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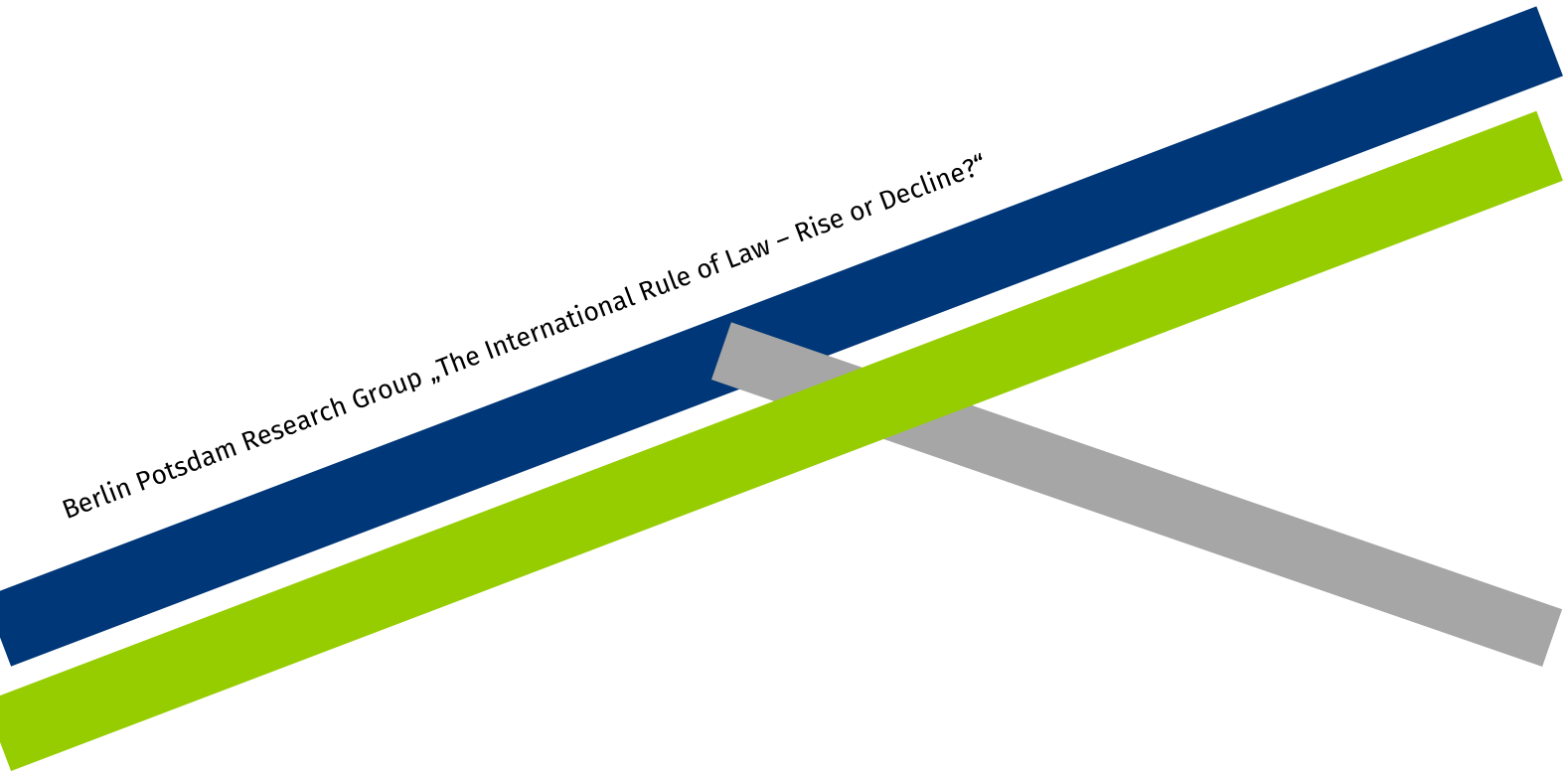
Janina Barkholdt and Nina Reiners

Pronouncements of Expert Treaty Bodies: From 'Black Boxes' to 'Key Catalysts' in International Law?



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Pronouncements of Expert Treaty Bodies: From 'Black Boxes' to 'Key Catalysts' in International Law?

Janina Barkholdt[1] *and Nina Reiners*[2]

Abstract:

While some pronouncements of expert treaty bodies have been considered 'key catalysts' for the development of international human rights law, others are only selectively referred to in legal practice. This article argues that the varying normative impact is due to the informal character of pronouncements. In the absence of treaty provisions specifying their legal effect, practitioners tend to rely on different factors and arguments when either drawing on or rejecting certain pronouncements. Scholars in turn face difficulties when trying to identify explanatory patterns within this diverging practice as the informal character confronts both international lawyers and international relations scholars with their respective methodological 'blind spots'. In light of these intradisciplinary challenges, this article explores the extent as to which an interdisciplinary approach helps to assess the reasons for the varying impact of pronouncements. After analysing the factors determining their legal significanceon the basis of State practice and the academic debate, this article identifies the drafting process as a factor which promises to be particularly insightful when explored from an interdisciplinary perspective and sketches out a framework for future research.

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1. Introduction

On 14 July 2017, the Committee on the Elimination of Discrimination against Women ('CEDAW') published General Recommendation No. 35 on gender-based violence against women.[3] General Recommendation No. 35 is not only noteworthy because it confirms CEDAW's broad understanding of 'discrimination' in Art. 1[4] as including the duty to eliminate 'gender-based violence'.[5] It is the reasoning put forward by the Committee in support of its interpretation which deserves particular attention. Emphasizing that:

> For over 25 years, the practice of States parties has endorsed the Committee's interpretation. The opinio juris and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General Recommendation No. 19 has been a key catalyst for this process.[6]

CEDAW does not only heavily rely on the acceptance and adoption of the recommended interpretation by States parties. It even ascribes a central – if not causal – role for the evolution of customary international law to its own interpretation. This rather assertive claim by CEDAW suggests taking a closer look at the normative impact of treaty body pronouncements in general in order to assess the extent as to which this claim is justified or even generalizable.

Although 'key catalyst' might seem too strong a designation to some, it can hardly be contested that several pronouncements of expert treaty bodies[7] monitoring human rights treaties have become a central point of reference for international and domestic bodies when interpreting and applying

[3] General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017.

[4] Article 1, Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

[5] General Recommendation No. 35, supra n 1 at 7 para 21. This is noteworthy insofar as the word 'violence' does not appear in the convention. Furthermore, the wording of Art. 1 rather aims at ensuring equal treatment of women, instead of prohibiting specific forms of conduct. In contrast to Article 4(a), International Convention on the Elimination of All Forms of Racial Discrimination, (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, which requires States parties to declare as 'an offence punishable by law [...] all acts of violence [...] against any race or group of persons of another colour or ethnic origin'; see also: Yahyaoui Krivenko, 'The Role and Impact of Soft Law on the Emergence of a prohibition of violence against women within the context of the CEDAW', in Lagoutte, Gammeltoft-Hansen and Cerone (eds), Tracing the Roles of Soft Law in Human Rights, Oxford University Press 2016, at 47-68 arguing that the travaux préparatoires indicate that it was not included at the time of adoption; Byrnes, 'Whose International Law is it?' (2016) 59 Japanese Yearbook of International Law at 14-50 and 34-43.

[6] General Recommendation No. 35, supra n 1, at 7 para 21.

[7] We focus on expert committees, which are established under an international treaty or a resolution by an international organization to assist State parties with the implementation of a human rights treaty. This assistance consists of monitoring their compliance, considering claims by other States or even individuals that a State party is not fulfilling its obligations, and in publishing general comments regarding the interpretation of the respective conventions, see eg. Articles 40-45 ICCPR; Articles 9, 11-14 CERD; Articles 18-21 CEDAW. The output of the commissions work takes the form of concluding observations or concluding comments with respect to State reports, views or suggestions or recommendations with respect to communications and general comments/recommendations/suggestions regarding the implementation or interpretation of the respective conventions in general. Due to this terminological variety 'pronouncements' is chosen as a generic term.

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international law[8] and when adopting legislation.[9] Yet, at the same time, other pronouncements have been cited rather selectively by legal practice[10] or even experienced severe pushback by States parties.[11] How can we explain those manifest variations between different pronouncements? On which factors does their normative impact depend?

While differing political preferences of those applying the law and changes in the general climate regarding human rights may not be neglected in their explanatory value,[12] it appears doubtful whether those explanations are to be regarded as being exhaustive. After all, – and despite all enthusiasm about a maximum of human rights protection at the international level – we may not forget that the normative impact of pronouncements is not obvious, considering that the treaties establishing the expert bodies are silent on the legal effect of the latter's output.

In the quest for guidance on their normative weight other than an explicit provision in the treaties, international lawyers turn to the legal arguments on the basis of which a certain role of pronouncements has been justified in practice and in the academic debate. While a number of those arguments appear to be accessible to legal methods, it also seems that the decision-making process preceding the adoption of the pronouncements plays a non-negligible role for its subsequent functions. At the same time, we find this drafting process to be largely unspecified in the treaty texts,

[8] See e.g. the recent decision by the Spanish Supreme Court, María Josefa Oliver Sánchez, Tribunal Supremo, Sentencia Num. 1263/2018 (July 17, 2018) at www.poderjudicial.es/search/openDocument/, according to which the Spanish government must comply with the views of the CEDAW Committee as a matter of the State's constitutional mandate as well as its international obligations (as analysed by Kanetake in (2019) 113 American Journal of International Law 586-592).

[9] M Kanetake, 'UN Human Rights Treaty Bodies Before Domestic Courts' (2018) 67 International and Comparative Law *Quarterly* at 201–232 and 217-8; Van Alebeek and Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law', in Keller and Ulfstein (eds), *Human Rights Treaty Bodies*, CUP 2011 at 362-67 referring to Colombia, Hungary, Norway and Poland whose domestic law explicitly provides for options to give effect to views.

[10] See e.g. United Kingdom, House of Lords: Jones v. Saudi Arabia, 14 June 2006, [2006] UKHL 26; (2007) 1 AC 270, para. 57 (Lord Hoffmann) ('…as an interpretation of article 14 or a statement of international law, I regard it [Conclusions and recommendations of the Committee against Torture: Canada 7 July 2005, CAT/C/CR/34/CAN] as having no value') and on the other hand: A. v. Secretary of State for the Home Department [2005] UKHL 71 at paras 34 36 relying heavily on treaty body pronouncements to establish an exclusionary rule of evidence that prevents the use of information obtained by means of torture; Court of Appeal: R. (on the application of Al Skeini) v. Secretary of State for Defence, Application for judicial review, (2005) EWCA Civ 1609, (2006) HRLR 7 at para 101, citing general comment No. 31 of the Human Rights Committee to establish the extraterritorial application of the Human Rights Act 1998.

[11] See e.g. General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 6 (1994) of the Human Rights Committee, according to which 'It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.' as it was 'an inappropriate task for States parties in relation to human rights treaties' and that a 'reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'. This pronouncement met with severe criticism and opposition by a number of States and led to a less confrontational approach by the HRC (See further Rasulov, 'The Life and Times of the Modern Law of Reservations: The Doctrinal Genealogy of General Comment No. 24' (2009) 14 Austrian Review of European & International Law 103 at 111; Helfer, 'Pushback Against Supervisory Systems: Lessons for the ILO from International Human Rights Institutions' (August 28, 2019) Duke Law School Public Law & Legal Theory Series No. 2019-55, available at SSRN: https://ssrn.com/abstract=3435123 6-7.); see also on the most recent pushback against the right to abortion: Stevens, 'Pushing a Right to Abortion through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment' (2018) 70 Penn State Journal of Law and International Affairs at 130-4.

[12] See Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1; Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 Arizona State Law Journal 795.

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in particular if compared to the much more limited degree of procedural autonomy conferred to international courts and tribunals.[13] While this lack of specificity may therefore be an important piece of the puzzle when explaining the varying relevance of pronouncements, it equally confronts (positivist) international lawyers with their methodological 'blind spot': Traditionally, legal method operates as a filter vis-à-vis the multiplicity of social norms in order to identify those of an elevated normative quality, i.e. legal norms. Based on the doctrine of sources of law and the rules of interpretation, legal method is concerned with ascertaining the existence or non-existence of law, nothing more and nothing less. Consequently, the methods of international lawyers for *tracing* informal decision-making processes are limited.[14] It is at this point where interdisciplinary collaboration may provide a fruitful way forward.[15] While the method of process-tracing as developed in social science scholarship may open the 'black box' of the decision-making process for international lawyers, international relations scholars could in turn benefit from the careful analysis of legal patterns as conducted by international lawyers. From an international relations' perspective, the development of legal standards without the direct involvement of governments challenges explanations of decision-making in international politics.[16] Thus, international relations scholars might benefit from legal expertise in identifying the legal preconditions and parameters of the decision-making process.[17]

Consequently, this article argues that the varying impact of pronouncements can only be fully explained when the informal character of pronouncements is taken as a point of departure and interdisciplinary methods are resorted to where appropriate. To demonstrate this, the article proceeds as follows. First, we embed the challenge posed by treaty body pronouncements in the debate on informality in international law (2.). The second section analyzes the reasons for the varying normative impact of pronouncements in order to discern explanatory patterns (3.). From an international law perspective, normative explanations for their effect are discussed. Subsequently, methods used in international relations to study treaty body pronouncements are introduced, with a particular focus on process-tracing. We make two observations: first, we confirm that pronouncements do not require correspondence with a traditional understanding of formal categories to impact legal practice; and second, we identify the specific factors that orchestrate this impact. In a last part, we suggest avenues for future interdisciplinary research (4.) We demonstrate that the impact of pronouncements does not depend exclusively on the current political preferences

[13] Even though the International Court of Justice 'shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.' (Article 30 (1) Statute of the International Court of Justice), those rules only apply to the extent that they are compatible with the other provisions contained in the statute, in particular Articles 36-38, 43, 50, 65 (2), which contain limitations for the sources and the evidence the Court can draw from for its decision.

[14] See also Coomans, Grünfeld and Kamminga 'Methods of Human Rights Research: A Primer' (2010) 32 Human Rights Quarterly 179-186, at 181: 'Legal scholarship [...] makes implicit assumptions in this regard and runs the risk of remaining disconnected from reality.'

[15] See also Brunnée and Toope, 'International Law and the Practice of Legality: Stability and Change' (2018) 49/4 Victoria University of Wellington Law Review (Special Symposium Issue 'The Dynamic Evolution of International Law') at 433; Pollack and Shaffer, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 (3) Minnesota Law Review 706-799; Langford, 'Interdisciplinarity and multimethod research', in: Andreassen, Sano and McInerney-Lankford (eds), Research Methods in Human Rights: A Handbook, Edward Elgar 2017 161-191.

[16] For an overview see: Cox and Jacobson, The Anatomy Of Influence: Decision Making In International Organization, Cambridge University Press 1973.

[17] Coomans, Grünfeld and Kamminga, supra n 13: 'Social scientists [...]risk ignoring or misinterpreting applicable legal standards.'

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of domestic and international practitioners, but on the presence of several criteria. The majority of those criteria can be identified with legal methods. However, for those arguments which are linked to the decision-making process preceding the adoption of the pronouncements, we consider an interdisciplinary collaboration insightful and suggest a framework for future research in this respect. In times where the legitimacy of international human rights courts and monitoring bodies faces severe challenges,[18] our contribution engages with criticism which is incurred by the informality of pronouncements. This criticism primarily refers to the lack of transparency, elusive methodological standards and political activism within those 'black boxes'.[19] Identifying the criteria which have been considered to increase the procedural legitimacy of pronouncements is a crucial step to preserve their normative acceptability and faith in international monitoring bodies.

2. The Informal Character of Pronouncements as an Intradisciplinary Challenge

Why is it so difficult to explain the – often varying – legal effects of pronouncements by treaty bodies? We argue that the challenge to both disciplines lies in the informality of both drafting process and the subsequently adopted pronouncements. Hence, we contextualize them within the more general debate on informality in international lawmaking.

a) The Informal Character of Pronouncements

At first glance, it may seem counter-intuitive to some to understand the pronouncements of treaty bodies as informal: after all, they are established on the basis of a formal treaty.[20] States explicitly delegated the task of monitoring the implementation of the respective conventions to them. Similar to international courts and tribunals, treaty bodies are composed of independent experts and mandated by states to apply and interpret the respective treaties.[21] Even the adoption of pronouncements according to their own rules of procedure, a feature shared by most international courts and tribunals,[22] finds a legal basis in the treaties.[23] Yet, while within both disciplines, informality has been defined in various ways and with different emphases,[24] most approaches

[18] See for a similarly motivated approach vis-à-vis human rights courts: Hamilton and Buyse, 'Human Rights Courts as Norm-Brokers' (2018) Human Rights Law Review 205-232 at 205-206.

[19] Stevens, supra n 10.

[20] Which distinguishes them from purely private activities, such as the International Law Association (ILA) or the Institut du Droit International (IDI).

[21] See for composition: Article 28 (2) and (3) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Art. 17 (1) CEDAW; Article 8 (1) CERD; see for mandate: e.g. Article 17 (1) CEDAW 'for the purpose of considering the progress made in the implementation of the present Convention'.

[22] E.g. ICJ: Article 30 (1) ICJ-Statute; ICC: Article 52 (1) Rome Statute.

[23] E.g legal basis for general comments: Article 40 (IV) ICCPR; Art. 21 (1) CEDAW; Article 9 (2) CERD; Article 45 (d) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3; Article 33 (5) International Convention for the Protection of All Persons from Enforced Disappearance (CED) (adopted 20 December 2006, entered into force 23 December 2010), 2716 UNTS 3; Article 19 (3), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85.

[24] In international law: e.g Aust, 'The Theory and Practice of Informal International Instruments', (1986) 35 International and Comparative Law Quarterly 787; Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in: Pauwelyn, Wessel and Wouters (eds), Informal International Law-Making, Oxford University Press 2012, at 15-20; Brölmann and Radi, 'Introduction: International Lawmaking in a Global World', in: Brölmann and Radi (eds), Research Handbook on the Theory and Practice of International Lawmaking, Edward Elgar Publishing 2016 at 4-7; see also understanding of 'informal change' in: Kleinlein, 'Matters of Interpretation: How to Conceptualize and Evaluate Change of Norms and Values in the International Legal Order'

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coincide in stating that informality does not only exist in the absence of authorization, but also when authorization does not fulfil a minimum degree of definiteness and specificity.[25]

Bearing this in mind, we observe that not only the legal effect, but also the drafting process is left unspecified in the treaties. Instead, States parties conferred a very large degree of procedural autonomy to the respective treaty body.[26] In this respect, treaty bodies differ significantly from international courts and tribunals.[27] While the latter adopt their decisions on the basis of treaty provisions which only allow for the consideration of certain forms of sources and certain types of evidence,[28] the treaty bodies can autonomously decide which sources of information they consult, which normative standards they apply and in which procedure they consider them.[29] While eventually some of their pronouncements are often cited in the same breath as decisions of international courts and tribunals and, even, considered 'key catalysts' of legal developments,[30] others are at best cited in a selective fashion, at worst ignored. In order to explain this differing reception of their pronouncements, it is thus suggested to pay particular attention to the drafting process as characterized by its distinctive feature vis-à-vis international courts and tribunals: the extensive procedural autonomy of the treaty bodies therein.

This aspect gained (even more) importance over the past years as treaty bodies use their procedural autonomy to consult more and more openly with stakeholders, such as states, civil society actors and international organizations, in the drafting process of general comments.[31] While those had been drafted traditionally on the basis of State reports and individual communications, the drafting

(November 2018) KFG Working Paper Series, No. 24, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?'; In international relations: Andonova and Elsig, 'Informal International Law-Making: A Conceptual View from International Relations', in Pauwelyn, Wessel and Wouters (eds), *Informal International Law-Making*, Oxford University Press 2012, at 63-80; Stone, 'Informal Governance in International Organizations: Introduction to the Special Issue' (2013) 8 (2) The Review of International Organizations 121-136.

[25] See also categorizations proposed by Chinkin, 'Normative Development in the International Legal System', in: Shelton (ed), Commitment and Compliance: The Role of Non-Binding Norms in the International System, Oxford University Press 2000 21, at 30; Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 Leiden Journal of International Law at 313, 315 and 317.

[26] E.g. Article 39 (2) ICCPR; Article 10 (1) CERD; Article 19 (1) CEDAW; see e.g. 'Rules of Procedure of the Human Rights Committee', 9 January 2019, CCPR/C/3/Rev.11 (HRC Rules of Procedure), which, inter alia, leaves open the criteria according to which the topics for general comments are selected and which sources will be consulted in the drafting process.

[27] See also in this respect the recently published decision by CERD on the admissibility of an inter-State communication, in which it distinguishes itself from a judicial body, CERD/C/99/4, 27 August 2019, para. 49: "Moreover, the Committee, an expert monitoring body entitled to adopt non-binding recommendations is not convinced that a principle of *lis pendens* or *electa una via* is applicable which should rule out proceedings concerning the same matter by a judicial body entitled to adopt a legally binding judgment".

[28] Even though international courts and tribunals are also authorized to give themselves rules of procedure (e.g Art. 30 (1) Statute of the International Court of Justice; Article 25 lit d ECHR), the respective statute as well as rules of procedure and practice directions clearly define the sources from which the Court can draw exclusively (Article 38), the process of obtaining evidence (Arts. 48-52 ICJ-Statute; Registry of the ECHR, Rules of the Court (1 August 2018), in particular Annex) and contain an obligation to give reasons for the decision (Art. 56 (1) ICJ-Statute; Art. 45 and 49 ECHR). See further for evidence specifically obtained from non-governmental organizations: ICJ, Practice Direction XII, (as amended on 20 January 2009 and 21 March 2013)).

[29] Supra n 23.

[30] See also Report of the International Law Commission (2018), Chapter IV, UN Doc. A/73/10 at 112 para 17 quoting General Recommendation No. 35 when stating that '...the pronouncement may serve as a catalyst for the subsequent practice of States parties'.

[31] See Part C III; see also Rule 76 (4) Human Rights Committee Rules of Procedure (n 8) 'The preliminary draft of the general comment will be circulated to the States parties and other relevant stakeholders for comments.'

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process has changed over the last two decades and became more and more "expert-driven and broadly participatory".[32] This begs the question whether it is the involvement of certain actors in the drafting process which increases or decreases the normative acceptability of pronouncements.[33]

The classification of pronouncements as 'informal' is further shared by those approaches which define informality 'in contrast and opposition to traditional international lawmaking' and distinguish between actor informality, process informality and outcome informality.[34]

Pronouncements of treaty bodies can be considered along the lines of primarily two dimensions of this definition: First, they are characterized by output informality. Output informality encompasses all forms of international cooperation that cannot be characterized as a traditional source of international law.[35] Even though treaty bodies are authorized to adopt pronouncements, the treaties are silent on their legal value. Therefore, pronouncements are neither a traditional source of international law, nor can they derive legally binding force from the treaty on which they are based. Secondly, they are characterized by actor informality, meaning by the involvement of non-traditional actors.[36] The procedural autonomy of treaty bodies in the drafting process has led to intense cooperation between the elected members with civil society actors, states and international organizations and introduced actor informality as a feature of pronouncements. Therefore, pronouncements can be characterized by their informal character.

b) Contextualizing Pronouncements in the Informality Debate

Given these informal characteristics of pronouncements, legal scholars and practitioners struggle with the assessment of their legal value.

Law presupposes the distinction between legally relevant and legally irrelevant facts. From a traditional point of view, this undertaking follows the binary distinction between law and non-law.[37] Pronouncements of treaty bodies are neither attributable to States nor can they easily be classified as one of the sources listed in Art. 38 ICJ-Statute.[38] Classifying them – because of this lack of formality

[32] Meier and Brás Gomes, 'Human Rights Treaty Bodies', in: Meier and Gostin (eds), Human Rights in Global Health: Rights-Based Governance for a Globalized World, Oxford University Press 2018, at 521; see further on the drafting process of the recently adopted General Comment No. 36 of the HRC: Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) Human Rights Law Review, at 347.

[33] See also Helfer, supra n 10 at 11 '...disagreements between states and international monitoring bodies over expansive interpretations cannot be fully controlled by either set of actors. [....] These effects are often indirect, emerge only over time, and potentially implicate a wide range of non-state actors, including individual litigants, international institutions, national and international courts, and civil society groups. The number and diversity of these actors, and the trajectory of their interactions, affect whether claims of expansive authority remain contested or settle into new equilibria.'

[34] Pauwelyn, supra n 21 at 15; similarly Brölmann, Radi, supra n 21 at 6 distinguishing between actors and output.

[35] Ibid.

[36] Ibid.

[37] See e.g Kelsen, 'Legal Formalism and the Pure Theory of Law (1929)', in Jacobson and Schlink (eds), Weimar: A Jurisprudence of Crisis, The University of California Press, January 2001 76-83; Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 65 167–82 at 179-81; Weil, 'Towards Relative Normativity in International Law' (1983) 77 American Journal of International Law 413-447 at 417; see also South West Africa (Ethiopia v South Africa, Liberia v South Africa) (Second Phase), Judgment, ICJ Rep 1966, 6 at 34 para 49: '[i]t is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form.'

[38] Members 'shall serve in their personal capacity' and not as State representatives, see e.g. Article 28 (3) ICCPR.

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- as non-binding, *ergo* as non-law and eventually legally irrelevant, however, may not sufficiently explain their observable presence in legal practice.[39] Therefore, their effect challenges the traditional binary approach. Yet, the question whether this effect can be explained in *legal* terms is not new in international law.[40] Apart from pronouncements of mandated treaty bodies, this question has also come up with respect to other categories of provisions.[41] Challenging binary distinctions in international law, these norms are designated as 'soft law'.[42] While for a long time the debate concentrated on the legal nature of 'soft law' (some arguing in favour of a 'grey zone'[43] or a broadening of the concept of law[44]; others warning from doing precisely this[45]), over the last decades and possibly under the impression of studies on the actual impact and effectiveness of 'soft law' norms[46] - the discussion gained several nuances. Apart from concentrating increasingly on their regulatory effect (-iveness) and, as a result of this, questions of legitimacy and accountability,[47] the focus of debate shifted from discussing the legal nature to analysing its legal effects.[48]

However, the question of how to distinguish between law and non-law is still unresolved. For those applying the law it cannot be circumvented by pointing to its 'hard law-like' regulatory effect or by focussing on legal effects instead of legal nature.[49] It is not only unclear which criteria demarcate

[39] See below section A.

[40] It has been discussed with respect to e.g. gentlemen's agreements concluded since the 19th century, see Klabbers, 'International Courts and Informal International Law' in Informal International Lawmaking, supra n 21, 222-5; and General Assembly resolutions: Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations, Springer 1966.

[41] First, provisions emanating from an entity lacking international legal personality, but which enjoys a certain degree of authorization by a subject under international law to fulfil a function in international law; e.g. the International Law Commission of the UN (ILC), International Committee of the Red Cross (ICRC). Second, those contained in binding international agreements which are considered to be too vague to create legal rights or obligations. Third, those adopted by subjects of international law in instruments with a non-binding character. See also Chinkin, 'Normative Development in the International Legal System', supra n 21; Ellis, supra n 21.

[42] See Abi-Saab, 'Cours général de droit international public' (1987) 207 Receuil des Cours at 206; Baxter, 'International Law in 'Her Infinite Variety'' (1980) 29 International and Comparative Law Quarterly 549–566, at 549; Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38.4 International and Comparative Law Quarterly 850–866; Dupuy, 'Droit déclaratoire et droit programmatoire: de la coutume sauvage à la 'soft law' en´l'élaboration du droit international public' Societé francaise pour le Droit International public, Colloque de Toulouse, Leiden, Sijthof 1975, 132-148; Fastenrath, 'Relative Normativity in International Law' (1993) 4 European Journal of International Law 305-340; Thürer, 'Soft Law', Max Planck Encyclopedia of Public International Law 2009; see also for more sceptic voices on the term: Blutman, 'In the trap of a legal metaphor: International Soft Law' (2010) 59 International and Comparative Law Quarterly 605–624; Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 65 167–82.

[43] Baxter, supra n 37 at 563; Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law' (1991) 230 Recueil Des Cours at 23, 34; Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 European Journal of International Law 499-515.

[44] Abi-Saab, supra n 37 at 213; Asamoah, supra n 37 at 66-7.

[45] Aust, supra n 21 at 804-6 and 811, Blutman, supra n 37 at 623-4, M. Virally, „Rapport définitif', 60-I Annuaire de l'Institut de Droit International (1983), 328-357, at 341; Weil, supra n 32 at 421.

[46] Shelton, supra n 22.

[47] Benvenisti, 'Towards a Typology of Informal International Lawmaking Mechanisms and their Distinct Accountability Gaps', in Informal International Lawmaking, supra n 21 at 297-309; Duquet et al, 'Upholding the Rule of Law in Informal International Lawmaking Processes' (2014) 6 Hague Journal on the Rule of Law, Hague Journal on the Rule of Law 75–95; Goldmann, Internationale öffentliche Gewalt, Springer 2015; Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014 108 American Journal of International Law 1-40 at 8f.

[48] Pauwelyn, supra n 21 at 130; Virally, supra n 40 at 343: „effets juridiques secondaires'.

[49] Pauwelyn, Wessel and Wouters, 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable', supra n 21 at 527-8.

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the line between legal and non-legal implications, but also their exact scope: Does international law merely allow lawyers to consider 'soft law' or does it oblige them to do so?[50] These general ambiguities evolving from the debate on 'soft law' might have contributed to the diverging practice vis-à-vis the legal value of pronouncements which in turn affects their normative influence. However, the question arises whether certain criteria are recurrently referred to in legal practice when assessing the legal weight of pronouncements. These criteria may then help to explain why certain pronouncements are more influential than others. A first step to approach this question is to identify the applicable legal bases. They determine to what extent pronouncements can have legal implications at all. Second, the notion of 'persuasiveness' (as opposed to 'bindingness') has further been outlined 'as a basis for taking account of monitoring bodies' findings in [...] judicial reasoning'.[51] Identifying factors which influence the persuasiveness can therefore help to define the scope of their legal implications. Here, the impact on the persuasiveness of the pronouncement by the involvement of certain types of actors into the drafting process, in particular, civil society actors, deserves particular attention. Due to their lack of insight into the drafting process, which is usually left unexplored as "non-law", legal scholars confront their methodological "blind spot" precisely here.

Yet, while international relations scholars possess the methods to analyse the personal, procedural, and substantive dimensions of the policy cycle, which precede, succeed or run parallel to traditional intergovernmental decision-making, informality poses methodological and theoretical challenges to these analyses as well. Broadly speaking, social science research neglects the informal sphere, relying mostly on official data[52] and the study of formally-designated actors, processes and outcomes. This challenge is compounded at the international level, where decision-making processes typically occur behind closed doors, rendered a 'black box' to outside observers; as such, their internal workings are impossible to understand without access to primary sources[53].

This has also effects on analyses of the *who* of decision-making, which are usually limited to governments[54]. Other relevant actors, such as expert committees, are often overlooked as autonomous decision makers, especially in the realm of international law[55]. Overall, informality is less accessible 'to qualitative empirical research, rarely able to be grasped in elegant formal models, and still morally suspect'.[56] Yet, recent studies highlight that most of the processes in international

[50] Goldmann, supra n 42 at 191.

[51] Kanetake, supra n 9 at 222-3.

[52] Reykers and Beach, 'Process-tracing as a tool to analyse discretion', in: Delreux and Adriaensen (eds.), The Principal Agent Model and the European Union, Springer 2017, 255-281, here 257. Collier, Brady, et al.: Sources of Leverage in Causal Inference: Toward an Alternative View of Methodology (2004). In: Brady and Collier: Rethinking Social Inquiry: Diverse Tools, Shared Standards: 229-266; Biermann & Koops: Studying relations among international organizations in world politics: core concepts and challenges (2017). In Biermann & Koops (Eds.), Palgrave Handbook of Inter-Organizational Relations in World Politics: 1-46, here 32.

[53] Arts and Verschuren: Assessing Political Influence in Complex Decision-Making: An Instrument Based on Triangulation (1999). In: International Political Science Review 20(4): 411-424.

[54] Cox, Jacobson, et al. (1973): The Anatomy Of Influence: Decision Making In International Organization. Cambridge, Cambridge University Press.

[55] von Bernstorff: Procedures of Decision-Making and the Role of Law in International Organizations (2008). In: German Law Journal 9(11): 1939-1964.

[56] Brie and Stölting: Formal Institutions and Informal Institutional Arrangements (2012). In: Christiansen and Neuhold: International Handbook on Informal Governance. Cheltenham, Edward Elgar Publishing: at 19.

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organizations are informal[57] and decision-making outside of the intergovernmental core[58] has gained attention, particularly in respect to its potential to transform the future of global governance specifically because of its opportunities for the participation for non-state actors.[59]

One main utility of studying the informal processes and actors that orchestrate international law development is to outline the role non-state actors de facto play — something scholarship has been plagued to accomplish, due to the inherent research difficulties such a study poses.[60] As non-state actors usually do not have any voting or even participation rights, their influence is anything but obvious. Methodologically, this demands more efforts to include the often case-specific informal ways of cooperation within a theoretical model of transnational influence on lawmaking and gather empirical evidence instead of simply focusing on the formal forms of cooperation with non-state actors.[61]

To conclude this section, informality represents a methodological challenge to both disciplines alike. International relations scholars are increasingly concerned with how to detect causal mechanisms in informal decision-making processes. International lawyers, on the other hand, struggle with categorizing the outcome of an informal process as it defies the binary distinction between law and non-law. Both disciplines are confronted with the question of how else to distinguish between relevant and irrelevant acts and actors and how to explain the distinction. Consequently, both disciplines struggle to explain the diverging impact of pronouncements by expert treaty bodies.

3. Pronouncements of Treaty Bodies as an Interdisciplinary Opportunity

The intradisciplinary challenges outlined above provide the entry-point for interdisciplinary collaboration: international relations scholarship knows analytical frameworks which aim to capture the personal, procedural and substantive dimensions of the policy cycle which precede, succeed or run parallel to traditional intergovernmental decision-making. Such analyses may shed light on aspects which are usually left unexplored as 'non-law' in the binary approach of traditional lawyers. The more thoroughly international relations scholars apprehend the mechanisms of informal decision-making, the better equipped international lawyers will be to assess the persuasiveness of its outcome in normative terms. At the same time, international lawyers could provide a salient framework to better capture the preconditions and actual impact that surround informal decision-making[62].

[57] Instead of many see Conzelmann: Informal Governance in International Relations (2012). In: Christiansen and Neuhold: International Handbook on Informal Governance. Cheltenham, Edward Elgar Publishing: 219-235.

[58] Steffek: Explaining Cooperation between IGOs and NGOs – Push Factors, Pull Factors, and the Policy Cycle (2013). In: Review of International Studies 39(4): 993-1013.

[59] Kahler: Global Governance: Three Futures (2018). In: International Studies Review 20(2): 239-246, at 242, 244.

[60] Instead of many see the contributions to the volume Noortmann, Reinisch, et al. (2015): Non-State Actors in International Law. London, Bloomsbury Publishing.

[61] Steffek 2013 fn 56.

[62] Brie and Stölting, 19: 'Accessible only in a limited fashion to qualitative empirical research, rarely able to be grasped in elegant formal models, and still morally suspect, the informal sphere has the aura of the irrational and the irregular'.

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a) Pronouncements of Treaty Bodies – Legal Effects?

Legal scholars focus on the *legal effects* of pronouncements. The range of possible legal effects demarcates the possible impact pronouncements can have from a normative point of view. Yet, the legal value challenges the traditional understanding of sources and rules of interpretation under international law: Without explicit legal personality, treaty bodies are neither subjects under international law, nor is their practice attributable to States. Nevertheless, even if not explicitly tasked with developing the law, States parties have authorized them to monitor and facilitate the implementation and application of the respective treaties.[63]

aa) Current State of Practice

An analysis of the current state of practice reveals that it is highly diverse. Yet, certain patterns are discernible, which help to explain the diverging impact of pronouncements.

Statements of Governments

Apart from reacting to specific decisions against their respective State,[64] governments did not comment explicitly on the legal value of pronouncements for a long time. This started to change with the Human Rights Committee's publication of General Comment No. 24[65] and culminated in a heated debate about a draft of General Comment No. 33. In the draft of General Comment No. 33, the Human Rights Committee described itself as 'authentic interpreter' of the International Covenant on Civil and Political Rights (ICCPR) exhibiting 'most of the characteristics of a judicial decision' and stated that either its jurisprudence 'may be considered' as subsequent practice within the sense of article 31(3)(b) VCLT 'or, alternatively, the acquiescence of States parties in those determinations constitutes such practice.'[66] In reaction to this, several States parties stated that pronouncements do not have a legally binding character and do not constitute subsequent practice in the sense of Art. 31 (3) lit. b VCLT.[67] Some States, however, stressed that the specific category of views must be considered in good faith.[68] Furthermore, some stated that States parties' reactions to pronouncements may constitute relevant State practice in the formation of custom or in the sense of Art. 31 (3) lit. b VCLT.[69] In the final version of General Comment No. 33, the Human Rights Committee omitted several contested formulations, but kept its position with respect to the bindingness of views and interim

[63] Supra n 20.

[64] E.g. Austria, HRC, Summary Record of the 1719th Meeting: Austria, 4 November 1998, UN Doc. CCPR/C/SR.1719, para. 22.

[65] See Annual Report 1995 of the Human Rights Committee, A/50/40 vol. I pp. 126-134 (the United States and the United Kingdom) Annual Report 1996 of the Human Rights Committee, A/51/40 vol. I pp. 104-106 (France).

[66] Draft General Comment No. 33 (18 August 2008) (CCPR/C/GC/33/CRP.3), 25 August 2008 at paras 12-21.

[67] See, e.g, on Draft General Comment No. 33: Australia (3 October 2008), 1-5; Belgium (23 October 2008), 1-1; Japan, para 10; New Zealand (12 September 2008), para. 3; Poland (12 September) 1-5; United Kingdom (17 October 2008) 1-3; United States of America (17 October 2008) 1-7, available at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC33-ObligationsofStatesParties.aspx (accessed 12 September 2018); positive: Mexico (2 October 2008); Turkey.

[68] See e.g. Australia (3 October 2008), para 1, but in the limits of para 6; Germany (15 October 2008), 1, Japan (3 October 2008), para 18, New Zealand, paras 8, 10; Norway, 2, Poland, 1; Romania (16 October 2008), 2; Switzerland (23 October 2008), 2; Turkey, para. 1.

[69] E.g. Australia, 4; Poland, 6; see also UN GA, Seventieth Session, Sixth Committee, Summary Record of the 22nd meeting (A/C.6/70/SR.22), 6 November 2015, para 46 (United States of America), for silence as constituting acquiescence: Australia, paras 13-4.

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measures[70] and described its pronouncements as 'authoritative'[71]. Following this exchange, other treaty bodies adopted the practice of publishing draft general comments and calling upon all stakeholders, including State parties, to provide their comments.[72] States have used this opportunity in the past to reiterate their position on the non-bindingness of pronouncements[73] and emphasized, that silence must not be interpreted as agreement.[74]

Only recently, States debated the role of pronouncements of treaty bodies in the 6th Committee of the UN General Assembly. In August 2018, the International Law Commission (ILC) had adopted draft conclusion 13 and respective commentaries on the role of pronouncements therein on second reading and had, *inter alia*, stated in draft conclusion 13 (3), that it 'is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates'[75]. In comparison to the ILC's previous formulation, this has been interpreted 'as more oriented toward a recognition by the Commission that such pronouncements do contribute to the interpretation of treaties'.[76] Even though the whole set of draft conclusions, including draft conclusion 13, was adopted by the Sixth Committee on 13th November 2018 without a vote,[77] the preceding debate indicated divergent views of delegations on the legal value of pronouncements ranging from those attributing a 'major role' to them in the interpretation of the respective treaties,[78] those accepting their autonomous interpretative value under certain circumstances[79] to those delegations emphasizing, that they could only be considered to the extent that they are accepted by States or as an aid to identify existing State consent[80]. Despite the highly diverse picture which this analysis offers, we may take from it that the legal value of pronouncements depends to a large extent on the features of a concrete pronouncement and the circumstances of its adoption.

Practice of Domestic Courts

[70] General Comment No. 33 (CCPR/C/GC/33), 25 June 2009, paras 19-20.

[71] Ibid., para 13.

[72] Published online at https://www.ohchr.org/EN/HRBodies; Human Rights Committee: Draft General Comment 9 (Deadline 1 June 2014); Draft General Comment on Article 6 (Deadline 6 October 2017); CEDAW: Draft for update of General Recommendation No. 19 (Deadline 30 September 2016): Draft General Recommendation on Gender-Related Dimensions of Disaster Risk Reduction in a Changing Climate', 11 October 2016 (Deadline for submissions 31 January 2017); CRPD, Draft General Comment No. 7 on Articles 4.3 and 33.3 CRPD (Deadline 15 May 2018) CAT: Draft Revised General Comment on the implementation of article 3 of the Convention in the context of article 22 (Deadline 31 March 2017); CRC: Comment on Children in Street Situations (Deadline April 2016).

[73] See e.g. CEDAW on Changing Climate, ibid: Mauritius, 1; Russian Federation, 2-3.; CRPD Draft General Comment 7, ibid: Denmark (9 May 2018), 2; United States of America (10 June 2014) on Draft General Comment 9 of HRC, para 4; United Kingdom, para 2; CEDAW Draft update of General Comment 19, Australia, paras 10-2.

[74] Norway, CEDAW, changing climate, supra n 67 at 2.

[75] Report of the International Law Commission on the Work of its Seventieth Session, UN Doc A/73/10 (Geneva, 30 April–1 June and 2 July–10 August 2018), Chap. IV 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties', chap. VI, draft conclusion 13 and commentaries, 106-116.

[76] Murphy, 'Anniversary Commemoration and Work of the International Law Commission's Seventieth Session', (2019) 113 American Journal of International Law 90-108, at 93.

[77] UN GA Resolution of 7 November 2018, A/C.6/73/L.23; see for statements of delegations in the 6th Committee, https://papersmart.unmeetings.org/en/ga/sixth/73rd-session/statements/.

[78] Italy, further: 'should be duly considered', see also Council of Europe 'their contribution to the interpretation of treaties has been of great importance'.

[79] Chile, Japan, Portugal, Republic of Korea, Spain, Vietnam.

[80] Belarus, Iran, United States. While emphasizing the role of State consent with regard to their role in the context of Art. 31 (3) VCLT, in their statements the Russian Federation and Sierra Leone did not take a position with respect to the interpretative value as such.

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Turning to the practice of domestic courts, the following analysis cannot be fully exhaustive in quantitative terms; as such, its exploratory scope is limited to two main points of examination: first, to determine whether a consensus with respect to the legal value of pronouncements among domestic courts is discernible; and second, to extract particular legal arguments domestic courts engage with respect to the legal weight and basis.[81]

There is no uniform practice of domestic courts with respect to the pronouncements of treaty bodies.[82] In a number of decisions domestic courts simply use the pronouncements as an aid in their interpretation without explaining neither their legal basis, nor their legal weight, and mostly to confirm their own interpretation.[83] Few courts explicitly found them to be legally binding.[84] Several courts stated, that while not being legally binding as such,[85] the pronouncements carry significant weight.[86] Yet, it is possible to identify certain recurrently mentioned factors in their reasoning, that influence the legal value of the pronouncements, such as the treaty body's mandate,[87] its

[81] See also Kanetake, supra n 9; van Alebeek and Nollkaemper, supra n 8; ILA, 'Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals' (2002); ILA, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies' (2004); Tracing the Roles of Soft Law, supra n 4.

[82] While ILA (2004), ibid. at para 175 states that: 'most courts have recognised that [...] the treaty bodies' interpretations deserve to be given considerable weight'; Kanetake, supra n 9 at 203 is more sceptic ('not clear'); see also ILC Report 2018, supra n 70 at footnote 653.

[83] Bangladesh, Supreme Court, Bangladesh Legal Aid and Services Trust and ors v. Government of Bangladesh, Writ Petitions No 5863 of 2009, No 754 of 2010, No 4275 of 2010, ILDC 1916 (BD 2010), 8 July 2010 at para. 45; Colombia, Constitutional Court, Sentencia T-077/13 (2013) at 14 February 2013; India, High Court of Delhi, Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors, WP(C) Nos 8853 of 2008, and 10700 of 2009 (2010), Judgment of 4 June 2010 at para 23; Judgment of the ECHR, Ministry of Justice of the Russian Federation, Constitutional proceedings, No 12-P, ILDC 2590 (RU 2016), 19th April 2016 at para 2.2; Supreme Court of Spain, X v Public Prosecutor of Spain, Judgment, ILDC 2620 (ES 2016), STS 2573/2016, 3rd June 2016; Civil Chamber, at para 14 (general comment); Israel: Dobrin and Tzur v Israel Prison Service and ors, Original petition to the Supreme Court sitting as the High Court of Justice, HCJ 2245/06, ILDC 2407 (IL 2006), 13th June 2006, para. 19; Constitutional Court at para. 18; Millicent Awuor Omuya alias Maimuna Awuor & Another v The Attorney General and Others [2015] Petition No 562 of 2012 (High Court of Kenya at Nairobi, 17 September 2015) at paras 92, 94.

[84] Tribunal Supremo de Espãna, sentencia núm. 1263/2018, 17 July 2018, fundamento de derecho séptimo at 23–24; in that direction: Lewis v Attorney General of Jamaica (2000) 134 ILR 615 (Jamaica, Judicial Committee of the Privy Council, 12 September 2000), 635.

[85] Explicitly denying legal bindingness: Kavanagh (Joseph) v Governor of Mountjoy Prison and Attorney General, Appeal Decision, [2002] IESC 13, [2002] 3 IR 97, (2002) 2 ILRM 81, ILDC 488 (IE 2002), 1st March 2002, Ireland; Supreme Court, para. 36; France, Council of State, Hauchemaille v. France, case No. 238849, 11 October 2001, ILDC 767 (FR 2001), para. 22; Others v Home Secretary (No 1) [2004] UKHL 56; 137 ILR 1 (UK, House of Lords, 16 December 2004) para. 63 (Lord Bingham).

[86] German Federal Constitutional Court, Order of the Second Senate of 29 January 2019 - 2 BvC 62/14, Rn. 65; see also Netherlands, Central Appeals Tribunal, Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank (21 July 2006); Norway, Supreme Court, A. v. The Norwegian Immigration Appeals Board, 16 April 2008, Case No. HR-2008–681-A, ILDC 1326 (NW 2008), paras. 52 and 58; Kracke v Mental Health Review Board, Appeal decision, [2009] VCAT 646, ILDC 1608 (AU 2009), 23rd April 2009, para. 376; Argentina, Supreme Court, S Y Q C v Government of the City of Buenos Aires, Q 64 XLVI, ILDC 2384 (AR 2012), 24th April 2012, para. 10; New Zealand, Mansouri-Rad v Department of Labour, Appeal decision, Refugee Appeal No 74665/03, [2005] NZAR 60, ILDC 217 (NZ 2004), 7th July 2004, para. 73; Cal v Attorney-General (2007) 71 WIR 110; 135 ILR 77 (Belize, Supreme Court, 18 October 2007), para. 125.

[87] Mohammed v Ministry of Defence, Appeal judgment, [2017] UKSC 2, ILDC 2803 (UK 2017), 17th January 2017, UK Supreme Court [UKSC], paras. 48, 269f., 344, at para. 269; S Y Q C v City of Buenos Aires, supra n 81 at para. 10; Mansouri-Rad, supra n 81 at para. 73.

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composition of experts,[88] the experience of the committee,[89] the quality of its reasoning[90] and the consistency of reasoning among the treaty bodies[91]. Those courts citing an explicit legal basis referred to Article 32 VCLT,[92] Article 38 lit. d ICJ Statute[93] or 'good faith'[94]. Some Courts rejected certain legal arguments, in particular the argument that a pronouncement could overrule domestic judicial decisions[95] or that it could in itself amount to a subsequent agreement or practice between the parties[96].

Decisions of International Courts and Tribunals

The International Court of Justice has considered pronouncements on several occasions when interpreting the respective treaties.[97] In some cases, the Court has, similar to domestic courts, referred to the pronouncements as substantiation for its own interpretations without further elaborating their legal value.[98] In *Diallo*, the ICJ — for the first time in its jurisprudence — gave some indication to this effect with the following:

> 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***.[99]

[88] Mohammed, ibid at para. 269; Australia, Federal Court, Minister for Immigration and Citizenship v Anochie, Trial judgment, [2012] FCA 1440, ILDC 2558 (AU 2012), 18th December 2012, para. 49.

[89] Government of South Africa and ors v Grootboom, Appeal to Constitutional Court, [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC), ILDC 285 (ZA 2000), 4th October 2000, South Africa; Constitutional Court [CC], paras. 31f.

[90] Order of the Second Senate of 29 January 2019, supra n 81 at para 77; Government of South Africa and ors v Grootboom, supra n 84 at paras 31-2; R v Sin Yau-ming (1991) 1 HKPLR 88 (Hong Kong, Court of Appeal, 30 September 1991), 107; Kracke, supra n 81 at para. 376 and 451; Maloney v The Queen and Attorney-General of the Commonwealth (intervening), Appeal decision, [2013] HCA 28, ILDC 2740 (AU 2013), 19th June 2013, Australia, paras 175-6.

[91] Order of the Second Senate of 29 January 2019, supra n 81 at para 77.

[92] Anochie, supra n 83 at para 48; in this direction Osaka High Court, Judgment of 28 October 1994, Japanese Annual of International Law, vol. 38 (1995), 129–130.

[93] Anochie, supra n 83 at para 49.

[94] German Federal Constitutional Court, Order of the First Senate of 26 July 2016 - 1 BvL 8/15, para. 90.

[95] Estate of the late Zahara (Ziba) Kazemi and Hashemi, Canadian Lawyers for International Human Rights (intervening) and ors (intervening) v Iran and ors, Final appeal, Case No 35034, ILDC 1721 (CA 2014), 10th October 2014, Canada, Supreme Court [SCC], at paras 147-8; Singarasa (Nallaratnam) v Attorney General, Application for judicial review, SC Spl (LA) No 182/99, ILDC 518 (LK 2006), 15th September 2006, Sri Lanka; Supreme Court at para 21; R (AB) v The Secretary of State for Justice [2017] EWHC 1694 (Admin) (UK, High Court of Justice Queen's Bench Division Administrative Court, 4 July 2017) at para 113.

[96] Maloney, supra n 85 at para 173 and 175-6; Order of the Second Senate of 29 January 2019, supra n 81 at para 76.

[97] 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, 10, at 27, para. 39; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, 422, at 457 para 101; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, 639, at 663–664 para 66; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, 136 at 179–181 paras 109–110 and 112, and at 192–193 para 136.

[98] Construction of a Wall, supra n 91 at 179–181, paras 109– 110 and 112, and at 192–193, para 136; Belgium v. Senegal, supra n 91, at 422 and at 457 para. 101.

[99] Diallo, supra n 91 at 663–664 para 66 (emphasis by the authors).

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A further nuance of the Court's jurisprudence is illustrated in the even more recent *Advisory Opinion Judgment No. 2867*. The Court exclusively relied 'on the basis of 30 years of experience in the application of the above-mentioned Article 14' underlying the 'significant differences between the two General Comments by the Human Rights Committee on Article 14' not just to confirm its own interpretation, but rather to note a development of the principle in question since its last engagement with it in its Advisory Opinion in 1956.[100] On that basis, the court considered it adequate to modify its previous interpretation of the principle of equality.[101] Similarly, but with an additional reference to the jurisprudence of regional courts, it had already been argued before in the *Joint Separate Opinion* in the *Armed Activities Case of 2006*:

> General Comment No. 24 (52) has sought to provide some answers to contemporary problems in the context of the International Covenant on Civil and Political Rights, with ***its analysis being very close to that of the European Court of Human Rights and the Inter-American Court***. The practice of such bodies is not to be viewed as 'making an exception' to the law as determined in 1951 by the International Court; we take the view that it ***is rather a development to cover what the Court was never asked at that time, and to address new issues that have arisen subsequently***.[102]

International Tribunals[103] and regional human rights courts and bodies[104] have also referred to pronouncements as interpretative practices under parallel rules, even though they rarely explained the legal basis for doing so.[105]

bb) Current Academic Debate on Treaty Bodies

Some commentators attribute an 'authoritative'[106] character to pronouncements based on an interpretation in good faith of those treaty provisions which establish the competences of monitoring bodies.[107] Others invoke a 'duty to consider' to justify – if not a substantive at least a procedural legal obligation - to consider the pronouncements and in that way their *guiding/instructing* effect.[108] Different legal bases are brought forward to support this claim: the

[100] Judgment No. 2867, supra n 91, at 24-27 paras 36-39, in particular para 39; Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, I.C.J. Reports 1956, at 85.

[101] Judgment No. 2867, supra n 91 para 38-9.

[102] Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma in the Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment of 3 February 2006, at 69 para 16 (emphasis by the authors).

[103] Furundzija, Judgment of 10 December 1998, Case No. IT-95-17/1-T, §§ 153 (Nr. 170) and 155 (Nr. 172).

[104] 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 at paras 189 and 191; ACHPR, 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 at para 63; ECtHR Magyar Helsinki Bizottsag v. Hungary [GC], Application no. 18030/11, 8 November 2016 at para 141.

[105] See for an explicit reference to Article 31 (3) lit. c VCLT: ECtHR Mamatkulov and Askarov v Turkey (GC) App No 46827/99 and 46951/99, ECHR 2005-I, at paras 111-115.

[106] See e.g. Geneva Academy, Optimizing the UN Treaty Body System. Academic Platform Report on the 2020 Review, May 2018 available at https://www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf at 26.

[107] See also Human Rights Committee General Comment No. 33 (revised version of 5 November 2008) at para 19.

[108] LS Borlini and L Crema, 'The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or mission éducatrice?', forthcoming in 18(1) Global Community Yearbook of International Law and Jurisprudence 2019, (Oxford University Press: 2020), p. 32 (with respect to "individual complaints against the

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general principle of good faith or a general duty to cooperate,[109] Art. 38 (1) lit. d ICJ Statute,[110] Art. 31 (3) lit. a and b (claiming that pronouncements as such amount to SASP[111]) and Art. 31 (3) lit. c VCLT[112]. Some point to the *indicative* character of pronouncements in the process of recognition of a source of a legally binding obligation (such as Art. 31 (3) lit. a and b VCLT,[113] Article 31 (1) VCLT [114] and Article 38 (1) lit. d ICJ Statute[115]) whereby the exact weight depends on a variety of factors.[116] Others emphasize the *supplementary* character of treaty body pronouncements in the sense of Art. 32 ICJ VCLT (which some equate in its legal weight with Art. 38 (1) lit. d ICJ Statute[117]) and argue that State practice illustrates, that despite being referred to frequently, their role is entirely left to the discretion of the interpreter[118] and solely determined by domestic law. The role of pronouncements has also been perceived as negligible for the purpose of interpretation[119] and as merely constituting the *factual* background of a legal dispute.

Overall, the analysis reveals, that the legal weight of pronouncements is subject to controversy. However, certain patterns are discernible: Legal arguments are often based on factors that are ascertainable with legal methods (such as the mandate of the treaty body, its composition, the type of pronouncement, the quality of its reasoning and the consistency with the findings of other

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same state regarding the same subject matter"); Van Alebeek and Nollkaemper, supra n 8, at 386-7 and Ulfstein, 'Individual Complaints', in Keller and Ulfstein, supra 8 at 100 (with respect to views); see also Kälin and Künzli, The Law of International Human Rights Protection, Oxford University Press 2009 at 225.

[109] ILC, Report of the Sixty-third session (2011), Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10), Guide to Practice on Reservations to Treaties, guideline 3.2.3 and commentary to that guideline at 402 para 3.

[110] Andenas and Leiss, 'The Systemic Relevance of 'Judicial Decisions' in Article 38 of the ICJ Statute' (2017) 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht at 907.

[111] Describing this approach: ILA Report, supra n 76, at 6 para 22.

[112] Dörr, 'Article 31', in: Dörr and Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Springer 2018 at 608-9 paras 100-1.

[113] Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur, International Law Commission Sixty-eighth Session, Geneva (2 May-10 June and 4 July-12 August 2016) A/CN.4/694, paras 43-48; Mechlem, 'Treaty bodies and the interpretation of human rights' (2009) 42 Vanderbilt Journal of Transnational Law 905-947, 920-1; Kanetake, supra n 21 at 218; Schlütter, 'Aspects of human rights interpretation by the UN treaty bodies', in Keller and Ulfstein, supra n 8 at 289–290; Klein and Kretzmer, 'The UN Human Rights Committee: the general comments — the evolution of an autonomous monitoring instrument' (2015) 58 German Yearbook of International Law 189–229 at 205-6.

[114] ILC Report 2018, supra n 70, draft conclusion 13 and commentaries at 115 para 24.

[115] Chinkin, 'Sources', in: Moeckli et al (eds) International Human Rights Law, 3rd ed, Oxford University Press, 2018, 63–85, at 78–80; in this direction: Berman, 'Authority in International Law', KFG Working Paper Series, No. 22, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?', Berlin, November 2018 at 16.

[116] See also Keith, 'Between 'Great Weight', 'Excessive Pretensions' and 'Statements of No Value': United Nations Human Rights Treaty Bodies, National Courts and the Rule of International Human Rights Law' (February 13, 2017). Available at SSRN: https://ssrn.com/abstract=2916032, at 12-3.

[117] Fourth Report 2016, supra n 108 at paras 63-65; Van Alebeek and Nollkaemper, supra n 8 at 411; see Pellet and Müller, 'Article 38', in: Zimmermann et al (eds), The Statute of the International Court of Justice: A Commentary (3rd dition), Oxford University Press 2019, para 306 who understand Article 38 lit. d only as 'tools which it [the Court] is invited to use in order to investigate the three sources listed previously'.

[118] Fourth Report 2016, supra n 108 paras 62-64 for Article 32.

[119] Ando, 'L'avenir des organes de supervision: Limites et possibilités du Comité des droits de l'homme', (1991-1992) Annuaire Canadien des droits de la personne 183-189 at 186: Dennis and Stewart, 'Justiciability of Economic, Social, and Cultural Rights' (2004) 98 American Journal of International Law 462-515 at 493-495; Information provided by the Special Rapporteur on the Right to Education Ms. Katarina Tomasevski (3 February 2004), Commission on Human Rights, First session of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (23 February – 5 March 2005), (E/CN.4/2004/WG.23/CRP.4) at para 8.

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international judicial or monitoring bodies and the reflection of State practice). In that vein, it seems that the pronouncements of treaty bodies are most influential, if a balance is struck between the demands of a more 'dynamic interpretation' as characterized by references to 'public reason'[120] (arguments based on 'good faith', the quality of reasoning and their consistency with other international human rights bodies) and a more 'representative interpretation'[121] guided by the intention and practice of States parties (as illustrated by references to Articles 31, 32 VCLT, 38 lit. d ICJ-Statute, to the mandate of the treaty bodies and State practice, the use of *argumentum a fortiori*, as was the case regarding the right to water and the prohibition of gender-based violence). At the same time, these two strands of judicial argumentation seem to build partly on assumptions about the drafting process, in particular on the impartiality, expertise and experience reflected therein and the consultation with States and experts. The balance of the two judicial strands of interpretation thus seem to be linked and mediated by a rather opaque deliberation process.

b) Opening the 'Black Box' of Decision-Making

This latter set of factors displayed in the deliberation process can only be assessed by looking into the decision-making processes of treaty bodies and the interdisciplinary collaboration with international relations scholarship may prove fruitful in this respect.

From the perspective of international relations scholarship, treaty bodies are non-intergovernmental decision makers by delegation. As previous scholarship notes, dynamics of decision-making are markedly different 'outside of the intergovernmental core'[122]. Decisions that result from this discretion, impossible to fully qualify via legal texts and formal rules[123], provide a new vein for study. Hence, we need to apply methods which open the black box of decision-making in treaty bodies in order to understand how their pronouncements come to life. This also allows verifying or falsifying assumptions regarding the factors influencing the weight of pronouncements, such as the independence and expertise of members and the level of authorization and support by States[124].

Process-Tracing as a Method to Look into the 'Black Box' of Decision-Making

Process-tracing has gained attraction in the discipline as perhaps the promising method to empirically engage with the informality of decision-making.[125] Described as 'arguably the only method that allows us to study causal mechanisms,'[126] process-tracing specifically undertakes

[120] See Hamilton and Buyse, supra n 17 at 206.

[121] See Pehl, Repräsentative Auslegung völkerrechtlicher Verträge, Nomos 2019.

[122] Steffek fn 64.

[123] Stone: Informal Governance in International Organizations: Introduction to the Special Issue (2013). In: The Review of International Organizations 8(2): 121-136. here 122f.

[124] Carraro: Electing the experts: Expertise and independence in the UN human rights treaty bodies (2019). In: European Journal of International Relations: 1-26; Elsig, & Pollack. Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization (2014). European Journal of International Relations, 20(2), 391-415; but also the role of diversity in membership, Truscan: Diversity in Membership of the UN Human Rights Treaty Bodies (2018). Geneva Academy, Geneva.

[125] For process-tracing as method, see: Beach & Pedersen: Process-tracing methods: Foundations and guidelines (2013). University of Michigan Press; Bennett & Checkel: Process Tracing. From Metaphor to Analytic Tool (2014). Cambridge University Press.

[126] Ibid., at 1f.

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'detailed, within-case empirical analysis of how a causal process plays out in an actual case'[127]. This allows for valuable insights on actors' preferences, strategies and resources when exploring the procedural dimension of informal lawmaking.

One particular variant of process-tracing — theory-testing, which 'deduces a theory from the existing literature and then tests whether evidence shows that each part of a hypothesized causal mechanism is present in a given case' — seems especially promising for the interdisciplinary project we propose,[128] whose collaboration we sketch below.

In order to evaluate the assumptions of lawyers about the decision-making process, process-tracing shifts the analytical focus from causes, e.g., the delegation of interpretative power to treaty bodies, and outcomes, e.g., the acceptance of those interpretations by States parties[129], to the hypothesized causal process connecting them. In order to generalize beyond a single case, process-tracing requires a systematic case selection[130], a focus on testing or generating causal mechanisms[131] and transparency regarding data collection and interpretation[132].

Case Selection

Cases should be selected from the category of treaty interpretations which clarify or modify existing norms.[133] Examplatory for this is General Comment No. 15 of the Committee on Economic, Social and Cultural Rights (CESCR),[134] which, similar to CEDAW's General Recommendation No. 35, updated obligations inexplicit in the original text of its treaty. This general comment broke new grounds for human rights law by being the first legal framework for a human right to water. Water was not included as a right in the treaty and therefore 'created' on the basis of human rights to an adequate standard of living and to health. In follow-up response to this interpretation, critics argued the CESCR

[127] Reykers and Beach, 261.

[128] See also BA Andreassen, 'Comparative analyses of human rights performance', in: BA Andreassen, H-O Sano, S McInerney-Lankford (eds.), Research Methods in Human Rights: A Handbook, Edward Elgar 2017, 222-252, at 247; N Davidson, Process-Tracing the Meaning of International Human Rights Law, Forthcoming, Rossana Deplano and Nicholas Tsagourias Eds., Handbook on Research Methods in International Law (Elgar, 2019).

[129] See analysis of practice above.

[130] Beach, 2017, 16-19.

[131] This seems to distinguish the application of process tracing in the Social Sciences from Legal Studies where it is primarily applied to reconstruct a process preceding a lawsuit without rigorously aiming at testing or developing hypotheses, see e.g Davidson, 2017. Alien Tort Statute Litigation and Transitional Justice: Bringing the Marcos Case back to the Philippines. International Journal of Transitional Justice, 11(2), 257-275.

[132] On collecting data from the UN treaty bodies see Halme-Tuomisaari: Methodologically blonde at the UN. In a tactical quest for inclusion (2018), Social Anthropology 26(4): 456-470.

[133] For three categories of treaty interpretation see Ando (2010): General Comments / Recommendations. Max Planck Encyclopedia of Public International Law. Rüdiger. Oxford / Heidelberg, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press.

[134] Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), Official Records of the Economic and Social Council 2003, Supplement No. 2 (E/2003/22-E/C.12/2002/13), annex IV. For an overview of the genesis, content, and impact see Reiners, Nina (2018): General Comment No. 15 on the Right to Water (2002). Quellen zur Geschichte der Menschenrechte, Arbeitskreis Menschenrechte im 20. Jahrhundert: www.geschichte-menschenrechte.de/general-comment-15-on-the-right-to-water-2002/.

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overstepped its mandate[135]. Nevertheless, the interpretation was confirmed subsequently by several UN General Assembly resolutions —of which the last was adopted without a vote.[136]

In order to test assumptions about the drafting process of a treaty interpretation, causal mechanisms need to be conceptualized in ways that enable their verification or falsification[137]. Over the last decade, this process, lacking any formal regulatory framework, has *de facto* been opened to non-members — non-state actors, such as individuals from civil society, as well as experts from specialized agencies.[138] Furthermore, treaty bodies now invite States and non-state actors to comment on first drafts of the General Comments, which they publish on their website.[139] In light of this broad spectrum of informal responders, the question then arises as to what extent each participating party — State, other international body, civil society actor — affects the decision-making process and the content of the pronouncement. This answer is crucial to assess whether the normative explanation of independence and expertise of treaty bodies is merely a legal fiction or a reflection of reality.

Data Collection

Insights into informal decision-making processes will most likely be gained outside the available record (e.g. official sources like meeting notes).[140] It is therefore imperative for one to fill data gaps oneself: this can be done by conducting interviews with the involved parties — a committee's treaty body members, States representatives, staff in the OHCHR, and non-state actors, and by examining their correspondence in the archives. Other useful data might be found amid treaty bodies' recent practice to engage with stakeholders. These insights are, however, limited, as an analysis of documents to assess non-state influence does not capture the informal ways of interacting with the treaty bodies[141].

c) An Attempt at Systematization and Synthesis

What does the foregoing analysis tell us about the reasons for the varying influence of pronouncements?

First, the analysis of practice and scholarship found that pronouncements are not seen as being legally binding, which also explains the broad spectre of their normative influence.

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[135] These two articles present the core arguments in the debate around the legality and legitimacy of General Comment No. 15. While Tully is very critical of the initiative of the CESCR, Langford provides justifications for the General Comment, based on his own insights during the decision-making process. Langford: Ambition That Overleaps Itself? A Response to Stephan Tully's Critique of the General Comment on the Right to Water, in: Netherlands Quarterly of Human Rights 24:3 (2006), 433-459; Tully: A Human Right to Access Water – A Critique of General Comment No. 15, in: Netherlands Quarterly of Human Rights 23 (2005), 35-63.

[136] General Assembly resolution 70/169 of 17 December 2015 recalls general comment No. 15 of the Committee on Economic, Social and Cultural Rights on the right to water and uses the same language (para. 2).

[137] Beach and Pedersen, 56-67.

[138] Winkler (2012): The Human Right to Water: Significance, Legal Status and Implications for Water Allocation. London / Oxford / New York, Bloomsbury Publishing; Riedel (2006): The Human Right to Water and General Comment No. 15 of the CESCR. In: Riedel and Rothen: The Human Right to Water. Berlin, BWV: 19-36.

[139] See above.

[140] Beach and Pedersen, 116f., 132-141; see further M Halme Tuomisaari (2018): Methodologically blonde at the UN in a tactical quest for inclusion. In: Social Anthropology 26(4): 456-470.

[141] Türkelli et al, fn 55.

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Second, consensus exists that they may produce legal effects which – in contrast – narrows the range of normative impact. For instance, their role as 'key catalysts' for future law is rarely contested. However, the extent to which they impact *existing* law, is still a matter of controversy. Scholars justify the consideration of pronouncements by referring to a broad range of possible legal bases. Yet, practice is often inconclusive in that respect. More importantly, it is unclear to what extent interpreters are under an obligation to consider pronouncements' content, as their attributed legal value ranges from a substantial duty to implement, procedural duty to consider, and a shift of argumentative burden to a merely supplementary value.

Third, the analysis of practice reveals that their legal value in a concrete case depends on a variety of factors. Some of them are more accessible to legal methods, such as the level of authorization in their mandate, the support by the subjects of international law, the category of pronouncements and the legal reasoning of the treaty bodies. While the normative impact at the domestic level also depends on the effect of international law within the respective domestic legal order and the competences of the domestic judiciary vis-à-vis the domestic legislator, the analysis of practice reveals that the pronouncements of treaty bodies are considered to be most persuasive, if a balance is struck between a more 'dynamic interpretation' guided by considerations of the public good and a 'representative interpretation' reflecting the intention and practice of States parties. At the same time, it was shown that this balance builds on and is mediated by assumptions about the preceding decision-making process which can only be studied when opening the 'black box' of the drafting process.

Fourth, unlike lawyers, international relations scholars possess tools to do so which is why we consider an interdisciplinary collaboration fruitful when assessing factors relating to the decision-making process. Lawyers and international relations scholars mainly approach the role of pronouncements from two different perspectives. As demonstrated by the first three points, lawyers focus on outcomes and analyse the effects of a decision-making process through the lens of *legal relevance*. International relations scholars, by contrast, seek to assess the *causal relevance* of factors within the decision-making process, or the effectiveness of the pronouncements based on States' compliance with them. However, it is difficult to reconstruct and theorize causality in such an informal decision-making process. The method of process-tracing addresses this demand. Collaboration with international lawyers will not only help to identify the preconditions and parameters that broadly orchestrate the drafting process, but also to select diagnostically conclusive cases to substantiate arguments, as lawyers are trained in identifying idiosyncratic interpretations and the level of its acceptance. Furthermore, lawyers, who often base arguments about the legal relevance of pronouncements on assumptions about the drafting process, will be able to directly test them due to the process-tracing.

Fifth, for lawyers, insights into the decision-making process stemming from the collaboration with international relations scholars may have implications for the level of legal interpretation and legal policy: At the level of legal interpretation, they should be careful how they formulate arguments which are based on assumptions about the decision-making process.[142] With respect to legal policy,

[142] As 'persuasive authority stems from its merit', Kanetake, supra n 9, at 222 citing Flanders, 'Toward a Theory of Persuasive Authority' (2009) 62 Oklahoma Law Review 55 at 62.

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insights gained by process-tracing could be considered when reforming the treaty body system and with a view to the current backlash against international monitoring bodies.[143]

4. Conclusion and a Future Research Agenda

To this point, we have demonstrated that the informal character of pronouncements represents simultaneously the underlying reason for the diverging influence of pronouncements and a methodological challenge when trying to identify certain patterns in those variations. At the same time, our contribution sketches a pathway to overcome those intradisciplinary challenges; also by proposing a framework for interdisciplinary collaboration. As such, our findings should not only inform the debate on the normative impact of pronouncements, but also prove fruitful in other fields of more informal development of international law, such as the phenomenon of cross-referencing between regional and international courts and tribunals not falling under Article 31 (3) lit. c VCLT,[144] the extent as to which Article 38 lit. d ICJ-Statute contains a duty or a right to consider judicial decisions and certain scholarly opinions[145] or the legal weight of decisions of foreign domestic courts[146] in the interpretation of international law. Finally, our results may help to distinguish between different causes for pushback against pronouncements: between backlash evolving from a changing political climate on the one hand, and more legal, intrinsic reasons stemming from the procedural legitimacy and substantive quality of pronouncements on the other.

[143] Geneva Academy, supra n 105; see also Helfer, supra n 10, at 20 'However, in an era when populist challenges to international institutions are on the rise, there is a nontrivial risk that "strengthening" processes could in fact lead to the opposite result – weakened and less impactful systems of international supervision and monitoring."

[144] As indicated in the Joint Declaration cited above supra n 97; Hamilton and Buyse, supra n 18.

[145] Andenas and Leiss, supra n 109.

[146] See e.g. Langford, supra n 14 at 163: "For example, the notion of the 'minimum essential level' in social rights traces itself back to German philosophy and sociology at the turn of the twentieth century. In 1951, it was judicialized by the German Federal Constitutional Court and was later imported into the well-known jurisprudence and conceptual apparatus of the UN CESCER and domestic courts such as the Colombian Constitutional Court."

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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