

## UN HUMAN RIGHTS TREATY MONITORING BODIES BEFORE DOMESTIC COURTS

MACHIKO KANETAKE\*

**Abstract** This article analyses both cooperative and confrontational interactions between domestic judges and UN human rights treaty monitoring bodies. Based on a number of cases collected through multiple databases, this article addresses the basis on which the monitoring bodies encourage the domestic acceptance of their views, general comments, and reports; how domestic courts engage with these findings; on what basis; and why some courts are more willing to engage with these findings. A key argument is that judicial accommodation is highly selective; domestic judges occasionally avoid, discount, and contest the interpretation put forward by the treaty monitoring bodies and thereby pose a challenge to their legitimacy.

**Keywords:** bindingness, domestic courts, Human Rights Committee, persuasiveness, UN human rights treaty monitoring bodies.

### I. INTRODUCTION

UN human rights treaty monitoring bodies often rely on domestic endorsement in order to demonstrate the practical significance of their work. The monitoring bodies publish comments, observations and views, expecting, if not formally obliging, States parties to take action in response to them at the domestic level. When treaty bodies issue General Comments, they do so in the anticipation that they will not only guide States when they submit their reports but will also have an impact on wider domestic human rights practices. When they adopt ‘Views’ arising from individual communications,<sup>1</sup> they anticipate that a remedy will be provided.

This article seeks to understand and assess the engagement of domestic courts with the formally non-binding instruments adopted by UN human rights treaty monitoring bodies. In this article, ‘formally non-binding’ instruments denote in a narrowly defined legal sense those which do not qualify as treaties or reflect

\* Assistant Professor of Public International Law, Utrecht University, [m.kanetake@uu.nl](mailto:m.kanetake@uu.nl). I thank Rosanne van Alebeek, Sarah Cleveland, Gerald L Neuman, Tim Staal, Timothy Webster and anonymous reviewers for advice on earlier drafts. Mistakes which remain are my own.

<sup>1</sup> For the purpose of this article, I use the term ‘petitioner’ as the word to include an ‘author of the communication’ and a ‘complainant’ for individual communications.

custom or general principles of law.<sup>2</sup> For the purpose of this article, the initial assumption is that the comments, observations, recommendations and views adopted by the human rights treaty-monitoring bodies are, in themselves, formally non-binding at the international level. Yet it is one of the purposes of the article to discuss whether these instruments still give rise to any obligations on the part of States parties. This article focuses on judicial organs because domestic judges are circumscribed in terms of the documents they can utilize in their judicial reasoning. Legislative and executive organs are generally not as constrained as judges in taking account of non-binding international instruments in their work. Nevertheless, despite the constraints of judicial settings, judges, from time to time, engage with the documents adopted by UN human rights treaty monitoring bodies. This invites analysis of the normative grounds on which national judges, through their reasoning, interact with the monitoring bodies.

This article contributes to broader legal scholarship on the domestic reception of international or foreign legal documents which are not formally given effect in the domestic legal order. Consistent interpretation, systemic integration and judicial comity allow national judges to refer, selectively, to non-ratified treaties, unincorporated treaties, the recommendations of international organizations and the judgments of foreign courts.<sup>3</sup> Studies have been conducted in the field of human rights, which explore the practice of domestic judges in citing foreign court decisions, unincorporated human rights treaties, and the judgments of regional human rights courts that do not have formal domestic legal effect.<sup>4</sup> Despite the rich literature on judicial engagement with formally non-binding human rights instruments and cases, relatively limited academic attention has been paid to domestic judicial engagement with the work of the UN human rights treaty-monitoring bodies.<sup>5</sup>

<sup>2</sup> Statute of the International Court of Justice, 26 June 1945, 39 AJIL Supp. 215 (1945) (entered into force on 24 October 1945) art 38(1). The notion of 'formality' in this article is different from, for instance, the conceptual use of the term as signifying determinacy or certainty: eg, J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011).

<sup>3</sup> On consistent interpretation and systemic integration, see A Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) Ch 7 (Consistent Interpretation); J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in OK Fauchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2012) 141. The present author previously analysed judicial engagement in wider 'informal' international instruments, see M Kanetake and A Nollkaemper, 'The Application of Informal International Instruments before Domestic Courts' (2014) 46 *GeoWashIntlLRev* 765.

<sup>4</sup> eg A Müller and HE Kjos, *Judicial Dialogue and Human Rights* (Cambridge University Press 2017); C McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *OJLS* 499; MA Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *ColumLRev* 628.

<sup>5</sup> The limited existing studies include: R van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in H Keller and G Ulfstein (eds), *UN*

This article first gives an overview of the narratives employed by the monitoring bodies to encourage domestic compliance with the comments, observations, recommendations and views (collectively termed ‘findings’ in this article) adopted by the ten bodies tasked with monitoring the implementation of the ten core UN human rights treaties in force as of 1 December 2016 (section II below).<sup>6</sup> Based upon a number of reported cases,<sup>7</sup> it analyses how national courts give effect<sup>8</sup> to findings which are generally regarded as non-binding at the international level (section III) and on what basis (section IV). Building on the analysis of court decisions, it then identifies several reasons why some courts are more willing to engage with these findings than others (section V). It also critically assesses the normative grounds employed by domestic courts in terms of their consistency and deference to domestic political organs.

The study of a limited number of court decisions shows the extent to which the monitoring bodies’ findings have permeated the reasoning of national judges. Nevertheless, it is not clear whether it can be concluded that ‘most courts have recognised that ... the treaty bodies’ interpretations deserve to be given considerable weight’, as the ILA’s Committee on International Human Rights Law and Practice (1997–2008) observed in its 2004 Berlin report<sup>9</sup> which had assembled and analysed an extensive body of court decisions. From the, albeit limited, survey of court decisions undertaken here, a variety of judicial receptions of the findings of UN human rights bodies can be seen. While domestic courts do indeed take account of treaty body findings into their reasoning, some are simply not familiar with their work and, even if they are, judges also occasionally avoid, discount and contest the interpretations put forward by the treaty bodies. By studying the judicial amenability to the findings of monitoring bodies, this article highlights the

*Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 356; ILA (2002) (n 7) and (2004) (n 7).

<sup>6</sup> The ten bodies I have studied are the following: (i) Human Rights Committee (HRC), (ii) Committee on Economic, Social and Cultural Rights (CESCR), (iii) Committee on the Elimination of Racial Discrimination (CERD), (iv) Committee on the Elimination of Discrimination against Women (CEDAW), (v) Committee against Torture (CAT), (vi) Subcommittee on Prevention of Torture (SPT), (vii) Committee on the Rights of the Child (CRC), (viii) Committee on Migrant Workers (CMW), (ix) Committee on the Rights of Persons with Disabilities (CRPD), and (x) Committee on Enforced Disappearances (CED).

<sup>7</sup> I have collected and analysed 150 domestic court decisions (decided from 1982 to 2016) from my own research, the Oxford Reports on International Law in Domestic Courts (ILDC), the International Law Reports (ILR), and the reports of the ILA’s Committee on International Human Rights Law and Practice (1997–2008) which assembled and analysed an extensive body of court decisions: see ILA, Committee on International Human Rights Law and Practice, ‘Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals’ (2002); ILA, Committee on International Human Rights Law and Practice, ‘Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies’ (2004).

<sup>8</sup> For the purpose of this article, I use the terms ‘to give effect’ and ‘to apply’ interchangeably. Also, in this article, the term ‘application’ includes not only the use of an instrument as a legal basis for courts’ final findings, but also the use of the monitoring bodies’ findings as an interpretive guide.

<sup>9</sup> ILA (2004) (n 7) para 175.

selective and partial accommodation of international findings by domestic courts, which both approve and contest the treaty bodies' opinions and their legitimacy.

## II. THE APPROACH OF THE HUMAN RIGHTS MONITORING BODIES TO INDUCING COMPLIANCE

Human rights treaty monitoring bodies attempt to encourage the domestic acceptance of their findings in a variety of different ways. One institutionalised means of doing so is through the appointment of a Special Rapporteur for the Follow-Up of Views, the first of which was established in 1990 by the Human Rights Committee (HRC)<sup>10</sup> and whose practice has provided a template for other monitoring bodies. Another important tool used to disseminate the work of the monitoring bodies is the dialogue that treaty monitoring bodies periodically have with delegations from State parties.<sup>11</sup> The treaty monitoring bodies also emphasize the significance of their findings in both a general and normative sense, encouraging, or even seeking to oblige, member States to take particular steps at the domestic level. The HRC has been a key player in such attempts to augment the normative significance of its findings.<sup>12</sup> Their use of an imperative vocabulary is evident, particularly with regard to interim measures.<sup>13</sup> The HRC has developed jurisprudence according to which non-compliance with interim measures could constitute not only regrettable behaviour but also a breach of State parties' obligations under the Optional Protocol.<sup>14</sup> In 2005, the Committee against Torture (CAT) followed suit and identified the existence of an obligation to comply with its interim measures.<sup>15</sup> Despite oppositions from States, the HRC maintained its position in General Comment No. 33 in 2009, reiterating that a State party must comply with interim measures as part of its obligation to respect in good faith the individual communication procedure.<sup>16</sup>

<sup>10</sup> AM de Zayas, 'Follow-up Procedure of the UN Human Rights Committee, The Commentary' (1991) 47 *Review: International Commission of Jurists* 28, 32–3.

<sup>11</sup> For a critical analysis of the dialogue, see eg Y Donders and V Vleugel, 'Universality, Diversity, and Legal Certainty: Cultural Diversity in the Dialogue between the CEDAW and States Parties' in M Kanetake and A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2015) 321.

<sup>12</sup> See S Davidson, 'Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee' in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 305.

<sup>13</sup> van Alebeek and Nollkaemper (n 5) 356, 387.

<sup>14</sup> See eg *Piandiong et al v The Philippines*, CCPR/C/70/D/869/1999 (19 October 2000) paras 5.1–5.4; GJ Naldi, 'Interim Measures in the UN Human Rights Committee' (2004) 53 *ICLQ* 445, 447–50.

<sup>15</sup> *Mafhoud Brada v France*, CAT/C/34/D/195/2002 (24 May 2005) para 13.4; van Alebeek and Nollkaemper (n 5) 389; N Rodley, 'The Role and Impact of Treaty Bodies' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 621, 635.

<sup>16</sup> HRC, 'General Comment No. 33: The Obligations of States Parties under the Optional Protocol' CCPR/C/GC/33 (2009) para 19.

The HRC has also tried to invest its Views on individual communications with an imperative character. In an early draft of what became the HRC's General Comment No. 33 concerning the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the HRC stressed the legal character of the Committee's Views. According to the draft:

the views issued by the Committee under the Optional Protocol exhibit *most* of the characteristics of a judicial decision ... Hence, the work of the Committee is to be regarded as *determinative of the issues* presented. ... [The] terminology might be thought to imply that the Committee's views are purely advisory or recommendatory. However, this is not a justifiable conclusion ... [T]he views of the Committee ... represent an authoritative determination of a body established under the Covenant itself as the [an] *authentic interpreter* of that instrument. ... A finding of a violation by the Committee engages the *legal obligation* of the State party to *reconsider* the matter. ... [There is] an *obligation to respect the views* of the Committee in the given case.<sup>17</sup>

Under the draft, obligation to respect the Views of the HRC arose from a States' obligation to provide an effective remedy and to act in good faith.<sup>18</sup> The HRC's emphasis on the legal character of its Views was strongly supported by Amnesty International,<sup>19</sup> whilst Mexico also found the text generally acceptable.<sup>20</sup> However, many other States - including Belgium, France, Germany, Japan, Norway, Russia, Sweden, Switzerland, UK and US - expressed their disagreement with the draft's obligatory tone.<sup>21</sup> Germany emphasized that 'the views formulated by the Committee cannot develop a legally binding effect'.<sup>22</sup> The UK made it clear that the Committee is neither a court nor a body with a quasi-judicial mandate.<sup>23</sup> The US expressed its fundamental disagreement with the content of the draft and urged the HRC to withdraw

<sup>17</sup> HRC, 'Draft General Comment No 33 (Second Revised Version as of 18 August 2008)' CCPR/C/GC/33/CRP.3 (2008) paras 11–16 (original footnotes omitted; emphasis added).

<sup>18</sup> *ibid.*, paras 15–16.

<sup>19</sup> Amnesty International, 'Comments on Draft General Comment No 33', Ref: TIGO IOR 40/2008.204 (3 October 2008).

<sup>20</sup> Misión Permanente de México, Nota: OGE05258 (2 de octubre de 2008).

<sup>21</sup> 'Commentaires du Royaume de Belgique' (23 octobre 2008); 'Commentaires de la France sur le projet d'observation générale No.33 sur les obligations des Etats parties en vertu du Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques' (8 octobre 2008); Germany, 'Note Verbale' No. 296/2008 (15 October 2008); 'Comments by the Norwegian Government' (2008); 'Comments by the Russian Federation' (October 2008); 'Comments by the Government of Sweden' (3 October 2008); 'Réponse de la Suisse concernant le Projet d'observation générale no 33 (Deuxième version révisée au 18 août 2008)' (le 23 octobre 2008); 'Comments of the Government of the United Kingdom of Great Britain and Northern Ireland on draft General Comment 33' (17 October 2008); 'Comments of the United States of America on the Human Rights Committee's Draft General Comment 33' (17 October 2008).

<sup>22</sup> Germany, 'Note Verbale', No 296/2008 (15 October 2008).

<sup>23</sup> 'Comments of the Government of the United Kingdom of Great Britain and Northern Ireland on draft General Comment 33' (17 October 2008).

it.<sup>24</sup> In addition, France, Japan, Norway and Russia expressly denied the obligatory character of interim measures. Japan reiterated that ‘the interim measures do not have any legal binding force’.<sup>25</sup> The anxiety prevailing among States parties was reflected in Sweden’s concern that the draft would extend the HRC’s competence ‘beyond what the states intended’.<sup>26</sup>

Having received strong criticism from States parties, the HRC revised the language of the document. According to the final version, its Views exhibit ‘some of the principal characteristics of a judicial decision’—as opposed to ‘most of the characteristics of a judicial decision’.<sup>27</sup> While Views continue to be described as ‘an authoritative determination’, General Comment No. 33 in the end omitted the critical phrase ‘authentic interpreter’ when describing the role of the Committee.<sup>28</sup> The ‘obligation to respect the views of the Committee’ was deleted; instead, the final version referred to a ‘duty to cooperate with the Committee’ arising from an application of the principle of good faith to the observance of all treaty obligations.<sup>29</sup> On the whole, therefore, the HRC retreated from its proactive stance on the imperative character of its Views. What the HRC still insisted upon was the obligation of States parties to implement interim measures.<sup>30</sup>

### III. PRACTICES OF JUDICIAL ENGAGEMENT

The episode regarding General Comment No. 33 underlines the importance of considering how the findings of the monitoring bodies have been received by domestic authorities. Domestic engagement with UN human rights treaty bodies can be assessed from multiple perspectives. One approach is to analyse the rate of compliance with their recommendations. An indication of this is the level of satisfactory follow-up by States parties to the findings of the human rights treaties. According to 2016 reports, 43 per cent of the CAT’s communications (which found violations) received satisfactory or partially satisfactory responses<sup>31</sup> and 33 per cent of the communications of

<sup>24</sup> ‘Comments of the United States of America on the Human Rights Committee’s Draft General Comment 33’ (17 October 2008).

<sup>25</sup> Japan, Comments on Draft General Comment No 33 (3 October 2008).

<sup>26</sup> ‘Comments by the Government of Sweden’ (3 October 2008).

<sup>27</sup> HRC, GC 33 (n 16) para 11 (emphasis added).

<sup>28</sup> *ibid.*, para 13; HRC, Draft GC 33 (n 17) para 14. See also Y Iwasawa, ‘Domestic Application of International Law’ (2016) 378 *Recueil des Cours* 239–41 (regarding the distinction between authentic interpretation and authoritative interpretation).

<sup>29</sup> HRC, Draft GC 33 (n 17) para 16; HRC, GC 33 (n 16) para 15.

<sup>30</sup> HRC, GC 33 (n 16) para 19.

<sup>31</sup> ‘Report of the Committee against Torture, Fifty-Fifth Session (27 July–4 August 2015) Fifty-Sixth Session (9 November–9 December 2015) Fifty-Seventh Session (18 April–13 May 2016)’ UN Doc A/71/44 (2016) para 80 (51 communications out of a total 119 communications where the CAT had found violations).

the Committee on the Elimination of Racial Discrimination (CERD) received such responses.<sup>32</sup> For the HRC, the 2009 report records a comparable response rate of 15 per cent.<sup>33</sup> The focus of this article is not, however, on general rates of compliance but on the use of treaty body findings in judicial reasoning. The cases analysed<sup>34</sup> can be divided according to the *types* of the treaty bodies' findings, the *purposes* for which they are employed, and the *weight* accorded to them. This section will describe the types of findings to be considered, before undertaking an analysis of the normative bases for domestic courts to engage with the monitoring bodies.

### A. Types of Findings

#### 1. General comments and recommendations addressed to all States parties

The UN human rights treaty monitoring bodies adopt broadly three forms of documents:<sup>35</sup> (i) findings on issues of a *general* nature addressed to all States parties, namely, General Comments and Recommendations;<sup>36</sup> (ii) findings addressed to a *particular State* after the consideration of its State report, namely, Concluding Observations<sup>37</sup> and Concluding Comments;<sup>38</sup> and (iii) findings concerning *individual communications* or petitions, namely, Views or Decisions<sup>39</sup> and Suggestions and Recommendations.<sup>40</sup>

Domestic courts have frequently taken account of General Comments and Recommendations, which not only inform judges about the substance of law, but also give flexibility to judges in determining how they should be reflected. There are abundant examples<sup>41</sup> of judicial engagement with the

<sup>32</sup> 'Report of the Committee on the Elimination of Racial Discrimination Eighty-Seventh Session (3–28 August 2015) Eighty-Eighth Session (23 November–11 December 2015) Eighty-Ninth Session (25 April–13 May 2016)' UN Doc A/71/18 (2016) 17–8 (5 satisfactory or partly satisfactory responses out of 15 communications).

<sup>33</sup> Among 390 communications or groups of communications listed, four did not require follow-up responses, and there were 58 satisfactory responses: 'Report of the Human Rights Committee, Volume I, Ninety-Fourth Session (13–31 October 2008) Ninety-Fifth Session (16 March–3 April 2009) Ninety-Sixth Session (13–31 July 2009)' UN Doc A/64/40 (Vol. I) (2009) 126–68.

<sup>34</sup> See (n 7) on the cases I collected for the purpose of this article.

<sup>35</sup> See N Ando, 'General Comments/Recommendations' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2008, online edition) para 2.

<sup>36</sup> General Comments/Recommendations can be adopted by all ten bodies.

<sup>37</sup> Concluding Observations are adopted by HRC (civil/political rights), CESCR (social/economic rights), CERD (racial discrimination), CAT (torture), CRC (child), CMW (migrant), and CED (disappearances). The practices to separate General Comments (for all members) and Concluding Observations (for a particular member) started at the HRC, which was followed by other monitoring bodies: Ando (n 35) para 12.

<sup>38</sup> Concluding Comments are adopted by CEDAW (women).

<sup>39</sup> Views are adopted by HRC (civil/political rights), CESCR (social/economic rights), CEDAW (women), CAT (torture), and CMW (migrants). This report uses the term 'Views' to describe the findings regarding individual communications or petitions, although the findings can also be called as 'Decisions' etc.

<sup>40</sup> Suggestions and Recommendations are adopted by CERD (racial discrimination).

<sup>41</sup> For further examples, see ILA (2002) (n 7); ILA (2004) (n 7).

HRC's General Comments on the ICCPR and its protocols.<sup>42</sup> For example, among the 35 General Comments adopted by the HRC from 1981 to 2014, General Comment No. 7<sup>43</sup> on the prohibition of torture was invoked in *Bangladesh Legal Aid* in 2010 by the Bangladesh High Court, which relied on the HRC to extend the prohibition of torture to corporal punishment.<sup>44</sup> General Comments Nos. 8 (on the right to liberty), 16 (regarding the notion of arbitrariness), 20 (on the right to freedom from torture), and 23 (on the right to a fair hearing) were drawn on by the Victorian Civil and Administrative Tribunal in *Kracke* in 2009 in Australia to construe ICCPR provisions.<sup>45</sup>

General Comments Nos. 15 and 29 were referred to in *A and Others (No. 1)* concerning the detention of suspected foreign terrorists, in which Lord Bingham, for the majority in the House of Lords, drew on the ICCPR and its General Comments.<sup>46</sup> General Comment No. 18 concerning non-discrimination was relied upon in *Ts'epe* in 2005 by the Lesotho Court of Appeal when interpreting Article 26 of the ICCPR.<sup>47</sup> The same General Comment was invoked by the Kenyan High Court in *RM* in 2006 when construing the scope of non-discrimination principle, as well as by the Swiss Federal Supreme Court in its Judgment of 10 April 1996 when finding violations of Articles 2, 14, and 26 of the ICCPR.<sup>48</sup> General Comment No.

<sup>42</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (1966); Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 302; Second Optional Protocol to the International Covenant on Civil and Political Rights, 15 December 1989.

<sup>43</sup> HRC, 'General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (art. 7)' HRI/GEN/1/Rev.9 (Vol. I) (1982).

<sup>44</sup> *Bangladesh Legal Aid and Services Trust and ors v Government of Bangladesh, Writ Petition to the High Court Division of the Supreme Court* (2010) Writ Petition No 5863 of 2009, Writ Petition No 754 of 2010, Writ Petition No 4275 of 2010, ILDC 1916 (BD 2010) (Bangladesh, High Court Division, 8 July 2010), para 45.

<sup>45</sup> (i) HRC, 'General Comment No. 8: Right to Liberty and Security of Persons (article 9)', HRI/GEN/1/Rev.9 (Vol. I) (1982); *Kracke v Mental Health Review Board, Appeal Decision* [2009] VCAT 646, ILDC 1608 (AU 2009) (Australia, Victorian Civil and Administrative Tribunal, 23 April 2009), para 629. (ii) HRC, 'General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (article 17)', HRI/GEN/1/Rev.9 (Vol. I) (1988); *Kracke*, *ibid*, paras 169–171, 592. (iii) HRC, 'General Comment No. 20: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (article 7)', HRI/GEN/1/Rev.9 (Vol. I) (1992); *Kracke*, *ibid*, para 550. (iv) HRC, 'General Comment No. 23: The Rights of Minorities (Article 27)', CCPR/C/21/Rev.1/Add.5 (1994); *Kracke*, *ibid*, paras 376–80, 442, 450–3, 477.

<sup>46</sup> *A and Others v Home Secretary (No 1)* [2004] UKHL 56; 137 ILR 1 (UK, House of Lords, 16 December 2004) paras 59–61 and 63 (Lord Bingham); HRC, 'General Comment No. 15: The Position of Aliens under the Covenant', HRI/GEN/1/Rev.9 (Vol. I) (1986), 15; HRC, 'General Comment No. 29', UN Doc CCPR/C/21/Rev.1/Add.11 (2001), 29.

<sup>47</sup> *Ts'epe v Independent Electoral Commission and ors, Appeal Judgment* (2005) C of A (Civ) No 11/05, ILDC 161 (LS 2005) (Lesotho, Court of Appeal, 30 June 2005) para 18.

<sup>48</sup> *RM v Attorney-General* (2006) 143 ILR 299 (Kenya, High Court, 1 December 2006); *M. and Mme D v X et Chambre supérieure du Tribunal des mineurs du canton de Vaud*, Judgment of 10 April 1996, Swiss Federal Supreme Court (*Bundesgericht*), BGE 122 I 109; cited in ILA (2002) (n 7) para 55.

20 on the prohibition of torture was cited by Lord Bingham in *A and Others v Home Secretary (No. 2)* as one of a number of international materials that demonstrated that the prohibition of torture would require States to do more than eschew the practice of torture.<sup>49</sup> The same General Comment informed the decision of the Court in the Canadian case of *Suresh* in 2002.<sup>50</sup> Likewise, the Federal Court of Appeal in Canada in *Almrei* in 2005 made use of General Comment No. 20 to construe non-refoulement under Article 7 of the ICCPR.<sup>51</sup> Finally, General Comment No. 35 on liberty and security of person was relied upon by the High Court of Kenya in 2015 in the *Millicent Awuor Omuya* case when interpreting Article 9(1) of the ICCPR and ultimately finding that the detention of the petitioners in health care facilities, who were unable to pay their medical fees, was arbitrary and unconstitutional.<sup>52</sup>

Turning to the domestic reception of the work of the Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3 was made use of by the Constitutional Court of Peru in *Cuzco Bar Association* in 2005 for the purpose of identifying and explaining the ‘principle of progressivity’ in the achievement of economic and social rights.<sup>53</sup> General Comment No. 4 was drawn on by the Supreme Court of British Columbia in *Victoria (City) v Adams* in 2008 in connection with Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>54</sup> General Comment No. 13 on the right to education was referred to by the German Federal Constitutional Court in 2013 when upholding the constitutionality of general tuition fees at universities.<sup>55</sup> General Comment No. 14 was relied upon by the High Court of Delhi in the

<sup>49</sup> HRC General Comment No. 20 (note 45); *A and Others v Home Secretary (No 2)* [2005] UKHL 71; 137 ILR 116 (UK, House of Lords, 8 December 2005) para 34 (Lord Bingham).

<sup>50</sup> *Suresh v Canada, (2002) 208 DLR (4th) 1* (2002) 124 ILR 343 (Canada, Supreme Court, 11 January 2002).

<sup>51</sup> *Almrei v Minister of Citizenship & Immigration and Solicitor General, Appeal judgment* (2005) 2005 FCA 54, ILDC 638 (CA 2005) (Canada, Federal Court of Appeal, 8 February 2005), para 124.

<sup>52</sup> Human Rights Committee, ‘General Comment No. 35: Article 9 (Liberty and Security of Person)’, CCPR/C/GC/35 (16 December 2014) para 7; *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, Constitutional and Human Rights Division, 17 September 2015), paras 92, 94.

<sup>53</sup> CESCR, ‘General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’ E/1991/23 (1990); *Cuzco Bar Association and ors v Congress of the Republic, Original Petition, Accumulated Claims 050-2004-A1/TC, 051-2004A1/TC, 004-2005-P1/TC, 007-2005-P1/TC, 009-2005-P1/TC* (2005) ILDC 679 (PE 2005) (Peru, Constitutional Court, 3 June 2005) para H4.

<sup>54</sup> CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the ICESCR), E/1992/23 (13 December 1991); *Victoria (City) v Adams* (2008) 2008 BCSC 1363 (Canada, Supreme Court of British Columbia, 14 October 2008) paras 85–89.

<sup>55</sup> CESCR, ‘General Comment No. 13: The Right to Education (Article 13 of the Covenant)’, E/C.12/1999/10 (8 December 1999) para 19; German Federal Constitutional Court (BVerfG), Order of the First Senate of 8 May 2013, 1 BvL 1/08 <[http://www.bverfg.de/e/ls20130508\\_1bvl000108en.html](http://www.bverfg.de/e/ls20130508_1bvl000108en.html)> para 43.

*Mandal* case in 2010 when construing the meaning of the right to health under the ICESCR.<sup>56</sup>

The opinions of other human rights monitoring bodies have likewise guided domestic judicial reasoning. For instance, General Recommendation No. 23 of the CERD regarding indigenous land rights was drawn on by the Belize Supreme Court in *Cal* in 2007,<sup>57</sup> which noted that the CERD ‘confirmed that the failure of states to recognize and respect indigenous customary land tenure is a form of racial discrimination’.<sup>58</sup> The observation of the Committee on the Elimination of Discrimination against Women (CEDAW) was used in *Bangladesh Legal Aid* in 2010, in which the Bangladesh High Court also made reference to the position of the CAT on the absolute and non-derogable nature of the prohibition of torture.<sup>59</sup> In the *Test Trial Fund Clara Wichmann* case in 2005, the CEDAW’s General Recommendation No. 23 on political and public life was invoked by the Dutch District Court when interpreting Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women.<sup>60</sup> Overall, there is no shortage of domestic court cases whose reasoning has drawn on the treaty bodies’ general interpretive positions.

At the same time, judges can be openly critical of General Comments. Critical remarks were made, for instance, by the UK’s High Court in *AB* in 2017.<sup>61</sup> The claimant, AB, was a youth offender who had a record of violent behaviour towards prisoner officers and other inmates. The claimant contended that his solitary confinement amounted to ‘inhuman or degrading treatment’ prohibited under Article 3 of the European Convention on Human Rights (ECHR). In rejecting this contention, the High Court dissociated itself from General Comment No. 10 of the Committee on the Rights of the Child (CRC) which rejected the solitary confinement of juveniles and which had been relied upon by the claimant.<sup>62</sup> The UK court did ‘not attach any real weight’ to the General Comment No. 10, not only because the UK had not entirely incorporated the Convention on the Rights of the Child or because the court was tasked with the fact sensitive interpretation of the ECHR (ie,

<sup>56</sup> CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)’, E/C.12/2000/4 (2000); *Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors*, WP(C) Nos 8853 of 2008, and 10700 of 2009 (2010) (India, High Court of Delhi, Judgment of 4 June 2010) para 23.

<sup>57</sup> CERD, ‘General Recommendation No. 23: Indigenous Peoples’ (1997) para 5; *Cal v Attorney-General* (2007) 71 WIR 110; 135 ILR 77 (Belize, Supreme Court, 18 October 2007).

<sup>58</sup> *Cal* *ibid*, para 123.

<sup>59</sup> *Bangladesh Legal Aid* (n 44) para 45.  
<sup>60</sup> CEDAW, ‘General Recommendation No. 23: Political and Public Life’, A/52/38 (1997) 23; *Test Trial Fund Clara Wichmann (Stichting Proefprocessenfonds Clara Wichmann) and ors v Netherlands, first instance decision* (2005) HA ZA 03/3395, LJN: AU2088, ILDC 221 (NL 2005) (The Netherlands, District Court, 7 September 2005), para H2 (ILDC) 3.18–3.22.

<sup>61</sup> *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).

<sup>62</sup> *ibid*, para 101; Committee on the Rights of the Child, ‘General Comment No. 10 (2007): Children’s Rights in Juvenile Justice’ CRC/C/GC/10 (25 April 2007) para 89.

another convention).<sup>63</sup> The High Court was critical because the CRC, which ‘may well be trying to bring about what it sees as desirable changes in policy and practice’, ‘is not performing a judicial function’.<sup>64</sup> In short, the High Court seems to have regarded the treaty-monitoring body as seeking to progressively develop the treaty to a point which could no longer be legitimately relied on for the purposes of domestic judicial reasoning.

## 2. Observations addressed to individual States concerning State party reports

National judges not only draw on General Comments and Recommendations but also cite the country-specific reports or observations of treaty bodies to support particular constructions of international and domestic human rights provisions. Noteworthy in this regard is the Argentine Supreme Court’s decision called *FAL* (2012) on the scope of legal abortion. In this landmark decision, the Argentine court not only took into account the Concluding Observations of the HRC and the Report of the CRC addressed to Argentina, but also those addressed to other States.<sup>65</sup> In reinterpreting Article 86 of the Criminal Code and extending the scope of abortion to rape victims, the Argentine Supreme Court referred to the fact that the HRC ‘expressed its concern’ over the restrictive interpretation of Article 86 of the Argentine Criminal Code.<sup>66</sup>

Another noteworthy case is the Canadian Supreme Court decision in *Suresh* (2002) which drew on the general position of the CAT as well as on its report on Canada in the process of constitutional interpretation.<sup>67</sup> The Canadian court concluded that a ‘better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under section 7 of the Charter’.<sup>68</sup> In the *Cal* case (2007), the Belize Supreme Court not only made reference to General Recommendation No. 23 of CERD, but also to the country-specific Correspondence from the Chairperson of CERD to Belize’s Permanent Representative to the UN in which the CERD drew

<sup>63</sup> See *R (AB) v The Secretary of State for Justice* (n 61) paras 112–113.

<sup>64</sup> *ibid*, para 113.

<sup>65</sup> *F, A L s/Medida Autosatisfactiva*, F 259 XLVI, 13 March 2012 (Corte Suprema de Justicia de la Nación (National Supreme Court of Justice, Argentina)) paras 12, 13, 26; HRC, ‘Concluding Observations: Argentina’, CCPR /C/ARG/CO/4 (2010); HRC, ‘Concluding Observations: Peru’, CCPR/CO/70/PER (2000); HRC, ‘Concluding Observations: The Gambia’, CCPR/CO/75/GMB (2004); CRC, ‘Concluding Observations: Argentina’, CRC /C/ARG/CO/3-4 (2010).

<sup>66</sup> *FAL* (n 65) para 12.

<sup>67</sup> The Canadian Supreme Court drew on the general point that the UN Committee against Torture ‘has applied Art. 3(1) even to individuals who have terrorist associations’. *Suresh* (n 50) para 73. The Committee’s report advised that ‘Canada should “[c]omply fully with article 3(1) [on the prohibition of expelling or extradition in danger of torture] ... whether or not the individual is a serious criminal or security risk”’: *ibid*, para 73 (quoting CAT, Conclusions and Recommendations of the Committee against Torture: Canada, CAT/C/XXV/Concl.4, at 6(a)).

<sup>68</sup> *Suresh*, *ibid*, para 75.

attention to land privation in Belize without prior consultation of the Mayan people.<sup>69</sup>

At the same time, domestic courts have occasionally *challenged* or *deliberately avoided* the observations addressed to individual States. For example, Canadian and British courts have disagreed with the CAT's Concluding Observations concerning whether civil remedies should be available for the victims of torture committed abroad. In *Bouzari v Iran*, the Canadian courts dismissed the civil action brought by the alleged victims of torture against Iran, upholding Iran's jurisdictional immunities before Canadian courts. One of the applicants' arguments was based on Article 14 (1) (right to redress) of the Torture Convention,<sup>70</sup> which they argued required the provision of a civil remedy for *all* acts of torture, including those committed *outside* the forum State. In rejecting this interpretation, the Ontario Superior Court in 2002 endorsed the observation of the Attorney-General's expert, who pointed out that the failure of Canada to provide a civil remedy to the victims of torture committed abroad had not been criticized by the CAT.<sup>71</sup>

Interestingly, in its subsequent Concluding Observations addressed to Canada in 2005, the Committee did criticize the restricted availability of civil remedies to torture victims.<sup>72</sup> The Committee reiterated its concern in its Concluding Observations in 2012 in a more specific manner.<sup>73</sup> In response, however, the CAT's Observations to Canada in 2005 were themselves criticized by UK judges in *Jones v Saudi Arabia* (2006),<sup>74</sup> in which the House of Lords apparently disagreed with the CAT's interpretation and upheld sovereign immunity in civil proceedings instituted by the victims of

<sup>69</sup> *Cal* (n 57) para 124.

<sup>70</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, art 14(1).

<sup>71</sup> *Bouzari v Islamic Republic of Iran* (2002) 124 ILR 427 (Canada, Ontario Superior Court of Justice, 1 May 2002) paras 51–52 (regarding Mr Greenwood's submission). The Court of Appeal in 2004 upheld the conclusion of the lower court, but did not refer specifically to the Committee's findings: *Bouzari v Islamic Republic of Iran* (2004) 128 ILR 586 (Canada, Ontario Court of Appeal, 30 June 2004).

<sup>72</sup> CAT, 'Conclusions and Recommendations: Canada' (2005) CAT/C/CR/34/CAN (7 July 2005) para 5(f).

<sup>73</sup> The Concluding Observations in 2012 provides: '[t]he Committee remains concerned at the lack of effective measures to provide redress, including compensation, through civil jurisdiction to all victims of torture, *mainly due to the restrictions under provisions of the State Immunity Act* (art. 14)' (emphasis added). The CAT recommended that Canada 'should ensure that all victims of torture are able to access remedy and obtain redress, *wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim*'. In this regard, it should consider amending the State Immunity Act to remove obstacles to redress for all victims of torture' (emphasis added): UN Committee against Torture, 'Concluding Observations of the Committee against Torture: Canada' (2012) CAT/C/CAN/CO/6 (25 June 2012) para 15 (civil remedies and state immunity). See also UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak' A/HRC/13/39/Add.5 paras 179–185 (favouring the restriction of immunity in civil proceedings).

<sup>74</sup> *Jones v Saudi Arabia* [2006] UKHL 26; (2007) 1 AC 270 (UK, House of Lords, 14 June 2006).

torture committed abroad. Having noted the CAT's critical remarks regarding Canada's State report, Lord Bingham dismissed the relevance of the CAT's observation, noting that '[w]hatever its value in influencing the trend of international thinking, the legal authority of the Committee's recommendation is slight'.<sup>75</sup> Lord Hoffmann found 'no value' in the Committee's position.<sup>76</sup>

Courts might have also *deliberately avoided* taking account of country-specific observations, although it is methodologically difficult to trace whether this is the case and, if so, why. In *Canadian Foundation for Children* Canadian courts upheld the constitutionality of Section 43 of the Criminal Code, which justified the use by parents of reasonable corrective force against a child. In the course of constitutional interpretation, both the Ontario Superior Court of Justice in 2000 and the Court of Appeal in 2002 referred to the CRC in order to suggest that Canada was *not* obliged to apply criminal sanctions in the case of corporal punishment of children.<sup>77</sup> By contrast, the Reports of the CRC did not appear in the majority's reasoning in the subsequent decision of the Canadian Supreme Court in 2004,<sup>78</sup> although in her dissenting opinion Judge Arbour drew attention to the CRC's 2003 Concluding Observations in which it expressed its deep concern that Canada had taken 'no action to remove section 43 of the Criminal Code'.<sup>79</sup> The majority might have simply avoided engaging with the CRC's critical Observations.

Likewise, in the *Asociación Solcom* case in 2011,<sup>80</sup> the Spanish court did not make any reference to the Concluding Observations of the Committee on the Rights of Persons with Disabilities (CRPD), which were issued one month prior to the judgment, and in which the CRPD addressed the specific point disputed before the court; namely, the lack of resources provided to guarantee the right of persons with disabilities to live independently and to be included in the community.<sup>81</sup> If judges were aware of the presence of the

<sup>75</sup> *ibid*, para 23 (Lord Bingham).

<sup>76</sup> *ibid*, para 57 (Lord Hoffmann).

<sup>77</sup> See *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* 2000 CanLII 22397 (ON SC) (Canada, Ontario Superior Court of Justice, 5 July 2000) para 98; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney-General)* (2002) 57 OR (3d) 511; 207 DLR (4th) 632 (Canada, Ontario Court of Appeal) para 22; Report of the CRC, UN Doc A/51/41 (SUPP) (1996).

<sup>78</sup> On the other hand, the Canadian Supreme Court still referred to the reports of the HRC: *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* (2004) Docket No 29113, 2004 SCC 4, [2004] 1 SCR 76, ILDC 177 (CA 2004) (Canada, Supreme Court, 30 January 2004) para 33.

<sup>79</sup> CRC, 'Concluding Observations: Canada', CRC/C/15/Add.215 (2003) paras 32–33. See *Canadian Foundation for Children* (n 78) para 188 (Arbour J, dissenting opinion).

<sup>80</sup> *Asociación Solcom para la solidaridad comunitaria de las personas con diversidad funcional y la inclusión social and Asociación Asistencia para a vida independente v Conselleria de Trabajo e Benestar, First instance decision* (2011) No 1090/2011, ILDC 1899 (ES 2011) (26 October 2011).

<sup>81</sup> R Marín Aís, 'Analysis: ILDC 1899 (ES 2011)' (2012) paras A5–6.

Concluding Observations (and this is not known), this could mean that they deliberately avoided referring to them.

### 3. Views and suggestions addressed to individual States concerning individual complaints

As with country-specific concluding observations, findings relating to individual complaints have also been both drawn on and rejected by domestic courts. The HRC adopted 1200 Views between 1977 and March 2017,<sup>82</sup> and the CAT had adopted 329 merits decisions by May 2017.<sup>83</sup> Some of these Views and decisions have been relied on by national courts.<sup>84</sup>

For instance, in the *FAL* case in Argentina, the Supreme Court referred to the fact that the HRC, in its Views, had criticized Argentina for failing to ensure timely access to legal abortion.<sup>85</sup> Likewise, the Supreme Court of Norway in *Federation of Offshore Workers Trade Unions* considered the HRC's Views, in conjunction with the jurisprudence of the European Court of Human Rights (ECtHR) and ILO bodies.<sup>86</sup> The German Federal Constitutional Court cited the Views of the HRC when holding that criminal trials in absentia were inconsistent with international law.<sup>87</sup> The Nepal Supreme Court in *Pant and Others* in 2007 referred to observations of the HRC, together with ECtHR jurisprudence, in order to stress that Article 26 of the ICCPR encompasses non-discrimination on the ground of sexual orientation.<sup>88</sup>

The Views of other committees have also been invoked. In *Boudellaa v Bosnia and Herzegovina* in 2002, the Human Rights Chamber of Bosnia and Herzegovina interpreted Article 3 (the prohibition of torture) of the ECHR by making reference to the test developed by the CAT in its Views on the principle of non-refoulement under Article 3 of the Torture Convention.<sup>89</sup> In *A and Others (No. 2)* in 2005

<sup>82</sup> Report of the HRC, 117th session (20 June–15 July 2016), 118th session (17 October–4 November 2016), 119th session (6–29 March 2017), UN Doc A/72/40 (2017) para 24.

<sup>83</sup> Report of the CAT, Fifty-eighth session (25 July–12 August 2016), Fifty-ninth session (7 November–7 December 2016), Sixtieth session (18 April–12 May 2017), UN Doc A/72/44 (2017) para 77.

<sup>84</sup> For further examples, see ILA (2002) (n 7); ILA (2004) (n 7).  
<sup>85</sup> *FAL* (n 65) para 26; HRC, 'Views: Communication No. 1608/2007' CCPR/C/101/D/1608/2007 (2011).

<sup>86</sup> *Federation of Offshore Workers Trade Unions (Oljearbeidernes Fellessammenslutning, OFS)* case, Supreme Court of Norway, Rt 1997-580; cited in ILA (2004) (n 7) para 66.

<sup>87</sup> Bundesverfassungsgericht, 3rd Chamber 2nd Senate (24 January 1991) 2 BvR 1704/90; cited in ILA, *ibid*, para 57.

<sup>88</sup> *Pant and Others v Nepal Government and Others* (2007) 138 ILR 500 (Unofficial English translation prepared by the Supreme Court of Nepal) (Nepal, Supreme Court, 21 December 2007) 522–3.

<sup>89</sup> The Chamber seems to suggest that neither art 3 of the Torture Convention nor art 3 of the ECHR was breached, as it has not been alleged that there is a consistent pattern of gross, flagrant or mass violations of human rights in the US (to which the applicants were sent): *Boudellaa v Bosnia and Herzegovina* (2002) 136 ILR 309 (Bosnia and Herzegovina, Human Rights Chamber, 11 October 2002) paras 313–316; CAT, *Mutombo v Switzerland*, Comm No 13/1993, Decision of 27 April 1994, UN Doc A/49/44 (SUPP) (1994) at 45, 52, para 9.3.

concerning the use of torture evidence, Lord Bingham cited the Views of the CAT in the process of ascertaining State practice regarding Article 15 of the Torture Convention. Having cited the CAT's decisions, Lord Bingham observed that '[t]he clear implication is that the evidence should have been excluded had the complaint been verified'.<sup>90</sup>

At the same time, there are examples of Views being rejected, such as when the by the Czech Constitutional Court rejected the Views of the HRC addressed to Czech Republic, in which the HRC had concluded that differentiation between non-citizens and Czech citizens infringed the prohibition of discrimination under Article 26 of the ICCPR.<sup>91</sup>

### *B. The Use of Findings: Interpretation of Human Rights Treaties and Analogous Domestic Provisions*

General Comments, Concluding Observations and Views have not been used on an independent and free-standing basis but in order to assist the construction of formal law. While attempts have been made by litigants to invoke decisions regarding individual complaints as providing an autonomous legal basis for judicial decisions (that is, as the basis on which the wrongfulness of acts or the legality of law is ultimately decided), domestic courts have, not surprisingly, rejected such attempts in the absence of specific statutory or constitutional grounds expressly providing for this. For instance, the Irish Supreme Court in *Kavanagh v Governor of Mountjoy Prison* (2002) observed that the View of the HRC could not 'prevail' against the concluded decision of a properly constituted court.<sup>92</sup>

In general, the findings of the monitoring bodies are mentioned in the context of informing understandings of relevant provisions of the human rights treaties. For instance, the CAT's Views were used by Lord Bingham in *A and Others* (No. 2) when interpreting Article 15 of the Torture Convention.<sup>93</sup> The CERD's General Recommendation was used by the Belize Supreme Court in *Cal* in 2007 when determining the treaty obligations under the Racial Discrimination Convention.<sup>94</sup>

These treaty provisions, then, often ultimately inform the interpretation of constitutional or statutory human rights provisions. This apparently holds true for States with dualist traditions. For instance, with respect to the ICCPR, substantively similar, if not identical, provisions can be found in the Canadian Charter of Rights and Freedom, the UK's Human Rights Act

<sup>90</sup> *A and Others* (No 2) (n 49) para 36 (Lord Bingham).

<sup>91</sup> ILA (2004) (n 7) para 52 (citing Nr 67 of 4 June 1997, Pl ÚS 33/96, Coll of the decisions 8 (1997 – II. Part) 163ff). See also *ibid*, paras 51, 53–56.

<sup>92</sup> *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97; 132 ILR 380 (Ireland, High Court, Judgment of 29 June 2001) 404. The argument, based upon legitimate expectation, was likewise rejected: see *ibid*, 404–6.

<sup>93</sup> *A and Others* (No 2) (n 49) para 36 (Lord Bingham).

<sup>94</sup> *Cal* (n 57).

(which is based upon the ECHR), and the New Zealand Bill of Rights Act 1990 (which is based on the ICCPR).<sup>95</sup> In *Suresh*, the Canadian Supreme Court invoked the ICCPR when construing Section 7 of the Canadian Charter and in doing so it referred to the HRC's General Comment No. 20.<sup>96</sup> In the same vein, in Australia, the ICCPR and the HRC's findings were consulted in order to interpret the Victorian Charter of Human Rights and Responsibilities Act. In *Kracke*, the Australian court construed the domestic human rights act consistently with the ICCPR, and drew extensively on General Comments when doing so.<sup>97</sup>

National judges have also employed findings when interpreting provisions of treaties other than those to which they directly relate. In *Bangladesh Legal Aid* (2010), for instance, the Bangladesh High Court referred to HRC General Comment No. 7 not only in connection with Article 7 of the ICCPR, but also for the purpose of interpreting customary law and the Torture Convention.<sup>98</sup> In a similar vein, domestic courts can also find treaty body findings of interpretive relevance for the construction of domestic laws which were not themselves designed to implement the particular human rights treaties or obligations in question.

### C. The Weight Accorded to Findings: Confirmatory and Substantive Approaches

The actual *weight* that the findings of the monitoring bodies carry in judicial interpretation varies. Some are employed in such a way as to substantively affect the judicial interpretation, whilst others are employed in order to confirm a construction already reached on other grounds.

In a majority of cases examined, domestic courts attribute only confirmatory value to treaty bodies' findings, as in the case of *Bangladesh Legal Aid* (2010).<sup>99</sup> In the case of *Jaftha* (2004), the South African Constitutional Court drew on the CESCR's General Comment No. 4 to 'reinforce' its conclusions concerning the international concept of adequate housing.<sup>100</sup>

On the other hand, treaty body findings have been used to give new meanings to treaty provisions, constitutional provisions and other domestic law and have brought about material differences to the outcomes. To illustrate, in February 2013 the Colombian Constitutional Court relied upon CESCR General Comment No. 15 when instructing the government to guarantee the core of

<sup>95</sup> See E Evatt, 'The Impact of International Human Rights on Domestic Law' in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 281, 286–94; ILA (2002) (n 7) paras 42–43.

<sup>96</sup> *Suresh* (n 50) para 66 (quoting the General Comment No. 20, para 9).

<sup>97</sup> *Kracke* (n 45).

<sup>98</sup> *Bangladesh Legal Aid* (n 44) para 45.

<sup>99</sup> *Bangladesh Legal Aid* (n 44).

<sup>100</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* (2004) CCT74/03, [2004] ZACC 25, 2005 (2) SA 140 (CC) (Constitutional Court of South Africa, 8 October 2004); CESCR, 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the ICESCR)', E/1992/23 (1991).

the right to water.<sup>101</sup> The HRC's General Comment No. 18 seems to have had a material impact in *Ts'epe* in 2005 before Lesotho's Court of Appeal.<sup>102</sup> Likewise, the HRC's concluding observations appear to have been one of the key factors influencing the Argentine Supreme Court's interpretation of the ICCPR and relevant provision of the criminal code in the *FAL* case.<sup>103</sup>

Similarly, in *Cal* in 2007 the Belize Supreme Court allowed the CERD's General Recommendation and its country-specific Correspondence to inform its understanding of Belize's international obligations and the interpretation of its constitutional human rights provisions. The judge observed that '[t]hese considerations, engaging as they do Belize's international obligation ... weighed heavily with me in this case in interpreting the fundamental human rights provisions of the Constitution'.<sup>104</sup>

#### IV. THE NORMATIVE BASES FOR JUDICIAL ENGAGEMENT

The brief survey of domestic courts' practices then raises the question of what constitutes a basis of and reasons for judicial engagement with UN human rights treaty monitoring bodies. Whilst there may be circumstances in which courts are *obligated* to consider the Views and interim measures, in most cases judges invoke these findings not out of the obligation but due to their *persuasiveness*.

##### A. Obligations under Domestic Law

Domestic executive organs may be obliged to give effect to Views regarding individual communications. For instance, in Colombia Law 288 of 5 July 1996 provides for the enforcement of awards of compensation made by international bodies, including the HRC, under domestic law.<sup>105</sup> In the Czech Republic the Ministry of Justice is responsible for coordinating the implementation of the Views of the HRC under Act No. 517/2002 Coll.<sup>106</sup> Such laws oblige or facilitate executive organs to give effect to the decisions of UN human rights monitoring bodies. Nevertheless, such domestic legislation may have little relevance in obliging or enabling judicial organs to give effect to Views, much less General Comments and the Concluding Observations.

Domestic courts may be able to give effect to Views when there are domestic laws enabling the reopening of a case.<sup>107</sup> For instance, in Norway a case may be

<sup>101</sup> *Sentencia T-077/13* (2013) (Constitutional Court, Colombia, 14 February 2013).

<sup>102</sup> *Ts'epe* (n 47). <sup>103</sup> *FAL* (n 65) paras 12, 26. <sup>104</sup> *Cal* (n 57) para 126.

<sup>105</sup> ILA (2004) (n 7) para 29, fn 32.

<sup>106</sup> Act No. 517/2002 Coll. of Laws on *Some Measures in the System of Central State Organs*; cited in ILA, *ibid*.

<sup>107</sup> For detailed analysis, see van Alebeek and Nollkaemper (n 5) 360–82. In Finland, a finding of a violation by the HRC may create the government's obligation to pay compensation: see *ibid*, 368.

reopened when an international court or the HRC has found the country to be in breach of its obligations.<sup>108</sup> Relatively few countries, however, seem to have specific domestic legislation enabling courts to give effect to Views. The principle of *res judicata* is often a hurdle preventing domestic courts from making case-specific responses to Views of the monitoring bodies. In Slovakia an amendment to Act on the Constitutional Court was introduced in 2000 in order to oblige the government to initiate domestic proceedings should the HRC find a violation of the ICCPR.<sup>109</sup> However, this procedure was subsequently repealed on the basis that it might breach the principle of *res judicata*.<sup>110</sup>

### B. Obligations under International Law

#### 1. Findings which reflect binding obligations

Under international law States, and indirectly their courts, may, by virtue of their treaty obligations, be *obligated* to give effect to the substance of those General Comments, Concluding Observations and Views which simply reflect established treaty obligations. Treaty obligations can be developed through ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’, as provided for in Article 31(3)(b) of the Vienna Convention on the Law of Treaties.<sup>111</sup> The practice of treaty monitoring bodies themselves does not constitute ‘subsequent practice’ for the purpose of the Vienna Convention. Nevertheless, in practice, if their observations reflect the views of States, or are received positively or supportively by States, or are acquiesced in, they might be regarded as reflecting an interpretation accepted by States parties through subsequent practice,<sup>112</sup> although caution is necessary. The Hong Kong Court of Appeal, in *R v Sin Yau-ming* (1991), commented that it would give ‘considerable weight’ to the comments and decisions of the HRC as well as the jurisprudence under the ECHR ‘in so far as they reflect the interpretation of articles in the [ICCPR]’ and are directly related to the relevant domestic legislation.<sup>113</sup>

However, not all Comments, Observations and Views can be regarded as reflecting accepted treaty interpretations. The need for some autonomous source of obligation also makes it difficult to explain why domestic courts sometimes refer to the findings of monitoring bodies of a treaty that the

<sup>108</sup> See van Alebeek and Nollkaemper (n 5) 366, and fn 41–43.

<sup>109</sup> ILA (2004) (n 7) para 40.

<sup>110</sup> *ibid.*

<sup>111</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311 (entered into force 27 January 1980), art 31(3)(b).

<sup>112</sup> ILA (2004) (n 7) para 21; G Ulfstein, ‘Individual Complaints’ in H Keller, G Ulfstein and L Grover (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 73, 97–100.

<sup>113</sup> *R v Sin Yau-ming* (1991) 1 HKPLR 88 (Hong Kong, Court of Appeal, 30 September 1991), 107.

forum State has yet to ratify. A case in point is *Jaftha v Schoeman* (2004), in which the South African Constitutional Court sought guidance on the meaning of the right to adequate housing from Article 11(1) of the ICESCR and CESCR General Comment No. 4<sup>114</sup> even though South Africa had only signed and not ratified the Covenant.

### 2. *The binding nature of findings themselves*

Judicial reference to treaty bodies' findings cannot be based upon the binding nature of the findings themselves under international law. At the international level, the HRC's Views and interim measures are generally considered by States as non-binding.<sup>115</sup> This holds true also for General Comments and Recommendations and Concluding Observations.

It is true that this traditionally accepted position is increasingly at odds with the HRC's own position which, as has been seen above, is to stress the normative significance of its Views and findings.<sup>116</sup> Of course, the HRC is not alone in suggesting that treaty bodies' Views and other findings are authoritative and therefore ought to be respected. The Colombian Constitutional Court in 2004 characterized the CESCR as an 'authorized interpreter' of the Covenant.<sup>117</sup> In the *Test Trial Fund Clara Wichmann* case in 2005 the Dutch court noted that the CEDAW's General Recommendations should be considered when interpreting the Convention.<sup>118</sup> In the case of *Cal* in 2007 before the Belize Supreme Court, the judge noted that, given Belize's commitments under the Racial Discrimination Convention, the government 'should take this communication [country-specific Correspondence] seriously and respond accordingly'.<sup>119</sup> In *Canadian Foundation for Children* the Ontario Superior Court of Justice noted that the CRC 'is an important source for the interpretation of its principles and standards'.<sup>120</sup> Nevertheless, the basis for such, possibly case-specific, statements remains unclear.

### 3. *The obligation to consider*

Even if the findings of the monitoring bodies are formally non-binding, and have yet to reflect customary law or agreed treaty interpretations, it can still

<sup>114</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* (n 100) paras 23–24, fn 29.

<sup>115</sup> See van Alebeek and Nollkaemper (n 5) at 372–3, 385–90. See also section II of this article.

<sup>116</sup> See section II of this article.

<sup>117</sup> Decision No T-025 of 2004 (2004) (Constitutional Court, Colombia, 22 January 2004, English translation available at <[www.brookings.edu](http://www.brookings.edu)> para 8.3.2 ('como intérprete autorizado del Pacto sobre la materia ...').

<sup>118</sup> *Test Trial Fund Clara Wichmann (Stichting Proefprocessenfonds Clara Wichmann) and ors v Netherlands, first instance decision* (n 60) para 3.18.

<sup>119</sup> *Cal v Attorney-General* (n 57) para 125 (emphasis added).

<sup>120</sup> *Canadian Foundation for Children* (2000) (n 78) para 97.

be argued that there is an international obligation of procedural nature to give serious consideration to the Views of human rights treaty bodies concerning individual complaints. The existence of such an ‘obligation to consider’ is nevertheless controversial.<sup>121</sup> Even if such a procedural obligation exists, it would likely be limited to documents concerning particular individuals’ rights. The restricted applicability of this procedural duty is in part illustrated by the Jamaican case of *Lewis* in 2000.<sup>122</sup> In this case the Judicial Committee of the Privy Council noted that ‘[w]hen the report of the international human rights bodies is available that *should be considered* and if the Jamaican Privy Council do [*sic*] not accept it [then] they *should explain why*’.<sup>123</sup> The observation by the Privy Council that the judges should consider the report is significant, but seems to be largely conditioned on the specific circumstance that individuals’ critical human rights, such as the right to life, were at stake. In *Lewis*, the appellants, who had been sentenced to death by the Jamaican courts, made an application to the Inter-American Commission on Human Rights and to the HRC. The Privy Council’s observation was based upon the individuals’ right to life under the American Convention on Human Rights as well as the constitutional guarantees regarding fair and proper procedures. Caution must therefore be exercised in extending procedural obligations, such as that enunciated in *Lewis*, to other contexts, such as monitoring bodies’ Views on human rights complaints *other than* the right to life, or those bodies’ reports on matters *other than* individual petitions.

### C. Authorization

What international law formally at least offers is the authorization to consider the findings of human rights treaty monitoring bodies. States, and indirectly their courts, may take into account the findings of the monitoring bodies as part of ‘supplementary means of interpretation’ under Article 32 of the Vienna Convention of the Law of Treaties.<sup>124</sup>

In States with monist traditions, in which the Vienna Convention has domestic validity, Article 32 can serve as a formal legal basis that authorizes the use of non-binding instruments, potentially including the treaty bodies’ findings. For instance, the Japanese Osaka District Court, in 2004, observed that the General Comments of the HRC should be respected to a considerable

<sup>121</sup> See further van Alebeek and Nollkaemper (n 5) at 385–97.

<sup>122</sup> *Lewis v Attorney General of Jamaica* (2000) 134 ILR 615 (Jamaica, Judicial Committee of the Privy Council, 12 September 2000).

<sup>123</sup> *ibid*, 635 (emphasis added).  
<sup>124</sup> See HM Kindred, ‘The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach’ in OE Fitzgerald (ed), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law 2006) 5, 27–8 (suggesting that arts 31–32 might determine the contextual significance of soft law sources before Canadian courts); Iwasawa (n 28) 236–7.

extent when interpreting the ICCPR, as being comparable to subsequent practice under Article 31(3)(b) of the Vienna Convention on the Law of Treaties or supplementary means of interpretation under Article 32.<sup>125</sup> Article 32 of the Vienna Convention can be a means for resolving the ostensible conflict between the courts adherence to binding authority on the one hand, and reference to non-binding instruments on the other.

In dualist States, the Vienna Convention may not have formal domestic validity, yet Article 32 of the Vienna Convention may still be referred to in the context of interpreting treaties (which ultimately inform constitutional or statutory interpretation). Also, in Australia the Victorian Charter of Human Rights and Responsibilities Act authorizes interpretive reference to international and foreign instruments, arguably including findings of the monitoring bodies. Section 32(2) of the Victorian Charter of Human Rights, cited in the *Kracke* case,<sup>126</sup> provides that '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.<sup>127</sup> The explanatory memorandum, again quoted in *Kracke*, provides in Section 32(2):<sup>128</sup>

a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilized nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations (see article 38 of the Statute of the International Court of Justice). Decisions of the International Court of Justice, European Court of Justice, Inter-American Court of Human Rights and *United Nations treaty monitoring bodies including the Human Rights Committee*, will be particularly relevant.

According to this explanatory memorandum Section 32(2) of the Victorian Charter of Human Rights permits consideration of HRC decisions as a subsidiary means of statutory interpretation. Overall, while Article 32 of the Vienna Convention and analogous domestic law provisions provide explicit authorization, the perspective of whether international or domestic law in any way *obliges* States to consider the findings accounts for a very limited fraction of domestic judicial engagement with UN human rights monitoring bodies.

#### D. Persuasiveness

A supplementary factor is the *persuasiveness* of the formally non-binding documents adopted by human rights treaty monitoring bodies. In some of the cases examined, domestic courts have explicitly or implicitly employed the

<sup>125</sup> *Judgment of 9 March 2004* Osaka District Court, Case No 2002(U)12008, 1858 Hanrei Jiho 79.

<sup>126</sup> *Kracke* (n 45).

<sup>127</sup> See *ibid*, para 202.

<sup>128</sup> See *ibid*, para 202 (emphasis added).

notion of ‘persuasiveness’ as a basis for taking account of monitoring bodies’ findings in their judicial reasoning.

### 1. Notion of persuasiveness

Persuasiveness—or in a more familiar form, the idea of ‘persuasive authority’<sup>129</sup>—has evolved in order to account for inter-judicial communication.<sup>130</sup> This idea could assist in the context of judicial engagement with the monitoring bodies’ findings which lack formal domestic level effect. In the *Kracke* case the Australian court, when interpreting domestic human rights provisions, consulted not only General Comments, but also a range of comparable foreign and non-binding instruments, including case law from the UK, New Zealand, Canada and South Africa, the jurisprudence of the ECtHR and General Assembly resolutions.<sup>131</sup> Domestic judges are part of a network of vertical and horizontal cross-referencing of court decisions, and judges’ engagement with the findings of UN human rights monitoring bodies can be understood as an extension of such inter-judicial communication.

The idea of persuasiveness is to be contrasted with that of ‘bindingness’—or ‘binding authority’ in the more common usage—which carries independent obligatory force. A binding authority is authoritative just by virtue of its pedigree, while ‘persuasive authority’ stems from its merit.<sup>132</sup> Persuasiveness may potentially be given to any norms (whether domestic or international, whether binding or not) that are helpful in shedding light on the meaning and purpose of a particular domestic obligation.<sup>133</sup> The fact that ‘persuasive authority’ is not determined merely by an instrument’s pedigree means that

<sup>129</sup> In this article, the term ‘authority’ is generally used as the (legal) authority of courts as *actors*, as opposed to the authority of *instruments*. In contrast, persuasive ‘authority’ uses the term ‘authority’ (or ‘authorities’) for *instruments*, in a sense analogous to a ‘basis for judicial decisions’. The authority of courts and the nature of instruments are inseparable; the authority of courts to apply certain instruments for their judgments can be justified by the persuasiveness of those instruments. The concept of persuasive authority is, however, underdeveloped: see I Venzke, ‘Between Power and Persuasion: On International Institutions’ Authority in Making Law’ (2013) 4 TLT 351, 359 (suggesting that the persuasiveness of arguments per se does not provide a content-independent meaning to the notion of ‘authority’).

<sup>130</sup> For transnational judicial dialogue in general and its role in the development of international law, see further A-M Slaughter, ‘A Global Community of Courts’ (2003) 44 HarvIntLJ 191; CA Whytock, ‘Transnational Judicial Governance’ (2012) 2 St. John’s Journal of International and Comparative Law 55; CA Whytock, ‘Foreign Law in Domestic Courts: Different Uses, Different Implications’ in DW Jackson, MC Tolley and ML Volcansek (eds), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (State University of New York Press 2010) 45; E Benvenisti and GW Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’ (2009) 20 EJIL 59, (observing that the loose form of interjudicial co-ordination has contributed to the mitigation of fragmentation of norms within the international legal systems).

<sup>131</sup> See *Kracke* (n 45) para 98ff.

<sup>132</sup> C Flanders, ‘Toward a Theory of Persuasive Authority’ (2009) 62 OklahomaLRev 55, 62.

<sup>133</sup> *ibid.*

judges are generally accorded wide discretion to select those documents which they find persuasive.

In the cases studied, persuasiveness explicitly or implicitly serves as the basis for judicial engagement with monitoring bodies' findings. The South African High Court observed that 'General Comments have authoritative status under international law'.<sup>134</sup> The New Zealand Court of Appeal observed that a decision of the HRC must be of 'considerable persuasive authority'.<sup>135</sup> The Dutch Administrative High Court regarded the Views of the HRC as authoritative, and noted that national courts could only deviate from the Views if justified by weighty reasons.<sup>136</sup> The Belize Supreme Court in *Cal* accepted that it may regard the findings of the Inter-American Commission on Human Rights 'where appropriate and cogent, to be persuasive',<sup>137</sup> inasmuch as Belize was a party to the treaties monitored by the Inter-American Commission.<sup>138</sup> Other cases which do not explicitly acknowledge persuasiveness still appear to assume it as providing a basis for judicial engagement. The ILA's Committee on International Human Rights Law and Practice observed that despite their lack of binding force, committee decisions under individual complaint procedures may still have 'considerable persuasive force' on decision-makers in domestic legal systems.<sup>139</sup>

## 2. Factors constituting persuasiveness: Systematic association between findings and formal law and the impartiality of the bodies

What constitutes *persuasiveness* is by no means clear-cut, something which highlights the weakness of the notion in terms of its conceptual and political underpinnings. Judges are by no means unequivocal about the factors which render the monitoring bodies' findings more than merely non-binding documents. The ILA's Committee observed that the persuasiveness of the findings emanates from the mandates of each committee to monitor the implementation of the treaty and to receive complaints, the expertise and reputation of experts, and the legitimacy of the committee and its findings.<sup>140</sup>

<sup>134</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) 6 BCLR 625 (High Court Witwatersrand, Local Division); cited in ILA (2004) (n 7) para 11. The Court invoked General Comment No 12 of the ICESCR in accounting for the duty to respect rights of access: (2002) 6 BCLR 625 at 629, paras 17–18.

<sup>135</sup> *R v Goodwin (No. 2)* [1993] 2 NZLR 390; cited in ILA (2002) (n 7) para 41, fn 52. Similarly, in the New Zealand Court of Appeal, Eichelbaum CJ noted that 'a decision of the HRC must be of considerable persuasive authority': *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 461, 405; cited in ILA (2002), *ibid*, para 32, fns 29–30.

<sup>136</sup> The Netherlands, Central Appeals Tribunal, *Appellante v de Raad van Bestuur van de Sociale Verzekeringsbank* (21 July 2006) LJN: AY5560, para 4.36; cited in van Alebeek and Nollkaemper (n 5) at 402, fn 199.

<sup>137</sup> *Cal* (n 57) para 21.

<sup>138</sup> *Cal* (n 57) para 22; Charter of the Organization of American States, 119 UNTS 3; American Declaration of the Rights and Duties of Man, 43 AJIL Supp. 133 (1949).

<sup>139</sup> ILA (2002) (n 7) para 31. <sup>140</sup> *ibid*, para 33. See also Iwasawa (n 28) 235.

One of the broad factors that render the findings persuasive is the systematic connection between, on the one hand, the documentation and findings produced by the monitoring bodies and, on the other hand, the treaty provisions (or substantively comparable domestic law) that domestic judges are called upon to interpret. For example, General Comments issued by the HRC are institutionally connected to the ICCPR which itself empowers the Committee to assist States parties' compliance and thereby effectively to interpret the treaty provisions. Such an institutional connection is one of the factors that support the persuasiveness of its findings.

In turn, formally non-binding documents will be less persuasive if they are employed for the construction of treaties and domestic law which are not directly related to the documents in question. In *Mansouri-Rad* (2004), New Zealand's Refugee Status Appeals Authority noted that 'it is only appropriate that regard be had to the interpretation of those [international human rights] instruments by the "treaty bodies" set up under the instruments'.<sup>141</sup> The Refugee Status Appeals Authority observed that '[t]he decisions of the Human Rights Committee can be at least of *persuasive authority*'.<sup>142</sup> Interestingly, the Appeals Authority contrasted the decisions of the human rights treaty monitoring bodies with those of the UN Human Rights Commission (now replaced by the UN Human Rights Council) established by the UN's Economic and Social Council. According to the Appeals Authority, '[i]t is almost unnecessary to add that we do not see the UN Human Rights Commission as an appropriate point of reference, lying as it does *outside the treaty framework* earlier described'.<sup>143</sup> Thus in *Mansouri-Rad*, the systematic link between a treaty and its monitoring body made it appropriate to refer to the body's findings in judicial reasoning.

Another variable which supports persuasiveness is the *impartiality of the bodies* that adopt formally non-binding instruments. Such impartiality was one of the reasons that the Privy Council, in the New Zealand case of *Tangiora* (1999), found the HRC's Views hard to dismiss despite their lack of binding force.<sup>144</sup> The Privy Council, drawing on the observation of Tomuschat, observed that a State party may find it hard to reject such findings when they are based on orderly proceedings during which the State party has had a proper opportunity to present its case. The Views of the HRC acquire 'authority from the standing of its members and their judicial qualities of impartiality, objectivity and restraint'. Moreover, the Privy Council suggested that the functions of the

<sup>141</sup> *Mansouri-Rad v Department of Labour, Appeal Decision* (2004) Refugee Appeal no 74665/03, (2005) NZAR 60, ILDC 217 (NZ 2004) (New Zealand, Refugee Status Appeals Authority, 7 July 2004) para 73.

<sup>142</sup> *ibid*, para 73 (emphasis added).  
<sup>143</sup> *ibid*, para 78 (emphasis added). According to the Appeals Authority, 'the 52-state Commission is *highly politicised*, as witness the circumstances in which Cuba and China were successful in having the United States lose its seat in 2001': *ibid*.

<sup>144</sup> *Tangiora v Wellington District Legal Services Committee* (1999) [2000] 1 WLR 240; 124 ILR 570 (New Zealand, Judicial Committee of the Privy Council, 4 October 1999).

Committee are *adjudicative*, as it makes a definitive and final ruling which is determinative of an issue that has been referred to it.<sup>145</sup>

This does not mean that all documents adopted by the HRC possess the ‘judicial qualities’ of impartiality and objectivity. As suggested in the *Tangiora* case,<sup>146</sup> the function of the HRC is akin to an adjudicative body when it adopts ‘Views’ in response to individuals’ communications. By contrast, the HRC operates in a less adjudicatory manner when adopting General Comments, which are designed to assist member States more generally. The method or procedure for adopting General Comments and Recommendations varies depending on the human rights treaty bodies. Certainly, there has been progress in harmonizing working methods. The Chairs of the human rights treaty bodies have affirmed in 2011 that they should adopt common working methods.<sup>147</sup> In response to the UN General Assembly resolution, the Chairs of the treaty bodies endorsed in 2015 the common methodology for consultation in adopting general comments.<sup>148</sup> Yet to have common policies does not automatically lead to the harmonization of actual practices developed within each treaty body.<sup>149</sup> More fundamentally, the impartiality of members themselves is not above question. Whilst members of committees in principle serve in their personal capacity,<sup>150</sup> close ties with their governments may exist. Since their election may often depend on governmental lobbying, it may be difficult for experts to act entirely independently on all occasions,<sup>151</sup> despite the initiatives, such as the Addis Ababa Guidelines, to ensure independence and impartiality of treaty body

<sup>145</sup> ILR *ibid.*, 575.

<sup>146</sup> *Tangiora* (n 144).

<sup>147</sup> Report of the Secretary-General, ‘Status of the Human Rights Treaty Body System’, UN Doc A/71/118 (18 July 2016) para 64.

<sup>148</sup> UNGA Resolution, ‘Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System’, UN Doc A/RES/68/268 (21 April 2014) paras 9, 14, 38; Report of the Chairs of the Human Rights Treaty Bodies of Their Twenty-Sixth Meeting, UN Doc A/69/285 (11 August 2014) paras 15–54 (follow-up of the General Assembly resolution); Report of the Chairs of the Human Rights Treaty Bodies on Their Twenty-Seventh Meeting, UN Doc A/70/302 (7 August 2015) paras 25, 90–1.

<sup>149</sup> See Joint NGO Statement on the Occasion of the Twenty-Ninth Meeting of UN Treaty Body Chairs (27–30 June 2017, New York) at 5–6 (noting that consultation processes continue to vary from treaty body to treaty body).

<sup>150</sup> ICCPR (n 42) art 28(2); International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 195, Art 8(1); Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) 1249 UNTS 13 and its optional protocol (1999) art 17(1); Torture Convention (n 70) art 17(1); Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, art 43(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990) 2220 UNTS 3, art 72(2)(b); the Convention on the Rights of Persons with Disabilities (13 December 2006) 2515 UNTS 3, art 43(3); the International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006) Doc. A/61/488. C.N.737.2008, art 26(1).

<sup>151</sup> J Connors, ‘An Analysis and Evaluation of the System of State Reporting’ in AF Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (2000) 3, 12 (regarding the monitoring process of State reports).

members.<sup>152</sup> As suggested by the *Tangiora* case, such qualities can be relevant in attributing persuasiveness to the findings of treaty bodies and inducing engagement on the part of domestic courts.

#### V. REASONS FOR JUDICIAL (NON-)ENGAGEMENT

While the bindingness and persuasiveness of international findings may provide a normative basis for judges referring to UN treaty body materials, the variation in patterns of judicial engagement is striking. Such variance cannot be attributed to the international legal status of the findings or their general persuasiveness. There are apparently a number of sociological factors which encourage or discourage the use of such materials by national judges.

##### A. Variance in Judicial Engagement

Broadly speaking, Canada, the UK, New Zealand, and possibly some other common law countries tend to be less hesitant in employing findings on the basis of their being persuasive.<sup>153</sup> The Supreme Court of Canada has frequently used the provisions of human rights treaties and related findings as an aid to interpreting the Canadian Charter of Rights and Freedoms even though the Charter, unlike the South African Constitution, does not expressly direct courts to consider international law.<sup>154</sup> On the other hand, the 2004 Berlin report prepared by the ILA's Committee on International Human Rights Law and Practice records that it was not able to identify judicial references to such findings in the countries of Francophone Africa, the Arab region, and some other regions. There were no identifiable judicial practices in Bulgaria, Jordan, Egypt, Saudi Arabia, Colombia, Ecuador, Chile, Argentina, Malaysia, Singapore and Brunei.<sup>155</sup>

Such reluctance may also be evident in some other countries. The French *Conseil d'Etat* emphasized in 2001 that the HRC was a non-judicial organ whose findings were not binding.<sup>156</sup> In Japan, arguments based on non-binding documents have been largely rejected, unless the courts have found

<sup>152</sup> 'Guidelines on the Independence and Impartiality of Members of the Human Rights Treaty Bodies ("the Addis Ababa Guidelines")' UN Doc A/67/222 (2 August 2012) Annex I.

<sup>153</sup> The reliance on 'persuasive authority' can be seen in the case law of the Canadian Supreme Court, for instance. See J Brunnée and SJ Toope, 'Hesitant Embrace: The Application of International Law by Canadian Courts, A' (2002) 40 Canadian Yearbook of International Law 3; HP Glenn, 'Persuasive Authority' (1986) 32 McGillLJ 261; G Hudson, 'Neither Here Nor There: The (Non-)Impact of International Law on Judicial Reasoning in Canada and South Africa' (2008) 21 CJLJ 322; K Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 NYUJIntl& Pol 501.

<sup>154</sup> A Lamer, 'Enforcing International Human Rights Law: The Treaty System in the 21st Century' in AF Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (2000) 305, 309. See also Kindred (n 124) 26.

<sup>155</sup> ILA (2004) (n 7) para 29, fn 28.

<sup>156</sup> France, Council of State, *Hauchemaille v France* (11 October 2001) ILDC 767 (FR 2001), para 22.

those documents to reflect customary international law or established treaty interpretation.<sup>157</sup> The Tokyo District Court observed in 2001 that HRC General Comments ‘neither represent the authoritative interpretation of the ICCPR nor have legal binding force’.<sup>158</sup> Nevertheless, there are still several noteworthy cases in Japan, especially in the lower courts, which draw on findings of the treaty monitoring bodies for interpretive purposes.<sup>159</sup> For instance, the Takamatsu High Court of Japan has employed the HRC’s Views together with the ECHR and a UN General Assembly resolution.<sup>160</sup> Yet these materials did not appear in the subsequent appeals decision by the Supreme Court, which ultimately rejected the decision of the Takamatsu High Court.<sup>161</sup> It was in its Judgment of 4 September 2013 that the Japanese Supreme Court, for the first time, referred to the recommendations of human rights treaty bodies, when finding unconstitutional the provision of the Japanese Civil Code which differentiated between a child out of wedlock and a legitimate child for the purpose of inheritance law.<sup>162</sup> The Japanese Supreme Court referred to the ICCPR and the Convention on the Rights of the Child as having expressed concern at Japanese provisions that discriminated against illegitimate children.

The cases examined are limited to *explicit* engagement with monitoring bodies’ findings. The lack of express engagement with the outputs of the monitoring bodies does not mean that judges have not taken their findings into account. For instance, the French Constitutional Council in *Decision No 2005-524/525 DC* in 2005 ‘probably took into account’<sup>163</sup> the opinions expressed by the HRC *inter alia* in General Comment No. 26 when finding that the Second Optional Protocol to the ICCPR excluded denunciation and so the ratification of the Protocol implied a constitutional revision in

<sup>157</sup> See further Y Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (1998) 37–40. Some court decisions are, however, apparently affected by General Comments, despite the lack of explicit reference to them: *ibid.*, 121 (regarding Judgment of June 23, 1993, Tokyo High Ct., 46 Kominshu 43, 14 Waseda Bull CompL 58 (1993)).

<sup>158</sup> Judgment of 15 March 2001, Tokyo District Court, 1784 Hanrei Jiho 67.

<sup>159</sup> *eg* Judgment of 9 March 2004, Osaka District Court, 1155 Hanrei Taimuzu 185; 1858 Hanrei Jiho 79. For the use of international human rights standards in Japanese courts, see further Y Iwasawa, ‘The Domestic Impact of International Human Rights Standards: The Japanese Experience’ in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 245.

<sup>160</sup> Judgment of 25 November 1997, Takamatsu High Ct. (Japan), 997 Hanrei Taimuzu 65. On 15 March 1996, the Tokushima District Court (1597 Hanrei Jiho 115) decided in favour of the plaintiffs, which was followed by the Takamatsu High Court, in its decision in 1997. The Takamatsu High Court employed the Views of the HRC (*Moraell v France*), the ECHR and the Body of Principles as interpretive guidance for art 14(1) of the ICCPR. The Supreme Court rejected these decisions without discussing the interpretation of the ICCPR. For the Judgment of 15 March 1996, see 40 JapAnnIntL 118 (1997); Iwasawa (n 159) 37–40.

<sup>161</sup> See *ibid.*  
<sup>162</sup> Judgment of 4 September 2013 Supreme Court, Case No 2012(Ku)984 (Japan, Supreme Court).

<sup>163</sup> D Szymczak, ‘Analysis: International treaties related to the abolition of capital punishment, Constitutional complaint procedure, Decision No 2005-524/525 DC, Council Rep 142’, ILDC 761 (FR 2005), para A5 (7 December 2007).

France.<sup>164</sup> What is clear is that there is a great deal of variance in practice regarding the explicit invocation of findings of UN human rights treaty bodies in judicial reasoning.

### *B. Some Factors Influencing the Variance in Practice*

#### *1. Domestic effect of treaties*

There are apparently a number of factors that influence the extent to which national courts resort to the findings of the treaty bodies.<sup>165</sup> While it is not intended to provide a comprehensive account of these factors, it is possible to identify certain elements which influence the domestic reception of the findings. First of all, and as a precondition, judicial engagement with UN human rights treaty monitoring bodies generally requires the direct applicability of human rights treaties or the presence of substantively comparable domestic human rights provisions.<sup>166</sup> Without these mediums, judicial reference to the treaty bodies' findings would be necessarily restricted.

For instance, when ratified such treaties as the Torture Convention, the ICCPR, and the Racial Discrimination Convention, the US made declarations concerning their non-self-executing character.<sup>167</sup> This necessarily limits judicial engagement with the findings of the monitoring bodies established by these conventions, although both the treaties and the findings of the monitoring bodies can still inform the interpretation of substantively comparable constitutional provisions.<sup>168</sup> In States with dualist traditions human rights treaties (which by themselves do not form part of domestic law) may inform the interpretation of constitutions or statutory human rights acts. The interpretive rules commonly employed by domestic courts, such as consistent interpretation and systemic integration,<sup>169</sup> facilitate the use of international law, and possibly of related non-binding documents, before the national courts.

<sup>164</sup> International treaties related to the abolition of capital punishment, Constitutional complaint procedure (2005) Decision No 2005-524/525 DC, Council Rep 142, ILDC 761 (FR 2005) (France, Constitutional Council, 13 October 2005).

<sup>165</sup> See ILA (2002) (n 7) para 19.  
<sup>166</sup> In this sense, there are no clear-cut distinctions between monist and dualist states. The fact that international human rights treaties are automatically valid under domestic law may appear to facilitate judicial engagement with the monitoring bodies' findings, but many common law countries, which have dualist traditions, have domestic constitutional or statutory human rights provisions which implement, or are substantively similar to, the provisions of international human rights treaties: ILA (2004) (n 7) para 182.

<sup>167</sup> GL Neuman, 'The Uses of International Law in Constitutional Interpretation' (2004) 98 AJIL 82, 86.

<sup>168</sup> See *ibid*, 89–90; J Kalb, 'Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after Medellín' (2010) 115 Penn State Law Review 1051.

<sup>169</sup> For these interpretive rules, see further A Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) Ch 7 (Consistent Interpretation); J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Fauchald and Nollkaemper (n 3) 141.

## 2. Familiarity with the findings and other international instruments

Second, as the ILA's Committee suggested in its 2004 Berlin report,<sup>170</sup> public awareness also influences the degree of judicial engagement with the work of the UN human rights monitoring bodies. If the findings of the treaty bodies are available in local languages, and the public has knowledge of their work, then there is strong incentive for litigant parties to draw on them. In court proceedings, not surprisingly, each party will adduce as much material as possible in support of their arguments. Judges would hear their arguments, perhaps comment on their invocation of the findings, and may find them useful. On a related point, the content of judicial education can also affect the levels of familiarity with human rights treaties and the findings of the monitoring bodies. If one does not need to study international law and international human rights law in order to qualify as a national judge, this may make them less inclined to draw on relatively unfamiliar materials such as international treaties, much less the General Comments and Views, in their judicial reasoning.

## 3. Separation of powers

Finally, variance in use can also be ascribed to the rigorousness of the separation of powers between the judicial and political branches of the government. Judicial engagement with monitoring bodies' findings which are formally non-binding may represent a degree of judicial encroachment upon the authority of the legislative and executive bodies which are endowed with greater democratic legitimacy. This is because such engagement would channel international norms into the domestic order without their being mediated by the legislative or executive approval processes. Some courts do indeed refuse to give effect to the treaty bodies' findings on the grounds that it amounts to judicial intrusion into the realm of authority of the political organs of governance. For example, in the *Singarasa* case in 2006 the Sri Lanka Supreme Court refused to give effect to the findings of the HRC on the ground that the legislature had not taken measures to give effect to the rights under the ICCPR.<sup>171</sup>

Likewise, the Court of Appeal of Singapore in *Yong Vui Kong* in 2010 acknowledged 'inherent limits' when resorting to consistent interpretation; reference to international human rights norms would not be appropriate if it was inconsistent with the express wording of the Singapore Constitution or with the country's constitutional history.<sup>172</sup> The Singapore court cited Lord

<sup>170</sup> ILA (2004) (n 7) para 182.

<sup>171</sup> *Singarasa v Attorney-General* [18 Sri Lanka Journal of International Law (2006) 519] 138 ILR 469 (Sri Lanka, Supreme Court, 15 September 2006).

<sup>172</sup> *Yong Vui Kong v Public Prosecutor* (2010) [2010] 3 SLR 489; 143 ILR 374 (Singapore, Court of Appeal, 14 May 2010) 401, para 59.

Bingham's comments in another case<sup>173</sup> that '[i]t is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies'.<sup>174</sup> It would have been necessary for Parliament to first enact new laws or amend the Singapore Constitution for effective to be given to international human rights norms.<sup>175</sup>

From these judgments it can be suggested that the more faithful the judicial organs are to the separation of powers and to the legislative authority of political organs, the less amenable are the courts to the use of formally non-binding international instruments, including the monitoring bodies' Comments, Observations and Views. For instance, in the UK judges historically enjoy a privileged position and make rules through their own jurisprudence,<sup>176</sup> something which facilitates judicial reference to formally non-binding international documents.

Overall, while the normative and sociological factors considered in this article are by no means exhaustive, it seems clear that levels of judicial engagement are determined not only by the international characteristics of the Comments and Views. There are also a number of *domestic* and country-specific factors, including the relationships between the judicial and legislative authorities that contribute towards domestic acceptance of the findings of UN human rights treaty monitoring bodies.

## VI. CONCLUSION

The subject-matter overlap between international and national law has increased the relevance of national courts in determining the *raison d'être* of international law and monitoring bodies at the domestic level. International human rights treaties primarily regulate how governments ought to exercise authority over individuals and entities within their jurisdiction, while domestic constitutional and administrative laws likewise regulate the governments' exercise of authority. This content-level overlap has empowered national courts in measuring not only the domestic relevance of human rights treaties but also the opinions of the treaty monitoring bodies.

This analysis of court decisions has revealed that national courts have begun to respond to the expectation of the UN human rights monitoring bodies that domestic organs should take account of their findings. Domestic courts employ General Comments and Recommendations, Concluding Observations, and Views, in order to give meaning to relevant human rights treaties which can further inform their interpretation of constitutional or

<sup>173</sup> *Reyes v The Queen* [2002] 2 AC 235 at 247 (Lord Bingham).

<sup>174</sup> *Yong Vui Kong v Public Prosecutor* (n 172). *ibid.*, 401, para 59. (Emphasis was added by the Court of Appeal of Singapore.)

<sup>175</sup> *Yong Vui Kong* (n 172) 401, para 59.

<sup>176</sup> See R Kolb, *Interprétation et création du droit international: Esquisses d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006) 63–73.

statutory human rights provisions. Judges are usually not obliged to consider these findings; arguably, courts are merely authorized to do so under international law or their doing so falls within the area of discretion which judges are permitted to exercise under domestic law. Whether or not judges do draw upon specific Comments, Observations, and Views depends in part upon the persuasiveness of these documents. The judicial decisions surveyed suggest that there are some identifiable factors, such as the impartiality of the monitoring bodies, which enhances the persuasiveness of their findings. At the same time, these factors do not help distinguish which of the monitoring bodies' findings are more persuasive than others. Judges' decision to invoke specific findings in their judicial reasoning is also presumably influenced by other case-specific and value-laden factors.

The uncertainties associated with the notion of persuasiveness mean that domestic judges can take account of those international findings which they find of use without having to explain why they are not taking account of those which they do not find helpful. Thus judicial engagement is both accommodating and confrontational. Domestic courts not only accept findings, but also interpret them in the manner they find most useful, deliberately avoid using them, and reject them either expressly through their reasoning or implicitly as a result of the decisions which they reach. Therefore, one cannot be certain whether most courts are willing to follow the ICJ's observation in *Diallo* in 2010 that it 'should ascribe great weight to the interpretation adopted by this independent body [i.e., the HRC] that was established specifically to supervise the application of that treaty'.<sup>177</sup> The ICJ itself has also kept its distance from the decisions of treaty bodies. In the *Obligation to Prosecute or Extradite (Belgium v Senegal)* case in 2012, the ICJ took a rather dismissive attitude toward the CAT's decision which had differed itself from the ICJ in terms of the temporal scope of the obligation to prosecute under Article 7(1) of the Torture Convention.<sup>178</sup>

Both the friendly and the confrontational judicial responses, though contrasting, are in fact treading the same path. As human rights treaties and

<sup>177</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits 2010 ICJ Reports 639, (Judgment of 30 November 2010), para 66 (emphasis added). Also, in the *Wall* advisory opinion (2004), the ICJ took into account the 'constant practice of the Human Rights Committee' in deciding on the extraterritorial applicability of the ICCPR: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Reports 136 (Advisory Opinion of 9 July 2004) para 109.

<sup>178</sup> *Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Reports 422 (Judgment of 20 July 2012) para 101. The ICJ referred to the CAT's decision of 23 November 1989, according to which the obligation was not applicable to acts committed prior to the Convention's entry into force: *ibid*; *OR, MM, MS v Argentina*, UN Doc CAT/C/WG/3/DR/1, 2 and 3/1988, Comm Nos 1/1988, 2/1988 and 3/1988 (23 November 1989) para 7.5. The ICJ then left a critical note with regard to the CAT's decision which did not limit the temporal scope: *Obligation to Prosecute*, *ibid*; *Suleymane Guengueng et al v Senegal*, UN Doc CAT/C/36/D/181/2001, Comm No 181/2001 (19 May 2006). The Court's stance is contrasted with the separate opinion of Judge Cançado Trindade: *Obligation to Prosecute*, *ibid*, at 551–2, paras 161–5.

the findings of the monitoring bodies increasingly bear upon domestic decision-making, there are a growing number of instances in which national courts encounter differences between their understandings of human rights law and those advanced by the treaty monitoring bodies. On such occasions, judges may not always favour the interpretation put forward by the international bodies.

The resulting accommodation and contestation by domestic courts has normative effects at the international level. The references by domestic courts to the findings of the monitoring bodies strengthen the normativity of those findings at the international level and may encourage other courts to follow them, despite their lack of formal legal binding force. The acknowledgement that domestic courts have given to such findings may further serve to strengthen the authority of the treaty monitoring bodies. The contrary is also true; judicial avoidance and contestation may undermine the normativity of the treaty bodies' findings, discourage other courts from having recourse to them, and lessen the overall influence of the UN human rights treaty monitoring bodies themselves.