Acts of International Organizations as Extraneous Material for Treaty Interpretation

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Accepted: 2 August 2022 / Published online: 23 August 2022 © The Author(s) 2022

Abstract
Acts of international organizations often reflect developments in international law. Therefore, they could contribute to the evolutive interpretation of treaty texts if it were not for Article 31 VCLT, which embraces extraneous material for interpretative purposes but strongly focuses on the parties’ acceptance of the material’s interpretative value. The analysis of national and international case law shows that acts of international organizations are very rarely mentioned in the context of treaty interpretation and very little use is made of the opportunity to establish the ordinary meanings of technical treaty terms through such acts. The organizations’ most important interpretive role lies in the self-application of their constituent instruments, and even then, only with respect to so-called ‘household matters’ concerning each organization’s own procedures and competences. In contrast, the functional authority of organizations concerning the interpretation of the ‘constitutional’ rights and obligations of their Member States requires the latter’s broad acceptance. With regard to treaties other than constituent instruments, the analysed case law illustrates that domestic and international courts continue to demonstrate great reluctance in using the acts of international organizations in their interpretive processes and, when they do, they do so in a faltering manner.

Keywords Evolutive interpretation · Extraneous interpretive material · Subsequent practice · International organizations · Expert bodies · Conference of State Parties

1 Introduction

The role of international organizations as one of the two main architects of the international legal order, the other one being States, is an increasingly popular topic in scholarship. This is so partly because the International Law Commission (ILC), but also international organizations themselves tend to marginalize the latter’s role in
international law-making processes.\(^1\) As a matter of fact, international organizations consider themselves to be the facilitators of legal development rather than the architects thereof, as they are quite comfortable in their function of preparing the grounds and providing the forums for international consensus-building efforts driven by States.\(^2\) That being said, international legal development can be advanced on several levels, not only through law-driven practice and treaty-making but also through evolutive interpretations of existing treaties. This, of course, requires that treaty interpretation is receptive to shifting social needs and new commonly-shared convictions within the international community.\(^3\) The well-known ‘living instrument’\(^4\) language employed by human rights bodies to clarify that treaty interpretation must consider ‘changes over time and present-day conditions’\(^5\) has made evolutive interpretation acceptable, at least for human rights treaties. Unsurprisingly, this method has also been utilized for other types of treaties, such as those protecting common goods (e.g. the environment) and vulnerable groups (e.g. civilians, minorities, refugees).\(^6\)

Irrespective of their subject matter and objectives, international treaties appear to be especially receptive to evolutive interpretation if they contain generic terms where their meaning can evolve over time. The International Court of Justice (ICJ) in *Navigational and Related Rights* (2009) made that clear with regard to the Spanish term ‘comercio’ (English: commerce) which played a significant role in the Treaty of Limits\(^7\) concluded in 1858 between Costa Rica and Nicaragua.\(^8\) Without mentioning the rules of interpretation enshrined in Article 31 VCLT, the ICJ held that the term must be understood, as a rule, in the light of what was determined to have been the parties’ common intention at the time of the conclusion of the treaty. However, if the meaning of the term has changed over time, then the original intent of the parties should be contextualized within the present-day meaning of the term when the treaty is applied. According to the ICJ, the intent to allow for evolutive interpretation can be deduced from the use of generic terms in a treaty that is meant to last.\(^9\) The ICJ’s emphasis on the parties’ intent has been thoroughly discussed and criticised elsewhere and, as such, will not be touched upon here.\(^10\) For the purpose of this contribution, the judgment provokes an observation of a more general nature: when elaborating on the modern-day meaning of ‘comercio’, the Court relied on its

\(^1\) With regard to the ILC: Blokker (2017), pp. 1 et seq.
\(^2\) De Serpa Soares (2016), pp. 102 et seq.
\(^3\) ILC, Special Rapporteur Georg Nolte, Treaties over Time, in particular: subsequent agreements and subsequent practice, UN Doc. A/63/10 (2008), Annex A, p. 365, paras. 1 and 2.
\(^4\) European Court of Human Rights (ECtHR), *Loizidou v. Turkey* (Preliminary Objections), Appl. no. 1531/89, Judgment, 23 March 1995, para. 71; Inter-American Court of Human Rights (I-ACtHR), Advisory Opinion OC-16/99, 1 October 1999, para. 114.
\(^5\) I-ACtHR, Advisory Opinion OC-16/99, 1 October 1999, para. 114.
\(^6\) Arato (2015), p. 206.
\(^7\) A Treaty of Limits is a treaty that establishes or confirms a border between two States.
\(^8\) *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, p. 213, para. 63.
\(^9\) *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, p. 213, paras. 64 and 67.
\(^10\) Bjorge (2015), pp. 190–191.
own understanding of the term rather than extraneous material. More specifically, when the ICJ declared that the term ‘comercio’ comprises the paid transport of not only goods but also persons such as tourists, it did not utilize the notion of ‘trade in service’ as applied within the World Trade Organization (WTO) and the United Nations (UN) system, of which both Costa Rica and Nicaragua are members. This is all the more remarkable as Costa Rica argued in its written memorial that the tourism industry is a service sector that falls under the General Agreement on Trade in Services (GATS) and the Central Product Classification (CPC) system promulgated by the United Nations Statistical Commission.\footnote{Dispute concerning Navigational and Related Rights (Costa Rica v. Nicaragua), ICJ Reports 2009, p. 213; Written Proceedings, Dispute concerning Navigational and Related Rights, Vol. I, Memorial of Costa Rica, 29 August 2006, at p. 70, para. 4.66, \url{https://www.icj-cij.org/public/files/case-related/133/15084.pdf} (accessed 1 August 2022).}

Irrespective of whether the ICJ’s interpretation of the term ‘comercio’ is persuasive due to the Court’s judicial authority, the case raises a fundamental question of treaty interpretation: What is the interpretive value of acts of international organizations? As it stands, one important indicator of legal change are the documents, draft models, resolutions and opinions produced by international organizations. Then again, these documents are created by international actors whose decisions are not those of their Member States but their own. This inevitably renders the link between the States parties’ consent to a specific treaty text and the document produced by an international organization rather tenuous.

It is the purpose of this study to explore the significance of acts of international organizations as extraneous material for treaty interpretation. For this purpose, the term ‘acts’ is used as an umbrella term which includes not only ‘resolutions’, which are a formal expression of an organization’s opinion, but also its decisions on procedural and function-related matters and publications, e.g. handbooks and guidelines authorized by such organizations. As the first step, this study will place extraneous material, regardless of its source, within the context provided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Second, the present research explores the difference between extraneous material produced by expert treaty bodies as opposed to that originating from international organizations. Finally, the analysis turns to selected areas of international organizations’ functional expertise and their interpretive classification by international and domestic courts and tribunals.

### 2 Extraneousness of Material and Authorship

By way of a definition, extraneous\footnote{Synonym: extrinsic material.} material is an interpretive resource that originates from outside the primary treaty text and is brought into the process of interpretation in order to better understand the (current) meaning of the primary text.\footnote{Dörr (2018b), Art. 32, para. 1.}
Starting with the textual approach to treaty interpretation, Article 31 paragraph 1 VCLT does not identify any particular assistive material that an interpreter may use to clarify the ordinary meaning of treaty terms. However, international practice shows that the material used in the context of textual interpretation can be of either external origin or intrinsic, i.e. the term’s meaning is laid down in, or deduced from, other treaty provisions. By way of an example, an intrinsic origin would be the treaty’s own definition clauses, whereas well-established dictionaries, such as the Oxford English Dictionary, would fall under the category of extraneous aids. In Kasikili/Sedudu Island, the ICJ referred to the Dictionnaire français d’hydrologie de surface avec équivalents en anglais, espagnol, allemand to establish the meaning of the term ‘main channel’\textsuperscript{14} The telos interpretation pursuant to Article 31 paragraph 1 VCLT is not adverse towards the use of extraneous material, too. Whereas determining the object and purpose of a treaty requires first and foremost an in-depth analysis of the treaty itself, e.g. its preamble, there are cases where the object and purpose of one treaty have been determined by distinguishing them from ‘extraneous’ treaties of a similar type (e.g. one friendship and commerce treaty from others of the same kind\textsuperscript{15}). As the first sentence of Article 31 paragraph 2 VCLT clarifies, ‘contextual’ interpretation can also be intrinsic and extraneous. The contextual material referred to in Article 31 paragraph 2(a) and (b) VCLT is extraneous because any agreement and instrument relating to a given treaty is evidently not part of the primary treaty text that has to be interpreted. The same is valid for the subsequent practice and agreements of the parties (Art. 31 para. 3(a) and (b)), rules of international law binding upon them (Art. 31 para. 3(c)) and supplementary means of treaty interpretation (Art. 32 VCLT) which accommodate any extraneous material that does not fall comfortably under Article 31 paragraphs 2 and 3.\textsuperscript{16} It is therefore reasonable to say that Article 31 paragraphs 2 and 3, as well as Article 32, are primarily concerned with extraneous interpretive material.

Indeed, it is not the intrinsic or extraneous property of the material in relation to the primary treaty text that qualifies or disqualifies it for the purpose of treaty interpretation, rather, Article 31 paragraphs 2 and 3 and Article 32 VCLT attach importance to the extraneous material’s affiliation with the parties to the treaty. Ideally, the parties to the treaty that requires collective interpretation will also be the authors of the extraneous material (Art. 31 para. 2(a) and para. 3(a) VCLT). However, even if the material’s authorship does not originate within the collectivity of parties, it remains relevant for the purpose of interpretation if the collectivity of parties to the treaty agree on the material’s value as contextually relevant material. This can be seen in Art. 31 paragraph 2(b), but also Article 31 paragraph 3(c) VCLT widens the focus from authorship to the parties’ consent to a rule of international law which makes the rule suitable for the systemic interpretation of the treaty. In addition, Art. 31 paragraph 3(b) on subsequent practice does not specify the author of the

\textsuperscript{14} Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999, p. 1045, para. 30.
\textsuperscript{15} Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, ICJ Reports 1996, p. 803, para. 27.
\textsuperscript{16} Crema (2013), p. 17.
interpretive material; one could therefore argue that subsequent treaty practice may stem from a single party or even a non-party to the treaty being interpreted, e.g. a treaty body or an international organization.\textsuperscript{17} In any case, the practice’s interpretive relevance requires that it establishes the agreement of all parties on this particular treaty interpretation.\textsuperscript{18} This allows the conclusion that authorship is not the decisive criterion for the interpretive value of the extraneous material as Article 31 VCLT is more concerned with consent. Finally, Article 32 VCLT is neither particularly concerned with authorship nor consent regarding the interpretive value of supplementary extraneous material given that the exact nature of the material is left open by the provision.\textsuperscript{19} This is why any supplementary material introduced under Article 32 VCLT is only supposed to help disambiguate manifestly unclear results that emerge from the application of Article 31 VCLT, or to support what is already established under this provision.

It follows that the rules of interpretation are by no means averse to extraneous materials, indeed, the opposite is true. However, Article 31 paragraphs 2 and 3 VCLT requires the acceptance of these materials in one way or another by all the parties to the treaty that requires interpretation, whereas Article 31 paragraph 1 VCLT (established meaning of the terms) and Article 32 VCLT (supplementary material) do not.

\section*{3 Authors of Extraneous Material}

The general rule that the interpretive value of extraneous material strongly depends on its reconnection with the States parties’ consent has implications for external expertise. This is at least valid if one accepts the traditional approach to treaty interpretation enshrined in Article 31 VCLT and does not challenge these general rules as a ‘straitjacket’ for interpretive processes.\textsuperscript{20}

\subsection*{3.1 Expert Treaty Bodies}

External expertise can be found in different international institutions and communities, most prominently in so-called ‘expert treaty bodies’, which are composed of

\textsuperscript{17} Dörr (2018a), Art. 31, para. 86; in contrast: ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, GA Official Record 73rd Session, UN Doc. A/73/10.

\textsuperscript{18} For a restrictive reading of Art. 31 para. 3(b) ILC Conclusion 5 (practice must be attributable to a party to the treaty, not the ‘social practice’ of non-parties and non-State actors), Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10, at p. 11; for a broader approach see Berner (2017), pp. 127–128.

\textsuperscript{19} Dörr (2018b), Art. 32, para. 27.

\textsuperscript{20} Tobin (2010), p. 3, quoting Joseph Weiler, Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century 5–6 (Feb. 14, 2008) (draft of an unpublished presentation, International Legal Theory Colloquium: Interpretation in International Law, Institute for International Law and Justice, New York University School of Law).
independent individuals contributing their professional knowledge to the body’s decisions.\footnote{ILC Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10, Conclusion 13(1).} Without having international legal personality, these bodies have close institutional ties with the treaty that needs interpreting as they are established by that treaty to monitor State-party compliance, which necessitates a clear understanding of the applicable rules.\footnote{Azaria (2020), p. 33, at p. 34.} Expert treaty bodies (‘committees’) are especially common for human rights treaties concluded under the auspices of the UN and even though they are not bestowed with the competence to issue legally binding decisions, they nevertheless enjoy considerable respect and influence as ‘guardians’ of the treaty. In the course of this function, expert bodies produce a wealth of pronouncements on the scope, understanding and dynamic developments of their respective human rights treaty (‘general comments’). All this inevitably leads to disagreement over the interpretive value of these pronouncements and views, which has been fuelled by the equivocal stance of the ICJ. In\footnote{Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, p. 639, para. 66.} \textit{Diallo}, the ICJ considered the Human Rights Committee’s understanding of provisions of the International Covenant on Civil and Political Rights as highly significant. The Court stressed that it ascribes ‘great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty’\footnote{Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Judgment, 4 February 2021, para. 101.} However, the fact that the ICJ does not consider itself legally obliged to model its own interpretation of the human rights treaty’s provisions after that of the treaty’s expert body led to a clash. In the 2021 judgment in the case of \textit{Application of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)}, the ICJ narrowly interpreted Article 1 paragraph 1 CERD and its term ‘national origin’, thereby deviating from the CERD Committee’s broader understanding of the term.\footnote{Application of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), Judgment, 4 February 2021, para. 101.} Most importantly, the ICJ explicitly reasoned the term’s narrow interpretation by reference to customary rules of treaty interpretation without discussing and integrating the CERD Committee’s understanding into the interpretive exercise. By doing so, the ICJ strongly implied that expert treaty bodies’ pronouncements are not in and of themselves a constitutive element of treaty interpretation, e.g. subsequent practice pursuant to Article 31 paragraph 3(b) VCLT. Even Article 32 does not seem to be able to accommodate material produced by expert bodies. Article 32 VCLT requires that extraneous material is brought into the interpretive process, as the Court did with the CERD’s \textit{travaux préparatoires};\footnote{Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. United Arab Emirates), Judgment, 4 February 2021, para. 101.} however, this was not the case with the CERD Committee’s pronouncements, which were only ‘carefully considered’ by the ICJ.\footnote{Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. United Arab Emirates), Judgment, 4 February 2021, para. 101.} Without explicitly saying so, the ICJ appears to have classified the expert
treaty body’s pronouncements as a subsidiary means for the determination of rules of law (Art. 38 para. 1(d) ICJ Statute), i.e. they have consultative authority without directly contributing to the rule’s meaning. By putting expert treaty bodies in this incommodes place, the ICJ is in tune with the view supported by the majority of ILC members, which prevailed on the highly disputed 2018 Draft Conclusion 13 on subsequent agreements and subsequent practice.\footnote{ILC Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10, at p. 106.} According to paragraph 3 of this Conclusion, the pronouncements of expert treaty bodies may only give rise or refer to subsequent agreements and practice of States parties under Article 31 paragraph 3 as well as Article 32 VCLT. In other words, if no meaningful subsequent State practice exists on which the independent expert body can build its assessment, it is reduced to making ‘interpretive offers’ to persuade States parties to share a certain understanding of the law, which the latter may or may not accept by way of subsequent practice.\footnote{For a different view see International Law Association (ILA), Committee on Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (2004), in: ILA, Report of the Seventy-First Conference, London 2004, pp. 621, 629, para. 22.}

3.2 International Organizations

This study is first and foremost concerned with international organizations as authors of extraneous interpretive material. In line with the definition provided in Article 2(a) of the ILC Draft Articles on the Responsibility of International Organizations, an international organization is established by an instrument governed by international law and, most importantly, is bestowed with its own international legal personality.\footnote{Draft Articles on the responsibility of international organizations, ILC Yearbook 2011, Vol. II, Part 2, pp. 40–104.} The latter signifies that the organization has a will, a voice and a personality separate from its Member States, which is a precondition for exerting under its own name the rights and duties conferred upon it under the constituent instrument. In light of the above remarks on extraneous material in treaty interpretation, it follows that the independent legal personality of international organizations allows them to take on multiple roles in treaty interpretation.

3.2.1 Contribution to Treaty Context

If an international organization is a party to a treaty that requires interpreting, its acts and decisions may be considered under Article 31 paragraph 2(b) VCLT, provided that the other parties to the treaty explicitly or implicitly accept the contextual relevance of these acts. An example would be the interpretative declaration of the European Union’s (EU’s) European Council and Commission on Article 184 of the Withdrawal Agreement between the EU and the United Kingdom (UK).\footnote{General Secretary of the Council, Special meeting of the European Council (Art. 50) (25 November 2018)—Statement for the Minutes, EU CO XT 20017/18, at p. 3: ‘The European Council and the European Commission take note of the declaration by the United Kingdom, that the United Kingdom shares...}
3.2.2 Subsequent Practice in the Application of Constituent Instruments

As far as the meaning of an organization’s constituent instrument has to be determined, the implementing practice of its organs has relevance under Article 31 paragraph 3(b) VCLT. The ICJ has regularly referred to this practice, most prominently in the Wall Advisory Opinion where the Court legally assessed parallel considerations of security matters by the General Assembly and the Security Council. Despite the wording of Article 12 UN Charter strongly indicating the opposite, the Court examined the UN organs’ evolving approach to Article 12 UN Charter over time to finally conclude ‘that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter’. Even the ILC, with its reluctance to allow international organizations into States’ legal spaces, seems to have blinked in Conclusion 12 of its 2018 Draft Conclusion on subsequent agreements and subsequent practice. In paragraph 3, Conclusion 12 states that the ‘practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying Articles 31 and 32’. According to the present author’s opinion, an even stronger emphasis on the organizations’ dominant interpretive role in the day-to-day application of their constitution is also supported by the ICJ’s advisory opinions touching upon this matter. This is at least reasonable in the interpretation of institutional provisions that concern the competences and processes within the organization and its organs, which are so-called household matters. An example would be the UN Security Council’s interpretation of Article 27 paragraph 3 UN Charter to the effect that an ‘empty chair’ of a permanent member cannot prevent sufficient ‘concurring votes of the permanent members’ within the meaning of the Article. For the organ practice to be decisive, it is not required that all Member States of the organization are represented in the organ; depending on the addressee of the institutional rules, the Secretary-General can contribute as much to the rules’ interpretation as the plenary organ. Given that organ practice can develop over a long period, with many opportunities

Footnote 30 (continued)
this interpretation’, 25 November 2018, available at https://data.consilium.europa.eu/doc/document/XT-20017-2018-INIT/en/pdf.
31 See the analysis of the ICJ’s approach to subsequent organ practice in Quayle (2016), pp. 867 et seq.
32 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, para. 28.
33 ILC Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10, at p. 93.
34 Special Rapporteur Arsanjani, Institut de Droit International, 7ème commission, ‘Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (With Particular Reference to the UN System)?’, available at https://www.idi-iil.org/app/uploads/2021/05/Report-7th-commission-interpretation-statutes-international-organizati ons-vol-81-yearbook-online-session.pdf (accessed 1 August 2022).
35 Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, p. 66, para. 27.
36 E.g., Security Council Resolutions No. 82 of 25 June 1950 and No. 83 of 27 June 1950.
for self-affirmation, the practice\textsuperscript{37} of the organization occupies a much more prominent place in the holistic interpretation of the organization’s institutional rules than the ILC conceded.\textsuperscript{38}

Having said that, a more cautious assessment of the interpretive value of organ practice is appropriate with regard to provisions of the constituent instruments that concern substantive ‘constitutional’ obligations of Member States, such as the prohibition on using armed force in Article 2 paragraph 4 UN Charter, the General Agreement on Tariffs and Trade’s (GATT’s) non-discrimination obligations within the WTO context and the Schedule of the 1946 International Convention for the Regulation of Whaling (ICRW). The latter was the focus of the ICJ in the \textit{Whaling} judgment of 2014 which, \textit{inter alia}, dealt with the interpretive value of the legally non-binding decisions of the International Whaling Commission (IWC),\textsuperscript{39} a body that the ICJ classified as an international organization. This is evident from the fact that the Court invited the Commission to submit observations under Article 69 paragraph 3 of the Rules of the Court, which foresees submissions of ‘public international organizations’.\textsuperscript{40} The IWC’s constituent instrument is the ICRW and the Schedule as its integral part, therefore the Commission’s decisions exclusively concern its own constituent instrument, primarily the Schedule, which is the source of Member States’ obligations regarding whaling activities. In the \textit{Whaling} judgment, the Court was quite clear about the conditions under which the non-binding resolutions of the Whaling Commission adopted under Article VI ICRW have interpretive value for the terms in the ICRW: ‘[W]hen [the resolutions] are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the [Whaling] Convention or its Schedule’.\textsuperscript{41} If they fail to find this broad support, the ICJ rejects the resolutions as either subsequent agreements (para. 3(a)) or subsequent practice

\textsuperscript{37} This practice in the application of the constituent instrument’s institutional rules, that interpret these rules, is not to be confused with ‘established practice’ as a category of rules of the organization alongside the constituent instrument, Art. 2(b) ILC Draft Articles on the Responsibility of International Organizations (2011), Draft Conclusion 12(4) of the ILC Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10.

\textsuperscript{38} ILC Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10, Draft Conclusion 12, p. 103, paras. 34 and 35.

\textsuperscript{39} \textit{Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)}, Judgment, ICJ Reports 2014, p. 226.

\textsuperscript{40} \textit{Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)}, Judgment, ICJ Reports 2014, p. 226, para. 3; see Rules of the Court, adopted on 14 April 1978 and entered into force on 1 July 1978. The second sentence of Art. 69(3) reads: ‘The Court, or the President if the Court is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the public international organization concerned, fix a time-limit within which the organization may submit to the Court its observations in writing. These observations shall be communicated to the parties and may be discussed by them and by the representative of the said organization during the oral proceedings’.

\textsuperscript{41} \textit{Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)}, Judgment, ICJ Reports 2014, p. 226, para. 46.
(para. 3(b)) and it is noteworthy that the Court did not distinguish between the two categories of Article 31 paragraph 3 VCLT.\textsuperscript{42}

The Whaling judgment is informative in two key ways. First, the ICJ does not consider the non-binding resolutions of the IWC to be relevant as an aid in understanding the common acceptance of the term ‘scientific research’ in Article VIII ICRW. The disregard for the organization’s contribution to textual interpretation (Art. 31(1) VCLT) is in line with the Navigational and Related Rights case mentioned in the introduction, in which the ICJ refused to consider decisions of the UN and the WTO in order to determine the modern meaning of the treaty term ‘comercio’.\textsuperscript{43} The second way in which the Whaling judgment is informative is that the ICJ regarded the IWC’s decisions as potential subsequent agreement and practice pursuant to Article 31 paragraph 3(a) and (b) VCLT against the backdrop that all 88 IWC members are parties to the ICRW. This provides, from the Court’s perspective, the plenary organs of international organizations such as the UN General Assembly and the IWC with a more on-par status with Conferences of the States Parties (COP), the latter of which are supreme plenary bodies of a treaty, representing all States parties on equal terms without having distinct legal personality.\textsuperscript{44} As a matter of law, the line between the two categories, COP and the plenary organ of an international organization, easily blurs if there is no agreement on the body’s international legal personality, as the ILC noted with regard to the IWC.\textsuperscript{45} This alone argues in favour of treating both categories equally in the context of Article 31 paragraph 3 VCLT. Thus, to the extent that the substantive rights and obligations of Member States need to be interpreted, the focus shifts away from an organization’s practice to its Member States’ consent: legally non-binding resolutions of organs of international organizations must be supported by all Member States of the organization in question to be considered as relevant subsequent agreement or practice in the sense of Article 31 paragraph 3(a) and (b) VCLT, respectively. The interpretive value of non-binding resolutions of organs in which not all Member States are represented, e.g. the UN Human Rights Council, is accordingly diminished as far as Member States’ substantive obligations under the constituent instruments are concerned. As the agreement of all Member States in the interpretation must be established separately, the interpretive value of a non-plenary organ’s resolution is comparable to that of expert treaty bodies.

3.2.3 Legally Binding Decisions as Relevant Rules of International Law

Legally binding decisions of an international organization may be considered as ‘relevant rules of international law’ under Article 31 paragraph 3(c) VCLT and as such

\textsuperscript{42} Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, p. 226, para. 83.

\textsuperscript{43} Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, ICJ Reports 2009, p. 213, paras. 63, 64, 67.

\textsuperscript{44} ILC Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10, Conclusion 11(1).

\textsuperscript{45} ILC Draft conclusions on subsequent agreements and subsequent practice with commentaries, UN Doc. A/73/10, Draft Conclusion 11, Commentary para. 2, p. 93.
impact the interpretation of Member States’ *inter-se* treaty relation. A rare case in which a UN Security Council resolution has been given such a role was the *Loizidou* case, where the European Court of Human Rights (ECtHR) mentioned in one breath Article 31 paragraph 3(c) VCLT and the Security Council resolutions concerning the non-recognition of Northern Cyprus. However, it is worth noting that the ECtHR did not use the UN resolutions as a means to interpret a provision of the European Convention on Human Rights (ECHR) but to determine the relevant legal facts (the statehood of Northern Cyprus) that impact the Court’s jurisdiction. In the International Centre for Settlement of Investment Disputes (ICSID) *Vattenfall* investment dispute between the Swedish company of the same name and Germany, the EU as *amicus curiae* considered its own laws, as construed by the EU’s Court of Justice in *Achmea*, as being of interpretive value for the arbitration clause under the relevant bilateral investment treaty (BIT), read in conjunction with Article 26 Energy Charter Treaty (ECT). Accordingly, the ICSID tribunal was supposed to interpret the BIT of the two EU Member States pursuant to Article 31 paragraph 3(c) VCLT in the light of relevant EU law. The approach was resolutely rejected by the ICSID tribunal, primarily because EU law is not applicable to all parties to the ETC. In contrast, the Permanent Court of Arbitration (PCA) in the 2005 *Iron Rhine Railway* case classified EU law as a ‘relevant rule of international law’ under Article 31 paragraph 3(c) VCLT. However, in this special case, the relevant arbitration agreement between Belgium and the Netherlands explicitly allowed the application of EU law as a part of international law.

### 3.2.4 Functional Authority and Expertise

Finally, acts and decisions of international organizations may be utilized for treaty text interpretation because their authors enjoy functional authority in the subject-matter area covered by the treaty. The interpretive significance of their acts does not fall within one specific category listed in Articles 31 and 32 VCLT but is, as a matter of preliminary assessment, cross-cutting. As mentioned in the introduction, a generic term used in a treaty may acquire a different meaning in the light of the thematically relevant decisions of international organisations, which is in line with Article 31 paragraph 1 VCLT. In addition, acts can be of contextual relevance for treaty interpretation as they may be evidence of subsequent agreement, practice or

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46 ECtHR [GC], *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment, 18 December 1996, para. 44.
47 Nevertheless, the case is mentioned in academic writing as an example of the relevance of binding Security Council resolutions in the context of systemic interpretation, Tzevelekos (2010), p. 623; McLachlan (2005), p. 294.
48 CJEU, Case C-284/16, *Slowakische Republik v. Achmea BV*, Judgment, 6 March 2018, ECLI:EU:C:2018:158.
49 ICSID, *Vattenfall AB et al. v. Federal Republic of Germany*, Decision on the Achmea Issue, 31 August 2018, ICSID Case No ARB/12/12, para. 151.
50 ICSID, *Vattenfall AB et al. v. Federal Republic of Germany*, Decision on the Achmea Issue, 31 August 2018, paras. 153-158.
51 PCA, *Iron Rhine Arbitration (Belgium v. Netherlands)*, Final Award, 24 May 2005, Case No. 2003-02.
law according to Article 31 paragraph 3 VCLT. Finally, thematically relevant decisions can serve as supplementary means of interpretation under Article 32 VCLT in that they either confirm interpretive results or help to resolve inclusive interpretive results.

4 Selected Areas of Functional Authority

4.1 The United Nations and the Right to the Self-determination of Peoples

The United Nations’ authority in the area of the self-determination of peoples, especially within the context of decolonialization, is undisputed and is evidenced by Article 1 paragraph 2 and Article 55 UN Charter as well as its Chapters XI and XII on the international trusteeship system. Several important UN documents reaffirm this right and clarify its content and scope, among them General Assembly Resolutions 1514 (XV) and 2625 (XXV), the latter being known as the ‘Friendly Relations Declaration of 24 October 1970’. The resolution’s value for the interpretation of Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR) appears to be self-evident as Article 1 paragraph 3 ICCPR/ICESCR puts their States parties’ conventional duty under each Article 1 into the context of the provisions of the UN Charter. Nevertheless, the importance of General Assembly resolutions in the interpretation of Article 1 ICCPR/ICESCR is difficult to fathom. This is mainly because in all relevant cases before the ICJ, the Court was concerned with the identification of the customary character of the right to self-determination of peoples, which the Court established with reference to both Resolutions 1514 (XV) and 2625 (XXV). In the 2019 Chagos Advisory Opinion, the ICJ applied Principle VI of General Assembly Resolution 1541 (XV) on State duties regarding non-self-governing territories. This was done in order to understand the term ‘people’ in the context of a non-self-governing territory (‘geographically separate and […] distinct ethnically and/or culturally from the country administering it’). In addition, the ICJ used the same Principle VI to comprehend what must be considered the ‘realization’ of the right, be it through independent statehood, free association with another State or integration therein. Finally, the Court emphasized, this time without disclosing its source of insight, that the choice between the different options of self-realization

52 This is also highlighted by the UN Human Rights Committee in CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984, para. 6 available at: https://www.refworld.org/docid/453883f822.html (accessed 1 August 2022).
53 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports 2019, p. 95, para. 156.
54 ‘Realization’ is the term used in Art. 1(3) ICCPR/ICESCR; in the Chagos case the ICJ spoke of ‘implementing the right to self-determination’, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports 2019, p. 95, para. 156.
must be the expression of the free and genuine will of the people concerned,\textsuperscript{55} which captures the essence of General Assembly Resolutions 1514 (XV) and 2625 (XXV). Even though the ICJ mentioned Article 1 paragraph 3 ICCPR/ICESCR, the Court’s interpretation of the right to self-determination is, in fact, the identification of the corresponding rule under customary international law, which was in existence in the relevant period under consideration, i.e. between 1965 and 1968.\textsuperscript{56} To identify the content of the customary rule on self-determination, the Court emphasized that the relevant General Assembly resolutions were adopted either unanimously (Res. 2624) or with abstentions arising from minor issues of a non-fundamental nature (Res. 1514).\textsuperscript{57} It is a matter of speculation whether the ICJ would put the same emphasis on the States parties’ consent in the General Assembly resolutions when asked to interpret Article 1 ICCPR/ICESCR. Having said that, Article 1 paragraph 3 ICCPR/IESCR requires that States parties respect the right to self-determination ‘in conformity with the Charter of the United Nations’. Therefore, the ICCPR/IESCR’s interpretation is linked to the ICJ’s general acceptance of the UN organ’s authority to evolutively interpret and apply UN Charter provisions by way of subsequent agreement or practice (Art. 31 para. 3(a) and (b) VCLT). As the right to self-determination enshrined in the UN Charter concerns substantive obligations for UN Member States, the interpretation rule identified in the Whaling case applies. Namely, the interpretive value of a General Assembly resolution as subsequent practice or agreement is linked to the relevant body’s plenary character and its members’ unanimous support of the legally non-binding resolutions. This brings the interpretation of substantive treaty obligations under a constituent instrument in line with the identification of the scope of unwritten obligations under substantially identical customary international law.

The interpretation of Article 1 ICCPR/IESCR is not only a task for international courts and institutions but also for national courts. In the 1998 case \textit{Reference re Secession of Quebec}, the Canadian Supreme Court was confronted with the question of whether the Canadian province of Quebec has the right, based on international law, to unilaterally decide to secede from Canada.\textsuperscript{58} The Supreme Court negated such a right without seizing the opportunity of an in-depth interpretation of Article 1 paragraph 1 ICCPR to which Canada had been bound since 1976. The Court cited the Friendly Relations Declaration, General Assembly Resolution 2625 (XXV), to emphasize the principle of territorial integrity in the context of the ‘international law principles of self-determination’;\textsuperscript{59} however, it abstained from directly referring to

\textsuperscript{55} \textit{Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965}, Advisory Opinion, ICJ Reports 2019, p. 95, para. 157.  

\textsuperscript{56} The ICCPR and the ICESCR entered into force in 1976 but had been adopted by the General Assembly in 1966, which the Court emphasized, \textit{Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965}, Advisory Opinion, ICJ Reports 2019, p. 95, para. 154.  

\textsuperscript{57} \textit{Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965}, Advisory Opinion, ICJ Reports 2019, p. 95, para. 152.  

\textsuperscript{58} \textit{Reference re Secession of Quebec}, [1998] 2 SCR 217.  

\textsuperscript{59} \textit{Reference re Secession of Quebec}, [1998] 2 SCR 217, para. 128.
the Declaration when succinctly interpreting Article 1 ICCPR and Article 1 IESCR in a manner that focuses on self-determination within an existing State:

While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state.60

The reasons for the Supreme Court’s omission can only be assumed, but it may well be an indication of the Court’s reluctance to replace the parties’ intent, as reflected in the treaty’s wording, with an autonomous act of a plenary organ, even if that organ is the General Assembly.

4.2 OECD’s Model Tax Convention and Double Taxation Treaties

Since 1963, the Organization for Economic Co-operation and Development (OECD) has published a Draft Double Tax Convention on Income and Capital, accompanied by a commentary prepared by the OECD’s Committee on Fiscal Affairs. The OECD Model Convention was developed in response to OECD Member States’ need for a firm and solid template to use in their international negotiations on bilateral and multilateral double taxation treaties. Even though some OECD Member States made reservations to certain provisions of the Model Convention, which are recorded in the OECD commentary, the practical effect of the model was that for quite some time it was almost impossible for States to negotiate a double taxation treaty that substantially differs from the OECD Model Convention.61 This is the reason why the OECD Model Convention and its commentary are used by national tax authorities and courts as a possible aid for interpreting their State’s double taxation treaties. However, the documents’ placement under the system of Articles 31 and 32 VCLT is not uniform, as the following cases illustrate.

In Austria v. Germany, the Court of Justice of the European Union (CJEU) was concerned with the interpretation of a bilateral double taxation treaty between two EU Member States which was submitted by them to the European Court under a special agreement pursuant to Article 273 Treaty on the Functioning of the European Union.62 The relevant provisions of the double taxation agreement were phrased in accordance with the OECD Model Convention as well as its commentary, both of which were accepted by Austria and Germany as a means of interpretation.63 Accordingly, Advocate General Mengozzi referred vaguely to both Article 31 paragraph 1 and Article 31 paragraph 3(c) VCLT as the applicable rules of interpretation, ‘irrespective of what may be the general value, in international law,
of the commentaries on the articles of the OECD model convention’.64 Indeed, the parties’ prior consent on the relevance of the OECD instruments as extraneous interpretive material puts this case into a special category. It is all the more intriguing that the CJEU in its judgment entirely ignored the OECD Model Convention and offered its own contextual and purposive analysis of the double taxation agreement’s provisions.65

Australian courts are less reluctant to integrate the OECD Model Convention and its commentary into the interpretation of double taxation agreements. The leading case in this regard is the 1990 *Thiel* case in which the five Justices discussed the interpretive value of the OECD Model Convention under the rules of Articles 31 and 32 VCLT. Justice Dawson made clear that he was prepared to consider the extraneous material under Article 31 VCLT as part of the ‘context’ of the Australian-Swiss tax treaty as it was ‘made in connection with and accepted by the parties […] subsequently concluded in accordance with the framework of the Model’.66 However, due to doubts expressed in scholarly writings, he committed himself only to the interpretive value of both the OECD Model and the commentary as supplementary means under Article 32 VCLT.67 Justice McHugh agreed with this assessment and used the Model Convention and its commentary as a means of assistance in interpreting the meaning of the tax treaty’s term ‘enterprise’ after he found that the treaty text was ambiguous in this regard.68 The opinion that the OECD Model Convention and its commentary should be taken into account as supplementary extraneous material has been expressed in several other Australian judgments such as in *Lamesa Holding BV*69 and *Undershaft (No 1) Limited*.70

In contrast to the Australian courts, the Belgian *Cour de Cassation* accepted the OECD Model Convention and its commentary as subsequent practice, if not a subsequent agreement, regarding the interpretation of the Belgian–Luxembourg tax treaty within the meaning of Article 31 paragraph 3(a) and (b) VCLT because the treaty text was modelled after the OECD Model Convention.71 However, the Belgian *Cour de Cassation* is rather alone in this opinion. In 2014, the German *Bundesfinanzhof* rejected any relevance of the OECD Model Convention and commentary under Article 31 paragraph 3 VCLT when stating:

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64 AG Mengozzi, Case C-648/15, *Austria v. Germany*, Opinion of 27 April 2017, ECLI:EU:C:2017:311, paras. 72 and 73.
65 CJEU, Case C-648/15, *Austria v. Germany*, Judgment of 12 September 2017, ECLI:EU:C:2017:664, para. 43.
66 High Court of Australia, *Thiel v. Federal Commissioner of Taxation*, 22 August 1990, (1990) 171 CLR 338, para. 9 (Dawson J) available at https://staging.lcourt.gov.au/assets/publications/judgments/1990/036--THIEL_v__FEDERAL_COMMISSIONER_OF_TAXATION--(1990)_171_CLR_338.html.
67 High Court of Australia, *Thiel v. Federal Commissioner of Taxation*, 22 August 1990, (1990) 171 CLR 338, para. 10 (Dawson J).
68 High Court of Australia, *Thiel v. Federal Commissioner of Taxation*, 22 August 1990, (1990) 171 CLR 338, paras. 13-15 (McHugh J).
69 *Lamesa Holdings BV v. Federal Commissioner of Taxation* (1997) 97 ATC 4229.
70 *Undershaft (No 1) Limited v. Commissioner of Taxation* [2009] FCA 41, para. 43.
71 Cour de Cassation de belgique, Decision of 28 May 2004, F.02.0078.F.
[I]ntergovernmental administrative practices are not reflected by the OECD Model Convention. They are merely the opinions of the tax authorities involved [in the drafting of the OECD Model Convention], not some ‘practice’ of the parties to the double taxation agreement. Therefore, for the judiciary only the text and context of the treaty are relevant.\textsuperscript{72}

The struggles of domestic courts to make the OECD handbook fit within the framework of Articles 31 and 32 VCLT illustrate once more the uncertainty attached to the interpretive value of acts of international organizations. This leads to the handbook being ignored, dismissed or regarded as supplementary (Art. 32 VCLT).

\section*{4.3 UNHCR Handbooks and the Refugee Convention}

The Office of the United Nations High Commissioner for Refugees (UNHCR) is a subsidiary organ of the UN General Assembly (Art. 22 UN Charter) and, therefore, the UNHCR’s acts and decisions are attributable to the UN. The UNHCR’s functional authority regarding the 1951 Convention relating to the Status of Refugees and the 1951 Protocol Relating to the Status of Refugees is recognized in both the Convention\textsuperscript{73} and the Protocol.\textsuperscript{74} Both instruments endow the UNHCR with the duty to supervise their application and oblige the respective States parties to cooperate with the UNHCR in this regard.\textsuperscript{75} In carrying out this task, the UNHCR has produced a multitude of documents, one of which is the Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol.\textsuperscript{76} From the UNHCR’s perspective, the guidelines are intended to provide legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field.\textsuperscript{77} Whereas the practical relevance of the UNHCR handbook cannot be underestimated, its interpretive value is difficult to translate into the catalogue of interpretive means provided by Articles 31 and 32 VCLT.

The UNHCR handbook plays a pronounced role in domestic asylum proceedings when courts have to interpret and apply the Refugee Convention to a given case. The Supreme Court of the United States (US) in \textit{Cardoza-Fonseca} ruled in line with the handbook when establishing a lower standard of proof for asylum seekers.\textsuperscript{78}

\textsuperscript{72} Bundesfinanzhof, Judgment of 16 January 2014, I R 30/12, para. 19 (translation by the author), https://www.bundesfinanzhof.de/ de/entscheidung/entscheidungen-online/detail/STRE201410071/ (accessed 1 August 2022).

\textsuperscript{73} Art. 35 para. 1 of the 1951 Convention Relating to the Status of Refugees, 189 UNTS 150.

\textsuperscript{74} Art. II para. 1 of the 1951 Protocol Relating to the Status of Refugees, 606 UNTS 267.

\textsuperscript{75} See also Art. 8 of the UNHCR Statute.

\textsuperscript{76} The 2019 edition of the Handbook is available at https://www.unhcr.org/publications/legal/5ddfc dc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (accessed 1 August 2022).

\textsuperscript{77} Handbook 2019, above n. 76, p. 83.

\textsuperscript{78} US Supreme Court, \textit{INS v. Cardoza-Fonseca}, Judgment of 9 March 1987, 480 US 421 at p. 450.
footnote, the Court discussed the role of the handbook, stating that, while not legally binding on US agencies, ‘the Handbook provides significant guidance in construing the Protocol, to which the Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes’. In the UK House of Lords’ judgment in *Adan and Aitseguer* on 19 December 2000, Lord Steyn based his argument on the role of the UNHCR under the Refugee Convention and its 1967 Protocol: ‘Contracting States are obliged to co-operate with UNHCR. It is not surprising therefore that the UNHCR Handbook, although not binding on States, has high persuasive authority, and is much relied on by domestic courts and tribunals’. The Inter-American Court of Human Rights in *Pacheco Tineo Family v. Plurinational State of Bolivia* argued in a similar vein. When interpreting Article 29(b) of the American Convention on Human Rights, the Court took into account the significant evolution of the principles and regulations of international refugee law, based on the directives, criteria and other authorized rulings of agencies such as the UNHCR, adding in a footnote:

As such, it is a non-binding guide to interpretation. However, in the history of the UNHCR, after more than 60 years supervising the application of the Convention and the Protocol relating to the status of refugees, many countries, including many of the countries of Latin America, have included a specific reference to the Handbook as a guide to interpretation; in other words, it has sufficient authority to serve as a guide to interpretation for the States.

More succinct about the interpretive relevance of the UNHCR handbook is the ECtHR. Without referring to the VCLT, the Court clarified in *J.K. and others v. Sweden* that under the procedural limb of Article 3 ECHR (the prohibition of torture) the burden of proof in domestic asylum procedures lies, in principle, with the asylum seeker who, however, has the benefit of doubt. The ECtHR emphasized that this lower standard was determined by the UNHCR handbook, the UNHCR note on the burden and standard of proof in refugee claims, as well as the EU Qualification Directive. The reference to non-binding instruments, such as the UNHCR handbook and note, is not unusual for the ECtHR. In the 2010 *Tanase* case, the ECtHR stated that it ‘must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs, to interpret the guarantees of the Convention and to establish whether there is a common European standard in

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79 US Supreme Court, *Cardoza-Fonseca*, Judgment of 9 March 1987, 480 US 421 at p. 439, fn. 22.
80 House of Lords, Judgments—*Regina v. Secretary of State for The Home Department, Ex Parte Adan Regina v. Secretary of State for the Home Department Ex Parte Aitseguer*, 19 December 2000, Appeal decision, [2000] UKHL 67, [2001] 2 AC 477, [2001] 2 WLR 143, [2001] 1 All ER 593.
81 I-ACtHR, *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment of 25 November 2013 (Preliminary Objections, Merits, Reparations and Costs), para. 143, fn. 177.
82 ECtHR, *Case of J.K. and others v. Sweden*, Appl. no. 59166/12, Judgment of 23 August 2016, paras. 96 and 97; for the ‘EU Qualification Directive’ see Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ 2011, L 337/9.
The Court even emphasized in *Demir and Baykara* that it is not required that a respondent State party is legally bound by the relevant international instrument for it to be taken into account. For the ECtHR, these instruments are a means to identify consensus among European States that reflect their common values and common grounds in modern societies which the Court then uses when interpreting and applying the Convention. This approach, which is strongly linked to the idea of an European value system, evades the requirements of Article 31 VCLT but expresses a regional, specialised rule of treaty interpretation.

### 4.4 IMO Guidelines and the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) openly embraces the functional authority of international organizations by referring in several provisions to ‘competent’ or ‘appropriate’ organizations, with the International Maritime Organization (IMO) figuring prominently among them. Most importantly, UNCLOS refers in several provisions to ‘generally accepted’, ‘applicable’ and ‘global’ rules, regulations and standards. By means of these references, UNCLOS incorporates into its own provisions additional rules of other international instruments and thereby adopts current technical and environmental standards. It is not evident whether the UNCLOS references to ‘generally accepted standards’ include non-binding instruments that have been adopted by, for example, the IMO, although it is noteworthy that the IMO has highlighted that:

> [T]hese resolutions are normally adopted by consensus, which therefore reflect worldwide agreement by all IMO Member States. State parties to [UNCLOS] are expected to confirm to these rules and standards, bearing in mind the need to adapt them to the particular circumstances of each case.

As far as UNCLOS integrates other IMO conventions, e.g. the International Convention for the Prevention of Pollution from Ships, the non-binding instruments incorporated under these conventions also apply within the UNCLOS regime. This practice of incorporation not only adds to the complexity of UNCLOS obligations but also impacts the interpretive value of non-binding IMO instruments as they gain contextual relevance via incorporation.

An example of this contextual relevance is the *Rackete* case, decided by the Italian Supreme Court of Cassation (Third Criminal Section), which concerned *inter alia* Italy’s international duties regarding persons rescued in the Mediterranean

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83 ECtHR, *Tanase v. Moldovia*, Appl. no. 7/08, 27 April 2010, para. 176.  
84 ECtHR, *Demir and Baykara v. Turkey*, Appl. no. 34503/97, para. 85.  
85 ECtHR, *Demir and Baykara v. Turkey*, Appl. no. 34503/97, para. 86.  
86 Beckmann and Sun (2017), p. 221.  
87 Critical: Oxman (1991), pp. 146 et seq.  
88 Secretariat of IMO, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, 2014, IMO Doc. LEG/MISC.8 at p. 10.  
89 Beckmann and Sun (2017), p. 210.
Sea. In evaluating the legal situation, the Supreme Court did not apply Article 98 UNCLOS but paragraph 3.1.9 of the Annex to the International Convention on Maritime Search and Rescue (SAR), which was adopted by the IMO in 2004 and legally entered into force in 2006. According to paragraph 3.1.9:

[t]he Party responsible for the search and rescue region […] shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization.

Due to the Annex’s reference to IMO guidelines, the Supreme Court of Appeal used the legally non-binding IMO Guideline on the Treatment of Persons Rescued at Sea to interpret the term ‘place of safety’ in paragraph 3.1.9. Whereas the interpretive value of the IMO guideline is evident due to its legal incorporation into the SAR Annex, the Supreme Court did not stop there. To further confirm the understanding of the term ‘place of safety’, the Court referred to Resolution No. 1821 (2011) on rescue at sea, as adopted by the Parliamentary Assembly of the Council of Europe. According to paragraph 5.2 of this resolution, ‘the notion of “safe place” cannot be limited only to the physical protection of persons but necessarily includes respect for their fundamental rights’. Seemingly receptive to the human-rights aspect of sea rescue, the Supreme Court stressed that ‘although not a direct source of law, [the resolution] constitutes an indispensable interpretive criterion of the concept of “safe place” in international law’. This case highlights two aspects: first, the use of acts of international organisations in the interpretation of treaties is unproblematic if the treaty itself identifies them as the relevant context. Second, recourse to the Council of Europe as a supplementary means of interpretation illustrates the Supreme Court’s desire to confirm the interpretive result on the basis of an European understanding of values that is common to all European states and can be used accordingly for interpretation.

4.5 World Intellectual Property Organization and TRIPS

The WTO panels and the WTO Appellate Body are exceptionally receptive to the functional authority of other international organizations and their non-binding instruments. However, their dispute settlement reports do not always paint a clear and coherent picture of these instruments’ placement within the framework provided

90 La Corte Suprema de Cassazione, Terza Sezione Penale, Cass. N. 6626/2020, Judgment of 16 January 2020, available at https://www.sistemapenale.it/it/scheda/cassazione-sea-watch-illegittimo-larresto-di-carola-rackete (accessed 1 August 2022).
91 IMO Doc. Resolution MSC.155(78), Annex 5, 20 May 2004.
92 La Corte Suprema de Cassazione, Terza Sezione Penale, Cass. N. 6626/2020, Judgment of 16 January 2020, at p. 12 (‘pur non essendo fonte diretta del diritto, costituisce un criterio interpretativo imprescindibile del concetto di “luogo sicuro” nel diritto internazionale’, translation by author).
93 See, in this regard, the impressive study by Foltea (2012), pp. 183 et seq.
by Articles 31 and 32 VCLT,\textsuperscript{94} even though the dispute settlement bodies often structure their extensive interpretive exercise according to the different methods of interpretation and clearly label them in the respective headings. By way of an example, in the \textit{US–Shrimp} case, the Appellate Body clarified the ordinary meaning of the term ‘exhaustible natural resources’ (Art. XX GATT) by referring in a footnote to the UN World Commission on Environment and Development and its 1987 report entitled ‘Our Common Future’.\textsuperscript{95} In \textit{EC–Computer Equipment}, the Appellate Body classified decisions of the World Customs Organization’s Harmonized System Committee as ‘relevant’ for interpretive purposes, after the US as the complainant introduced the material as ‘subsequent practice’.\textsuperscript{96} In \textit{Mexico–Telecommunication Service}, it is evident from the wealth of interpretive material used by the Panel that it considered the 1998 OECD recommendations on effective actions against hard-core cartels as a supplementary means of interpretation that confirm a result already found elsewhere.\textsuperscript{97}

The WTO panels’ handling of material produced by the World Intellectual Property Organization (WIPO) provides a good illustration of the use and rejection of extraneous material, which is usually introduced by the disputing parties to the interpretation process. The link between WIPO and the Agreement on Trade-Related Aspects of the Intellectual Property Rights (TRIPS) consists of a number of intellectual property rights treaties which are incorporated into TRIPS, the most important of which is the 1971 Berne Convention for the Protection of Literary and Artistic Works. In \textit{US–Sect. 110(5) Copyright Act}, the Panel interpreted the phrase ‘not unreasonably prejudice the legitimate interests of the right holder’ in Article 13 TRIPS, which allows for exceptions to exclusive intellectual property rights. After emphasizing the almost identical wording of Article 9 of the 1971 Berne Convention.

\textsuperscript{94} See e.g. WTO, \textit{Mexico–Measures Affecting Telecommunications Services}, Report of the Panel of 2 April 2004, WT/DS204/R, paras. 7.129–7.134: interpretation of the phrase ‘to linking with suppliers’ in Sect. 2.1 of the Reference Paper which contains Mexico’s additional commitments under GATS Schedule of Commitments by reference to a non-binding Understanding concerning WTO dispute settlement (supplementary means of interpretation), the latter of which refers to International Telecommunication regulation; accordingly, the term ‘accounting rate’ in the Understanding is interpreted in the light of legally binding Regulations of the International Telecommunication Union (ITU) and non-binding ITU Recommendations, without reference to Art. 31 or 32 VCLT.

\textsuperscript{95} WTO, \textit{United States–Import Prohibition of Certain Shrimp and Shrimp Products}, Report of the Appellate Body of 12 October 1998, WT/DS58/AB/A, para. 128, fn. 106: textual interpretation of ‘exhaustible natural resources’ in Art. XX GATT with references to World Commission on Environment and Development, Our Common Future, in fn. 106.

\textsuperscript{96} WTO, \textit{EC–Customs Classification of Certain Computer Equipment}, Report of the Appellate Body of 5 June 1998, WT/DS62/AB/R, para. 90: ‘A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. […] However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant’.

\textsuperscript{97} WTO, \textit{Mexico–Measures Affecting Telecommunications Service}, Report of the Panel of 2 April 2004, AT/DS204/R, para. 7.236: ‘In addition, the meaning of “anti-competitive practices” is informed by related provisions of some international instruments that address competition policy. It is also worth pointing out, since both Mexico and the United States are members of the OECD, that the OECD has adopted a Recommendation calling for the strict prohibition of cartels’.
and Article 13 TRIPS, the Panel referred in a footnote to the Guide to the Berne Convention published by the WIPO in 1978, which was, for the Panel, of ‘persuasive value’. In *China–IO Rights*, the Panel refused to use documents prepared by the WIPO Committee of Experts on Measures Against Counterfeiting and Piracy as an interpretive aid for the term ‘commercial scale’ in Article 61 TRIPS. It observed that these documents had been made available by the GATT Secretariat to interested delegations during the TRIPS negotiations. However, because the material was not circulated to all delegations during the negotiations, the Panel concluded that it did not represent the ‘common intention of the delegations’. Furthermore, the Panel did not consider the 1988 WIPO Draft Model Provisions for National Laws concerning measures against counterfeiting and piracy to be relevant for the determination of the term ‘commercial scale’ in Article 61 TRIPS. The Panel noted that the definition provided in the Draft Model Provisions was prepared by the International Bureau of WIPO but remained controversial. It could not therefore serve as an example of the ordinary usage of the terms in Article 61 TRIPS. In addition, the WIPO Committee of Experts on Measures Against Counterfeiting and Piracy never adopted the Model Provisions. In light of the failure to reach consensus in the Committee, the Panel considered it inappropriate to elevate the Model Provisions and their explanatory notes to the status of the proper interpretative instrument of a treaty text (TRIPS) that was negotiated in another forum and that was finally agreed upon in that forum.

5 Concluding Remarks

The present study has explored the value of acts of international organizations when interpreting international treaties, with a particular focus on the materials produced by international organizations in the course of their functional activities. Since these acts often reflect legal developments, they can, at least in theory, contribute to the evolutive interpretation of treaty texts. Evidently, the wording of Article 31 VCLT is the main obstacle in this regard because, even though Article 31 VCLT embraces extraneous material for the purpose of interpretation, the provision’s focus lies on the parties’ acceptance of the material’s interpretive value. This considerably narrows the possibility of incorporating acts of international organizations into an interpretative process. This is at least true if the interpreting authorities follow a conservative reading of Article 31 VCLT. If, however, practice shows that the acts of international organizations are a reliable and important source of interpretive tools,

98 WTO, *US–Sect. 110(5) Copyright Act*, Panel Report of 15 June 2000, WT/DS160/R, para. 6.229, fn. 205.
99 WTO, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, Panel Report of 26 January 2009, WT/DS362/R, para. 7.586 (supplementary means).
100 WTO, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, Panel Report of 26 January 2009, WT/DS362/R, para. 7.567.
101 WTO, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, Panel Report of 26 January 2009, WT/DS362/R, para. 7.567.
this could point to the existence of a customary rule of interpretation which accepts acts of international organizations as a means of interpretation. Having said this, the present research shows that such a legal development is not yet forthcoming. The analysis of national and international case law shows that acts of international organizations are very rarely mentioned in the context of treaty interpretation and very little use is made of the possibility to establish the ordinary meaning of technical treaty terms through such acts. The most important role is given to the practice of international organizations when they apply their own constituent instruments, and even then, only with respect to so-called ‘household matters’ concerning an organization’s own procedures and competences. In contrast, the functional authority of organizations with regard to the interpretation of the ‘constitutional’ rights and obligations of their Member States requires the latter’s broad acceptance. With regard to treaties other than constituent instruments, the analysed case law illustrates that acts of international organizations play an interpretative role when the organization has a recognized functional relationship with the treaty, e.g. because the treaty refers to the organization, assigns a supervising role to it, or even incorporates acts of the organization into its substantive treaty obligations. In conclusion, it is fair to say that both domestic and international courts continue to demonstrate great reluctance and uncertainty in using the acts of international organizations in their interpretive processes. Such acts are often mentioned in footnotes or appear as an afterthought when the interpretive result has already been established through traditional interpretive means. Nothing indicates that the acts of international organizations will be released from their consignment as only a supplementary means of interpretation in the foreseeable future.

Funding Open access funding provided by Paris Lodron University of Salzburg.

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