SEPARATE OPINION OF JUDGE TLADI

I. INTRODUCTION

1. I am in broad agreement with the reply of the Court to the question posed by the International Labour Organization (hereinafter the "ILO"). I believe that, on balance, Convention No. 87 must be read as protecting the right to strike. However, I have some concerns. First, I am concerned by the Court's overall approach to the interpretation of treaties, which might be read as treating the elements of Article 31 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention" or the "Convention") in a uniform way and without necessary nuance. This, in my view, is not only inconsistent with the plain reading of Article 31 of the Convention, but it is also a departure from the Court's jurisprudence. Second, reading the Court's Opinion, one might get the impression that the river flows in only one direction. Yet, for me, not all the elements of interpretation point towards the conclusion arrived at by the Court — even if I find that conclusion to be correct. In particular, I do not believe that, in this case, the element of object and purpose supports the conclusion of the Court. Finally, and relatedly, I am unconvinced by the Court's categorization of decisions and pronouncements of courts and other bodies as supplementary means of interpretation under Article 32 — a categorization it has never made before and need not make now.

2. I will start in the next section with the broader concern, namely the Court's approach to treaty interpretation. Second, I will address the narrowest of the issues that give me discomfort, namely the categorization of decisions and pronouncements of treaty bodies. I will not address, except briefly, my concern that the object and purpose of Convention No. 87 does not itself support the conclusion reached by the Court.

3. I do not address this third issue in much detail because while I think it is important, unlike the other two issues, it does not raise any systemic issues of significance to the future jurisprudence of the Court. I will, however, say a few words about it here. The reasoning of the Court strikes me as reflecting a sort of reverse engineering. By this I mean that the reasoning suggests that the Court first reached its conclusion and then sought reasons to support it. This is contrary to the requirement of good faith in Article 31 (1).

4. The Court concludes that the object and purpose of Convention No. 87 is to "guarantee freedom of association as a means of improving labour conditions and achieving sustained progress" (para. 72 of the Advisory Opinion). This is true, but to my mind this does not take the argument any further since the import of this objective raises the same questions that are raised by the debates surrounding ordinary meaning and context, which the Court addresses appropriately. I think the Court could have simply acknowledged that object and purpose do not move the needle one way or the other and still arrived at the conclusion that the ordinary meaning of the words, read in their context, points to the conclusion that the right to strike is protected. This would mean that the interpretation under Article 31 (1) would still result in the conclusion that Convention No. 87 protects the right to strike. This, however, does not have any significance beyond the present Advisory Opinion, and so I leave the matter here.

II. THE PROPER APPROACH TO TREATY INTERPRETATION

5. Now, let me apologize because this section of the separate opinion is somewhat lengthy. It is lengthy because the Court's approach to interpretation is central to its mandate, so it is important that the proper approach is stated clearly. In describing the approach that I believe to be correct, I

will first set out why that approach is supported by the text of Article 31 of the Vienna Convention before showing that the Court's *jurisprudence constante* is consistent with that understanding.

6. At paragraph 66, the Court lays out its approach to the customary international law rule set forth in Article 31 of the Vienna Convention. Nothing in that paragraph, taken in isolation, is incorrect. It is nonetheless misleading, and I fear it may, in time, occasion a shift in the Court's approach to treaty interpretation. The Court describes its approach as follows:

> "Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 31, paragraph 2, sets out what is to be regarded as context: 'in addition to the text, including its preamble and annexes', '[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' and '[a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, '[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions', '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' and '[a]ny relevant rules of international law applicable in the relations between the parties'. These means of interpretation are to be considered by way of a single combined operation (*Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025*, para. 177). The Court will interpret Convention No. 87 pursuant to Article 31, commencing with Article 31, paragraph 1."

7. As I have already said, there is nothing in this paragraph that anyone can call incorrect — it largely reproduces Article 31 of the Vienna Convention. My concern is that the *manner* of presentation, though faithful in content, flattens the structure of the provision. The elements in Article 31 do not all serve the same function, and by presenting them in this undifferentiated sequence the Court risks under-emphasizing the elements in Article 31 (1) of the Convention or overemphasizing the elements in Article 31 (3). While I had in the past expressed a hope that this fear might end up being a "storm in a cup", I see that the tendency has now made its way to the Court[1].

8. Two reasons have been advanced for the conflation of the elements in Article 31. The first is that Article 31 is titled the "General Rule" of interpretation, in the singular, and not "General Rules" in the plural. On this view, all the elements of Article 31 must, necessarily, be treated as being of equal significance[2]. I will address this reason below. The second reason, referred to in paragraph 66 of the Court's Opinion, is that "[t]hese means of interpretation are to be considered by way of a single combined operation". While the Court's Opinion credits the *Climate Change* Advisory Opinion for this statement, it is now well known that the source of this statement is

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[1] I have elsewhere, in the context of the work of the International Law Commission (hereinafter the "ILC"), complained of this tendency to underemphasize Article 31 (1) in favour of the means of interpretation in Article 31 (3). See Dire Tladi, "Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?", *EJIL:Talk!*, 30 August 2018.

[2] See, for example, ILC, Summary record of the 3394th meeting, UN doc. A/CN.4/SR.3394, p. 4 (Mr Wood) ("the misconception that the general rule of treaty interpretation was set forth only in article 31 (1) of the 1969 Vienna Convention needed to be addressed" and "subsequent agreements and subsequent practice were an integral and obligatory part of the general rule of treaty interpretation reflected in article 31, not an optional extra, and they had equal standing to that of other elements of the general rule").

paragraph 8 of the ILC Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties — which eventually became Articles 31 and 32 of the Vienna Convention. Since that paragraph in the Commentary appears to be the source of the confusion now beginning to take hold, I will quote the relevant passage:

> "[T]he application of the means of interpretation in the article [should] be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."[3]

9. The first point to be made is that, as important as they are, the commentaries to the ILC's Draft Articles cannot override the text of the Draft Articles, and certainly not the Vienna Convention. But more importantly, the phrase "single combined operation" and the crucible metaphor do not, in my view, suggest that all the elements of interpretation play the same or equal role. The Commentary itself speaks of the elements being "thrown into the crucible" so that "*their interaction* would give the legally relevant interpretation"[4] — this language describes the unity of the interpretive *process*, not the equivalence of the interpretive *materials*. A crucible may yield a unified result, but that result is determined by the distinct natures and proportions of what is introduced into it. The text of Article 31 bears this out: the elements referred to in its different paragraphs play different roles in the process of interpretation.

10. To my mind, the *main* rule of interpretation is to be found in Article 31 (1) of the Convention. This is to say that the purpose of interpretation is to find, in good faith, the ordinary meaning of the words of a treaty, in their context and in light of the object and purpose of the treaty. This flows from the mandatory language of the paragraph, i.e. "[a] treaty *shall* be interpreted . . . ". The *application* of the elements contained therein is mandatory. Compare that to the language in paragraph 3 of Article 31, according to which it is mandatory to "*take[] into account*" the elements referenced therein. I accept that the whole of Article 31 is the general rule, but only in the sense that the means of interpretation in paragraph 3 are relevant *as tools* for identifying the ordinary meaning of the words, in their context and in light of the object and purpose of the treaty.

11. The drafters of the Vienna Convention — and the ILC as drafter of the Articles — could have presented us with a text that does not distinguish between the functions of the elements in Article 31, but they did not (even though it would have been easy to do so). Moreover, it is clear that the ILC was aware that the structure of the provision was likely to be seen as creating a hierarchy of sorts between the elements[5]. In fact, in the famous paragraph where the ILC explains the relationship between the elements referenced in paragraphs 1, 2 and 3 of Article 31, it also states the following:

> "[T]he word 'context' in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word 'context' in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 'There shall be taken into

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[3] ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission (YILC)*, 1966, Vol. II, pp. 219-220, para. 8 of the commentary to draft articles 27 and 28.

[4] *Ibid*. (emphasis added).

[5] Indeed, the famous "crucible" and "single combined operation" statement was a direct response to statements from States evincing "a possible fear that the successive paragraphs of article 27 might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article".

account *together with the context*' is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3."[6]

12. This text, which is rarely ever referred to, though appearing just below the mantras of "single combined operation" and "crucible", makes plain that the elements in the third paragraph are intended to facilitate interpretation according to the first paragraph. Thus, subsequent practice, subsequent agreements and other relevant rules are all part of a search for the ordinary meaning of the words, in their context and in the light of the object and purpose of the treaty. This textual understanding of Article 31 is consistent with the longstanding jurisprudence of the Court, to which I now turn.

13. The elements of interpretation contained in the first paragraph of Article 31 are the main elements in the interpretative process and provide the point of departure for interpretation, as demonstrated by the Court's jurisprudence. In its 1994 Judgment in *Territorial Dispute (Libya/Chad)*, the Court made this abundantly clear:

> "The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation *must be based above all upon the text of the treaty*."[7]

14. Indeed, it is difficult to find a decision of the Court in which the interpretation is not "based above all" on the text, which is to say "the ordinary meaning of the words, in their context and in the

[6] ILC, Draft Articles on the Law of Treaties with commentaries, *YILC*, 1966, Vol. II, p. 220, para. 8 of the commentary to draft articles 27 and 28.

[7] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41 (emphasis added). See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 123, para. 33; *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 318, para. 100 ("According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text of the treaty.")

light of the object and purpose" of the treaty in question[8]. Even where the Court does not set out the elements of Article 31 (1) explicitly, its actual interpretative process focuses on the text-based elements of interpretation[9]. The Court's approach in *Pulau Ligitan and Pulau Sipadan* reflects most clearly the pride of place that the Court has consistently given to text-based elements of interpretation. There the Court begins with a close textual analysis of Article IV of the 1891 Convention. It examines, amongst others, the meaning of the words "continued" and "across", and the difference in punctuation between the two authentic versions — a colon in the English text and a semicolon in the Dutch — on which the parties had built competing readings[10]. This is followed by context[11], before the Court turns its attention to object and purpose[12]. Having analysed the text, i.e. ordinary meaning, context and object and purpose, the Court then arrives at a conclusion about the interpretation[13]. Having made this preliminary conclusion, the Court then moves, not to Article 31 (3), but rather to Article 32, stating that it will have recourse to supplementary means of interpretation "in order to seek a possible confirmation of *its interpretation of the text of the Convention*"[14]. It is only after making a conclusion concerning the supplementary means of interpretation[15] that the Court then addresses the subsequent agreement and subsequent practice[16], before providing its final interpretation of the treaty.

15. In that case, the Court clearly treats the text-based elements in Article 31 (1) as the point of departure, with the elements in Article 31 (3) being "taken into account" in support of that

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[8] See, for example, *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 501, paras. 99 *et seq.*; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, paras. 23 *et seq.*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 174, para. 94; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160 ("The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose."); *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 28, paras. 57-58; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 64, para. 138; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, pp. 437-438, para. 71; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 96, paras. 78 *et seq*.; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment, I.C.J. Reports 2024 (I)*, p. 117, para. 46; *Land and Maritime Delimitation and Sovereignty Over Islands (Gabon/Equatorial Guinea), Judgment of 19 May 2025*, para. 35. See, in particular, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37, where the Court first refers to the text-based elements, and then adds, "Moreover . . . there shall be taken into account, together with the context, the subsequent conduct of the parties to the treaty…", the "moreover" indicating something additional. This "moreover" language is also used in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 182, para. 41 ("Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties'").

[9] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 584, paras. 58 *et seq*.; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 321-322, para. 95.

[10] *Pulau Ligitan and Pulau Sipadan* (above fn 8), pp. 646-648, paras. 39-43.

[11] *Ibid.*, pp. 648-651, paras. 44-48.

[12] *Ibid.*, pp. 651-652, paras. 49-51.

[13] *Ibid*., pp. 652-653, para. 52 ("The Court accordingly concludes that the text of Article IV of the 1891 Convention, when read in context and in the light of the Convention's object and purpose, cannot be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of the island of Sebatik.")

[14] *Ibid*., p. 653, para. 53 (emphasis added).

[15] *Ibid.*, pp. 655-656, para. 58.

[16] *Ibid.*, pp. 656-665, para. 59-80.

interpretation. This approach is clearly visible in other decisions of the Court[17]. Even *Kasikili/Sedudu*, the *reference* case for subsequent agreements and subsequent practice, illustrates that the primary purpose of interpretation is to find the ordinary meaning of the words, in their context and in light of the treaty's object and purpose[18]. In that case, the Court stated that "customary international law [finds] expression in Article 31 of the Vienna Convention"[19]. So here the Court refers to the whole of Article 31. Yet when it begins the process of interpretation, it recalls what it terms as the Court's jurisprudence, namely, that

> "a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty."[20]

16. It is significant that, in formulating the applicable "rules of interpretation set forth in the 1969 Vienna Convention" the Court does not, at that stage of its analysis, even mention the means of interpretation in Article 31 (3) of the Vienna Convention[21]. With respect to subsequent agreements and subsequent practice, the Court, having addressed the views of the Parties, states that "the Court *has itself frequently examined* the subsequent practice of the parties in the application of that treaty" when interpreting treaties[22]. It is impossible to reconcile this discretionary language ("the Court has itself frequently examined") with the suggestion that there is equality between these tools of interpretation and the main rule contained in Article 31, paragraph 1. I cannot, for example, imagine the Court saying it "has frequently examined the ordinary meaning of the words", or "the Court has frequently examined the context of the words", or "the Court has frequently examined the object and purpose" as a way of introducing the consideration of those elements.

17. I have been able to find some cases which may be read to pull in a different direction. The best example is the Court's Advisory Opinion on *Climate Change*, where the text in paragraph 66 is taken from[23]. Another is *Dispute Regarding Navigational and Related Rights*, where the Court proceeded to specify the significance of subsequent practice before identifying the centrality of the text-based elements[24]. Yet even there, the Court relies not on elements external to the treaty but rather on the ordinary meaning of the word "comercio" in the treaty which, the Court observed, was a "generic term" and, as such, capable of evolving[25]. It also relied on the object and purpose of the

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[17] See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 46, paras. 64-65, where the Court, having laid out that interpretation is to be undertaken in accordance with Article 31 (1) of the Convention, then states that "*[t]hat interpretation will also take into account*, together with the context, 'any relevant rules of international law applicable in the relations between the parties'" — a clear indication that the text-based elements have pride of place (emphasis added).

[18] See, for example, *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II),* p. 1060, para. 20.

[19] *Ibid.*, p. 1059, para. 18.

[20] *Ibid.*, p. 1060, para. 20, citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41.

[21] *Ibid*.

[22] *Ibid.*, p. 1076, para. 50 (emphasis added).

[23] *Obligations of States in respect of Climate Change, Advisory Opinion of 23 July 2025*, para. 177.

[24] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64.

[25] *Ibid.*, p. 243, para. 67

treaty, namely the permanent settlement of the parties' territorial disputes[26]. In *Somalia* v. *Kenya*, the Court adopts a somewhat middle-of-the-road approach:

> "Article 31, paragraph 1, of the Vienna Convention provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. These elements of interpretation — ordinary meaning, context and object and purpose — are to be considered as a whole. Paragraph 2 of Article 31 sets out what is to be regarded as context. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice which establishes such an agreement, and any relevant rules of international law applicable in the relations between the parties."[27]

18. Here the Court refers to all the elements of interpretation together, in a fashion similar to paragraph 66 of the Court's Advisory Opinion. Yet there is a subtle difference. Before moving to the elements external to the text of the treaty, the Court states that "[t]hese elements of interpretation — ordinary meaning, context and object and purpose — are to be considered as a whole", thus creating a clear distinction between them and other elements that are to be thrown into the crucible[28].

19. What I have said above is in no way meant to diminish the importance of the means of interpretation reflected in Article 31 (3). As the Court noted in *Request for Interpretation of Judgment in Temple of Preah Vihear*, interpretation of treaties "may be affected by the subsequent conduct of those States, as provided by the principle stated in Article 31, paragraph 3 *(b)*" of the Vienna Convention[29]. The means of interpretation contained in Article 31 (3) of the Vienna Convention are extremely important as tools for finding the true meaning of a treaty, but the point of departure remains the text, and, in particular, the ordinary meaning of the words, in their context and in light of the object and purpose of the treaty being interpreted.

III. THE DECISIONS AND PRONOUNCEMENTS OF COURTS AND TREATY BODIES ARE NOT SUPPLEMENTARY MEANS

20. While the Court concludes that its analysis of Convention No. 87 in accordance with the elements in Article 31 does not lead to an interpretation that is ambiguous or obscure, nor one that is absurd, it nonetheless decides to consider supplementary means of interpretation under Article 32 of the Vienna Convention. In this connection, it observes, at paragraph 102, "that the use of the term 'including' in Article 32 of the [Convention] indicates that the means mentioned therein do not constitute an exhaustive list". This is incontestable. Indeed, it has long been recognized that subsequent practice of States not meeting the conditions set forth in Article 31 (3) of the Convention, what might be termed "other subsequent practice", can be relied upon as supplementary means of interpretation under Article 32.

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[26] *Ibid.*, para. 68.

[27] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 64.

[28] See also *ibid.*, pp. 36-37, para. 89.

[29] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Judgment, I.C.J. Reports 2013*, pp. 307-308, para. 75; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, p. 455, para. 135, where an unfortunate choice of words by the Court might suggest that the taking into account of the elements in Article 31 (3) is optional ("In accordance with the rule reflected in Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties, the Covenant *may be taken into account*").

21. In addition to "other subsequent practice", the Court identifies "pronouncements of competent supervisory bodies" as covered by the term "including" in Article 32. These include the decisions and other pronouncements of courts, tribunals and bodies established to supervise the implementation of treaties (hereinafter "pronouncements"). The categorization of pronouncements as supplementary means within the meaning of Article 32 is, in my view, at best unnecessary and potentially problematic. The Court did not need to come to such a definitive conclusion on an issue that would have no effect whatsoever on its overall conclusion.

22. It is now accepted that the Court can have recourse to pronouncements for the purposes of treaty interpretation and it has done so on several occasions[30]. While the Court has frequently considered and even relied on pronouncements, it has not, before today, felt the need to categorize these pronouncements as falling under any particular element of interpretation. There are different views about how pronouncements should be classified. The strongest form of the claim — that the jurisprudence of an expert treaty body *itself* constitutes subsequent practice establishing the agreement of the parties under Article 31 (3) *(b)* of the Vienna Convention — was advanced by the Human Rights Committee in its Draft General Comment 33 and abandoned in the face of objections from States parties. The ILC has since confirmed that pronouncements cannot, as such, constitute subsequent practice under Article 31 (3), though they may give rise to or refer to such practice by the parties themselves[31]. The more qualified view is that pronouncements fall under Article 31 (3) *(c)* as other "relevant rules of international law", or under Article 32[32].

23. The ILC's Special Rapporteur on subsidiary means for the determination of rules of international law has, in his third Report, suggested that the Court has, in its CERD cases, "considered [pronouncements] as supplementary" means of interpretation[33]. This conclusion is arrived at, in part, because of the consideration of pronouncements "after the explicit statement deeming supplementary means unnecessary and after the analysis of the *travaux*"[34]. While this conclusion is at least reasoned,

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[30] See *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 663-664, paras. 66-67; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 457-458, para. 101*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 179, para. 109*; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 96, para. 77, and p. 104, para. 101.

[31] See Human Rights Committee, Draft General Comment No. 33 (Second revised version), UN doc. CCPR/C/GC/33/CRP.3 (25 August 2008), para. 18, which proposed that "the general body of jurisprudence generated by the Committee" — or, alternatively, "the acquiescence of States parties in those determinations" — constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within Article 31 (3) *(b)* of the Vienna Convention. Following objections from States parties (see, for example, Comments of the United States of America on Draft General Comment 33 (17 October 2008), para. 17), the Committee abandoned this formulation and adopted the final text without reference to Article 31 (3) *(b)*, retaining only the more modest claim that its Views "represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument" in Human Rights Committee, General Comment No. 33, UN doc. CCPR/C/GC/33 (5 November 2008), para. 13. The ILC subsequently confirmed that "pronouncements of expert treaty bodies cannot as such constitute subsequent practice under article 31, paragraph 3 *(b)*" (ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with Commentaries, in Report of the International Law Commission on the work of its seventieth session, UN doc. A/73/10 (2018), Conclusion 13 and Commentary, paras. 9-10).

[32] See, for a thorough discussion, Danae Azaria, "The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties", *International Community Law Review*, Vol. 22 (2020), Iss. 1, pp. 35 *et seq*.

[33] ILC, Third report on subsidiary means for the determination of rules of international law, by Charles Chernor Jalloh, Special Rapporteur, UN doc. A/CN.4/781, 29 January 2025, para. 392.

[34] *Ibid*. ("[T]he Court did not explicitly categorize this practice as a supplementary means of interpretation. However, its placement after the explicit statement deeming supplementary means unnecessary and after the analysis of the travaux strongly indicates that the Court considered the Committee's practice as supplementary and confirmatory rather than a primary interpretative tool.").

unlike the Court's own assertion, it is not without its problems. First, if we adopt this reasoning, then subsequent practice under Article 31 (3) of the Convention may also have to be seen as supplementary because, in several cases, the Court has considered subsequent practice after stating that it is unnecessary to consider supplementary means of interpretation and after examining such supplementary means[35]. Second, in *Qatar* v. *UAE*, the case on which the Special Rapporteur relies, the Court did not classify the practice of the CERD Committee or regional human rights courts as supplementary means under Article 32. Paragraph 76 states that it will first interpret the term "national origin" according to the general rule of interpretation in Article 31 (1) and, *in the same paragraph*, states that it will then consider supplementary means under Article 32. It is in the next paragraph, paragraph 77, that it states that it "will *also* examine the practice of the CERD Committee and of regional human rights courts"[36], suggesting that it is treating the pronouncements differently from the elements in Articles 31 and 32.

24. Thus, the Court has not in the past determined pronouncements to be supplementary means under Article 32 of the Convention, nor has it "considered" them as such, implicitly or otherwise. In my view, while pronouncements may be qualitatively different from judicial decisions, including decisions of the Court, they are functionally similar. When the Court refers to its previous decisions in the interpretation of a particular treaty, it is not doing so as supplementary means of interpretation, nor is it necessary to classify such reliance under one or another paragraph of Article 31. By the same token, and consistent with its previous jurisprudence, it is not necessary to classify pronouncements. Pronouncements, like judicial decisions, aid in the process of interpretation but do not do so as a means of interpretation themselves. I do not often struggle to find words to explain what I mean, but I must confess that I had been struggling to explain my approach to the function of pronouncements in the interpretative process. It was only towards the end of penning this separate opinion that I found something that captured my view clearly. In the course of the debate on the Third Report of the ILC Special Rapporteur referred to above, Mathias Forteau said this:

> "It was fair to say that subsidiary means played a role in interpretation. However, it did not transform the function of [pronouncements[37]], nor did it transform them into means of interpretation. [Pronouncements] were always used in an ancillary capacity, as an aid to the means of interpretation, and not as the means of interpretation themselves. To put it another way, they played a role in determining the interpretation, but not in the interpretation itself. [They] did not have two functions; their sole function was to help determine the existence and content of the law, which obviously included helping to determine the interpretation of the law.
>
> [Pronouncements] intervened from the outside, to clarify the means of interpretation . . . but that did not transform subsidiary means into means of interpretation themselves[.]

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[35] See, for example, *Pulau Ligitan and Pulau Sipadan* (above fn 8). At para. 53, the Court states that it "does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1891 Convention and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention", then having considered supplementary means under Article 32, it then, between paragraphs 59-80, addresses subsequent practice, concluding that "subsequent practice of the parties to the 1891 Convention confirms the conclusions at which the Court has arrived in paragraph 52 above as to the interpretation" of the relevant treaty. See also *Kasikili/Sedudu* (above fn 18), where, at paragraph 46, the Court addresses the *travaux préparatoires,* and then only from paragraph 47 addresses the arguments of the parties concerning subsequent practice and subsequent agreements.

[36] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 95-96, paras. 76-77.

[37] Forteau was referring to subsidiary means in general, while here I am speaking of particular subsidiary means, namely pronouncements.

> [W]hen a problem of interpretation arose, States [or courts] must apply the rules of interpretation and means of interpretation set out, in particular, in articles 31 and 32 of the Vienna Convention. In the process of applying those rules and means, States [or courts] might have recourse to subsidiary means to assist them."[38]

25. Mr Forteau is correct, and the Court is not. I hope the Court will not, in the future, feel the need to qualify pronouncements in this way.

(Signed) Dire TLADI.

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[38] ILC, Summary record of the 3712th meeting, UN doc. A/CN.4/SR.3712, p. 19 (Mr Forteau).