1. INTRODUCTION

The eight human rights treaty bodies\(^1\) fulfil a number of vital functions in the human rights system.\(^2\) They supervise states parties’ compliance with their obligations under a treaty, monitor progress and provide public scrutiny on realisation efforts. They assist states in assessing achievements and in identifying implementation gaps. They try to induce changes to the law, policy and practice in member states and provide guidance on the measures needed to realise rights at the national level. They stimulate and inform national human rights dialogue. Some treaty bodies afford individual redress. And, finally, they interpret the treaties they supervise in order to discharge their mandate of monitoring states parties’ implementation.\(^3\) They are, according to their chairpersons, legal mechanisms\(^4\) and they play an important role in establishing the normative content of human rights and in giving concrete meaning to individual rights and state obligations.

The main instruments used by the treaty bodies to discharge the last of the mentioned functions – the interpretative function – are General Comments which serve to develop a comprehensive understanding of a right. For many rights, in particular socio–economic rights, these General

\(^{1}\) Committee on the Elimination of All Forms of Racial Discrimination (CERD), Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW) and Committee on the Rights of Persons with Disabilities (CRPD). A Committee on Enforced Disappearances (CED) will be established once the Convention on the Protection of All Persons from Enforced Disappearance enters into force. There is also a Subcommittee on Prevention established under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.


Comments (or General Recommendations, as they are also referred to\(^5\)) are the most authoritative interpretation available and they are relied upon regularly by international human rights bodies and national courts despite the fact that they are not binding.\(^6\) The treaty bodies’ work is therefore important not only for the parties to a treaty but also for the understanding of a particular right generally. In addition, their rather technical and legal work complements the more political activities of other human rights actors, notably the Human Rights Council.

As the treaty bodies contribute to advancing knowledge of human rights, their General Comments, in particular, can be understood as research outputs in a wide sense, namely if research is defined as ‘the systematic study of materials and sources in order to establish facts and reach new conclusions’.\(^7\) Given the importance of the treaty bodies’ interpretative outputs, it seems self-evident that they should be based on the coherent use of an appropriate method. ‘Method’ in this context is understood loosely as ‘a way of doing something’.\(^8\) This paper will suggest that a key method for the treaty bodies in order to discharge their interpretative function is the customary international law method codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). It will argue that this method is necessary when treaty bodies interpret obligations under a treaty in order to make their work comprehensible, rational, legitimate and reproducible and to do justice to the principles of legal certainty and of the rule of law. Whenever the Committees do not deal with legally binding obligations but – for instance, as part of their constructive dialogue with states parties – give policy advice and provide different options for steps that might be useful to fulfil obligations, other methods will come into play. In line with their different functions the treaty bodies have to use and combine different methods as appropriate. The focus of this paper will, however, be on the application of Art. 31 and 32 VCLT in

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5 The term ‘General Recommendations’ is used by the CERD and the CEDAW. For ease of reference the remainder of this text uses the term ‘General Comments’ as shorthand for both.


the context of the Committees’ interpretative function with respect to legally binding obligations only.

The paper will deal with the treaty bodies in general but will, for three reasons, draw particularly on examples from the work of the Committee on Economic, Social and Cultural Rights (CESCR). First, due to a marked paucity of global, regional and national case law the interpretations advanced by the CESCR in its concluding observations and General Comments are particularly crucial to understanding economic, social and cultural rights. Second, an analysis of the work of the CESCR is timely against the backdrop of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which will enable the Committee to pronounce on violations of the ICESCR in individual cases. Third, although not exclusive to the CESCR, there are methodological weaknesses in the work of this body which lend themselves to a study of the consequences of disregard for the requirements of Articles 31 and 32 VCLT.

The analysis will proceed in three steps: the first part will give an overview of the human rights treaty bodies with regard to their composition, nature and activities and the normative significance of their outputs. The second will discuss the rules of interpretation applicable in international law as reflected in Articles 31 and 32 VCLT as well as their applicability to the work of the treaty bodies and the question of how the treaty bodies’ findings fit within the system of those provisions. The third part will use three subjects addressed in the General Comments of the CESCR as examples to demonstrate how neglect of the rules of interpretation may undermine the value, credibility and usefulness of the work of treaty bodies, thereby resulting in a possible weakening rather than strengthening of the human rights system. The paper will close with conclusions and recommendations developed from the analysis.

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9 On 18 June 2008 the Human Rights Council adopted by consensus an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and recommended that the General Assembly adopts it and opens it for signature, ratification and accession in March 2009.