

The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties

Danae Azaria

Associate Professor, Faculty of Laws, University College London (UCL),
Senior Humboldt Fellow (Alexander von Humboldt Foundation),
Humboldt University of Berlin (2019–2020), Principal Investigator,
European Research Council Starting Grant, Project “State Silence”
(2020–2025)
d.azaria@ucl.ac.uk

Abstract

Although it is widely accepted that the pronouncements of expert treaty bodies are not binding, this does not mean that they are deprived of any effect in law. This study focuses on their legal effects vis-à-vis the interpretation of treaties, and explores how the International Court of Justice and the International Law Commission have dealt with the pronouncements of expert treaty bodies in relation to the interpretation of treaties. The tale about the Court’s and the Commission’s approaches in this respect demonstrates the profound belief of both the Court and the Commission that international law is a legal system, which calls for reliance on the pronouncements of expert treaty bodies as integral actors within the legal system with some ‘authority’ concerning the determination of the law (within their mandate). This does not mean that the Court and the Commission support a ‘blind reliance’ on such pronouncements; rather the quality of each pronouncement is a criterion for relying on it. The reasoning of the Court and (and implicitly of) the Commission also shows that they consider that international law as a legal system, which necessitates ‘legal consistency’. This in turn suggests that the reliance on pronouncements of expert treaty bodies, which are mandated to supervise the application (and interpretation) of particular treaties, may constitute an exercise of ‘systemic integration’ which exceeds the confines of the rule set forth in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

Keywords

expert treaty bodies – treaty interpretation – International Court of Justice – International Law Commission – systemic integration – criteria for relying on pronouncements of expert treaty bodies

1 Introduction

Expert treaty bodies are bodies established by treaty¹ (or ‘derivative treaty law’, such as a binding decision of a conference of treaty parties) and composed of experts that are independent from their State of nationality or the State that has nominated them for election: they do not operate under instructions of government. Expert treaty bodies differ from conferences of parties (‘COPS’) or meetings of parties (‘MOPS’), which are composed of delegates of treaty parties,² and from international organisations in that expert treaty bodies lack international legal personality. Given these differences, the pronouncements of expert treaty bodies do not have the same legal effects as the decisions and pronouncements of COPS/MOPS or of international organisations. Often, the constitutive instruments of expert treaty bodies do not specifically indicate whether their pronouncements are binding or not. Different designations are

-
- 1 Articles 8–14, *International Convention on the Elimination of All Forms of Racial Discrimination* (7 March 1966), 660 UNTS 195; Articles 28–45, *International Covenant on Civil and Political Rights* (19 December 1966), 999 UNTS 171. Articles 17–22, *Convention on the Elimination of All Forms of Discrimination against Women* (18 December 1979), 1249 UNTS 13; Articles 34–39, *Convention on the Rights of Persons with Disabilities* (13 December 2006), 2515 UNTS 3. Articles 43–45, *Convention on the Rights of the Child* (20 November 1989), 1577 UNTS 3. Articles 17–24, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984), 1465 UNTS 85. Article 15, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (25 June 1998), 2161 UNTS 447 (‘Aarhus Convention’), and *Decision 1/7 on review of compliance*, adopted at the first meeting of the Aarhus Convention parties, 2002 (ECE/MP.PP/2/Add.8).
 - 2 Examples of treaties establishing COPS or MOPS: *Convention for the Protection of the Marine Environment of the North-East Atlantic* 1992, 2354 UNTS 67; *Protocol on Substances that Deplete the Ozone Layer* 1987, 1522 UNTS 3.

used to describe their pronouncements, such as ‘views’;³ ‘recommendations’;⁴ and ‘comments’.⁵ The interpretation of their constitutive instruments often indicates that these pronouncements are intended not to be binding. Literature also perceives them as not binding (unless evidence to the contrary exists).⁶

However, this does not mean that non-binding pronouncements of expert treaty bodies have no effects in law, such as in relation to the interpretation of treaties whose application they have been mandated to monitor or oversee, or in relation to the determination of permissibility of reservations to such treaties. This study focuses on their legal effects vis-à-vis the interpretation of treaties. This question gained particular attention since 2008 when the Human Rights Committee portrayed itself as the ‘authentic interpreter’ of the International Covenant on Civil and Political Rights (‘ICCPR’), and claimed that its jurisprudence ‘may be considered’ as subsequent practice within the meaning of the rule set forth in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (‘VCLT’).⁷ The Human Rights Committee received criticism by numerous treaty parties. Several treaty parties stated that its pronouncements do not constitute subsequent practice within the meaning of the rule

3 Article 42(7)(c), *International Covenant on Civil and Political Rights* (19 December 1966), 999 UNTS 171; Article 5 (4), *Optional Protocol to the International Covenant on Civil and Political Rights* (19 December 1966), 999 UNTS 171; Article 9(1), *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (5 March 2009), A/RES/63/117.

4 Article 9(2), *International Convention on the Elimination of All Forms of Racial Discrimination* (7 March 1966), 660 UNTS 195; Article 21(1), *Convention on the Elimination of All Forms of Discrimination against Women* (18 December 1979), 1249 UNTS 13; Article 45(d), *Convention on the Rights of the Child* (20 December 1989), 1577 UNTS 3; Article 33 (5), *International Convention for the Protection of All Persons from Enforced Disappearance* (20 December 2006), 2716 UNTS 3.

5 Article 19(3), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984), 1465 UNTS 85; Article 40(4), *International Covenant on Civil and Political Rights* (19 December 1966), 999 UNTS 171; Article 74, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (18 December 1990), 2220 UNTS 3.

6 N. Rodley, *The Role and Impact of Treaty Bodies*, in D. Shelton, ed., *The Oxford Handbook of International Human Rights Law* (2013), pp. 621–648, at 639; C. Tomuschat, *Human Rights: Between Idealism and Realism* (2014), p. 267; D. Shelton, *The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies*, in H.P. Hestermeyer et al. (eds), *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum*, vol. 1 (2012), pp. 553–575 at 559.

7 Draft General Comment No. 33 (2nd version, 18 August 2008) (CCPR/C/GC/33/CRP.3), 25 August 2008, paras. 12–21; Article 31(3)(b), *Vienna Convention on the Law of Treaties* (23 May 1969), 1155 UNTS 331.

set forth in VCLT Article 31(3)(b).⁸ In its final version, General Comment No. 33 does not include numerous of its draft statements that were challenged by treaty parties, and describes its pronouncements as ‘authoritative’.⁹ However, some treaty parties stated that although their silence vis-à-vis the pronouncements of the Human Rights Committee cannot be taken as acquiescence,¹⁰ the pronouncements may give rise to State practice within the meaning of VCLT Article 31(3)(b).¹¹ As a separate matter, scholars refer to the ‘duty [of treaty parties] to consider’ the pronouncements of expert treaty bodies in order to explain the guiding effect of these pronouncements.¹²

But, what does it mean that the pronouncements of an expert treaty body may be ‘authoritative’, while they do not fall within the scope of the rule in VCLT Article 31(3)(a) or (b)? This study provides an empirical or observational analysis of the reasoning of the International Court of Justice (‘ICJ’ or ‘Court’) and of the International Law Commission (‘ILC’ or ‘Commission’) concerning the reliance on the pronouncements of expert treaty bodies. First, it identifies the cases where the ICJ has relied upon the pronouncements of expert treaty bodies, and assesses the reasoning of the Court with a view to understanding *how* and *why* the Court relied on such pronouncements (Section 2). Second, it demonstrates how the Commission has dealt with pronouncements of expert treaty bodies in its work focusing on the 2018 Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties (Section 3). In this latter respect, it analyses the approach of the ILC Special Rapporteur, the opinions of ILC Members as recorded in their public debate in the ILC plenary sessions, and the first and second readings of the ILC Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties as well as their accompanying commentaries. This analysis is significant because first it explains the ICJ’s and ILC’s modern understanding about the legal effects of expert treaty bodies’ pronouncements

8 Australia (3 October 2008), pp. 1–5; Japan, (3 October 2008), para. 10; New Zealand (12 September 2008), para. 3; United Kingdom (17 October 2008), pp. 1–3; United States of America (17 October 2008), pp. 1–7; Belgium (23 October 2008); Poland (date unavailable), pp. 1–5. Available at: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC33-ObligationsofStatesParties.aspx>.

9 GC No. 33 (CCPR/C/GC/33), 25 June 2009, para. 13.

10 Norway, para. 6; Sweden (3 October 2008), paras. 4–8.

11 Mauritius (7 October 2008), para. 2; Germany (15 September 2008), para. 4, available at: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC33-ObligationsofStatesParties.aspx>.

12 R. Van Alebeek and A. Nollkaemper, The Legal Status of Decisions by Human Rights Treaty Bodies in National Law, in H. Keller and L. Grover (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012), pp. 356–413 at 386.

on treaty interpretation, and second because it reveals the underlying belief of the ICJ and implicitly the ILC that international law is a legal system which needs consistency and clarity.

2 The Reliance of the International Court of Justice on the Pronouncements of Expert Treaty Bodies

International courts and tribunals have considered the pronouncements of expert treaty bodies when interpreting treaties or identifying rules of customary international law that they apply.¹³ This section focuses on the decisions of the ICJ. As of 30 January 2020, the Court has dealt with the pronouncements of expert treaty bodies in four cases: two contentious proceedings and two advisory opinions.¹⁴ These are discussed below in chronological order.

2.1 *Wall Advisory Opinion (2004)*

In the *Wall Advisory Opinion (2004)*, the Court was concerned with the question submitted to it by the United Nations General Assembly as to ‘what are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, [...] considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions’. The Court examined whether some human rights conventions, including the ICCPR and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) applied to the case before it and the compatibility of the construction of the wall by Israel in the Occupied Palestinian

13 IACHR: *Case of the Constitutional Tribunal (Camba Campos and Others) v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2013, Series C No. 268, paras. 189 and 191. African Commission HPR: *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 30th ordinary session, Banjul, October 2001, para. 63. ECtHR: *Mamatkulov and Askarov v Turkey (GC)* App No 46827/99 and 46951/99, ECHR 2005-1, paras. 111–115.

14 *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; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 457, para. 101; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, pp. 663–664, para. 66; *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 pp. 192–193, para. 136.

Territory. In this respect, a central question that the Court faced was whether the Occupied Palestinian Territory was excluded from the scope of application of the ICCPR, pursuant to the latter's Article 2(1), which reads: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant [...]" (emphasis added). Additionally, the Court was concerned with whether the Occupied Palestinian Territory was excluded from the scope of application of the ICESCR, which does not include a provision similar to Article 2 of the ICCPR.

In relation to the ICCPR, the Court noted that 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.'¹⁵ After noting the object and purpose of the ICCPR, it reasoned that

[t]he constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *Lopez Burgos v. Uruguay*; case No. 56/79, *Lilian Celiherti de Cusariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106181, *Montero v. Uruguay*).¹⁶

The Court continued that the preparatory works of the ICCPR confirm this interpretation.¹⁷ Further, it noted that in response to the Report of Israel in relation to the issue of whether the ICCPR applies to the Palestine Occupied Territories, the Human Rights Committee had reached the conclusion that 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories'.¹⁸

In relation to the ICESCR, the Court noted that this Covenant does not have a provision dedicated to its scope of application. It took note of Israel's positions in its Reports to the Committee on Economic, Social and Cultural Rights, and the Committee's responses that the ICESCR applies to occupied

15 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at para. 109 [emphasis added].

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*, para. 110.

territories. On the basis of these, the Court concluded that the ICESCR applies to the Occupied Palestinian Territories.¹⁹

Further, the Court examined whether there are certain exceptions in these Covenants that would permit Israel's conduct. In relation to the ICCPR, it considered that Article 12(3) contains exceptions to the right of freedom of movement contained in paragraph 1 of that Article, and that restrictions under Article 12(3) must be directed to the ends authorized and be necessary for the attainment of those ends. It noted that the Human Rights Committee suggests in its General Comment No.27 that 'they must conform to the principle of proportionality and must be the least intrusive instrument amongst those which might achieve the desired result'.²⁰ The Court finally concluded that 'these conditions [set out by the Human Rights Committee] are not met in the present instance'.²¹

This was the first instance where the Court expressly relied on the pronouncements of an expert treaty body in its reasoning. The Court did not draw a distinction between general comments, pronouncements on individual complaints, and pronouncements in relation to periodic State reports. It relied on pronouncements made in all these forms of outputs.²² However, the Court did not indicate whether there was a particular criterion by which it assessed further whether it should rely or not on those pronouncements, such as the quality of their analysis.

Further, the Court did not indicate the ground on which it relied on the pronouncements of these Committees. There is no evidence in the Court's express reasoning that reliance on such pronouncements was mandatory. This gives the impression that the ICJ may have instead relied on them as a supplementary means of treaty interpretation (within the meaning of Article 32 of the VCLT), or instead (or supplementarily) as a subsidiary means for determining rules of law (within the meaning of Article 38(1)(d) of the ICJ Statute).²³ The Court relied on the preparatory works after noting that its interpretation is consistent with the constant practice of the Human Rights Committee. This sequence in the Court's reasoning may give the impression that either it considered the pronouncement of the expert treaty body as not constituting a supplementary means of interpretation, such as the treaty's preparatory works, or

19 Ibid, para. 112.

20 Ibid, para. 136.

21 Ibid, para. 136.

22 Ibid, para. 109.

23 *Statute of the International Court of Justice* (24 October 1945), 993 UNTS 3.

that among the supplementary means of interpretation it gave priority to the pronouncement of the expert treaty body.

2.2 *Ahmadou Diallo (2010)*

In *Ahmadou Diallo* (2010), the Court was concerned with proceedings brought by Guinea against the Democratic Republic of Congo ('DRC') concerning the arrest, detention and expulsion of Mr. Diallo, a Guinean national in the territory of DRC. The Court *inter alia* examined whether DRC's conduct had violated the ICCPR (Article 13) and the African Charter (Article 12(4)). Having set out its interpretation of these provisions, the Court made references to the pronouncements of the Human Rights Committee and the African Commission for Human and Peoples' Rights.

In relation to the ICCPR, it found that its interpretation 'is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties.' Crucially, the Court continued:

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*. The point here is to *achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled*.²⁴ [emphasis added]

The Court took a similar approach in relation to the African Charter and the African Commission. It reasoned that 'when the Court is called upon [...] to apply a regional instrument for the protection of human rights, it *must take due account of* the interpretation of that instrument adopted by the independent bodies *which have been specifically created [...] to monitor the sound application of the treaty* in question'. It noted that, in the case before it, the Court's interpretation of Article 12 of the African Charter 'is consonant with the case law of the African Commission on Human and Peoples' Rights' and cited two individual petition cases.²⁵

24 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 66.

25 *Ibid.*, para. 67.

The Court relied on pronouncements in the context of individual complaints procedures of both universal and regional expert treaty bodies.²⁶ Some question may arise as to why the Court used the language ‘should ascribe great weight’ as opposed to ‘must take due account of’ in its reasoning vis-à-vis the pronouncements of the Human Rights Committee and the African Commission respectively, which appears on first sight inconsistent. However, at a minimum both terms suggest that reliance on pronouncements is not mandatory; rather the Court relies on them in a discretionary manner. Importantly, the Court explained that reliance on the pronouncements of expert treaty bodies was called for first because treaty parties have specifically created these bodies and have mandated them with powers over specific treaties, and second owing to the need for clarity and consistency in international law, as well as on the legal security (both for individuals protected under the ICCPR and treaty parties to the ICCPR).

2.3 *Belgium v. Senegal (2012)*

In *Belgium v. Senegal (2012)*, the Court was concerned with a complaint by Belgium that inter alia Senegal had violated Article 7(1) of the Convention Against Torture. The dispute also involved the question whether a treaty party (here Senegal) was obliged to criminalise under Article 4 of the Convention acts of torture that were committed before the entry into force of the Convention against Torture for that treaty party or to establish jurisdiction over such acts pursuant to Article 5 of the Convention. The Court noted that since there was no evidence in the Convention of an intention to establish such an obligation on treaty parties, the obligation to prosecute, under Article 7(1) of the Convention did not apply to such acts.²⁷ The Court referred to the fact that the Committee against Torture emphasized in one of its individual complaint procedure that the term ‘torture’ for purposes of the Convention ‘can only mean torture that occurs subsequent to the entry into force of the Convention.’²⁸ It continued:

However, when the Committee considered Mr. Habré’s situation, the question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that

²⁶ Ibid, para. 66.

²⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at para. 100.

²⁸ Ibid, para. 101.

question (*Guengueng et al. v. Senegal* (communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).²⁹

The Court referred to the Committee's finding about the meaning of the term 'torture' in the Convention. It seemingly took a different view to the Committee. But, the important detail is that it expressly addressed the reasons for its different finding.³⁰ Further, the ICJ showed that it did not rely on the Committee's pronouncement, because of the Committee's reasoning: it never addressed this point in that case and the issue was not raised before the Committee. In other words, the criterion was the reasoning's quality.

2.4 *Advisory Opinion on Judgment No. 2867 (2012)*

In its Advisory Opinion on *Judgment No. 2867 (2012)*, the Court was concerned with the the principle of equality before the Court of an organisation and the employee in cases of applications for review of judgments of the UNAT and the ILOAT. The Court noted 'the development of the principle of equality of access to courts and tribunals since 1946, when the review procedure was established', which is reflected in the 'significant differences' between the two General Comments by the Human Rights Committee on Article 14(1) of the ICCPR that requires that '[a]ll persons shall be equal before the courts and tribunals'.³¹ The Court explained that General Comment No.13 (1984) adopted just seven years after the Covenant came into force, only repeated the provision's terms and called on States to report more fully on steps taken to ensure equality before the courts, including equal access to the courts.³² But, on the basis of 30 years of experience in the application of Article 14 of the ICCPR, General Comment No.32 (2007) 'gives detailed attention' to equality before domestic courts and tribunals,³³ and Article 14 guarantees equal access and equality of arms. While in non-criminal matters the right of equal access does not address the issue of the right of appeal, if procedural rights are accorded they must be provided to

²⁹ Ibid.

³⁰ M. Andenas and J.R. Leiss, The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute, 77 *ZaORV* (2017) 907–972 at 948–951.

³¹ *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.

³² Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), paras. 2–3.

³³ *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.

all the parties unless distinctions can be justified on objective and reasonable grounds.³⁴ On this basis, the Court found that there is no such justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member.³⁵

The Court did not explain how the pronouncements of the Human Rights Committee were relevant for the interpretation of Article 14 of the ICCPR. One may hypothesise that this was because the Court had indicated explicitly in *Ahmadou Diallo* (2010) its reasoning for relying on the Committee's findings (legal certainty, legal consistency and legal security). However, the Court's comparison between different General Comments suggests that the Court considers that some qualitative criterion is required for assessing which pronouncement to rely on.

2.5 *Interim Conclusions*

The ICJ has not in all its decisions explained the grounds for relying (or not) on the pronouncements of expert treaty bodies. However, assessing its reasoning allows for some reflection on whether the Court is developing some approach vis-à-vis its reliance on the pronouncements of expert treaty bodies. *Ahmadou Diallo* (2010) was an exception to the Court's approach – its reasoning was more explicit in that case. The Court considered that it is not obliged to take a position consistent with the pronouncements of an expert treaty body, but that it 'should ascribe great weight' to them or 'it must take due account of' them. Its reasoning was dual. First, expert treaty bodies are established specifically in order to supervise and monitor the treaty's application. The Court seems to implicitly consider that if treaty parties established expert treaty bodies, they have specifically delegated to them some interpretative function, as part of their oversight functions, and this function cannot be empty of any legal effect. Second, the Court's reasoning has been shaped by the need for and goal of 'legal clarity and consistency in international law' and the legal security for both the individuals whose rights are protected under the treaty and for the treaty parties.

The fact that the Court identified some reasons for relying on the pronouncements of expert treaty bodies introduces some transparency in the Court's decisions. The Court avoids the risk of being arbitrary in its reliance

34 Human Rights Committee, General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial, paras. 8–9, 12 and 13.

35 *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.

on 'precedent'.³⁶ However, two central questions persist, which are discussed below.

First, the Court's reasoning in all these decisions taken together allows for some conclusions to be drawn about which criteria apply for relying (or not) on each pronouncement. The form of the output in which the pronouncement has been made is not determinative of whether the Court will rely on it and the weight to be given to it. Different expert treaty bodies have diverse functions and outputs. For instance, the Human Rights Committee adopts General Comments but it also adopts views in relation to individual complaints brought against treaty parties by individuals; as well as views concerning periodic State reports. There is no evidence that the Court drew a distinction between pronouncements made in the context of these different types of outputs. Rather, in the *Wall Advisory Opinion* the ICJ relied on pronouncements made in the context of outputs under all these procedures.³⁷ In *Ahmadou Diallo*, it relied on two pronouncements of the African Commission which the Commission made in the context of individual complaints before it.³⁸ And in *Belgium v. Senegal*, although it did not rely on the Human Rights Committee's pronouncement in the individual complaint proceedings in question, it did not do so because of the form of the Committee's output, but owing to the quality of its reasoning.³⁹ Similarly, in the *Advisory Opinion Judgment No. 2876*, the ICJ dealt with two General Comments and relied on (the later) General Comment No.32, because it reflected 30 years of experience in the application of Article 14, as opposed to General Comment No.13, which simply *restated* Article 14 of the ICCPR. The Court's reasoned choice implies that the quality of the reasoning and analysis in the pronouncement of the expert treaty body is determinative of whether the Court will rely on it.

Second, it is unclear how the Court classifies the pronouncements of expert treaty bodies for the purpose of treaty interpretation. The Court has not

36 On the use of precedent in a discretionary manner by those who invoke it: HG Cohen, *Theorizing Precedent in International Law*, in A. Bianchi, D. Peat, M. Windsor (eds), *Interpretation in International Law* (2015), pp. 268–289 at 271 ('precedent is a choice').

37 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at para. 109.

38 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 67.

39 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at para. 101.

indicated that it has relied on them because they constitute subsequent practice within the meaning of the rule set forth in Article 31(3)(b) of the VCLT. It has not indicated that they fall within the rule set forth in Article 31(3)(c) of the VCLT, as some suggest.⁴⁰ It has not classified them as a supplementary means of interpretation within the meaning of the rule in VCLT Article 32. And, it has not clarified that it relied on them as subsidiary means for the determination of rules of law within the meaning of Article 38(1)(d) of the ICJ Statute, which according to some authors ‘embodies a principle of systemic institutional integration’,⁴¹ and imposes an obligation on the ICJ to take into account the findings of other international courts and tribunals and expert treaty bodies when determining international rules. There is no evidence in the express reasoning of the Court that guides specifically to the one over the other alternative (or even supplementary) understandings.

However, the Court’s express objective to ensure ‘legal consistency in international law’ coupled with the fact that the Court avoided to merely dismiss the pronouncements of expert treaty bodies with which the Court does not agree indicates three wider premises of the Court’s reasoning. First, it may be understood from the Court’s overall approach and reasoning that the Court perceives international law as a legal system and itself as part of the international legal system, where multiple actors claim some authority as to the correct interpretation of the law. Second, the reliance on pronouncements of expert treaty bodies specifically mandated to supervise the application (and thus to interpret) the treaties over which the Court may also have jurisdiction can be seen as an exercise of systemic integration (beyond the confines of the rule set forth in VCLT Article 31(3)(c)).⁴² Third, the Court may and will depart from a pronouncement of an expert treaty body about the treaty, which the body has been mandated to supervise, it (by providing some reasoning for its departure), if the pronouncement lacks substantive correctness or demonstrates no

40 C. Brown, *A Common Law of International Adjudication* (2007), pp. 52–55.

41 M. Andenas and J.R. Leiss, The Systemic Relevance of “Judicial Decisions” in Article 38 of the ICJ Statute, 77 *ZaORV* (2017) 907–972 at 939.

42 On systemic integration: C. McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, 54 *ICLQ* (2005) 279–319.

(or not proper) adherence to methodology in interpreting the treaty in question⁴³ (or arguably when the body's composition lacks legal expertise).⁴⁴

3 The ILC's Work on the Pronouncements of Expert Treaty Bodies and Treaty Interpretation

The ILC has undertaken work on the legal effects of pronouncements of expert treaty bodies in numerous topics of its work. The focus of this study is the 2018 Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties ('Conclusions on SASP').⁴⁵ Before focusing on the Conclusions on SASP, the 2011 Guide to Practice on Reservations to Treaties ('Guide to Practice on Reservations') is examined because it also dealt with 'treaty monitoring bodies',⁴⁶ and the Commission's reasoning in this topic is relevant for the legal effects of pronouncements of expert treaty bodies. The Commission in the Guide to Practice on Reservations examined these legal effects through the prism of reservations to treaties. The VCLT does not contain express rules concerning the effects of impermissible reservations and concerning the competences of treaty monitoring bodies vis-à-vis impermissible reservations (since the latter developed after the conclusion of the VCLT).⁴⁷ The Commission's objective in this topic was to address the uncertainty which

43 ILC Special Rapporteur Nolte and scholars take the position that there can be no presumption as to the substantive correctness of a pronouncement: Special Rapporteur Nolte, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, A/CN.4/694, 7 March 2016, pp. 23–24; C. Tomuschat, *Human Rights: Between Idealism and Realism* (2014), p. 267. See also Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 33 (Sweden on behalf of the Nordic Countries).

44 N. Rodley, The Role and Impact of Treaty Bodies, in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013), pp. 621–648, at 624–625.

45 ILC, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries, UN Doc. A/73/10, 2018, pp. 16–140.

46 ILC, Text of the Guide to Practice on Reservations to Treaties, UN Doc. A/66/10/Add.1, 2011, pp. 1–603.

47 Treaties foreseeing the establishment of expert treaty bodies were concluded some years before the VCLT and entered in force a few months prior to the conclusion of the VCLT or after its conclusion. Thus, even in relation to these treaties, treaty parties had limited or non-existent experience at the time when the VCLT was being negotiated or concluded. Arts. 8–14, International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 (entry in force: 4 January 1969); Arts. 28–45, International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (entry in force: 23 March 1976).

has arisen in practice concerning whether ‘treaty monitoring bodies’ have a competence to determine the permissibility of reservations and their effects – a debate which found particular expression in the controversy that surrounded General Comment No. 24 of the Human Rights Committee.⁴⁸

The Guide to Practice on Reservations uses the term ‘treaty monitoring bodies’ to describe the same bodies as Conclusions on SASP do by the term ‘expert treaty bodies’. The Guide does not provide a definition but works on the assumption that these are created by treaty (and exceptionally by a decision of the treaty parties or an international organization), and that they are competent to apply and interpret the treaty in question.⁴⁹ Guideline 3.2.1 of the Guide to Practice on Reservations deals with the competence of treaty monitoring bodies to assess the permissibility of reservations. It provides that ‘[t]he 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’. While this wording does not clarify what is the legal effect of the pronouncements of expert treaty bodies, Guideline 3.2.2 provides that ‘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.’⁵⁰ This Guideline reflects the idea that the bodies’ pronouncements are not binding but have some legal effects. Because treaty parties have a duty to cooperate with the treaty monitoring bodies, treaty parties have to take their pronouncements into account – this is explicit in the commentary to Guideline 3.2.2.⁵¹

The Conclusions on SASP are concerned with the legal effects of the pronouncements of expert treaty bodies within the confines of treaty interpretation and further within the confines of the relevance of subsequent agreements and subsequent practice for treaty interpretation. In other words, the Commission’s work on this topic does not address (and thus does not determine) whether these may be relevant and if so how under VCLT Article 31(3) (c) or Article 38(1)(d) of the ICJ Statute. These options are unaffected by the Commission’s work on this topic – albeit some support for at least the latter can be found in the Commission’s work on this topic, as discussed below. Further, some ILC Members relied on the confines of the topic in order to argue for

48 Ibid, Text of the Guide to Practice on Reservations on Treaties, UN Doc. A/66/Add.1, 2011, pp. 1–603, at 400, para. 2.

49 Ibid, Text of the Guide to Practice on Reservations, at 400, footnote 1845, and at 397, para. 9.

50 Emphasis added.

51 ILC, Text of the Guide to Practice on Reservations to Treaties, UN Doc. A/66/10/Add.1, 2011, pp. 1–603, at 402, para. 3.

the exclusion of a reference to the pronouncements of expert treaty bodies in a separate Conclusion; and so the fact that the Commission finally included a Conclusion on the pronouncements of expert treaty bodies is a particular achievement that reflects the importance that ILC Members and States attach to the work and pronouncements of expert treaty bodies.

The following sections reflect on the development of the Commission's work on this topic in order to trace the reasoning behind the treatment of the pronouncements of expert treaty bodies. The Fourth Report of Special Rapporteur Nolte and the debates among ILC Members are discussed (Section 3.1), followed by an analysis of Conclusion 13 on the pronouncements of expert treaty bodies as adopted provisionally on first reading (Section 3.2), of the responses of governments to the first reading (Section 3.3), of Conclusion 13 as finally adopted on second reading on the basis of the Fifth Report of Special Rapporteur Nolte (Section 3.4).

3.1 *The Fourth Report of Special Rapporteur Nolte and the Debate in ILC Plenary*

Special Rapporteur Nolte initially dealt with expert treaty bodies in his Fourth Report.⁵² Drawing on the interpretation of the VCLT, the practice of States and decisions of international and national courts, the Special Rapporteur argued that the pronouncements of expert treaty bodies vis-à-vis the treaty that they have supervisory mandate are not subsequent agreements or subsequent practice of parties, and do not fall within the rules set forth in VCLT Article 31(3) (a) and (b). However, he argued that, first, a subsequent agreements and subsequent practice under VCLT Article 31(3), or other subsequent practice under VCLT Article 32, may arise from, or be reflected in, pronouncements of an expert treaty body.⁵³ Second, he proposed that the 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.⁵⁴ Third, he argued that the pronouncements of expert treaty bodies *inter alia* constitute 'other subsequent practice' within the rule in VCLT Article 32.⁵⁵ For Special Rapporteur Nolte,

52 Special Rapporteur Nolte, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, A/CN.4/694, 7 March 2016.

53 *Ibid.*, p. 47.

54 *Ibid.*, p. 47.

55 Special Rapporteur Nolte, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, A/CN.4/694, 7 March 2016, especially at 26, para. 62.

[p]ronouncements of expert bodies [...], 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. [...] 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”. [...] 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.⁵⁶

For him, ‘[t]he 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 in a supplementary fashion’ – in other words, international and domestic courts rely on the pronouncements of such bodies on the basis of the rule set forth in Article 32 of the VCLT.⁵⁷

Finally, in his Fourth Report (but without proposing a relevant draft conclusion), the Special Rapporteur argued that the pronouncements of expert treaty bodies may also constitute a subsidiary means for the determination of rules of law within the meaning of Article 38(1)(d) of the ICJ Statute.⁵⁸ This classification did not undermine the classification of the same pronouncements as a supplementary means of interpretation under VCLT Article 32.⁵⁹

In light of this reasoning, the draft Conclusion 12 as proposed by the Special Rapporteur read as follows:

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.

56 Ibid, pp. 25–26, para. 60.

57 Ibid, para. 53.

58 paras. 63–64.

59 Special Rapporteur Nolte, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, A/CN.4/694, 7 March 2016, paras. 63–64.

(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.

The two first propositions of the Special Rapporteur (finding reflection in paragraphs 2 and 4 of his proposed draft Conclusion 12 respectively) were widely supported by ILC Members in Plenary. Only one Member opposed the assessment that pronouncements of expert treaty bodies constituted a subsidiary means for determining rules of law within the meaning of Article 38(1)(d) of the ICJ Statute.⁶⁰ Others indicated that such classification fell outside of the present topic.⁶¹

However, his third proposition, which the Special Rapporteur considered to be covered by paragraph 3 of his proposed draft Conclusion 12 (that the pronouncements of expert treaty bodies are 'other subsequent practice' in the treaty's application and are thus a supplementary means of interpretation within the rule set forth in VCLT Article 32) received a variety of different reactions from ILC Members. These can be grouped in five categories based on their arguments. First, two ILC Members (Mr Murphy and Mr Park) argued that since the pronouncements of expert treaty bodies were not subsequent agreements or practice, they fell outside the scope of the topic (irrespective of whether they may be or may not be a means of interpretation).⁶² Second, one ILC Member (Mr Sturma) considered that the pronouncements of expert treaty bodies cannot be considered subsequent practice within

60 Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 15 (Murphy).

61 Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 9 (Tladi); Provisional summary record of the 3306th meeting, 27 May 2016, A/CN.4/SR.3306, 12 (Wood).

62 Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 15 (Murphy), 18 (Park).

VCLT Article 32.⁶³ Third, and in stark contrast to the others, one ILC Member (Ms Escobar-Hernandez) considered that the ‘pronouncements could not be considered to be nothing more than the opinion of individuals acting solely in their capacity as experts’ (as ‘other subsequent practice’ suggested by the Special Rapporteur), because she considered that expert treaty bodies had an interpretative function and their pronouncements had legal effects. However, she did not clarify what these legal effects are, but implicitly suggested that they were not merely a supplementary means of interpretation.⁶⁴ Fourth, three ILC Members considered that the pronouncements of expert treaty bodies were a supplementary means of interpretation within VCLT Article 32, but did not constitute ‘other subsequent practice.’⁶⁵ More specifically, Mr. Hmoud considered that ‘if the body in question was explicitly or implicitly tasked with interpreting the provisions of the treaty under which it had been established (by applying the rules of interpretation), the value of its pronouncements might be determined by article 32, but not by its “conduct”.’⁶⁶ He ‘could agree that such pronouncements constituted a supplementary means of interpretation, but there was nothing to suggest that they amounted to subsequent practice.’⁶⁷ Mr. Forteau argued that ‘such pronouncements did not amount to a “practice”, but to international “case law” or, if one preferred, to “subsidiary means” for the interpretation of rules of law, which was entirely different to subsequent practice as a means of interpretation.’ For him, ‘[t]he Special Rapporteur was quite right to state [...] that ‘such pronouncements were a “relevant means of interpretation”, but, once again, the fact that the pronouncements of expert bodies were a means of interpretation did not make them a form of practice. [W]hile the pronouncements of expert bodies belonged to the general category of means of interpretation, they did not belong to the specific category of subsequent practice.’⁶⁸ Mr. Kolodkin considered that ‘such pronouncements remained a supplementary means of treaty interpretation under article 32 of the Vienna Convention.’⁶⁹ Fifth, two ILC Members did not specifically or

63 Provisional summary record of the 3306th meeting, 27 May 2016, A/CN.4/SR.3306, 11 (Sturma).

64 Provisional summary record of the 3306th meeting, 27 May 2016, A/CN.4/SR.3306, 9 (Escobar-Hernandez). See also further explanation of her position in relation to the debate on second reading: Provisional Summary Record of the 3394th meeting, 3 May 2018 (7 June 2018), A/CN.4/SR.3394, pp. 11–12.

65 Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 5–7 especially 6 (Hmoud); *Ibid.*, 11 (Forteau); 19 (Kolodkin).

66 Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 5.

67 *Ibid.*, p. 7.

68 Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 11–12.

69 *Ibid.*, p. 19.

expressly oppose in substance that the pronouncements of expert treaty bodies may constitute supplementary means of interpretation. Mr. Wood stated that he was ‘not trying to downplay the importance of the pronouncements of expert bodies for the interpretation of treaties, but the Special Rapporteur had not demonstrated that they amounted to subsequent practice.’⁷⁰ Mr. Murase clarified that ‘the legal significance of the pronouncements had been acknowledged [by international courts and tribunals] not because they constituted “subsequent practice” but for other reasons’ – albeit he did not indicate which reasons he had in mind, and thus did not exclude the proposition that the pronouncements of expert treaty bodies constitute a supplementary means of interpretation within the meaning of VCLT Article 32.⁷¹

3.2 *ILC Conclusion 13[12] Adopted on First Reading*

The proposed draft Conclusion 12 was referred to the Drafting Committee, whose proceedings are not public.⁷² Given that some ILC Members contested the inclusion of a Conclusion specifically dedicated to pronouncements of expert treaty bodies (owing to the confines of the topic), and the variety of underlying premises of the arguments of ILC Members regarding the legal value of the pronouncements of expert treaty bodies per se, as discussed in Section 3.1 above, a compromise was achieved in the Drafting Committee through a ‘non-prejudice clause’ in paragraph 4 of Draft Conclusion 13[12] adopted provisionally by the Drafting Committee.⁷³ During the same ILC session (2016), the ILC adopted on first reading Draft Conclusion 13[12],⁷⁴ which was entitled ‘Pronouncements of expert treaty bodies’ and read:

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which

⁷⁰ Provisional summary record of the 3306th meeting, 27 May 2016, A/CN.4/SR.3306, 12.

⁷¹ Provisional summary record of the 3304th meeting, 25 May 2016, A/CN.4/SR.3304, 4.

⁷² The present author has had the privilege and opportunity to attend those closed proceedings as legal assistant to one of the ILC Members at the time, but she is bound by the confidentiality that is implicit in the closed nature of these proceedings and so she does not comment in this article on the issues discussed. Her comments are solely based on the evidence that is public.

⁷³ Statement of the Chairman of the Drafting Committee, Mr. Pavel Šturma, 10 June 2016, p. 6. Available at: http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2016_dc_chairman_statement_sasp.pdf&lang=E.

⁷⁴ ILC, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries thereto adopted by the Commission on first reading, at 120–240, UN Doc. A/71/10, 2016 (available at: <http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp6.pdf&lang=EF5RAC>).

- is established under a treaty and is not an organ of an international organization.
2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.
 3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.
 4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body *may otherwise make to the interpretation of a treaty*. [emphasis added]

The commentary to paragraph 4 of Conclusion 13^[12] explained the divergent opinions of ILC Members. More specifically, it stated that some ILC Members consider that ‘international and domestic courts mostly use pronouncements of expert treaty bodies in the discretionary way in which article 32 describes supplementary means of interpretation’,⁷⁵ and that the pronouncements of expert treaty bodies are ‘conduct mandated by the treaty the purpose of which is to contribute to the treaty’s proper application.’⁷⁶ It also stated that ‘[o]ther members consider that pronouncements of expert treaty bodies are not, as such, a form of practice in the sense of the present topic [which is] restricted to practice by the parties themselves’; and that ‘pronouncements of expert treaty bodies could not simultaneously be a form of application of the treaty and perform a monitoring function. According to those members, the *Diallo* judgment of the International Court of Justice suggested that the mandate and the function of expert treaty bodies, like that of courts, was to supervise the application of the treaty, not to serve themselves as a means of interpretation.’⁷⁷ Finally, the commentary indicated that ‘[t]he matter may be taken up again on second reading, in light of the views expressed by States.’⁷⁸

3.3 *Oral and Written Comments of Governments*

The oral statements of governments to the first reading of Draft Conclusion 13^[12] in the Sixth Committee meeting that considered the 2016 ILC Report can be

75 Ibid, p. 239, para. 25.

76 Ibid.

77 Ibid, p. 239, para. 26.

78 Ibid, p. 239, para. 27.

summarised as follows. Some States endorsed Draft Conclusion 13[12] without conditions.⁷⁹ Other States called for care not to overestimate the interpretative value of pronouncements of expert treaty bodies,⁸⁰ and cautioned that expert treaty bodies should not exceed their mandate or modify or amend the treaty.⁸¹

Both in their oral statements and their written comments and observations, numerous States stressed that the pronouncements of expert treaty bodies did not per se constitute or create a subsequent agreement or the subsequent practice of treaty parties.⁸² Of the written comments and observations on Draft Conclusion 13[12] made by overall 11 States,⁸³ two States agreed that the ‘the pronouncement of an expert treaty body, subject to relevant treaty provisions, may in itself constitute “other subsequent practice” under article 32 of the Vienna Convention, but not a subsequent agreement or subsequent practice by parties under article 31, paragraph 3.’⁸⁴ Only one State implicitly suggested that no legal value or effect can be attributed to the pronouncements of expert treaty bodies as a means of interpretation.⁸⁵ Finally, five States (the Nordic countries) indicated that the ‘legal weight [of the pronouncements of expert treaty bodies] will depend on their content, quality and legally persuasive character’⁸⁶ and one State proposed that the relevant Conclusion on second reading should clarify that the effect of a pronouncement of an expert treaty body depends on the interpretative impact that is permitted or provided for by a particular treaty.⁸⁷

79 A/C.6/71/SR.21, para. 96 (Portugal); A/C.6/71/SR.21, para. 131 (Netherlands); A/C.6/71/SR.22, para. 27 (Mexico); A/C.6/71/SR.22, para. 66 (New Zealand).

80 A/C.6/71/SR.20, para. 70 (China).

81 A/C.6/71/SR.20, para. 70 (China); A/C.6/71/SR.22, para. 41 (Singapore); A/C.6/71/SR.22, para. 73 (Malaysia); A/C.6/69/SR.22, para. 12 (Denmark, on behalf of the Nordic countries); A/C.6/69/SR.24, para. 29 (Malaysia). See also Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 33 (Sweden on behalf of the Nordic Countries).

82 A/C.6/71/SR.20, para. 53 (Finland, on behalf of the Nordic countries); A/C.6/71/SR.21, para. 77 (Austria); A/C.6/71/SR.22, para. 41 (Singapore); A/C.6/71/SR.22, para. 64 (Japan); A/C.6/70/SR.22, para. 46 (United States). See also Comments and observations received from Governments, A/CN.4/712, 21 February 2018, pp. 33–34 (Sweden on behalf of the Nordic Countries).

83 Sweden submitted observations on behalf of the 5 Nordic countries.

84 Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 32 (Czech Republic). See also similar approach, *ibid*, pp. 32–33 (Germany).

85 Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 31 (Belarus).

86 Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 33 (Sweden on behalf of the Nordic Countries).

87 Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 34 (United Kingdom).

3.4 *The Fifth Report of the Special Rapporteur and Conclusion 13 on Second Reading*

In his Fifth Report, Special Rapporteur Nolte having considered the statements and written observations of States, proposed that the Commission revisit its decision to replace his original proposal by paragraph 4 of Conclusion 13[12] on first reading, and replace that paragraph with the following:

A pronouncement of an expert treaty body, in the interpretation and application of the treaty under its mandate, may contribute to the interpretation of that treaty when applying articles 31, paragraph 1, and 32.⁸⁸

He explained that:

[the term] 'practice in the application of a treaty' [...] often consists of forms of cooperation among different organs within a State in which not every organ has a competence to make a binding decision. Like international organizations, *expert treaty bodies have been created by States to act as their agents in the process of ensuring the proper application of treaties.* The fact that such expert treaty bodies do not have the final decision-making power, but are merely an advisory element in the process of correctly applying the treaty, does not distinguish them from State organs that are involved in the application of a treaty without having the final decision-making power.⁸⁹ [emphasis added]

Some ILC Members disagreed about reopening the debate about Conclusion 13. They disagreed primarily about whether his proposed paragraph was outside the scope of the topic, and because they did not want to undermine the compromise the Commission reached as reflected in the language of the non-prejudice clause in the first reading of Conclusion 13[12].⁹⁰ Other ILC Members

88 Special Rapporteur Nolte, *Fifth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, A/CN.4/715, 28 February 2018, p. 43, para. 143.

89 Ibid, para. 141.

90 Provisional Summary Record of the 3391st meeting, 1 May 2018 (4 June 2018), A/CN.4/SR.3391, p. 5 (Hassouna); Ibid, p. 6 (Park); Ibid, pp. 8–9 (Murphy); Ibid, p. 10 (Tladi); Provisional Summary Record of the 3394th meeting, 3 May 2018 (7 June 2018), A/CN.4/SR.3394, p. 5 (Wood); Ibid, p. 14 (Reinisch); Provisional Summary Record of the 3395th meeting, 4 May 2018 (4 June 2018), A/CN.4/SR.3395, p. 8 (Vasquez-Bermudez).

strongly supported the Special Rapporteur's proposal.⁹¹ The Special Rapporteur emphasised again in Plenary that the ICJ in the *Wall Advisory Opinion* had referred to the 'practice' of the Human Rights Committee, and that in any event the present topic is concerned with subsequent practice, not only the subsequent practice of States.⁹²

On the basis of this debate, the Commission decided to refer the Draft Conclusions to the Drafting Committee, which decided to retain the non-prejudice clause while more clearly recognising that the pronouncements of expert treaty bodies contribute to the interpretation of treaties.⁹³ The language of Conclusion 13[12] adopted on first reading was retained entirely in Conclusion 13 on second reading in 2018 with the exception of paragraph 4,⁹⁴ which was changed to the following wording:

[t]his draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies *make to the interpretation of the treaties under their mandates*. [emphasis added]

91 Provisional Summary Record of the 3393rd meeting, 2 May 2018 (6 June 2018), A/CN.4/SR.3393 p. 4 (Murase); *Ibid.*, p. 9 (Grossman); *Ibid.*, p. 11 (Saboia); Provisional Summary Record of the 3394th meeting, 3 May 2018 (7 June 2018), A/CN.4/SR.3394, pp. 3–4 (Galvao Telles); *Ibid.*, pp. 8–9 (Sturma); *Ibid.*, pp. 12–13 (Escobar-Hernandez); *Ibid.*, p. 15 (Gomez-Robledo); Provisional Summary Record of the 3395th meeting, 4 May 2018 (4 June 2018), A/CN.4/SR.3395, p. 9 (Jalloh); *Ibid.*, 11 (Ruda Santolaria) although he disagreed with the Special Rapporteur's proposition that expert treaty bodies had been created by States to act as their agents in the process of ensuring the proper application of treaties.

92 Provisional Summary Record of the 3396th meeting, 7 May 2018 (12 June 2018), A/CN.4/SR.3396, p. 9.

93 Statement of the Chair of the Drafting Committee Mr. Charles Chernor Jalloh 18 May 2018, p. 16: http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sasp.pdf&lang=E.

94 ILC, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries thereto adopted by the Commission on second reading, at 16–140, UN Doc. A/73/10, 2018 (available at: http://legal.un.org/docs/?path=../ilc/reports/2018/english/a_73_10_advance.pdf&lang=E). Additionally, for reasons of consistency, a change was made in paragraph 4 of Conclusion 13 in the form of 'the deletion of the word "other" before "subsequent practice under article 32" in the first sentence'. Statement of the Chair of the Drafting Committee Mr. Charles Jalloh, 18 May 2018, p. 16. Available at: http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_sasp.pdf&lang=E.

The change in the language of Conclusion 13(4) seems to address the comments of States,⁹⁵ and the commentary clarifies that the wording ‘under their mandates’

reaffirms paragraph 2 of draft conclusion 13, which specifies that the relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable treaty rules under which such bodies operate. Paragraph 4 applies in principle to all treaty expert bodies. However, the extent to which pronouncements of expert treaty bodies contribute to the interpretation of the treaties “under their mandates” will vary [...].⁹⁶

Although the non-prejudice clause in Conclusion 13(4) does not expressly refer to the legal value of pronouncements per se, the commentary does address the issue. The commentary – as any ILC commentary to adopted ILC outputs – has been adopted by the Commission. It does not set out divergent views between ILC Members (as the one adopted on first reading). Commentaries are of particular interpretative value in relation to the adopted draft Conclusions.⁹⁷ They may guide the future practice of States, and the reasoning of international (and national) courts and tribunals.⁹⁸

The commentary to Conclusion 13(4) acknowledges that pronouncements of expert treaty bodies do not constitute practice of treaty parties, but ‘*conduct mandated by the treaty the purpose of which is to contribute to the treaty’s proper application.*’⁹⁹ As such and drawing support from the ICJ’s reliance on the ‘constant practice’ of the Human Rights Committee in the *Wall Advisory Opinion*, the commentary states that ‘pronouncements of expert treaty bodies *are to be used in the discretionary way in which article 32 describes supplementary*

95 Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 34 (United Kingdom).

96 Ibid, p. 116, para. 25.

97 G. Gaja, ‘Interpreting Articles Adopted by the International Law Commission’, 85 *British Yearbook of International Law* (2016) 10.

98 On the use of commentaries by the International Court of Justice and the methodology of their adoption, see respectively: D. Azaria, “Codification by Interpretation”: The International Law Commission as an Interpreter of International Law’ (*European Journal of International Law*, forthcoming 2020); D. Azaria, The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making, in United Nations (ed.), *The International Law Commission at 70* (Brill, forthcoming 2020).

99 Ibid, pp. 115–116, para. 24 (emphasis added).

means of interpretation' and that 'they also "contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty".¹⁰⁰ Additionally, the commentary notes that they have also been characterised as subsidiary means for determining rules of law pursuant to Article 38, paragraph 1(d) of the Statute of the ICJ.¹⁰¹

4 Conclusions

The Court's reasoning in the four cases where it has relied on the pronouncements of expert treaty bodies is unclear as to how the Court classifies the pronouncements for the purposes of treaty interpretation. The Court has not said that they constitute subsequent practice within the meaning of the rule set forth in Article 31(3)(b) of the VCLT, or that they fall within the rule set forth in Article 31(3)(c) of the VCLT. Further, it did not expressly classify them per se as a supplementary means of interpretation within the meaning of the rule in Article 32 of the VCLT, or as a subsidiary means for the determination of rules of law within the meaning of Article 38(1)(d) of the ICJ Statute. Yet, the Court's express objective to ensure 'legal consistency in international law' (coupled with the Court's avoidance to merely dismiss the pronouncements of expert treaty bodies with which the Court disagrees) indicates that the Court perceives international law as a legal system, where rules should be seen, interpreted and applied in harmony by the multiple actors within that legal system. Finally, although it did not prescribe or set out the precise criteria pursuant to which one has to identify which pronouncements of expert treaty bodies can be relied upon, the Court's reasoning suggests that the quality of the pronouncement is a criterion for this assessment.

On the other hand, the Commission has more directly dealt with the pronouncements of expert treaty bodies in its work on subsequent agreements and subsequent practice in relation to treaty interpretation. The Commission has clarified that expert treaty bodies play a crucial role in the interpretation of treaties in relation to which they have been mandated to exercise certain functions. They may solicit the subsequent practice of treaty parties in the treaty's application thus giving rise to a future agreement as to the treaty's interpretation (VCLT Article 31(3)(b)) or they may give rise to the practice of parties that falls short of such agreement, but which may fall within supplementary means of interpretation (VCLT Article 32). They may also solicit a future subsequent

¹⁰⁰ Ibid, p. 115, para. 24.

¹⁰¹ Ibid, pp. 115–116, para. 24.

agreement among treaty parties within the meaning of VCLT Article 31(3)(a). In this context, the silence of parties vis-à-vis the pronouncements of expert treaty bodies cannot be presumed to constitute acceptance of the interpretation adopted by the expert treaty body.

A major achievement of the Commission's work is its determination to clarify the interpretative value of pronouncements of expert treaty bodies themselves – a fact that has been praised by some States. The Commission decided to deal with this matter in the form of a non-prejudice clause primarily owing to the concern of some ILC Members that the legal value of pronouncements per se fell outside the Commission's work on this topic, since this topic was concerned with subsequent agreements and subsequent practice of *treaty parties* in relation to treaty interpretation. Yet, such a concern did not prevail partly because it the Commission also addressed in the same topic the legal value of pronouncements of international organisations and their organs vis-à-vis their constitutive instruments. Instead, a compromise was reached through a non-prejudice clause and a further explanation in the commentary. In this respect, the commentary to the non-prejudice clause adopted in relation to this question in Conclusion 13 makes a significant contribution to the scholarship and practice of international law in two ways. First, it adds more clarity and predictability in the manner in which international courts and tribunals as well as government officials and domestic courts will use the pronouncements of expert treaty bodies. Second, it acknowledges that pronouncements of expert treaty bodies do not constitute practice of treaty parties, but as 'conduct mandated by the treaty the purpose of which is to contribute to the treaty's proper application', they may be relied upon as a supplementary means of interpretation within the meaning of Article 32 of the VCLT; and they may contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty.¹⁰² As a separate matter, the commentary recognizes that the pronouncements of expert treaty bodies have been characterized as subsidiary means for the determination of the rules of law within the scope of Article 38(1)(d) of the ICJ Statute.¹⁰³ The commentary does not elaborate on the criteria that have to be used in order for the pronouncements of expert treaty bodies per se to be relied upon. However, the Special Rapporteur's Fourth Report and the responses of governments (as well as the reasoning of the ICJ in its Advisory Opinion on *Judgment No. 2867*) illustrate that the quality of each pronouncement of an expert treaty body,

¹⁰² Ibid, p. 115, para. 24.

¹⁰³ Ibid, pp. 115–116, para. 24.

and thus the adherence of the expert treaty body on some methodology in interpreting the treaty in question, is a determinative factor for relying on it.¹⁰⁴

The tale of the Court's and the Commission's approaches to the pronouncements of expert treaty bodies in relation to the interpretation of treaties demonstrates the profound belief of both the Court and the Commission that international law is a legal system, where expert treaty bodies are integral actors with some 'authority' concerning the determination of the law (within their mandate). It also shows the belief of the Court and (implicitly of the Commission) that this legal system necessitates 'legal consistency'. This in its turn may suggest that the reliance on pronouncements of expert treaty bodies specifically mandated to supervise the application (and interpretation) of treaties may be seen as an exercise of 'systemic integration' – 'that international obligations are interpreted by reference to their normative environment ("system")'¹⁰⁵ – a principle that exceeds the confines of the rule set forth in Article 31(3)(c) of the VCLT.

Acknowledgments

The author gratefully acknowledges Professor Campbell McLachlan, discussions with whom inspired and shed light on particular aspects of the research.

104 Special Rapporteur Nolte, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, A/CN.4/694, 7 March 2016, p. 23. See also C. Tomuschat, *Human Rights: Between Idealism and Realism* (2014), p. 267. See also Comments and observations received from Governments, A/CN.4/712, 21 February 2018, p. 33 (Sweden on behalf of the Nordic Countries).

105 ILC Study Group, *Fragmentation of International Law*, A/CN.4/L.682, 2006, paras. 413, 423.