known.[103] Indeed, expert bodies under human rights treaties themselves, like international human rights courts, occasionally invoke and apply the Vienna Convention rules on interpretation.[104] It is therefore appropriate to assess the relevance of pronouncements of expert bodies for the purpose of the interpretation of human rights treaties on the basis and within the framework of the Vienna Convention rules of interpretation.

(a) *Pronouncements as reflecting or giving rise to subsequent agreements or subsequent practice of the States parties themselves*

42. A pronouncement of an expert body under a human rights treaty cannot, as such, constitute subsequent practice under article 31, paragraph 3 (*b*), since that provision requires that a subsequent practice in the application of the treaty establishes the agreement of the parties. Indeed, the Human Rights Committee has abandoned its own proposal to consider its pronouncements to be a form of subsequent practice under article 31paragraph 3 (*b*).[105]

43. Pronouncements of expert bodies may, however, reflect or give rise to a subsequent agreement or a subsequent practice *by the parties themselves*, which establish their agreement regarding the interpretation of the treaty under article 31, paragraph 3 (*a*) or (*b*). That possibility has been recognized by the Commission,[106] States,[107] the final report of the International Law Association[108] and

[97] *Ibid.*

[98] *Ibid.*, p. 239, para. (3).

[99] Craven, "Legal differentiation and the concept of the human rights treaty in international law", pp. 497–499; Giegerich, "Reservations to multilateral treaties", para. 31.

[100] Fitzmaurice, "Interpretation of human rights treaties", in particular pp. 769–770; Gardiner, *Treaty Interpretation*, pp. 474–478; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 919–920; Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", p. 317.

[101] *Yearbook ... 2013*, vol. II (Part Two), para. 39, at pp. 21–22, para. (16) of the commentary to draft conclusion 1 as provisionally adopted.

[102] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 629, para. 22.

[103] The International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights were both adopted in 1966, after long and prominent negotiations.

[104] See, e.g., communication No. 118/1982, *Alberta Union v. Canada*, Views adopted on 18 July 1986, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), annex IX, sect. B, para. 6.3; Nolte, "Second report for the ILC Study Group on treaties over time", pp. 276–277 and 244–246 (European Court of Human Rights) and 268–270 (Inter-American Court of Human Rights); Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", p. 273; Keller and Grover, "General comments of the Human Rights Committee …", p. 164.

[105] See para. 20 above, at footnote 63.

[106] *Yearbook ... 2013*, vol. II (Part Two), para. 39, at pp. 23–24, para. (10) of the commentary to draft conclusion 2 as provisionally adopted.

[107] "States parties' reactions to the pronouncements or activities of a treaty body might, in some circumstances, constitute subsequent practice (of those States) for the purposes of article 31, paragraph 3." Statement of the United States before the Sixth Committee on 3 November 2015 (A/C.6/70/SR.22, para. 46).

[108] International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, pp. 628–629, para. 21.

authors.[109] There is indeed no reason why a subsequent agreement between the parties or subsequent practice that establishes the agreement of *the parties themselves* regarding the interpretation of a treaty could not arise from, or be reflected in, a pronouncement of a human rights expert body. Such a possibility would not circumvent the treaty provisions according to which such pronouncements are not binding, since the legal effect under article 31, paragraph 3 (*a*) or (*b*), would not be produced by the pronouncement itself, but rather arise from the conduct and from the agreement of the States parties.

44. Whereas a pronouncement by a human rights expert body can, in principle, give rise to a subsequent agreement or a subsequent practice *by the parties* under article 31, paragraph 3 (*a*) and (*b*), that possibility is not easily fulfilled in practice.[110] Most human rights treaties at the universal level have many parties. It will mostly be very difficult to establish that all parties have agreed, explicitly or by way of their practice, that a particular pronouncement of an expert body reflects the correct interpretation of the treaty. In fact, expert bodies under human rights treaties themselves have rarely attempted to specifically identify the practice of the parties for the purpose of interpreting a particular treaty provision.[111]

45. The pronouncement by the Committee under the International Covenant on Economic, Social and Cultural Rights, in its general comment No. 15 (2002), that articles 11 and 12 of that Covenant imply a right to water, offers an example for the way in which an agreement of the parties may come about.[112] After a debate over a number of years, the General Assembly on 17 December 2015 finally adopted a resolution, by consensus, that follows the interpretation of the Committee.[113] That resolution may reflect an agreement under article 31, paragraph 3 (*a*) or (*b*), depending on whether the consensus actually implies the acceptance of all the parties regarding the interpretation that is contained in the pronouncement.[114]

46. Another way for pronouncements of expert bodies to reflect or give rise to a subsequent agreement or subsequent practice under article 31, paragraph 3 (*a*) or (*b*), may result from the recent practice of the Human Rights Committee under the International Covenant on Civil and Political Rights of submitting drafts of general comments to States for comments before their adoption.[115] Depending on the reactions of States, such general comments may ultimately reflect or give rise to an agreement of the parties regarding the interpretation of a treaty.

47. In many cases an agreement of all the parties to a treaty regarding the interpretation contained in a pronouncement would only be conceivable if the absence of objections can be counted as reflecting an agreement by those State parties that have remained silent. In respect of that question the Commission has provisionally adopted draft conclusion 9, paragraph 2, according to which, "[s]ilence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction".[116]

48. Whereas a State party to a human rights treaty may have an obligation, under the general duty to cooperate under the treaty, to take into account and to react to those pronouncements of an expert body that are specifically addressed to it (such as a pronouncement regarding the permissibility of a reservation that it has formulated,[117] or individual communications regarding its conduct and its own report[118]), it cannot be expected that States parties react to every pronouncement by such a body, be it addressed to another State or to all States generally.[119] The practice of one or more States parties that follow a pronouncement by a human rights expert body "in the application of the treaty" also does not usually call for a reaction by those other States parties that have not engaged in such practice.[120] It is true that regional human rights courts have sometimes recognized that the practice of a substantial majority of States parties may have an effect on the interpretation of a treaty.[121] But such courts have not taken the position that other States parties should have reacted in order to prevent such an

[109] Mechlem, "Treaty bodies and the interpretation of human rights", pp. 920–921; Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 289–290; Herdegen, *Völkerrecht*, p. 125; Ulfstein, "Individual complaints", p. 96; Craven, *The International Covenant on Economic, Social and Cultural Rights—A Perspective on its Development*, p. 91.

[110] Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 293 and 318.

[111] See examples in Nolte, "Second report for the ILC Study Group on treaties over time", pp. 278–282, in particular p. 281; Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", p. 318; in this respect the practice of the expert bodies under the universal human rights treaties differs considerably from that of the European Court of Human Rights, see Nolte, "Second report for the ILC Study Group on treaties over time", pp. 246–262.

[112] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, *Official Records of the Economic and Social Council, 2003, Supplement No. 2* (E/2003/22-E/C.12/2002/13), annex IV.

[113] General Assembly resolution 70/169 of 17 December 2015, adopted without a vote, recalling general comment No. 15 (2002) of the Committee on Economic, Social and Cultural Rights on the right to water, ninth preambular paragraph; see, for previous resolution on the topic, General Assembly resolution 64/292 of 28 July 2010, which was adopted with 41 abstentions.

[114] See *Yearbook ... 2014*, vol. II (Part Two), para. 76, at p. 127, draft conclusion 10, para. 3, and pp. 133–134, paras. (31)–(38) of the commentary thereto, as provisionally adopted.

[115] Rodley, "The role and impact of treaty bodies", pp. 631–632; Keller and Grover, "General comments of the Human Rights Committee …", pp. 172–173: see statements of Australia, Belarus, Canada, Ireland, Japan, Switzerland, the United Kingdom and the United States prior to the adoption of general comment No. 35 of the Human Rights Committee in reaction to its draft, available from www.ohchr.org).

[116] See *Yearbook ... 2014*, vol. II (Part Two), p. 107, para. 75, draft conclusion 9, para. 2.

[117] *Yearbook ... 2011*, vol. II (Part Three), p. 239, para. (3) of the commentary to draft guideline 3.2.3.

[118] Tomuschat, "Human Rights Committee", para. 14 ("not to react at all … would appear to amount to a violation").

[119] Ulfstein, "Individual complaints", p. 97; it has been said that "in the practice of the [Human Rights Committee] to date, there have been no instances where any State other than the one examined has formally commented on the [Human Rights Committee] concluding observations": Citroni, "The Human Rights Committee and its role in interpreting the International Covenant on Civil and Political Rights *vis-à-vis* States Parties".

[120] See Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 410.

[121] *Yearbook ... 2014*, vol. II (Part Two), para. 76, at p. 124, para. (6) of the commentary to draft conclusion 9; *Loizidou v. Turkey* (Preliminary Objections), 23 March 1995, European Court of Human Rights, Series A, No. 310, paras. 79–80 and 82.

effect. Human rights treaties are applied in a multitude of cases and their enforcement is typically expected to take place through specific national procedures. It would therefore be difficult to determine under which circumstances, among the multitude of applications of a human rights treaty, a reaction by other States parties would be called for. It cannot be excluded, however, that a particular pronouncement or practice may exceptionally "call for some reaction", perhaps owing to the importance of the rule in question or the intensity of the debate among States in a particular case.

(b) *Pronouncements of treaty bodies as a relevant means of interpretation as such*

49. Apart from possibly giving rise to, or reflecting, subsequent agreements or subsequent practice of the parties themselves under article 31, paragraph 3 (*a*) and (*b*), of the Vienna Convention on the Law of Treaties, pronouncements by human rights expert bodies may also be a relevant means of interpretation as such.

50. Since pronouncements of expert bodies are usually not legally binding, any possible legal effect for the purpose of interpretation must be a lesser one.[122] Two well-known categories of such a lesser effect exist: the first is that pronouncements of expert bodies, while not binding, nevertheless "shall" be "taken into account". The second possibility is that such pronouncements simply "may" be taken into account. The distinction between "shall" and "may" can be found in articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 designates the principal means of interpretation that any interpreter of a treaty *needs* to take into account, whereas article 32 describes supplementary means of interpretation that an interpreter *may*, or may not, take into account.

51. It is not apparent why, under the rules of interpretation of the Vienna Convention on the Law of Treaties, pronouncements of expert bodies would *need* to be taken into account. Such pronouncements are not, as such, means of interpretation under article 31. The Commission has, however, stated in the commentary to its Guide to Practice on Reservations to Treaties that while "their conclusions are not legally binding … States parties are *obliged** only *to "give consideration" to** their assessments in good faith".[123] That proposition is not limited to a possibility ("may") to have recourse to pronouncements of expert bodies as a supplementary means of interpretation, as under article 32, but rather appears to designate such pronouncements as a means of interpretation that needs ("shall") be taken into account, as under article 31.

52. The statement in the commentary of the Guide to Practice on Reservations to Treaties does not, however, address the relevance of pronouncements of expert bodies under the rules of interpretation of the Vienna Convention on the Law of Treaties. It rather concerns the duty of every State party under a human rights treaty to cooperate in good faith and thus take account of pronouncements that are addressed to it (as are pronouncements regarding the permissibility of a reservation).[124] Moreover, the context in which the commentary is formulated suggests that the Commission was not so much concerned with the question of whether parties are actually generally *obliged* to take pronouncements of human rights bodies into account, but rather with explaining that such pronouncements are not binding. That does not exclude that pronouncements of expert bodies, as practice under the treaty generally, may contribute "to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty".[125]

53. The practice of international and domestic courts suggests that pronouncements of human rights expert bodies, in the vast majority of cases, are mostly not taken into account by those courts as a matter of obligation but rather as supplementary.[126] Therefore, domestic and international courts normally use pronouncements of treaty bodies in the way in which article 32 describes supplementary means of interpretation. Accordingly, the High Court of Osaka stated: "One may consider that the 'general comments' and 'views'… should be relied upon as supplementary means of interpretation of the [International Covenant on Civil and Political Rights]".[127]

54. States parties to a human rights treaty do not consider that their courts are under a general obligation pursuant to the treaty to take pronouncements of an expert

[122] Rodley, "The role and impact of treaty bodies", pp. 632 and 639.

[123] *Yearbook ... 2011*, vol. II (Part Three), p. 239, para. (3) of the commentary to draft guideline 3.2.3.

[124] *Ibid.*

[125] *Yearbook ... 2013*, vol. II (Part Two), para. 39, at p. 21, para. (15), footnote 58, of the commentary to draft conclusion 1 as provisionally adopted; see also *Yearbook ... 2015*, vol. II (Part Two), para. 129, at p. 61, para. (34) of the commentary to draft conclusion 11, para. 3.

[126] See, e.g., Netherlands: on the one hand: Central Appeals Tribunal (footnote 90 above); on the other hand: Annual Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 40* (A/46/40) chap. V, sect. J, para. 708: Netherlands do not share the Human Rights Committee's views and announce payment only "out of respect for the Committee"; United Kingdom: on the one hand: *Jones v. Saudi Arabia* (footnote 91 above) ("no value"); on the other hand: *A. v. Secretary of State for the Home Department*, House of Lords, [2005] UKHL 71, paras. 34–36, relying heavily on treaty body pronouncements to establish an exclusionary rule of evidence that prevents the use of information obtained by means of torture; Court of Appeal: *R (on the application of Al-Skeini) v. Secretary of State for Defence, Application for judicial review*, (2005) EWCA Civ 1609, (2006) *Human Rights Law Reports* 7, para. 101, citing general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant of the Human Rights Committee (*Human Rights Instruments*, vol. I: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty* Bodies, HRI/GEN/1/Rev.9(Vol.I), p. 243) to establish the extraterritorial application of the Human Rights Act 1998; South Africa: *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* (footnote 90 above) ("General comments have an authoritative status under international law"); on the other hand: Constitutional Court: *Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)* (CCT 8/02) [2002] ZACC 15, paras. 26 and 37, rejecting the application of the "minimum-core standard" set out by the Committee on Economic, Social and Cultural Rights in general comment No. 3 (1990) on the nature of States parties' obligations (HRI/GEN/1/Rev.9(Vol.I), p. 7); Japan: on the one hand: Osaka High Court, Judgment, 28 October 1994 (footnote 95 above) ("One may consider that the 'general comments' and 'views' … should be relied upon"); on the other hand: Tokyo District Court (footnote 91 above), ("the general comment neither represents authoritative interpretation of the [International Covenant on Civil and Political Rights] nor binds the interpretation of the treaty in Japan").

[127] Japan, Osaka High Court, Judgment of 28 October 1994 (footnote 95 above).

body into account whenever they apply the treaty.[128] Since human rights treaties are typically applied at the domestic level, and since such treaties usually leave room for States parties to decide the way in which they transpose the obligations that arise under the treaty to their domestic law,[129] it cannot be assumed that human rights treaties expect domestic courts to always take pronouncements of human rights expert bodies into account as a matter of legal obligation. Such a duty may, however, flow from the domestic law of a particular State itself, in particular if the national constitution is understood as encouraging the reception of international law generally, or at least certain kinds of international obligations.[130]

55. That does not exclude the idea that such pronouncements should nevertheless be taken very seriously. As the International Court of Justice has held, interpreters "should ascribe great weight to the interpretation [of the International Covenant on Civil and Political Rights] adopted by this independent body [the Human Rights Committee] that was established specifically to supervise the application of that treaty".[131] The point is rather that the weight that should be given to such pronouncements in each case depends on specific considerations, which include the cogency of their reasoning,[132] the character of the treaty and of the treaty provisions in question,[133] the professional composition of the responsible body,[134] the procedure by which a pronouncement has been arrived at[135] and possibly other factors.[136] It would therefore go too far to accord such pronouncements a general "presumption in favour of substantive correctness",[137] or to even assume that "the final arbiter for interpreting the Covenant [is] the Committee and not individual States".[138]

56. That means, in particular, that an individual pronouncement normally carries less weight than a series of pronouncements or a general comment reflecting a settled position on a question of interpretation ("jurisprudence" or "case law"). Accordingly, the International Court of Justice has emphasized the "considerable body of interpretative case law" and the "jurisprudence" of the Human Rights Committee in order to substantiate the proposition that "it should ascribe great weight to the interpretation adopted by this independent body" in a general comment[139] as it reflected "30 years of experience in the application of the above-mentioned Article 14".[140] The interpretative weight of a general comment, for the purpose of interpretation, accordingly depends on whether it reflects a thoroughly considered view of the Committee regarding the actual legal content (*lex lata*) of certain provisions of the Covenant,[141] in particular whether the general comment is based on repeated engagement by the Committee with certain specific cases or situations.[142] Every element of a general comment should be assessed separately under that standard.[143] The level of acceptance

[128] Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 408.

[129] Çalı, "Specialized rules of treaty interpretation: human rights", pp. 529–530.

[130] Germany, Order of the Second Senate of 14 October 2004, Federal Constitutional Court, 2 BvR 1481/04 ("*Görgülü*"), para. 33 ("This constitutional significance of an agreement under international law [here: the European Convention on Human Rights], aiming at the regional protection of human rights, is the expression of the Basic Law's commitment to international law (*Völkerrechtsfreundlichkeit*); the Basic Law encourages both the exercise of State sovereignty through the law of international agreements and international cooperation, and the incorporation of the general rules of public international law, and therefore is, if possible, to be interpreted in such a way that no conflict arises with duties of the Federal Republic of Germany under public international law."), available from www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html; Rodley, "The role and impact of treaty bodies", p. 641.

[131] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (footnote 52 above), pp. 663–664, para. 66.

[132] Sweden (on behalf of the Nordic countries) (A/C.6/70/SR.20, para. 8); the reasoning on which pronouncements of expert bodies under human rights treaties are based is often rather short and not very methodological insofar as they elaborate on the interpretation of existing legal obligations arising under the treaty: Nolte, "Second report for the ILC Study Group on treaties over time", p. 277; Kälin, "Examination of State reports", pp. 50–60; Mechlem, "Treaty bodies and the interpretation of human rights", pp. 908 and 930; Shelton, "The legal status …", p. 574.

[133] Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", pp. 266–267.

[134] Depending, *inter alia*, on whether "persons having legal experience" were involved; see Rodley, "The role and impact of treaty bodies", pp. 624–625.

[135] Rodley, "The role and impact of treaty bodies", pp. 641–644, estimates that, due to the more or less limited scope of activities, different expert bodies under human rights treaties do not have a "similar authority", and he notes that for these bodies "there is too much work to be done, in too short a time, with inadequate resources"; Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 402–403.

[136] It may occur, for example, that the extraordinary circumstances of a particular case contribute to an unbalanced assessment by an expert body: see Happold, "Julian Assange and diplomatic asylum" (concerning an expert body that does not fall within the scope of the present report (para. 11 above)).

[137] Tomuschat, *Human Rights: Between Idealism and Realism*, p. 267; Hanski and Scheinin, *Leading Cases of the Human Rights Committee*, p. 23.

[138] United Nations, Office of the United Nations High Commissioner for Human Rights, "Human Rights Committee discusses the report of Canada", press release, 8 July 2015. Available from www.ohchr.org/en/press-releases/2015/07/human-rights-committee-discusses-report-canada?LangID=E&NewsID=16215.

[139] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (see footnote 52 above), pp. 663–664, para. 66.

[140] *Judgment No. 2867* (see footnote 78 above), p. 27, para. 39; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 78 above), p. 179, para. 109, referring to "the constant practice of the Human Rights Committee"; Rodley, "The role and impact of treaty bodies", p. 631 ("close to a codification of evolving practice").

[141] Keller and Grover, "General comments of the Human Rights Committee …", p. 124.

[142] *Judgment No. 2867* (see footnote 78 above), p. 27, para. 39, where the Court contrasted the first general comment No. 13 (1984) on administration of justice of the Human Rights Committee (concerning equality before courts and tribunals; HRI/GEN/1/Rev.9 (Vol.I) (see footnote 126 above), p. 184) with the second general comment on the question (general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32) and relied on the latter, as it reflected "30 years of experience in the application of the above-mentioned Article 14": Ulfstein, "Law-making by human rights treaty bodies", p. 252.

[143] Thus, for example, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 39, where the Committee under the International Covenant on Economic, Social and Cultural Rights states that "[t]o comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health *in other countries, and to prevent third parties from violating the right in other countries**, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law" (*Official Records of the Economic and Social Council, 2001, Supplement No. 2* (E/2001/22-E/C.12/2000/21), annex IV), which was clearly a statement *de lege ferenda*: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 78 above), pp. 180–181, para. 112.

of a particular pronouncement, or series of pronouncements, by States parties is also an important factor that determines the degree to which States, and their courts, should or need to take them into account.[144] It is, however, also clear that an expert body may always reconsider its own interpretative practice ("case law", "jurisprudence") in the light of further developments.[145]

57. The assessment of the weight to be given to pronouncements of expert bodies under human rights treaties, for the purpose of interpretation, is based on an analysis of State and court practice and of the literature. It avoids a misleading alternative between a "traditional approach" to the interpretation of human rights treaties and an approach that considers that "human rights treaties are different".[146] Pronouncements of expert bodies are no more binding or authoritative than what the respective treaty provides according to the rules of interpretation (arts. 31 and 32), but the rules are open enough to take any specific features of such treaties into account.[147]

### 5. Pronouncements of treaty bodies as "other subsequent practice" under article 32

58. Pronouncements of expert bodies are a form of practice under human rights treaties that takes place subsequent to their conclusion. The question is whether such pronouncements are therefore "other subsequent practice" under article 32 for the purpose of the present project.

59. In the course of the work on the present topic, the Commission has adopted draft conclusion 1, paragraph 4, according to which "recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32".[148] Pronouncements of expert bodies are indeed "in the application of the treaty" since such "application", according to the Commission:

> Includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation.[149]

60. Pronouncements of expert bodies under human rights treaties, as acts in the fulfilment of their mandate given by the States parties under the treaty, are "official statements regarding its interpretation" even if they are not binding. Official statements by individual States parties regarding the interpretation of a treaty are, after all, also not binding (for the other party or parties). The designation of a pronouncement of an expert body as "official" does not, of course, mean that such pronouncements are thereby assimilated to (official) acts of a State. Just as (official) acts of international organizations are not attributed to their member States, the term "official" only serves to characterize acts that are performed in the exercise of an element of public authority, as opposed to "private acts and omissions".[150] Such an element of authority may also be derived from or be established between States, as in the case of a mandate that is provided to expert bodies by a treaty.

61. However, the classification of pronouncements of expert bodies as "other subsequent practice in the application of the treaty" under article 32 would be excluded if such practice were limited to the practice of one of the *parties* to the treaty. The Commission has provisionally adopted draft conclusion 4, paragraph 3, according to which "[o]ther 'subsequent practice' … consists of conduct by one or more parties in the application of the treaty, after its conclusion".[151] Later, however, the Commission provisionally adopted draft conclusion 11, paragraph 3, according to which "practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32".[152] In its commentary to draft conclusion 11, paragraph 3, the Commission noted:

> The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1, para. 4, and 4, para. 3, provisionally adopted by the Commission at its sixty-fifth session, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties.[153]

62. The pronouncements of expert bodies under human rights treaties and the practice of an international organization in the application of its own instrument have in common that, while they are not the practice of a party to the treaty, they are nevertheless official pronouncements and conduct whose purpose under the treaty is to contribute to its proper application. Like the practice of international organizations, pronouncements of expert bodies cannot themselves be a form of subsequent practice under article 31, paragraph 3 (*b*). It is, however, their purpose under the treaty to contribute to its interpretation. That means of interpretation is "supplementary" in the sense of article 32 and, in contrast to subsequent practice under article 31, paragraph 3 (*b*), there is no strict obligation to take them "into account". It is sufficient to consider

[144] One example in which such factors, in their combination, have led to a situation that at least approaches a situation of subsequent practice under article 31, paragraph 3 (*b*), and its obligation to take such practice into account, is the articulation, by the Committee under the International Covenant on Economic, Social and Cultural Rights, of the right to water: see para. 45 above.

[145] Human Rights Committee, *Judge v. Canada*, communication No. 829/1998, Views adopted on 5 August 2003, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40* (A/58/40), vol. II, annex VI, sect. G, para. 10.3; Nolte, "Second report for the ILC Study Group on treaties over time", p. 277.

[146] Alternative referred to in International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies, p. 630, paras. 25–26; but see text at para. 41 above.

[147] Ulfstein, "Individual complaints", pp. 99–100; Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 386.

[148] *Yearbook ... 2013*, vol. II (Part Two), para. 38, draft conclusion 1, para. 4, as provisionally adopted.

[149] *Ibid.*, p. 30, para. (17) of the commentary to draft conclusion 4, as provisionally adopted.

[150] See art. 8 of the articles on responsibility of international organizations (footnote 29 above): "The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions." See also the commentary to art. 8, *Yearbook ...2011*, vol. II (Part Two), para. 88, at p. 60, para. (4).

[151] *Yearbook ... 2013*, vol. II (Part Two), p. 17, para. 38, draft conclusion 4, para. 3, as provisionally adopted.

[152] *Yearbook ... 2015*, vol. II (Part Two), para. 128, at p. 55.

[153] *Ibid.*, para. 129, at p. 61, para. (32) of the commentary to draft conclusion 11, footnote 347 with reference to *Yearbook ... 2013*, vol. II (Part Two), paras. 38–39.

them to be "other subsequent practice" under article 32. Pronouncements of expert bodies may also contribute "to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty"[154] without being themselves one of those primary means of interpretation under article 31.

63. The conclusion that pronouncements of human rights expert bodies are, as such, supplementary means of interpretation under article 32 is, in substance, also reflected in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. That provision speaks of "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Whereas Article 38, paragraph 1 (*d*), does not explicitly mention pronouncements of expert bodies (which are neither "judicial decisions" nor "teachings … of publicists"), such pronouncements may "exhibit some of the principal characteristics" of both those means.[155] Whereas views regarding individual communications have certain elements in common with court decisions, general comments have more in common with teachings due to their general nature. General comments may also display features of jurisprudence or a settled case law. The fact that Article 38, paragraph 1 (*d*), of the Statute only explicitly mentions judicial decisions and teachings of publicists as classical subsidiary means can be explained by the fact that the provision was originally drafted in 1920 and was retained without much discussion in 1946, long before expert bodies and their practice came into existence.[156]

64. Pronouncements of expert bodies may simultaneously be "other subsequent practice" under article 32 of the Vienna Convention on the Law of Treaties and a supplementary means for the determination of the law under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. Neither provision excludes the other, but they partly overlap where they refer to the same means, as demonstrated by the fact that decisions of domestic courts are recognized as falling both under Article 38, paragraph 1 (*d*), of the Statute and under article 32 of the Vienna Convention.[157] The main difference between both provisions lies not in the kinds of means that they envisage, but in their function for "determining" the law. Whereas Article 38, paragraph 1 (*d*), of the Statute focuses on the evidence for identifying the different sources of international law in judicial proceedings, article 32 of the Convention addresses treaty interpreters regardless of such proceedings.

65. Regardless of whether Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice encompasses pronouncements of treaty bodies or not, it is clear that the provision does not establish an *obligation* that the International Court of Justice, or of other interpreters, take those "subsidiary means" into account. Interpreters are merely "invited" to do so.[158] The subsidiary means for the determination of the different sources of international law under Article 38, paragraph 1 (*d*), of the Statute are therefore, like "supplementary means of interpretation" for treaties under article 32 of the Vienna Convention on the Law of Treaties, and are materials that interpreters may (and are encouraged but not required to) take into account.

## E. Other expert bodies

66. Expert bodies have not only been established under human rights treaties. Other multilateral treaties that provide for such bodies include the United Nations Convention on the Law of the Sea, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and the Single Convention on Narcotic Drugs.[159]

67. It is not necessary, for the purpose of the present report, to deal with all expert bodies that have been established on the basis of treaties. The report does not aim at proposing a conclusion that would articulate a rule that must be applied in all cases. The legal effect of pronouncements by an expert body depends, after all, first and foremost on the applicable treaty itself.[160] That effect must be determined by way of applying the rules on treaty interpretation (arts. 31 and 32). Those rules are open enough to provide guidance for all treaties by mandating a process of interpretation that takes several means of interpretation into account in a "single combined operation". They do not, however, provide for hard and fast rules that would risk circumventing the intentions of the parties.[161] The purpose of the present report, in that context, is to highlight certain cases that may provide some guidance for similar cases and to derive a preliminary conclusion regarding the possible effect of pronouncements by expert bodies for the interpretation of a treaty.

68. The expert bodies described below are particularly well-known and important examples of bodies which, at least at first sight, possess some similarities with expert bodies under human rights treaties.[162]

[154] *Yearbook ... 2013*, vol. II (Part Two), para. 39, at p. 21, para. (15), footnote 58, of the commentary to draft conclusion 1, as provisionally adopted.

[155] See Human Rights Committee, general comment No. 33 (footnote 63 above). Van Alebeek and Nollkaemper in "The legal status of decisions …", pp. 404–408 and 410–411, discuss important factors that distinguish expert bodies from courts, including the different status regarding the independence of their members: see also Ulfstein, "Individual complaints", pp. 79–82; and Pellet, "Article 38", pp. 859–860, para. 318, which discusses "the constant practice" of the Human Rights Committee as part of "jurisprudence".

[156] See Article 38 of the Statute of the Permanent Court of International Justice; Pellet, "Article 38", pp. 738–744, paras. 17–46; United Nations Conference on International Organization, "Summary of seventh meeting of the United Nations Committee of Jurists", document G/30, 13 April 1945, in *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIV, p. 162, at p. 170, and "Offical comments relating to the statute of the proposed international court of justice", *ibid.*, p. 387, at pp. 435–436.

[157] *Yearbook ... 2013*, vol. II (Part Two), para. 39, at p. 30, para. (17) of the commentary to draft conclusion 4, as provisionally adopted.

[158] Pellet, "Article 38", p. 854, para. 305; Van Alebeek and Nollkaemper, "The legal status of decisions …", p. 411.

[159] See para. 12 above.

[160] See para. 15 above.

[161] *Yearbook ... 2013*, vol. II (Part Two), para. 39, at pp. 13 and 18–20, paras. (14)–(16) of the commentary to draft conclusion 1, as provisionally adopted.

[162] Alvarez, *International Organizations as Law-makers*, p. 318; Ulfstein, "Treaty bodies", p. 888.

1. Commission on the Limits of the Continental Shelf

69. The Commission on the Limits of the Continental Shelf, in accordance with article 76, paragraph 8, and annex II to the United Nations Convention on the Law of the Sea, consists of 21 members who are experts in the fields of geology, geophysics or hydrography. According to article 2, paragraph 1, of annex II to the Convention, they serve in their personal capacity. Article 76, paragraph 8, states:

> The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

70. A recommendation of that Commission is not binding as such. It is, however, a necessary condition if a State wishes to establish the outer limit of its continental shelf as binding among all parties to the Convention. Therefore, only by accepting a recommendation of the Commission can a State achieve a final and binding status of the outer limits of its continental shelf beyond 200 nautical miles under the Convention. If a State disagrees with a recommendation of the Commission it can make a new submission to the Commission (art. 8 of annex II to the Convention). That process can be repeated and it can lead to what has been called a game of "ping-pong".[163]

71. Although a recommendation of that Commission under article 76, paragraph 8, of the Convention is not binding as such, the question of possible legal effects of such a decision has been debated.[164] The Commission itself has emphasized that its own role as a technical review body does not give it the competence to engage in legal interpretation of any parts of the Convention other than article 76 and annex II.[165] For example, the Commission acknowledged, in reaction to a submission made by Japan in 2008,[166] that it has no role regarding matters relating to the legal interpretation of article 121 of the Convention.[167] That position was supported by all parties to the case (China, Japan and the Republic of Korea). China, for example, stated in its communication of 3 August 2011:

> As a body consisting of experts in the fields of geology, geophysics and hydrography, the Commission should avoid the situation in which its work influences the interpretation and application of relevant provisions of the Convention, including article 121.[168]

72. Whereas the Commission itself does not seem to have expressed more developed views regarding the possible significance, for the purpose of interpretation, of its pronouncements, the International Law Association addressed the question in a report in 2004:

> [T]he Convention does not charge the Commission to consider and make recommendations on legal matters. However, the Commission has to be presumed to be competent to deal with issues concerning the interpretation or application of article 76 or other relevant articles of the Convention to the extent this is required to carry out the functions which are explicitly assigned to it. This conclusion also follows from the fact that the Commission is charged with considering submissions in accordance with article 76 of the Convention. This function includes the question whether the information that has been submitted to the Commission proves that the conditions set out in article 76 are actually met by the coastal State for the specific outer limit line it proposes. At times this may require the interpretation of specific provisions of article 76.[169]

73. At the same time, the report emphasized:

> On the other hand, the competence to interpret and apply article 76 of the Convention rests in the first place with its States parties. The Commission is only competent to deal with the interpretation of the provisions of article 76 and other provisions of the Convention to the extent this is necessary to carry out the functions which have been assigned to it under the Convention. As a consequence, this competence has to be interpreted restrictively.[170]

74. The position of the report echoes guideline 3.2.1 of the International Law Commission's Guide to Practice on Reservations to Treaties,[171] according to which "a treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization" (para. 1). The question is whether the conclusion which the International Law Commission draws from there in guideline 3.2.3 ("States and international organizations … shall give consideration to that body's assessment") is transferable to recommendations of the Commission on the Limits of the Continental Shelf. The functions of the Commission on the Limits of the Continental Shelf, however, consist, in the first place, in providing "scientific and technical advice", as reflected in its composition, which consists of "experts in the fields of geology, geophysics or hydrography". That situation is in marked contrast to expert bodies under human rights treaties whose functions usually consist, in particular, of providing "views" regarding the interpretation of human rights treaties and which are composed of persons with a "recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience" (e.g., article 28, paragraph 2, of the International Covenant on Civil and Political Rights). Such differences are relevant for the weight of pronouncements for the purpose of interpretation.

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[163] Gardiner, "The limits of the Area beyond national jurisdiction—Some problems with particular reference to the role of the Commission on the Limits of the Continental Shelf", p. 69; McDorman, "The continental shelf", p. 195.

[164] Anderson, "Developments in maritime boundary law and practice", p. 3214; Canvar, "Accountability and the Commission on the Limits of the Continental Shelf: Deciding who owns the ocean floor", pp. 402–407.

[165] See, e.g., Statement by the Chair of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission (CLCS/64), submitted to the twenty-fourth session (2009), paras. 18 and 25; Canvar, "Accountability and the Commission on the Limits of the Continental Shelf", p. 403.

[166] See submission by Japan to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, executive summary, available from www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf; further documentation on the case is available from www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm; see, generally, Gau, "Recent decisions by the Commission on the Limits of the Continental Shelf on Japan's submission for outer continental shelf".

[167] Statement by the Chair of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission (CLCS/62), submitted to the twenty-third session (2009), paras. 54 and 59.

[168] Quoted in Gau, "Recent decisions by the Commission on the Limits of the Continental Shelf …", p. 491; see also the statement to that effect by Canada dated 2 April 1980 (A/CONF.62/WS/4, para. 15), available from https://legal.un.org/diplomaticconferences/1973_los/vol13.shtml.

[169] International Law Association, "Legal issues of the outer continental shelf", p. 778.

[170] *Ibid.*, pp. 779–780.

[171] *Yearbook … 2011*, vol. II (Part Three), p. 30.

75. The Commission on the Limits of the Continental Shelf has, however, adopted scientific and technical guidelines by which it explains, *inter alia*, how it interprets certain aspects of article 76 of the Convention:[172]

> With these Guidelines, the Commission aims … to clarify its interpretation of scientific, technical and legal terms contained in the Convention. Clarification is required in particular because the Convention makes use of scientific terms in a legal context which at times departs significantly from accepted scientific definitions and terminology. In other cases, clarification is required because various terms in the Convention might be left open to several possible and equally acceptable interpretations. [173]

76. That particular pronouncement fulfils a function comparable to a general comment by an expert body under a human rights treaty, giving general advice on how to interpret specific provisions of a treaty, the Commission having "designed these Guidelines with a view to ensuring a uniform and extended State practice".[174]

### 2. Compliance Committee under the Kyoto Protocol

77. The Kyoto Protocol to the United Nations Framework Convention on Climate Change provides for different expert bodies whose members are expected to serve in their personal capacity. The Compliance Committee deals with individual noncompliance cases and is competent to determine violations of the Protocol.[175] The Expert Review Teams basically serve to review information on assigned amounts pursuant to article 3, paragraphs 7 and 8, of the Kyoto Protocol and ensure that the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Compliance Committee have adequate information.[176]

78. The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch. Each branch consists of 10 members serving in their personal capacities.[177] They "shall have recognized competence relating to climate change and in relevant fields such as scientific, technical, socio-economic or legal fields".[178]

79. The facilitative branch provides advice and facilitation of assistance to the individual parties, but does not determine legally binding questions of noncompliance. The members of the enforcement branch are required to also have "legal experience".[179] The enforcement branch has the function of determining cases of non-compliance with certain obligations. Furthermore, the enforcement branch deals with disagreements between parties and Expert Review Teams over adjustments or corrections proposed by the Expert Review Teams to the States parties.[180]

80. The responsibility of the enforcement branch to "determine" cases of noncompliance is based on article 18 of the Kyoto Protocol. The term "to determine" may seem to suggest that the decisions are final (unless overturned on appeal) and binding, but article 18 explicitly requires an amendment of the Protocol for such an effect to take place.[181] It is the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol that may consider reports of the Expert Review Teams, provide general political guidance and consider and decide appeals and has the prerogative to decide on the legal form of the procedures and mechanisms relating to compliance.[182]

81. Like other expert bodies, the compliance mechanism under the Kyoto Protocol has been confronted with the question of the significance, for the purpose of interpretation, of decisions of the Compliance Committee. For example, in a case concerning Croatia, regarding the calculation of its assigned amount of $CO_2$ (2009), the Expert Review Team held that the way in which Croatia had calculated its assigned amount of $CO_2$ was not in accordance with articles 3, paragraphs 7 and 8, and 7, paragraph 4, of the Kyoto Protocol.[183] Croatia had added 3.5 million tons of $CO_2$ equivalents to its base year, invoking article 4 of the United Nations Framework Convention on Climate Change (which grants flexibility to parties undergoing the process of transition to a market economy) and decision 7/CP.12 (which allows the adding of the amount of 3.5 million tons). The enforcement branch followed the view of the Expert Review Team and stated that decision 7/CP.12, which was adopted under the Convention, could not be applied to a calculation under the Kyoto Protocol.[184]

82. Croatia objected:

> The error [the enforcement branch of the Compliance Committee] committed is primarily caused by *grammatical* interpretation of the clause, contradicting the Convention and [the Conference of the Parties] decisions, 9/CP.2 in particular.
>
> Instead of grammatical interpretation, [the enforcement branch of the Compliance Committee] should have used *teleological* interpretation focusing on the intention of the Parties of the Convention, respecting particular circumstances of each party. Such interpretation would enable [the enforcement branch of the Compliance Committee] to adopt fair and equitable decision with respect to Croatia honouring the Convention, decision 7/CP.12, specific historical circumstances referring to Croatia, but also provisions of [the Kyoto Protocol].[185]

83. The enforcement branch, in its final decision of 26 November 2009, disagreed:

> After full consideration of the further written submission from Croatia, the enforcement branch concludes that there are not sufficient grounds provided in the submission to alter the preliminary finding of this branch. In this respect, the branch notes that:

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[172] Scientific and technical guidelines of the Commission on the Limits of the Continental Shelf adopted by the Commission on 13 May 1999 at its fifth session (CLCS/11).

[173] *Ibid.*, para. 1.3.

[174] *Ibid.*, para. 1.4; Canvar, "Accountability and the Commission on the Limits of the Continental Shelf", pp. 404 and 407.

[175] Decision 24/CP.7 (see footnote 40 above), annex; Ulfstein and Werksmann, "The Kyoto compliance system", p. 44.

[176] Decision 23/CP.7 on Guidelines for review under article 8 of the Kyoto Protocol, appendix I, sect. A, contained in *Report of the Conference of the Parties on its Seventh Session, held at Marrakesh, from 29 October to 10 November 2001*, Addendum, Part Two: *Action taken by the Conference of the Parties*, vol. III (FCCC/CP/2001/13/Add.3).

[177] Decision 24/CP.7 (footnote 40 above), annex, sections II, IV and V.

[178] *Ibid.*, sect. II, para. 6.

[179] *Ibid.*, sect. V, para. 3.

[180] *Ibid.*, sects. X and XV.

[181] Ulfstein and Werksmann, "The Kyoto compliance system", pp. 55–59.

[182] Decision 24/CP.7 (footnote 40 above), preamble and annex, sect. XIII; Ulfstein and Werksmann, "The Kyoto compliance system", p. 58.

[183] Report of the review of the initial report of Croatia (FCCC/IRR/2008/HRV), para. 157.

[184] Enforcement branch of the Compliance Committee, Preliminary finding (CC-2009-1-6/Croatia/EB), para. 21.

[185] Further written submission from Croatia (CC-2009-1-7/Croatia/EB), p. 6.

Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must 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. In addressing the questions of implementation before it, the enforcement branch followed this general rule and was not persuaded that it is necessary to follow another method of interpretation.[186]

84. Croatia lodged an appeal against the final decision of the enforcement branch to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol,[187] which it withdrew before the Conference of the Parties considered the case.[188]

85. The Compliance Committee under the Kyoto Protocol has little room for interpretation. Section XV, paragraph 1, of decision 24/CP.7 specifically lists the consequences that shall be applied in different cases.[189] The Committee may possess some discretion with regard to the determination of sanctions but that does not usually involve relevant questions of interpretation.[190] As the case of Croatia shows, there may be exceptional cases in which the Compliance Committee, in order to fulfil its function, needs to interpret the treaty in a way that risks controversy. In such a case, however, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol has the last word and does not need to consider whether the decision of the Compliance Committee is based on a proper interpretation of the treaty. Should the question arise before a court or another body, that institution should consider whether and to what extent legal expertise has been involved in the decision of the Compliance Committee.

86. The decisions of the Compliance Committee contribute to the practice in the application of the treaty. However, it goes too far to say that decisions of the enforcement branch may influence the determination of the applicable law in the international climate regime, "similar to the impact that judicial decisions on the international level have as a subsidiary source of international law".[191]

### 3. Compliance Committee under the Aarhus Convention

87. The Compliance Committee under the Aarhus Convention examines compliance issues, makes recommendations and prepares reports.[192] It consists of independent experts: "persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience".[193] In order to become final, the pronouncements of the Committee always require the agreement of the party concerned[194] or the endorsement of the Meeting of the Parties to the Convention.[195]

88. The Compliance Committee reports its activities to the Meeting of the Parties and submits recommendations to that body.[196] The Meeting of the Parties may then, upon consideration of the reports or recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention.[197] Therefore, although the Compliance Committee consists of independent experts, its pronouncements always need either the agreement of the party concerned or the endorsement of the Meeting of the Parties.[198] That requirement distinguishes the pronouncements of the Compliance Committee from the pronouncements of expert bodies under human rights treaties and gives them a more preliminary character, which in turn affects the weight that should be given to them for the purpose of interpretation.

89. It should also be mentioned, however, that the Compliance Committee has determined that when making recommendations it implicitly makes (provisional) determinations of non-compliance.[199] On that basis, authors have proposed that the Committee should be seen as "an independent and impartial review body of a quasi-judicial nature"[200] whose pronouncements result in "case law".[201] The Supreme Court of the United Kingdom of Great Britain and Northern Ireland has held that "the decisions of the Committee deserve respect on issues relating to standards of public participation".[202] And the Court of Appeal of England and Wales (Civil Division) stated that "there is persuasive authority … in decisions of the Aarhus Compliance Committee".[203] The Advocate General of the European Court of Justice has also repeatedly invoked recommendations of the Committee when dealing with provisions of the Aarhus Convention.[204]

[186] Enforcement branch of the Compliance Committee, Final decision (CC-2009-1-8/Croatia/EB), para. 3 (*a*).

[187] Appeal by Croatia against a final decision of the enforcement branch of the Compliance Committee (FCCC/KP/CMP/2010/2), annex; Comments from Croatia on the final decision (CC-2009-1-9/Croatia/EB), para. 2.

[188] Withdrawal by Croatia of its appeal against a final decision of the enforcement branch of the Compliance Committee (FCCC/KP/CMP/2011/2); documents relating to the case are available from http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5456.php.

[189] See Ulfstein and Werksmann, "The Kyoto compliance system", p. 55.

[190] Decision 24/CP.7 (footnote 40 above), annex, section XV, para. 1; Ulfstein and Werksmann, "The Kyoto compliance system", pp. 55–59.

[191] Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, p. 180.

[192] Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)", p. 203; decision I/7 on review of compliance (see footnote 41 above), annex, sect. III.

[193] Decision I/7 on review of compliance (see footnote 41 above), annex, paras. 1–2.

[194] *Ibid.*, para. 36.

[195] *Ibid.*, para. 37.

[196] *Ibid.*, para. 35.

[197] *Ibid.*, para. 37.

[198] *Ibid.*

[199] Koester, "The Convention on Access to Information …", p. 204; Report on the Fifth Meeting of the Compliance Committee, (MP.PP/C.1/2004/6), paras. 42–43.

[200] Koester, "The Convention on Access to Information …", p. 204.

[201] Term used by Andrusevych, Alge and Konrad, *Case Law of the Aarhus Convention Compliance Committee (2004–2011)*.

[202] *Walton v. The Scottish Ministers (Scotland)* [2012] UKSC 44, para. 100 (Lord Carnwath).

[203] *The Secretary of State for Communities and Local Government v. Venn* [2014] EWCA Civ 1539, para. 13.

[204] *Council of the European Union, European Parliament, European Commission v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Joined Cases C401/12 P to C-403/12 P, Opinion of Advocate General Jääskinen, 8 May 2014, *Reports of Cases*, para. 114 ("Reference should also be made to the position adopted by the Aarhus Convention Compliance Committee"); *Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider v. Land Rheinland-Pfalz*, case C-72/12, Opinion of Advocate General Cruz Villalón, 20 June 2013, *Reports of Cases*, para. 101 ("The Convention's Compliance Committee

4. International Narcotics Control Board

90. The International Narcotics Control Board is the monitoring body for the implementation of several international drug control treaties. According to article 9 of the Single Convention on Narcotic Drugs of 1961,[205] the Board has 13 members serving in their personal capacity, including those with medical, pharmacological or pharmaceutical experience.[206] The Board has been described as "an early example of the 'independent committee of experts' model that has been adopted and developed within the [United Nations] human rights system" whose similarities "far outweigh[]" the differences.[207]

91. The International Narcotics Control Board can take measures to ensure the execution of provisions of the Convention and call upon the Parties to the Convention, the Economic and Social Council of the United Nations and the Commission on Narcotic Drugs of the Council to impose sanctions if a State party has failed its obligations.[208] In its annual reports, the Board analyses the world situation with regard to drugs and provides recommendations.[209] The Board also considers in its reports whether States parties followed its previous recommendations.

92. States are not legally bound to follow the International Narcotics Control Board's interpretation of the con"ventions. A number of States have disagreed, for example, with the proposals of the Board regarding the establishment of so-called safe injection rooms and other harm reduction measures,[210] criticizing the Board for following too rigid an interpretation of the drug conventions and as acting beyond its mandate.[211]

5. Conclusion regarding other expert bodies

93. In summary, the pronouncements of the Commission on the Limits of the Continental Shelf, the Compliance Committee under the Kyoto Protocol, the Compliance Committee under the Aarhus Convention and the International Narcotics Control Board, as examples of relatively strong expert bodies that are not established under human rights treaties, are primarily designed to facilitate the agreement of the parties regarding the application of the treaty rather than playing a role in the interpretation of the treaty.

### F. Proposed draft conclusion 12

94. The following draft conclusion is proposed:

"*Draft conclusion 12. Pronouncements of expert bodies*

"1. For the purposes of these draft conclusions, an expert body is a body, consisting of experts serving in their individual capacity, which is established under a treaty for the purpose of contributing to its proper application. The term does not include organs of an international organization.

"2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be reflected in, pronouncements of an expert body.

"3. A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.

"4. Silence on the part of a State party shall not be assumed to constitute its acceptance of an interpretation of a treaty as it is expressed by a pronouncement of an expert body or by the practice of other parties in reaction to such a pronouncement.

"5. Paragraphs 1 to 4 apply without prejudice to any relevant rules of the treaty."

also regards the exclusion of environmental-law claims from actionable claims on the ground that actions relating to the rights of neighbours were restricted to subjective rights and the exclusion of environmental law from actions relating to the rights of neighbours as an infringement of article 9 (2). Even though that finding is not binding on the Court, it nevertheless supports my interpretation of the Convention."). See also Andrusevych, Alge and Konrad, *Case Law of the Aaarhus Convention Compliance Committee (2004–2011)*, pp. 138, 146 and 148.

[205] The International Narcotics Control Board was established under the Single Convention on Narcotic Drugs (see footnote 42 above). The 1971 Convention on Psychotropic Substances and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances transfer further competencies to the Board: see generally Klinger, *Die Implementationssicherungsmechanismen der UN-Drogenkonventionen von 1961, 1971 und 1988*, p. 137.

[206] Csete and Wolfe in "Closed to reason: the International Narcotics Control Board and HIV/AIDS", p. 3, raise the criticism that "none of the Board's 13 members has formal training in international law, despite the importance of such credentials in interpreting treaty provisions".

[207] Barrett, "'Unique in international relations'? A comparison of the International Narcotics Control Board and the UN human rights treaty bodies, pp. 5 and 12–13.

[208] Single Convention on Narcotic Drugs, art. 14; Convention on Psychotropic Substances, art. 19; and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 22.

[209] The requirement to issue annual reports on its work arises from article 15 of the Single Convention on Narcotic Drugs, article 18 of the Convention on Psychotropic Substances and article 23 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[210] International Narcotics Control Board, Report of the International Narcotics Control Board for 2009 (E/INCB/2009/1), para. 278; see also Csete and Wolfe, "Closed to reason", pp. 12 *et seq.*

[211] Barrett, " 'Unique in international relations'?", p. 8.

## Chapter II

## Decisions of domestic courts

95. One reason for the International Law Commission to address the present topic is that subsequent agreements and subsequent practice as a means of interpretation of treaties have implications at the domestic level.[212] When

[212] *Yearbook ... 2008*, vol. II (Part Two), annex I, at p. 155, para. 17.

it adopted draft conclusion 4, the Commission said that subsequent practice under article 31, paragraph 3 (*b*), as "conduct in the application of the treaty", might also include judgments of domestic courts.[213] The Commission also concluded that other subsequent practice under article 32 could take the form of a judicial pronouncement.[214]

96. There are therefore two reasons why decisions of domestic courts are relevant in the present context: (*a*) such decisions themselves may be a form of subsequent practice in the application of the treaty; and (*b*) domestic courts should properly assess subsequent agreements and subsequent practice when they are called to interpret and apply a treaty. As forms of subsequent practice under articles 31 and 32, decisions of domestic courts do not raise specific problems. Since, however, it is one of the purposes of the present work to provide guidance to domestic courts regarding the way in which treaties are properly interpreted and applied,[215] it may be helpful to review the way in which domestic courts have approached subsequent agreements and subsequent practice as means of interpretation and to assess whether practice is in line with the draft conclusions that the Commission has so far provisionally adopted. Such a review will provide a basis for a draft conclusion whose purpose is to direct the attention of domestic courts to certain questions that have arisen in that context.

97. It would be impossible to review all published decisions of domestic courts in which a treaty was, or should have been, interpreted by taking into account a subsequent agreement under article 31, paragraph 3 (*a*), or subsequent practice under articles 31, paragraph 3 (*b*), or 32. The following review, although necessarily incomplete, benefits from a research project on the question of how domestic courts in a number of States have treated subsequent agreements and subsequent practice as a means of treaty interpretation.[216]

## A. Constraints under domestic law

98. In most States, courts may apply treaties only within the framework of domestic law. Domestic law may therefore exclude the direct application of treaties or formulate certain constraints for such application.[217] Those constraints can affect the way in which treaties are interpreted, including the way in which subsequent agreements or subsequent practice under articles 31, paragraph 3 (*a*) and (*b*), and 32 are taken into account in the process of interpretation. The Federal Fiscal Court of Germany has stated, for example, that even if a subsequent agreement under article 31, paragraph 3 (*a*), were binding, domestic constitutional law would prevent that effect in domestic law.[218] The Court has argued, in particular, that a subsequent agreement under article 31, paragraph 3 (*a*), may not go so far as to override the law by which parliament has ratified the treaty and that this excluded an interpretation that would lead to an informal amendment of the treaty.[219] The German Federal Constitutional Court, on the other hand, has confirmed that the German Constitution accepts the "possibility under international law to (implicitly) modify the content or at least the interpretation of a treaty with respect to certain specific points by the practice of its application with the agreement of the other parties (see arts. 31, para. 3 (*b*), 39 [Vienna Convention on the Law of Treaties])".[220] That jurisprudence is based on the assumption that the distinction between a permissible interpretation and an informal amendment is relevant under both the domestic constitution and international law, and that the distinction can be drawn by clarifying whether the parties, by the respective practice, intended to interpret or to amend the treaty.[221]

## B. Classification

99. Domestic courts have sometimes explicitly recognized that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), are "authentic" means of interpretation.[222] They have, however, not always been certain about the legal consequences which that characterization entails. Whereas some courts have assumed that subsequent agreements and practice by the parties under the treaty may produce certain binding effects,[223] others have rightly emphasized that article 31, paragraph 3, requires only that subsequent agreements and subsequent practice "be taken into account".[224]

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[213] *Yearbook ... 2013*, vol. II (Part Two), pp. 28 and pp. 35–36, draft conclusion 4 and para. (12) of the commentary thereto, as provisionally adopted.

[214] *Ibid.*, p. 34, para. (36) of the commentary to draft conclusion 4, as provisionally adopted.

[215] On the interpretation of treaties by domestic courts generally, see the contributions in Aust and Nolte, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*.

[216] Katharina Berner, "Subsequent agreements and subsequent practice in domestic courts", doctoral thesis, Humboldt University of Berlin, 2015; this research has found pertinent decisions from Australia, Austria, Belgium, Canada, Germany, India, New Zealand, Switzerland, the United Kingdom, and the United States, as well as Hong Kong, China. The limitation of the study to those jurisdictions is due to reasons that include practice, availability and language. Spain, for example, in its response to the request of the Commission for information, has stated that no recent example could be found in the practice of its courts.

[217] Forteau, "The role of the international rules of interpretation for the determination of direct effect of international agreements".

[218] Germany, Federal Fiscal Court, *Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofes*, vol. 181, p. 158, at p. 161; vol. 219, p. 518, at pp. 527–528.

[219] *Ibid.*, vol. 157, p. 39, at pp. 43–44; vol. 227, p. 419, at p. 426.

[220] Decision of 15 December 2015 (not yet published), 2 BvL 1/12, para. 90: "völkerrechtlich vorgesehene Möglichkeit, den Inhalt oder zumindest die Auslegung eines Abkommens durch die Praxis seiner Anwendung in Übereinstimmung mit der anderen Vertragspartei in ganz bestimmten Punkten (konkludent) zu ändern (vgl. Art. 31 Abs. 3 Buchstabe b, Art. 39 WVRK)".

[221] Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, vol. 90, p. 286, at pp. 359–363; vol. 104, p. 151, at p. 201.

[222] Switzerland, Federal Court, Judgment of 8 April 2004, 4C.140/2003, *Bundesgerichtsentscheiden*, vol. 130 III, p. 430, at p. 439 (where the Court speaks of the parties as being "masters of the treaty" ("Herren der Verträge")), and Judgment of 12 September 2012, 2C_743/2011, *Bundesgerichtsentscheiden*, vol. 138 II, p. 524, at pp. 527–528; Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, vol. 90 (see previous footnote), at p. 362; see also India, Supreme Court, *Godhra Electricity Co Ltd. v. The State of Gujarat* [1975] *All India Reporter* 32, at http://indiankanoon.org/doc/737188/.

[223] Germany, Federal Fiscal Court, *Sammlung der Entscheidungen und Gutachten des Bundesfinanzhofes*, vol. 215, p. 237, at p. 241; vol. 181, p. 158, at p. 161.

[224] New Zealand, Court of Appeals, *Attorney-General v. Zaoui (No. 2)*, [2005] 1 *New Zealand Law Reports* 690 [130]; Hong Kong, China, Court of Final Appeals, *Ng Ka Ling v. Director of Immigration*

100. Decisions of domestic courts have not been uniform with regard to the relative weight that subsequent agreements and subsequent practice possess in the process of interpretation of a treaty. Whereas some decisions have clearly treated subsequent conduct under article 31 as a primary means of interpretation,[225] other decisions appear to have subordinated subsequent agreements and subsequent practice to other means of interpretation mentioned in article 31, in particular to textual interpretation.[226] The divergence may, however, be more apparent than real, because the same courts have pursued a different style of reasoning in different cases. Article 31 does not, after all, require that all means of interpretation must in each case be given the same predetermined weight.[227] Rather, the provision leaves room for putting more or less emphasis on certain of those means, as appropriate.

### C. Range of possible interpretations

101. The identification of subsequent practice under articles 31, paragraph 3 (*b*), and 32 has sometimes led domestic courts to arrive at a broad interpretation, and sometimes at a narrow interpretation. On the one hand, for example, the House of Lords of the United Kingdom interpreted the term "damage" under article 26, paragraph 2, of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) as also including "loss", invoking the subsequent conduct of the parties.[228] On the other hand, the Supreme Court of the United States, having regard to the subsequent practice of the parties, decided that the term "accident" in article 17 of the Warsaw Convention should be interpreted narrowly in the sense that it excluded events that were not caused by an unexpected or unusual event but exclusively by the passenger's state of health.[229] Another example of a restrictive interpretation is a decision in which the Federal Court of Australia interpreted the term "impairment of … dignity" under article 22 of the Vienna Convention on Diplomatic Relations as only requiring the receiving State to protect against breaches of the peace or the disruption of essential functions of embassies, and not against any forms of nuisance or insult.[230]

102. In a similar manner, subsequent practice under articles 31, paragraph 3 (*b*), and 32 has contributed to domestic courts arriving at both a more evolutive and a more static interpretation of a treaty. For example, in a case concerning the Convention on the Civil Aspects of International Child Abduction, the Court of Appeal of New Zealand interpreted the term "custody rights" as encompassing not only legal rights but also "de facto rights". On the basis of a review of legislative and judicial practice in different States and referring to article 31, paragraph 3 (*b*), the Court reasoned that this practice "evidence[d] a fundamental change in attitudes" which led it to a modern understanding of the term "custody rights" rather than an understanding "through a 1980 lens".[231] The German Federal Constitutional Court, in a series of cases concerning the interpretation of the treaty establishing the North Atlantic Treaty Organization in the light of the changed security context after the end of the Cold War, also held that subsequent agreements and subsequent practice under article 31, paragraph 3 (*b*), "could acquire significance for the meaning of the treaty" and ultimately held that that had been the case.[232]

103. Other decisions of domestic courts confirm that subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 do not necessarily support evolutive interpretations of a treaty. In *Eastern Airlines, Inc. v. Floyd*, for example, the Supreme Court of the United States was confronted with the question of whether the term "bodily injury" in article 17 of the Warsaw Convention of 1929 covered not only physical but also purely mental injuries. The court, taking account of the "post-1929 conduct" and "interpretations of the … signatories", emphasized that, despite some initiatives to the contrary, most parties had always understood the term to cover only bodily injuries.[233]

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[1999] 1 *Hong Kong Law Reports and Digest* 315, at p. 354; Austria, Higher Administrative Court, Judgment of 30 March 2006, 2002/15/0098, pp. 2 and 5.

[225] United Kingdom, House of Lords, *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, paras. 47–48 (Lord Steyn); United States, Supreme Court, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), pp. 183–185, and *O'Connor v. United States*, 479 U.S. 27 (1986), pp. 31–32; Switzerland, Federal Administrative Court, Judgment of 21 January 2010, BVGE 2010/7, para. 3.7.11 and Federal Court, Judgment of 8 April 2004 (see footnote 222 above).

[226] United Kingdom, House of Lords, *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, para. 31 (Lord Steyn); in the United States Supreme Court, Justice Scalia criticized the majority of the Court for relying on "[t]he practice of the treaty signatories" which, according to him, need not be consulted when the "Treaty's language resolves the issue presented, there is no necessity of looking further", *United States v. Stuart*, 489 U.S. 353, pp. 369 and 371.

[227] *Yearbook ... 2013)*, vol. II (Part Two), p. 21, para. (15) of the commentary to draft conclusion 1 on the present topic, as provisionally adopted.

[228] United Kingdom, House of Lords, *Fothergill v. Monarch Airlines* [1980] UKHL 6, paras. 278 (Lord Wilberforce) and 279 (Lord Diplock); similarly, Germany, Federal Court (Civil Matters), *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, vol. 84, p. 339, at pp. 343–344.

[229] United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 403–404.

[230] Australia, Federal Court of Australia, *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Magno and Almeida* [1992] FCA 566, paras. 30–35 (Judge Einfeld); see also United Kingdom, House of Lords: *R (Mullen) v. Secretary of State for the Home Department* (footnote 225 above), paras. 47–48 (Lord Steyn).

[231] New Zealand, Court of Appeal, *C v. H*, [2009] NZCA 100, paras. 175–177 and 195–196 (Judge Baragwanath); see also para. 31 (Judge Chambers): "Revision of the text as drafted and agreed in 1980 is simply impracticable, given that any revisions would have to be agreed among such a large body of Contracting States. Therefore evolutions necessary to keep pace with social and other trends must be achieved by evolutions in interpretation and construction. This is a permissible exercise given the terms of the Vienna Convention on the Law of Treaties, which also came in force in 1980. Article 31 (3) (*b*) permits a construction that reflects 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"; similarly: Canada, Supreme Court, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 *Supreme Court Reports* 982, para. 129 (Judge Cory).

[232] Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* vol. 90 (see footnote 221 above), at pp. 363–364, para. 276, and *ibid.*, vol. 104 (see footnote 221 above), pp. 206–207.

[233] United States, Supreme Court, *Eastern Airlines Inc. v. Floyd* (1991), 499 U.S. 530, pp. 547–549; see also United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* [2002] UKHL 7, paras. 98 and 125 (Lord Hope).

## D. Distinction between articles 31, paragraph 3, and 32 and the relevance of agreement between the parties

104. It is a more serious concern that domestic courts often do not distinguish clearly between subsequent agreements and subsequent practice under article 31, paragraph 3 (which requires agreement between the parties regarding the interpretation of a treaty), and other subsequent practice under article 32 (which does not require such agreement). The lack of distinction is not relevant when it only concerns the order in which a court considers different means of interpretation.[234] It does matter, however, when courts invoke article 31, paragraph 3 (*b*), without ascertaining whether the parties are actually in agreement regarding a particular interpretation.

105. That situation has occurred mainly in two types of cases: first, in cases in which courts have invoked article 31, paragraph 3, but have only referred to the practice of a limited number of parties to the treaty and thereby disregarded the requirement that such practice must establish the agreement of the parties;[235] and second, in cases in which domestic courts have simply assumed that the other parties have agreed, implicitly or by way of silence, to the practice of a limited number of parties, without providing any particular evidence or reason for that conclusion.[236]

106. In contrast, other court decisions have appropriately recognized that a particular subsequent practice did not establish an agreement between the parties,[237] or the courts have decided in conformity with the rule expressed in draft conclusion 9, paragraph 2, according to which silence on the part of a party to a treaty can only be taken to mean acceptance "if the circumstances call for some reaction".[238] Such circumstances have sometimes been recognized in specific cooperative contexts, for example under a bilateral treaty that provided for a particularly close form of cooperation.[239] This may be different if the form of cooperation envisaged by the treaty comes within the ambit of an international organization whose rules exclude that the practice of the parties, and their silence, are relevant for the purpose of interpretation.[240]

## E. Use of subsequent practice which is not accompanied by an agreement of the parties

107. The fact that domestic courts have sometimes applied article 31, paragraph 3 (*b*), without ascertaining whether a particular subsequent practice established the agreement of parties regarding the interpretation of the treaty does not mean, however, that a use of such practice for the purpose of interpretation is impermissible or not to be encouraged. As Judge Glazebrook of the Court of Appeal of New Zealand remarked, it is admissible to take decisions by the domestic court of another State into account because "[t]he Vienna Convention also permits supplementary means of interpretation to be used under art[icle] 32 such as decisions from other jurisdictions".[241]

108. Many domestic courts have used decisions from other domestic jurisdictions without explicitly basing that use on article 32[242] and therefore engage in a "judicial dialogue" even if no agreement of the parties can be established thereby. Apart from possibly confirming an interpretation under article 32, such engagement may add to the development of a subsequent practice together with other domestic courts.[243] However, a selective invocation of certain practice, executive or judicial, that either disregards significant countervailing practice or otherwise cannot claim to be representative, should not be given much weight and may provoke legitimate criticism.[244] The line between an appropriate use and a selective invocation of decisions of other domestic courts may be thin. Lord Hope of the House of Lords, quoting the Vienna rules of interpretation, provided a reasonable general guide when he stated:

> In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.[245]

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[234] See, e.g., United States, Supreme Court, *O'Connor v. United States* (footnote 225 above), pp. 31–33.

[235] United Kingdom, House of Lords: *Deep Vein Thrombosis and Air Travel Group Litigation* (see footnote 226 above), paras. 54–55 and 66–85 (Lord Mance), *R (Mullen) v. Secretary of State for the Home Department* (footnote 225 above), para. 47 (Lord Steyn), and *King v. Bristow Helicopters Ltd. (Scotland)* (see footnote 233 above), para. 80 (Lord Hope); New Zealand, Court of Appeal: *Attorney-General v. Zaoui and Others (No. 2)* (see footnote 224 above), para. 130 (Judge Glazebrook), and *Lena-Jane Punter v. Secretary for Justice, ex p Adam Punter*, [2004] 2 *New Zealand Law Reports* 28, para. 61 (Judge Glazebrook); Germany, Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts*, vol. 104 (see footnote 221 above), at pp. 256–257.

[236] United Kingdom, House of Lords, *R (Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, para. 38; Germany, Federal Administrative Court: Judgment of 29 November 1988, 1 C 75/86, [1988] *Neue Zeitschrift für Verwaltungsrecht*, p. 765, at p. 766.

[237] Australia, High Court of Australia, *Minister for Immigration v. Ibrahim*, [2000] HCA 55, para. 140 (Judge Gummow); Germany, Federal Administrative Court, Decision of 7 February 2008, 10 C 33/07, para. 35, which, however, concerned a case in which the available practice was not uniform.

[238] Switzerland, Federal Court, Judgment of 17 February 1971, *Bundesgerichtsentscheiden*, vol. 97 I, p. 359, at pp. 370–371.

[239] See United States, Supreme Court, *O'Connor v. United States* (footnote 225 above), pp. 33–35; Germany, Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, vol. 59, p. 63, at pp. 94–95.

[240] See United Kingdom, Supreme Court: on the one hand, *Assange v. The Swedish Prosecution Authority*, [2012] UKSC 22, paras. 68–71 (Lord Phillips); and, on the other, *Bucnys v. Ministry of Justice, Lithuania*, [2013] UKSC 71, paras. 39–43 (Lord Mance).

[241] New Zealand, Court of Appeal, *Ye v. Minister of Immigration*, [2009] 2 *New Zealand Law Reports* 596, at para. 71.

[242] See, e.g., United States, Supreme Court, *Air France v. Saks*, 470 U.S. 392, pp. 397–407; *Abbott v. Abbott*, 560 U.S. 1 (2010), Opinion (Judge Kennedy), Slip Opinion at www.supremecourt.gov/opinions/09pdf/08-645.pdf, at pp. 12–16; Germany, Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts*, vol. 139, p. 272, at pp. 288–289; Australia, High Court of Australia, *Macoun v. Commissioner of Taxation*, [2015] HCA 44, at pp. 75–82.

[243] Tzanakopoulos, "Judicial dialogue as a means of interpretation", p. 94; Benvenisti, "Reclaiming democracy: the strategic uses of foreign and international law by national courts".

[244] United Kingdom, Supreme Court, *R (Adams) v. Secretary of State for Justice*, [2011] UKSC 18, para. 17 (Lord Philips) ("This practice on the part of only one of the many signatories to the [International Covenant on Civil and Political Rights] does not provide a guide to the meaning of article 14 (6) … It has not been suggested that there is any consistency of practice on the part of the signatories that assists in determining the meaning of article 14 (6).").

[245] United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* (see footnote 233 above), para. 81.

109. Much depends on how that general orientation is applied. For example, it is not appropriate, as a general rule, to selectively invoke the decisions of one particular national jurisdiction or the practice of a particular group of States, as important as they may be.[246] On the other hand it may be appropriate, in a case in which the practice in different domestic jurisdictions diverges, to emphasize the practice of a more representative group of jurisdictions[247] and to give more weight to the decisions of higher courts.[248]

## F. Identification of subsequent agreements and subsequent practice

110. Not surprisingly, domestic courts have more frequently identified subsequent agreements under article 31, paragraph 3 (*a*), between two or very few parties rather than between the parties of open multilateral treaties.[249] In that context, domestic courts have not always carefully identified the evidence before concluding that the parties had subsequently agreed on a particular interpretation. For example, in *Diatlov v. Minister for Immigration and Multicultural Affairs*[250] the Federal Court of Australia stated that "it seems clear enough that the Stateless Persons Convention forms part of the context for the purposes of construing the Refugees Convention: see Vienna Convention, article 31 (3) (*a*), (*c*)". In order to draw the conclusion that the Convention relating to the Status of Stateless Persons constituted a subsequent agreement regarding the Convention relating to the Status of Refugees under article 31, paragraph 3 (*a*), the Court should have rather determined whether the Convention relating to the Status of Stateless Persons encompasses all parties to the Convention relating to the Status of Refugees (which it does not), and whether the former could be seen as having been concluded "regarding the interpretation" of the latter.

111. The Hong Kong Court of Final Appeal provided an example for a more rigorous approach when it was called to interpret the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Sino-British Joint Declaration) in the case of *Ng Ka Ling and another v. Director of Immigration*.[251] In that case, one party alleged that the Sino-British Joint Liaison Group, consisting of representatives of China and the United Kingdom under article 5 of the Joint Declaration, had come to an agreement regarding the interpretation of the Joint Declaration by pointing to a booklet which stated that it was compiled "on the basis of the existing immigration regulations and practices and the common view of the British and Chinese sides in the [Joint Liaison Group]". The Court, however, did not find it established that the purpose of the booklet was to interpret or to apply the Joint Declaration within the meaning of article 31, paragraph 3 (*a*).[252]

## G. Proposed draft conclusion 13

112. The following draft conclusion is proposed:

"*Draft conclusion 13. Decisions of domestic courts*

"1. Decisions of domestic courts in the application of a treaty may constitute relevant subsequent practice under articles 31, paragraph 3 (*b*), and 32 for the interpretation of the treaty.

"2. Domestic courts, when applying a treaty, should:

"(*a*) consider that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), are not binding as such;

"(*b*) be aware that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), and other subsequent practice under article 32 may support a narrow or a wide interpretation of the meaning of a term of a treaty, including one that is constant or is evolving over time;

"(*c*) distinguish between subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), which require the agreement of the parties, and other subsequent practice under article 32, which does not;

"(*d*) carefully identify whether a subsequent practice in the application of a treaty establishes agreement of the parties regarding an interpretation of the treaty, and in particular whether silence on the part of one or more parties actually constitutes their acceptance of the subsequent practice;

"(*e*) attempt to identify a broad and representative range of subsequent practice, including decisions of domestic courts, when considering subsequent practice as a means of interpreting a treaty."

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[246] See, e.g., United Kingdom, House of Lords, *King v. Bristow Helicopters Ltd. (Scotland)* (see footnote 233 above), para. 7 (Lord Mackay): "Because I consider it important that the Warsaw Convention should have a common construction in all the jurisdictions … that have adopted the Convention, I attach crucial importance to the decisions of the United States Supreme Court in *Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991), and *El Al Israel Airlines v. Tseng*, particularly as the United States is such a large participant in carriage by air."; or Judge Einfeld for the Federal Court of Australia in *Commissioner of the Australian Federal Police and the Commonwealth of Australia v. Magno and Almeida* (see footnote 230 above), para. 30, in a case concerning the interpretation of the term "impairment of dignity" of a diplomatic representation under article 22 of the Vienna Convention on Diplomatic Relations, recalling article 31, paragraph 3 (*b*), who stated that "international application of the Convention by democratic countries indicates that another significant consideration is freedom of speech in the host country. This factor is particularly weighty when dealing with political demonstrations outside embassies. It is useful to consider the practice of countries with considerable experience in dealing with this type of situation, such as the United States and the United Kingdom".

[247] Canada, Supreme Court, *Yugraneft Corp. v. Rexx Management Corp.*, [2010] 1 *Supreme Court Reports* 649, para. 21 (Judge Rothstein).

[248] United Kingdom, House of Lords, *Sidhu v. British Airways*, [1997] *Appeal Cases* 430, at para. 453 (Lord Hope); *Fothergill v. Monarch Airlines Ltd.* (see footnote 228 above), paras. 275–276 (Lord Wilberforce).

[249] Berner, "Subsequent agreements and subsequent practice in domestic courts", chap. 6.

[250] [1999] FCA 468, para. 28.

[251] [1999] 1 *Hong Kong Law Reports and Digest* 315.

[252] *Ibid.*, paras. 150–153.

## Chapter III

## Structure and scope of the draft conclusions

113. As the work on the present topic is advancing to the stage of first reading, it is necessary to consider some aspects that concern the proposed set of draft conclusions as a whole. The Special Rapporteur proposes to give the following general structure to the set of draft conclusions:

I. Introduction (with a new introductory draft conclusion 1*a*)

II. Basic rules and definitions (provisionally adopted draft conclusions 1, 2, 4, 5)

III. Subsequent agreements and subsequent practice in the process of interpretation (provisionally adopted draft conclusions 3, 6, 7, 8, 9)

IV. Specific forms and aspects of subsequent agreements and subsequent practice (provisionally adopted draft conclusions 10, 11, 12, 13)

V. Final clause (with a new final draft conclusion 14)

114. After its consideration of the present report, the Commission will have dealt with those aspects of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" that the Special Rapporteur originally proposed should be covered.[253] While it is possible that there remain certain aspects that have not been addressed, explicitly or implicitly, the cross-cutting and diverse nature of the present topic does not require that every possible aspect be addressed.

115. One aspect of the topic that has not been addressed is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations. The Special Rapporteur proposes that that aspect should be dealt with separately, if necessary, as the Commission did in its previous work on the law of treaties. In addition, the Special Rapporteur does not consider it necessary that subsequent agreements and subsequent practice regarding treaties that are "adopted within an international organization" in the sense of article 5 of the Vienna Convention on the Law of Treaties be addressed specifically.[254] There do not seem to be relevant general distinctions, at least as far as their interpretation is concerned, between such treaties and those that are adopted at a diplomatic conference.[255]

116. The commentary to a new introductory draft conclusion will accordingly make it clear that the draft conclusions as a whole do not deal with all circumstances in which subsequent agreements and subsequent practice may be taken into account in the interpretation of treaties.

117. The following draft conclusion is proposed:

"*New draft conclusion 1a. Introduction*

"The present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties."

[253] *Yearbook ... 2012*, vol. II (Part Two), paras. 237–239.

[254] See El Salvador (A/C.6/70/SR.22, para. 107) and Malaysia (A/C.6/70/SR.23, para. 50).

[255] Anderson, "1969 Vienna Convention: Article 5", p. 94, para. 19; Brölman, "Specialized rules of treaty interpretation: international organizations"; and Gardiner, *Treaty Interpretation*, pp. 126–127, do not address treaties "adopted within an international organization"; see also Schmalenbach, "Article 5", pp. 93–95, paras. 10–13.

## Chapter IV

## Revision of draft conclusion 4, paragraph 3

118. The advanced stage of the work on the topic within the Commission also gives occasion to reconsider a previously adopted draft conclusion in the light of later developments. In that context, the Special Rapporteur proposes, as do two States,[256] to revisit provisionally adopted draft conclusion 4, paragraph 3, according to which "other subsequent practice consists of conduct by one or more parties in the application of the treaty, after its conclusion". As described above (paras. 58–62), the Commission later provisionally adopted draft conclusion 11, paragraph 3, according to which: "Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32."[257] In its commentary to draft conclusion 11, paragraph 3, the Commission noted:

> The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1, para. 4, and 4, para. 3, provisionally adopted by the Commission at its sixty-fifth session, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties.[258]

119. The Special Rapporteur proposes in the present report that the pronouncements of expert bodies under human rights treaties, while not constituting practice of a party in the application of the treaty, are nevertheless official pronouncements whose purpose under the treaty it is to contribute to its proper application. Pronouncements of expert bodies are "in the application of the treaty", since such "application", according to the Commission:

[256] See footnote 20 above (Austria and Malaysia).

[257] *Yearbook ... 2015*, vol. II (Part Two), para. 128, at p. 55, draft conclusion 11, para. 3, as provisionally adopted.

[258] *Ibid.*, para. 129, at p. 61, para. (32) of the commentary to draft conclusion 11, as provisionally adopted, footnote 347, referring to *Yearbook ... 2013*, vol. II (Part Two), paras. 38–39.

Includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation.[259]

120. Pronouncements by expert bodies fit as a "supplementary" means of interpretation, as envisaged in article 32. In contrast to subsequent practice of the parties under article 31, paragraph 3 (*b*), there is no strict obligation to take such supplementary means "into account". The fact that the pronouncements are envisaged by the treaty as an official means to contribute to its proper application is sufficient to consider them to be "other subsequent practice" under article 32. The Special Rapporteur therefore proposes to replace the words "by one or more parties" in draft conclusion 4, paragraph 3, with the word "official" and reformulate draft conclusion 4, paragraph 3, as follows:

"Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion."

It is not necessary to change the text of draft conclusion 1, paragraph 4, but only to make an appropriate reference in the commentary.

121. The commentary would then clarify that the term "official conduct" not only encompasses conduct by States parties to a treaty but also conduct by bodies that are established by the treaty and are mandated to contribute to its proper application.

122. The following revision to draft conclusion 4 is proposed:

"*Revised draft conclusion 4*

"…

"3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion."

[259] *Ibid.*, p. 30–31, para. (17) of the commentary to draft conclusion 4, as provisionally adopted.

## Chapter V

## Future programme of work

123. The present report seeks to complete the set of draft conclusions proposed by the Special Rapporteur. If the Commission is able to provisionally adopt the draft conclusions that are proposed in the present report, the full set of draft conclusions could be adopted on first reading at the end of the sixty-eighth session in 2016. The Commission would then have adopted, in the four years from 2013 to 2016, the full set of draft conclusions with commentaries. A second reading could be envisaged for 2018, which would give States, international organizations and other relevant actors enough time to prepare written observations to the set of draft conclusions and commentaries adopted on first reading. The Special Rapporteur is aware that the programme of work is ambitious, and he is prepared to adapt the pace of progress to the circumstances.

Annex

## Proposed draft conclusions

*New draft conclusion 1a. Introduction*

The present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties.

*Proposed revised draft conclusion 4*

…

3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of official conduct in the application of the treaty, after its conclusion.

*Draft conclusion 12. Pronouncements of expert bodies*

1. For the purposes of these draft conclusions, an expert body is a body, consisting of experts serving in their individual capacity, which is established under a treaty for the purpose of contributing to its proper application. The term does not include organs of an international organization.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be reflected in, pronouncements of an expert body.

3. A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.

4. Silence on the part of a State party shall not be assumed to constitute its acceptance of an interpretation of a treaty as it is expressed by a pronouncement of an expert body or by the practice of other parties in reaction to such a pronouncement.

5. Paragraphs 1 to 4 apply without prejudice to any relevant rules of the treaty.

*Draft conclusion 13. Decisions of domestic courts*

1. Decisions of domestic courts in the application of a treaty may constitute relevant subsequent practice under articles 31, paragraph 3 (*b*), and 32 for the interpretation of the treaty.

2. Domestic courts, when applying a treaty, should:

(*a*) consider that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), are not binding as such;

(*b*) be aware that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), and other subsequent practice under article 32 may support a narrow or a wide interpretation of the meaning of a term of a treaty, including one that is constant or is evolving over time;

(*c*) distinguish between subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), which require the agreement of the parties, and other subsequent practice under article 32, which does not;

(*d*) carefully identify whether a subsequent practice in the application of a treaty establishes agreement of the parties regarding an interpretation of the treaty, and in particular whether silence on the part of one or more parties actually constitutes their acceptance of the subsequent practice;

(*e*) attempt to identify a broad and representative range of subsequent practice, including decisions of domestic courts, when considering subsequent practice as a means of interpreting a treaty.