

INTERNATIONAL LAW ASSOCIATION
NEW DELHI CONFERENCE (2002)

**COMMITTEE ON INTERNATIONAL HUMAN RIGHTS LAW AND
PRACTICE**

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**INTERIM REPORT ON THE IMPACT OF THE WORK OF THE UNITED
NATIONS HUMAN RIGHTS TREATY BODIES ON NATIONAL COURTS AND
TRIBUNALS¹**

BACKGROUND TO THE INTERIM STUDY

1. At the London Conference of the Association in 2000 the Executive Council approved the proposal of the Committee that the next stage of its work would be a study of the impact of the United Nations human rights treaty bodies established under the principal United Nations human rights treaties. The Committee had proposed that the initial stage of its project would be to focus primarily on the impact that the output of these bodies (in particular their “findings”) has had on the work of national courts and tribunals, with a view to examining subsequently the impact of the work of the treaty bodies in other contexts at the domestic level.
2. The principal purposes of the study are to document the extent to which the work of the treaty bodies had begun to have an impact on the work of national courts and tribunals, to identify the factors that contribute to the use by courts and tribunals of this material, and to encourage further utilisation of the international sources by courts, tribunals and advocates by disseminating information about how they were already being used.

¹ This report is based on a draft prepared by one of the Co-Rapporteurs of the Committee, Andrew Byrnes, as well as on information and material provided by members of the Committee and others. The Committee would like to thank the following, who have assisted in the preparation of this report by providing research or other assistance: Agnès Hurwitz, Autumn Field, Heli Niemi, Natacha Wexels-Riser, Christian Courtis, Ady Schonmann, Sara Hossain and Moni Shrestha.

3. This report is a preliminary survey of the use made by national courts and tribunals of the output of the treaty bodies.² It does not purport to be an exhaustive study of the many instances in which national courts have referred to or drawn on the work of the treaty bodies, either in its coverage of jurisdictions or of cases within particular jurisdictions; rather it endeavours to illustrate the different ways in which national courts have utilised that material and the principal legal issues which have been discussed, on the basis of the examples identified by the members of the Committee and others who have contributed information for the study. This interim study represents a sampling of case law from more than a dozen jurisdictions (and refers predominantly to English-language case law), the goal being to illustrate the range of issues that have come before domestic courts. The Committee hopes that the study will stimulate further documentation of the use made by national courts and tribunals of international material.

4. While the Committee considered that it would be worthwhile to study the impact of the work of the treaty bodies at the national level in other areas (such as the work of legislatures), it was felt that the study at this stage should be primarily focused on courts and tribunals, and similar adjudicative or quasi-judicial institutions (such as Ombuds procedures in some countries). The suggestion was also made that the study include references to the use made of treaty body output by international courts and tribunals. The present interim study includes a number of references to such cases, but a more detailed listing of those instances has been deferred to the next stage of the study.

5. The Committee proposes that this interim study will be further developed into a more comprehensive report for the 2004 Conference of the Association, and that this final report will document many more instances of the use of the work of the treaty bodies by domestic courts and tribunals, as well as by other domestic institutions.

A. INTRODUCTION

6. Starting with the adoption in 1965 of the International Convention on the Elimination of All Forms of Racial Discrimination, the United Nations has adopted a total of seven human rights treaties (of which six are currently in force³), under which committees of independent experts have been established to monitor the implementation by States parties of their obligations under the treaties.⁴ These committees, and the treaties under which they have been established, and the principal functions exercised by the committees are set out in Table 1.

Composition, role and functions of the treaty bodies

7. Each of the committees comprises experts who are nominated by individual States parties to the treaties and are elected by the meeting of the States parties. With the exception of the Committee on Economic, Social and Cultural Rights (which was established by a resolution of the United Nations Economic and Social Council), these treaty bodies are all established pursuant to provisions of the respective treaty.

8. The committees were originally established with the function of monitoring the implementation of the treaties by States parties through a number of different procedures. These include reporting procedures, individual and inter-State complaint procedures, and inquiry procedures.

² The study does not undertake an overall assessment of the impact of the treaties at the domestic level. Nor does it attempt to deal with the cases in which provisions of the treaties alone have been invoked by national courts and tribunals, or the invocation of the use of treaty body output before the treaty bodies themselves or before other international courts and tribunals.

³ The exception is the International Convention on the Rights of All Migrant Workers and Members of Their Families 1990.

⁴ For recent works dealing with the United Nations Human Rights treaty bodies system, see Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty System* (Cambridge: Cambridge University Press, 2000); Anne F Bayefsky (ed), *On the Future of the UN Human Rights Treaty System* (Dordrecht: Kluwer, 2001); the report prepared by Professor Philip Alston for the Commission on Human Rights (*Final report of the independent expert on enhancing the long-term effectiveness of the United Nations human rights treaty system*, UN Doc. E/CN.4/1997/74; Anne F Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads*, (Transnational Publishers, 2001) and on line at <http://www.yorku.ca/hrights/>; Christof Heyns and Frans Viljoen, *Impact Study of the United Nations Human Rights Treaties in Twenty UN Member States* (Pretoria, 2000) (electronic version), Guðmundur Alfredsson et al. (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (The Hague, 2001).

9. **Reporting procedures:** Under all of the treaties there is a reporting procedure, under which States parties accept a legally binding obligation to submit regular reports to the Committee on the steps they have taken to implement the treaty in question and any difficulties they may face in that task.
10. **Individual complaint procedures:** There are now individual communications procedures under four of the treaties.⁵ Under these procedures, an individual may bring a complaint to the committee concerned, claiming that he or she is a victim of a violation of the rights guaranteed under the convention. All of these procedures are optional, and complaints may only be brought against a State party to the treaty that has accepted the competence of the committee to hear such complaints. The individual must also satisfy various admissibility criteria (including the requirement to exhaust domestic remedies) before the committees can entertain a complaint.
11. **Inquiry procedures:** Two of the conventions have an inquiry procedure which can be initiated by the committee concerned if it receives reliable evidence that there are systematic violations of the convention taking place in the State party concerned. These are article 20 of the Convention against Torture (if torture is being systematically practised in a State party) and under the Optional Protocol to the CEDAW Convention ("grave or systematic violations" of that Convention). A State which becomes party to the Torture Convention and the CEDAW Optional Protocol is subject to the inquiry procedure under each treaty unless it chooses to opt out at the time of ratification or accession.
12. **Inter-State communication procedures:** A number of the treaties provide for an inter-State complaint procedure. However, as these procedures have never been used before any of the treaty bodies, they have not as yet produced any jurisprudence of relevance. These procedures are optional and a State must expressly accept the competence of the respective committees in relation to each procedure.

The work and output of the treaty bodies

13. Over the years the treaty bodies have produced a considerable body of practice which has become increasingly important in the interpretation and application of the human rights treaties by the committees themselves, governments, courts and tribunals, lawyers, non-governmental organisations, and others. These different outputs have supplemented the often very sparse general language of the treaty provisions and have been increasingly looked to as important sources for interpretation of the treaties and in relation to the performance of individual States parties in carrying out their obligations under the treaties.
14. The principal types of output produced by or for the treaty bodies are the following:⁶
- (a) the *General comments* or *General recommendations* adopted by the committees;⁷
 - (b) the *Concluding observations* (or *concluding comments* in the case of the CEDAW Committee) on the reports of individual countries;
 - (c) the *views* or *decisions* of a committee adopted in a case submitted under an individual complaints procedure,

⁵ The treaties for which there is an individual complaints procedure are:

International Convention on the Elimination of All Forms of Racial Discrimination: under article 14 of the Convention

International Covenant on Civil and Political Rights: under the (First) Optional Protocol to the Covenant

Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment: under article 22 of the Convention

Convention on the Elimination of All Forms of Discrimination against Women: under the Optional Protocol to the Convention (entered into force in December 2000).

While there has been considerable discussion of a communications procedure for the International Covenant on Economic, Social and Cultural Rights, the adoption of such a procedure is still under discussion.

⁶ While categories (e) and (f) are not as such "findings" of the committees, it was thought appropriate to include them as national courts have referred to them on a number of occasions.

⁷ The *General comments* and *General recommendations* adopted by the various committees up until mid-2001 have been consolidated in UN Doc HRI/GEN/1/Rev 5 (2001).

- (d) the *results of an inquiry* conducted by the Committee against Torture (and, prospectively, by the CEDAW Committee);
- (e) the *reports* produced by individual States parties to the treaties and submitted to the United Nations for review by the committee; and
- (f) the discussions between the Committee and the representatives of States parties during the examination of periodic reports submitted by a State (normally documented in the summary records of the committees).

15. While the treaties themselves are often reasonably well-known, the other outputs of the committees and documents produced by States parties to the conventions are less well-known. Yet it is these documents that provide detailed content to the generally-worded provisions of the treaties (in the case of the *General comments* and *General recommendations*), show the relevance of the Convention's provisions to the situation in a particular country (the *Concluding comments* or *observations* adopted following a country's report), and provide a source of comparative information about how other States parties (and one's own) have gone about implementing the Convention. The views adopted in individual cases are of importance not only to the person and country involved in the particular case, but also contribute to an important body of developing jurisprudence relevant to other countries.

TABLE 1

Treaty	Supervisory committee (number of members)	Reporting procedure	Individual complaints procedure	Inquiry procedure	Power to adopt (general) comments or recommendations
International Covenant on Civil and Political Rights (1966) [ICCPR] • [First] Optional Protocol to the ICCPR 1966 • Second Optional Protocol to the ICCPR 1989	Human Rights Committee (18)	Yes	Yes	No	Yes
International Covenant on Economic, Social and Cultural Rights (1966) [ICESCR]	Committee on Economic, Social and Cultural Rights (18)	Yes	No	No	Yes
International Convention on the Elimination of All Forms of Racial Discrimination (1965) [ICERD]	Committee on the Elimination of Racial Discrimination (18)	Yes	Yes	No	Yes
Convention on the Elimination of All Forms of Discrimination against Women (1979) [CEDAW] Optional Protocol to the CEDAW Convention (1999)	Committee on the Elimination of Discrimination against Women (23)	Yes	Yes	Yes	Yes
Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984) [CAT]	Committee against Torture (10)	Yes	Yes	Yes	Yes
Convention on the Rights of the Child (1989) [CRC] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)	Committee on the Rights of the Child (10)	Yes	No	No	Yes

B. OVERVIEW OF THE UTILITY AND IMPACT OF THE OUTPUT OF THE TREATY BODIES FOR NATIONAL COURTS AND TRIBUNALS

16. The format and scope of the output of the treaty bodies have evolved considerably since the first of the committees (the CERD Committee) commenced its work in the early 1970s. Together with the increasing knowledge of the treaty standards themselves, this has meant that the reference to these materials by national courts and tribunals has increased significantly in recent years. National courts and tribunals have drawn predominantly on two sources of the practice of the treaty bodies: the decisions and views of the treaty bodies under individual complaints procedures (in particular those of the Human Rights Committee, which has produced the largest body of decisions and views), and the *General comments* or *General recommendations* of the committees. In recent years, though, greater use has been made of other types of output produced by or for the treaty bodies.

17. One of the difficulties in assessing the impact of treaty body output at the national level has always been the problem of collecting data. Recent studies, both general and focusing on specific countries,⁸ have sought to examine this impact more systematically, but we still lack comprehensive information about many aspects of the reception of human rights treaty standards into national systems. Even in relation to the citation of treaty provisions and other treaty body output by and before national courts and tribunals, there appears to be no wide-ranging study or comprehensive database maintained by the United Nations or other body. This interim report is a modest effort to identify a number of the cases in which such materials have been cited by national courts and tribunals, and the final report will contain many more examples of this use.

18. A related difficulty is assessing the extent to which international jurisprudence has had a significant influence on the outcome of a particular case. Even in those cases in which a court reaches a conclusion consistent with the treaty body's interpretation of a norm, treaty body materials will frequently be cited along with other international material (including regional human rights material, and comparative national case law).

19. A number of factors have influenced the extent to which national courts have used the output of the treaty bodies. These factors (familiar from other studies of the use of international standards by domestic courts more generally) include the knowledge of those materials by national courts and advocates, the ability of the materials to be applied in the resolution of a specific case before a tribunal, the normative standard being interpreted by the national court and the relationship of the international standard to the domestic one, the quality of the reasoning underlying the international source, the availability of international review of the national decision, the accessibility of the international materials to national courts and advocates, and the general attitude of the national courts to international law.

20. Assessments of the decisions and views adopted by the Human Rights Committee under the First Optional Protocol to the ICCPR (the most substantial body of case law under any of the UN human rights treaties to date), while welcoming the procedure and the development of a jurisprudence of the treaty through this route, have been mixed, especially as regards the broader impact of that case law. Opsahl comments on the views of the Human Rights Committee up to the early 1990s: "The views are not reasoned in great detail, but sufficiently to explain the Committee's understanding and application of the Covenant".⁹ The Committee on Economic, Social and Cultural Rights, in a paper advocating the adoption of a complaint procedure under the ICESCR, wrote in the early 1990s:¹⁰ ("[T]he vast majority of commentators who have assessed the work of the Human Rights Committee have acknowledged the enormous importance of the procedure [under the (First) Optional Protocol] in terms of its contribution to an enhanced understanding of the normative implications of many of the provisions contained in the Covenant").

21. However, Henry Steiner has written:

"The views written over two decades have created a considerable and important body of doctrine related to the ICCPR. But the doctrine is little reported or organised outside the Committee's internal

⁸ See the studies cited *supra* note 4.

⁹ Torkel Opsahl, "The Human Rights Committee", in Philip Alston (ed), *The United Nations and Human Rights* (Oxford: Clarendon Press, 1992) 369, at 427.

¹⁰ Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical Paper adopted by the Committee on Economic, Social and Cultural Rights at its seventh session, UN Doc A/CONF.157/PC/62/Add. 5 (26 March 1993) at para. 30

documents such as Annual Reports, and a handful of scholarly articles and books. Only occasionally do views figure in a discursive way in judicial opinions of state courts."¹¹

"Courts of states that are parties to the ICCPR sometimes refer to views of the Committee without expressing any sense of their particular status or relevance in resolving an issue, perhaps an issue that arises under domestic constitutional law."¹²

22. Writing in 1998, Makau wa Mutua expresses a similar view, arguing that, while a number of the decisions of the committee have been "encouraging, they are too few and far between for the two decades of the Committee's existence. Beyond such cases, the impact of views on national courts, other international fora, and the development of human rights jurisprudence in general is doubtful."¹³

23. The Committee against Torture has also begun to develop a solid body of jurisprudence under the article 22 individual complaints procedure, particular in relation to the obligation of non-refoulement contained in article 3 of the Torture Convention. This case law on article 3 (now encapsulated in the Committee's first *General comment*¹⁴) have increasingly been cited before national courts and tribunals in the immigration field. The CERD Committee has still heard relatively few cases under the individual complaint procedure established by article 14 of the Convention.

24. In relation to general comments and recommendations adopted by the treaty bodies, the Human Rights Committee has led the way, pioneering the use of its power to transmit to states "such general comments as it may consider appropriate" to develop a substantial jurisprudence of the ICCPR.¹⁵ The format, quality and utility of the general comments has varied, though the trend has been towards an increasing quality and sophistication in the Committee's comments. Other committees have followed this lead, with both the CESCR¹⁶ and the CEDAW Committee¹⁷ producing substantial bodies of jurisprudence in this form, with the CERD Committee also beginning to use its power to adopt general recommendation more expansively in this manner as well,¹⁸ as have the Committee against Torture and the Committee on the Rights of the Child in the one general comment each of the latter has adopted to date.¹⁹

25. In an assessment published in 1991, Dominic McGoldrick wrote of the early *General comments* of the Human Rights Committee:

"Some of these general comments have been of high quality and represent valuable indications of the content of the respective rights and the steps that States parties could or should undertake to ensure the implementation of those rights. Other general comments have been much less helpful."²⁰

¹¹ Henry J Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?" in Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty System* (Cambridge: Cambridge University Press, 2000) 15, at 38.

¹² *Id* at n 42

¹³ Makau wa Mutua, "Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement" (1998) 4 *Buffalo Human Rights Law Review* 211, at 236.

¹⁴ *General comment 1* (1996), UN Doc HRI/GEN/1/Rev 5, at 252

¹⁵ See generally Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991), at 89-96; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N P Engel, 1993), at 573-576.

¹⁶ See generally Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Clarendon Press, 1995), at 87-92.

¹⁷ See Mara Bustelo, "'The Committee on the Elimination of Discrimination against Women at the Crossroads'" in Crawford and Alston, *supra* note 4, 79, at 96-98.

¹⁸ See generally Michael Banton, "Decision-taking in the Committee on the Elimination of Racial Discrimination" in Crawford and Alston, *supra* note 4, 55.

¹⁹ Reproduced in UN Doc HRI/GEN/1/Rev 5, at 252 and 255 respectively.

²⁰ McGoldrick, *supra* note 15, at 94.

26. The 1990s have seen a considerable development in the scope and quality of the *General comments* which Makau wa Mutua describes as "more articulate, highly reasoned, and increasingly useful signposts for states and others seeking a better jurisprudence of the ICCPR".²¹ However, he argues for further development of the general comments, lest they "remain suspended in space in their current formulation, ignored by states, and only of interest to a small group of specialists."²²

27. The other documentation that emerges from the work of the treaty bodies - concluding comments or observations, summary records of discussions, and State reports themselves -- have tended to be less relevant before national courts, though concluding comments and observations in particular have been important outputs for those lobbying for change outside the courts. Nevertheless, those materials also are beginning to be cited to courts more frequently.

28. The aim of this interim report is to attempt to examine whether the development of the jurisprudence of the committees and the increasing knowledge of their work product has led to an increased and more substantive use of the committees' outputs at the national level than the rather limited use referred to by commentators quoted above. Even the limited survey of the available material undertaken in the preparation of this report indicates that the use of treaty body output by national courts and tribunals has become more widespread than some of the recent commentaries suggest. Nevertheless, the manner in which that material is used by national courts shows that a number of the reasons for the apparently limited impact on national judicial decision-making (such as the nature of the decisions or general comments, or the attitude of domestic courts) continue to be valid.

C. NATIONAL COURTS AND TRIBUNALS AND TREATY BODY OUTPUT

1. Reference to the status of general comments/recommendations and decisions of the committees and their value as an interpretive guide

29. An important issue is the status of the output of the treaty bodies in the eyes of national courts and tribunals. It is generally accepted as a matter of international law that the decisions of the Human Rights Committee and other committees under individual complaints procedures are not as such formally binding under international law in the same way as a judgment of the European Court of Human Rights or the Inter-American Court of Human Rights,²³ even though some of the treaty bodies have underlined that a State is not

²¹ Makau wa Mutua, *supra* note 13, at 231. A conference examining the impact of the work of the treaty bodies held in 1997 concluded that "National courts make little reference to the decisions of the Human Rights Committee, the Committee against Torture (CAT) or the Committee on the Elimination of Racial Discrimination." *Conference Outcomes: Discussion and Recommendations* in Bayefsky (ed), *supra* note 4, 315 at 326-327.

²² Makau wa Mutua, *supra* note 13, at 231.

²³ See, e.g., in relation to the views of the Human Rights Committee the statement by Kurt Herndl, himself a former member of the Committee:

"It remains disputed whether the 'views' of the HRC are legally binding in a formal sense It is certain, however, that [they] are an authoritative ascertainment of law, and that each state party is obligated, by general international law, and particularly the effect of the provisions of the ICCPR, to eliminate violations of the provisions."

Kurt Herndl, "Zur Frage des rechtlichen Status der Entscheidungen eines Staatengemeinschaftsorgans: Die 'Views' des Menschenrechtsausschusses" in Konrad Ginther et al (eds), *Völkerrecht zwischen normativen Anspruch und politischer Realität: Festschrift für Karl Zemanek zum 65. Geburtstag* (Berlin, 1994) 203, at 212 (translation by Yuji Iwasawa "The Domestic Impact of International Human Rights Standards: The Japanese Experience" in Crawford and Alston, *supra* note 4, at 258).

To similar effect is McGoldrick, *supra* note 15 at 151-152, para 4.39. This is not to overlook the discussions which have taken place in relation to the power asserted by the Human Rights Committee to determine whether reservations to the ICCPR are valid under international law, in particular in the context of the Optional Protocol procedure, and the statement which now appears regularly in the Committee's views under the Optional Protocol in the following terms:

free to disregard findings of the committees with which they may disagree simply because the findings may not as such be binding.²⁴ The same applies to the general comments and recommendations adopted by the treaty bodies, and their other interpretation and application of the treaties in relation to specific countries.²⁵

30. National courts have tended to adopt a similar view of the legal status of the output of the treaty bodies,²⁶ referring to the provisions of the treaties themselves and contrasting them with the different

"Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views." (from *Sooklal v Trinidad and Tobago*, Communication 928/200, views adopted on 25 October 2001, para 7)

Martin Scheinin, a current member of the Human Rights Committee, has described the legal nature of the views as follows:

"The absence of specific provisions on the legally binding nature of the findings by the pertinent expert body in other human rights treaties does not mean that such findings are merely 'recommendations'. The treaty obligations themselves are, naturally, legally binding, and the international expert body established by the treaty is the most authoritative interpreter of the treaty in question. Therefore, a finding of a violation by a UN human rights treaty body may be understood as an indication of the State party being under a legal obligation to remedy the situation." (Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2nd rev ed 2000), at 444.)

See also the similar views of a former member of the Human Rights Committee: Elizabeth Evatt, "Reflecting on the role of international communications in implementing human rights" (1999) 5(2) *Australian Journal of Human Rights* 20, www.worldlii.org/au/journals/AJHR/1999/20.html.

²⁴ For example, the Human Rights Committee commented in its *Concluding observations* on Australia (UN Doc A/55/40, para 520 (2000)):

"The Committee is concerned over the approach of the State party to the Committee's Views in Communication No. 560/1993 (A. v. Australia). Rejecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications."

The position of the Human Rights Committee as to interim measures of protection, requested under Rule 86 of the Rules of Procedure is also illustrative of the position. In *Piandiong et al v the Philippines* (Communication 869/1999) the Committee commented:

"5.4 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol."

"8. ... The Committee reiterates its conclusion that the State committed a grave breach of its obligations under the Protocol by putting the alleged victims to death before the Committee had concluded its consideration of the communication."

²⁵ See Caroline Dommen, "Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms" (1998) *Georgia International Environmental Law Review* 1, art 21 ("While the Committees' concluding observations on state reports are not legally binding, they indicate the opinion of expert bodies specifically entrusted by state parties themselves, with the capacity to make pronouncements on a state's human rights performance.")

provisions of the European and American Conventions, as well as other international treaties which lead to binding adjudications, and the works of commentators.²⁷ Even when the courts of a State party are reluctant to implement a finding by the Human Rights Committee within the framework of valid domestic law, for instance for constitutional reasons, the international obligation of the State party to remedy the violation remains binding, as well as the general obligation to amend domestic laws that result in violations of treaty obligations.

31. The fact that committee decisions under an individual complaint procedure are not formally binding does not mean that as a practical matter they do not have considerable persuasive force on decision-makers in domestic legal systems. Even though national courts do not view the output of the treaty bodies as binding on the State under international law, they have been prepared to accept (rhetorically at any rate) that the product -- in particular the case law and the general comments/recommendations -- can be of value to them in interpreting both the treaty provisions and domestic law. In many cases the sources are simply referred to without any discussion of their particular status or relevance -- sometimes along with many other sources (including treaties to which the State may not even be a party) -- in court judgments.

32. For example, national courts have described the *General comments* and *Views* of the Human Rights Committee as a "major source for interpretation of the ICCPR",²⁸ and its decisions as being "persuasive",²⁹ or "of considerable persuasive authority"³⁰, or of direct relevance" to issues of discrimination.³¹ The *General comments* and recommendations of the Committee on Economic, Social and Cultural Rights have been described as "of importance for the interpretation and jurisprudential development [of the Covenant] though they are not directly binding".³² The *General comments* and similar outputs have been described as "essential points of reference for the interpretation of national constitutions and legislation and the development of the

²⁶ See, e.g., *Kavanagh v Governor of Mountjoy Prison* [2001] IEHC 77, para 12 (High Court of Ireland) ("The views of the Committee do not constitute a legally binding decision", citing McGoldrick, *supra* note 15, at 151). After noting that the decisions of the Human Rights Committee under the Optional Protocol were not formally binding, the court refused the applicant leave to apply for judicial review of his earlier trial and conviction -- held to have been in violation of the ICCPR by the Human Rights Committee -- on the ground that such a decision had no effect under Irish law (para 23):

"I am not satisfied that the views of the Committee can be said to be a judicial determination, the expression of views have the moral authority of the Committee but nothing more than that. The Committee is not a Court under the Constitution and without a constitutional amendment cannot affect the administration of justice in the Court established under the Constitution [art 34.1]"

See also *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529, at 573 (Full Court of the Federal Court of Australia, Einfeld J) ("Whereas a determination by the European Court imposes an obligation upon each State party recognising the court's jurisdiction to conform with that ruling, the HR Committee's report is not binding on an acceding state party")

²⁷ *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, at 134-136 (New Zealand Court of Appeal, per Keith J)

²⁸ *Maria v McElroy*, 68 F Supp 2d 206, 232 (EDNY 1999) ("The Human Rights Committee's General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR." (referring to *Aumeerudy-Cziffra v Mauritius*).

²⁹ *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 461 (New Zealand Court of Appeal, Smellie J) ("I agree also that the United Nations Human Rights Committee cases are persuasive")

³⁰ *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 405 (New Zealand Court of Appeal, Eichelbaum CJ) ("a decision of the HRC must be of considerable persuasive authority")

³¹ *Quilter v Attorney General* [1998] 1 NZLR 523, at 577 (New Zealand Court of Appeal, Tipping J: "Thus, while in no way binding, the committee's approach to the concept of discrimination is of direct relevance to New Zealand jurisprudence on the subject.")

³² *A and B v Regierungsrat des Kantons Zürich*, Judgment of 22 September 2000, § 2(g), Swiss Federal Supreme Court (*Bundesgerichtshof*) ("Diese Stellungnahmen sind zwar für die Auslegung unter Rechtsentwicklung von Bedeutung, können aber keine direkte Verbindlichkeit beanspruchen").

common law".³³ However, other courts have not been so enthusiastic in their endorsement of an elevated status for these sources.³⁴

33. There has been little exploration of the juridical basis for such a status (for example, whether the acceptance by States parties of most of the interpretative work of the committees amounts to subsequent practice in the interpretation of the treaty); rather the status is seen as deriving from the nature of each committee as the expert body constituted by the States parties to monitor the implementation of the treaty and to receive complaints under them, as well as deriving from the expertise and reputation of individual members, and the increasing legitimacy that the committees have gained as a result of their work over the years.³⁵

34. The Privy Council, hearing an appeal from New Zealand on the issue of whether the Human Rights Committee was a "judicial authority" for the purposes of the availability of legal aid for a communication to the Committee, commented:³⁶

"It is true that its views are not binding on the state party concerned, which is free to criticise them and may refuse to implement them. Nevertheless, as Professor Tomuschat has observed,³⁷ 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 Human Rights Committee acquire authority from the standing of its members and their judicial qualities of impartiality, objectivity and restraint. Moreover, there is much force in the provisional view of Thomas J that its functions are adjudicative. As he pointed out, when it reaches a final view that a state party is in breach of its obligations under the covenant, it makes a definitive and final ruling which is determinative of an issue that has been referred to it."³⁸

2. Influence of the availability of international complaint procedure

35. Courts in a number of countries have noted that, even though the interpretation by a treaty body may not formally bind the State party under international law or form part of domestic law, the possibility of scrutiny of the State party may in practice have an impact on the way in which the national courts interpret and develop domestic law. In particular, where a country is subject to an individual complaint procedure, this is likely to influence the way in which the courts interpret and develop national law -- towards compliance with the relevant treaty obligation if that can be done within the existing constitutional and legislative framework. For example, the High Court of Australia has commented:³⁹

³³ *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, at 235 (High Court of New Zealand, Cartwright J), quoting the Bloemfontein Statement 1993, para 8.

³⁴ See, e.g., Judgment of 27 March 1998, Kyoto District Court, 45 SHOMU GEPPU 1259 (stating that "'views' and the like [*General comments*] of the HRC do not legally bind Japanese courts . . . [they] are at most only taken into account as opinions on the level of facts'); Judgment of 15 October 1999, Osaka High Court, 1718 HANREI JHO 30 (stating that "[general] comments of the Human Rights Committee do not legally bind the interpretation of the ICCPR and the ICESCR by Japanese courts").

³⁵ See, e.g., *Kavanagh v Governor of Mountjoy Prison* [2001] IEHC 77, para 23 (High Court of Ireland, Finnegan J) ("I am not satisfied that the views of the Committee can be said to be a judicial determination, the expression of views have the moral authority of the Committee but nothing more than that.")

³⁶ *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, at 21 (Privy Council)

³⁷ The reference is to Christian Tomuschat, "Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications" (1980) 1 *Human Rights Law Journal* 249, at 255.

³⁸ See also the judgment of Judge Robert (dissenting as to the result) in *Gosselin v Quebec*, Quebec Court of Appeal, 23 April 1999 at 223

"Notons que si les conclusions et recommandations du Comité n'ont pas de caractère contraignant, elles n'en reflètent pas moins l'opinion du seul organ d'experts chargé de faire des déclarations de cette nature."

³⁹ *Mabo v Queensland* (1992) 175 CLR 1 at 42, 107 ALR 1 at 29 (High Court of Australia, per Brennan J; Mason CJ and McHugh J concurring) (citations omitted). See also *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, at 691 (New Zealand Court of Appeal, Casey J):

"The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."⁴⁰

3. Cases in which a person sought to have a decision of a treaty body given effect within the national legal system

36. However, accepting that international jurisprudence is "authoritative", "persuasive" or merely highly relevant does not mean that it will necessarily be applied by a domestic court if the international norm and procedure has not been directly incorporated into the domestic legal system.⁴¹ This problem is illustrated graphically by the case of *Kavanagh v Governor of Mountjoy Prison*, an Irish case which was instituted following a complaint Kavanagh submitted to the Human Rights Committee under the First Optional Protocol that his trial and conviction by a Special Court had involved a violation of articles 14 and 26 of the ICCPR. The Human Rights Committee held that there had been a violation of the ICCPR and called on the State party to provide an effective and enforceable remedy.⁴² The High Court of Ireland dismissed the case on a number of grounds, including the grounds that the decision of the Committee was not a binding decision and that in any event the ICCPR did not provide Kavanagh with an individual enforceable right under domestic law.

37. In Finland, where the ICCPR has been incorporated into domestic law, two findings by the Human Rights Committee of violations of article 9 of the ICCPR led to a series of proceedings on the duty of the State to pay compensation to the individual victim. After the case *Vuolanne v Finland* had been concluded by a finding of a violation, Mr Antti Vuolanne sought compensation from the State through the ordinary courts. His claim was denied by the court of first instance but accepted by the Helsinki Court of Appeal.⁴³ The State sought leave to appeal to the Supreme Court. Meanwhile, Mr Mario Ines Torres, the victim in *Torres v Finland* sought compensation through a separate procedure for administrative disputes and his claim was ultimately accepted by the final instance, the Supreme Administrative Court.⁴⁴ In an appeal brought by the State, the Supreme Court quashed the Appeal Court ruling in the *Vuolanne* case on the grounds that the procedure for administrative disputes was the correct one.⁴⁵ Finally, Mr Vuolanne was also successful in his new claim

"By its accession to the First Optional Protocol to the Covenant on 26 August 1989, New Zealand accepted individual access by its citizens to the United Nations Human Rights Committee for violation of rights under the Covenant, where they have been unable to obtain a domestic remedy. The Act reflects Covenant rights, and it would be a strange thing if Parliament, which passed it one year later, must be taken as contemplating that New Zealand citizens could go to the United Nations Committee in New York for appropriate redress, but could not obtain it from our own Courts."

Similar comments were made in *Tavita v Minister for Immigration* [1994] 2 NZLR 257, at 266 (New Zealand Court of Appeal, Cooke P) and *Quilter v Attorney General* [1998] 1 NZLR 523, at 577 (Tipping J).

⁴⁰ The importance of the procedure to which a state is subject is made clear by the fact that references in domestic case law to the UN instruments by States parties to the European Convention are far fewer than to the European Convention itself, under which the States can be taken to Strasbourg by aggrieved individuals.

⁴¹ See, e.g. Colombia, which by the enactment of Law 288 of 5 July 1996, (http://www.mindefensa.gov.co/politica/legislacion/normas/1996_288_ley_con.rtf) enabled the enforcement of awards of compensation made by international bodies such as the Human Rights Committee to be enforced in domestic law.

⁴² *Kavanagh v Ireland*, Human Rights Committee, Communication No 819/1998, views adopted on 4 April 2001, UN Doc CCPR/C/71/D/819/1998, at para 13.

⁴³ 9 October 1991, No 1475

⁴⁴ KHO 1991 A 47 on the procedural issue and KHO 1993 A 25 as the final judgment on compensation of 20,000 FIM plus 3,000 FIM in legal costs

⁴⁵ KKO 1993:3

instituted under the procedure for administrative disputes and was granted compensation by the Supreme Administrative Court.⁴⁶

38. The Judicial Committee of the Privy Council has considered the views and decisions of the Human Rights Committee in a number of cases. Most of these cases have involved challenges to the imposition of the death penalty in Commonwealth Caribbean countries. As the ultimate appellate court from a number of Caribbean jurisdictions, the Privy Council has been part of the national judicial system challenged by communications brought before the Human Rights Committee, and has also had the opportunity to express its views on the appropriate response to decisions of the Human Rights Committee in which violations of the ICCPR have been found, as well as the obligations that arise under domestic law as a result of the acceptance of international complaint procedures.

39. In *Pratt v Attorney General for Jamaica*⁴⁷ the Privy Council considered the views of the Committee in *Pratt and Morgan v Jamaica*⁴⁸ (the case itself had not come to the Privy Council before it went before the Human Rights Committee). Following the Human Rights Committee's conclusion that the delay involved in the carrying out of the death sentence had violated the appellants' rights under article 14(3)(d) of the ICCPR, the Privy Council laid down guidelines for ascertaining when a delay in the carrying out of a capital sentence would amount to cruel, inhuman or degrading treatment or punishment under the Constitution of Jamaica. In so doing, it took into account the need to make allowance for a case to be heard by the HRC, for which it estimated that 18 months would be sufficient time.⁴⁹

40. In *Lewis and others v Attorney General of Jamaica*⁵⁰ the Privy Council considered a case involving appeals by a number of persons who had successfully brought claims to the Human Rights Committee and subsequently lodged complaints with the Inter-American Commission of Human Rights. The Judicial Committee departed from its earlier case law and held that, where a person who had been condemned to death had lodged a complaint with an international human rights body complaining about his trial and sentencing, the Jamaican authorities were obliged to wait until the decision of the international body had been given, and were required to take this decision into account in considering any petition for clemency or commutation.⁵¹

4. Interpreting national bills of rights which are based on, derived from, or intended to implement the ICCPR

41. National courts have also recognised the relevance of the output of the committees in the interpretation of national constitutions or bills of rights, especially where those bills were intended to implement one of the human rights treaties,⁵² or are a domestic reenactment of them.⁵³

⁴⁶ KHO 16 April 1996, No 1069, upholding an earlier decision by the Uusimaa Administrative Court, 7 March 1995, No 360/2, granting 8,000 FIM as compensation and 4,000 FIM as legal costs

⁴⁷ [1994] 2 AC 1

⁴⁸ *Pratt and Morgan v Jamaica*, Human Rights Committee, Communication Nos. 210/1986 and 225/1987, views of 6 April 1989

⁴⁹ [1994] 2 AC at 35

⁵⁰ [2000] UKPC 35, [2000] 3 WLR 1785, (2000) 9 BHRC 121

⁵¹ [2000] UKPC 35, at paras 64 and 86; [2000] 3 WLR at 1806 and 1811

⁵² See, e.g., *R v Goodwin (No 2)* [1993] 2 NZLR 390 (New Zealand Court of Appeal):

"Whether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority."

⁵³ This is particularly so in relation to Hong Kong, where the introduction of a Bill of Rights in 1991 involved the enactment of an ordinary statute which reproduced provisions of the ICCPR, together with a direct incorporation of the ICCPR as applied to Hong Kong at a constitutional level (before 1997 in the Imperial Letters Patent and after 1997 in the Basic Law of the Hong Kong Special Administrative Region). See generally Johannes Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence" (1998) 47 *International and Comparative Law Quarterly* 928 and Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights" in Philip

42. For example, a number of decisions of Canadian, New Zealand and Hong Kong courts -- three jurisdictions which adopted bills of rights intended to implement the ICCPR in (1982, 1990 and 1991 respectively) have unsurprisingly seen the international jurisprudence and practice relating to the ICCPR as of special significance in the interpretation of the human rights guarantees.

43. In the first appellate court decision under the Hong Kong Bill of Rights Ordinance 1991 (which was effectively a direct enactment into domestic law of the ICCPR as applied to Hong Kong), the Court of Appeal commented:⁵⁴

"In interpreting the Bill of Rights Ordinance considerable assistance can be gained from the decisions of common law jurisdictions with a constitutionally entrenched Bill of Rights (in particular Canada and the United States), from the general comments and decisions of the Human Rights Committee under the ICCPR and the Optional Protocol to the ICCPR, and from the jurisprudence under the European Convention on Human Rights. While none of these are binding, in so far as they reflect the interpretation of articles in the ICCPR and are directly related to Hong Kong legislation, these sources are of the greatest assistance and should be given considerable weight."

44. In other countries as well there has been increasing recognition not only of decisions but also of the *General comments* as an important source of interpretative guidance.⁵⁵ For example, the Japanese courts have on a number of occasions recognised the relevance of the *general comments* of the Human Rights Committee to the interpretation of the ICCPR under domestic law.⁵⁶ Iwasawa cites the views expressed in 1994 by the Osaka High Court:⁵⁷

"General comments' and 'views' [of the Human Rights Committee] should be relied on as supplementary means of interpretation of the ICCPR. Furthermore, contents of an international convention of a similar kind such as the European Convention on Human Rights and jurisprudence under it can also be treated as supplementary means of interpretation of the ICCPR."

45. The trend is not confined to States in which a treaty has been directly incorporated into domestic law. Courts in a number of countries have taken the view that the international jurisprudence under the United Nations human rights treaties is a relevant interpretive source for the interpretation of constitutional provisions and also statutes. This reflects, among other things, the generally accepted principle that, since a State should not be assumed to be acting in a manner inconsistent with its international obligations, national law should, where possible, be interpreted in a manner which is in conformity with the State's obligations under customary international and treaty law. For example, in construing the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada has referred to international human rights norms, including those by which Canada was not bound and instruments adopted both before and after the adoption of the Charter.⁵⁸ Similarly, the Supreme Court of India has held on various occasions that, although treaties do not automatically become part of domestic law under the Indian Constitution upon ratification, international conventions ratified by the State are relevant to constitutional interpretation.⁵⁹

Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Clarendon Press, 1999) 318.

⁵⁴ *R v Sin Yau-ming* (1991) 1 HKPLR 88, at 107, [1992] 1 HKCLR 127, at 141. See also the opinion of the Privy Council on appeal from the Hong Kong Court of Appeal in *Fok Lai Ying v Governor in Council and others* (1997) 7 HKPLR 327 (Privy Council).

⁵⁵ *Maria v McElroy*, 68 F Supp 2d 206, 232 (ED NY 1999) ("The Human Rights Committee's General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR") (referring to *Aumeerudy-Cziffra v Mauritius*).

⁵⁶ See Iwasawa, *supra* note 23, at 257-265.

⁵⁷ *Id* at 259.

⁵⁸ See generally Anne F Bayefsky, *International Human Rights Law: Its Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992)

⁵⁹ In *Vishaka v State of Rajasthan*, AIR 1997 SC 3011, at 3015, (1998) 3 BHRC 261 the court addressed the relevance of these international sources to the interpretation of the constitutional guarantees as follows: "The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse ... The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial

46. In recent years a number of Commonwealth courts (especially those in Southern Africa), as well as the courts of other countries,⁶⁰ have energetically embraced international jurisprudence in the interpretation of national constitutional guarantees, including treaties to which the State concerned is not a party as well as those by which it is bound.⁶¹ Other courts or individual judges of them have expressed similar views,⁶² or simply looked to international sources.⁶³

47. This preparedness to look to international guarantees has been accompanied by a willingness to look at interpretative materials produced by international monitoring bodies. In this respect the sources which have been most frequently considered by many national courts are the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights, which comprises the most extensive body of international human rights case law available. This is true not only of the courts of States which are parties to the European Convention on Human Rights -- in which there appear to be only sparse references to the United Nations materials⁶⁴ -- but also in many other countries which are not parties to that Convention. The range and number of cases that have come before the Strasbourg organs and the fact that the issues arise to be decided in a concrete case make it likely that this body of jurisprudence will continue to be drawn on extensively by national courts, even as the United Nations jurisprudence becomes more abundant.

D. Cases in which there has been a reference by national courts and tribunals to the work of the treaty bodies

48. As mentioned above, although there have been references to the work of all the treaty committees by national courts, the majority of them appear to have been to the work of the Human Rights Committee. The

construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.”

⁶⁰ See, e.g. recent decisions of the Supreme Court of Israel which have referred to a number of United Nations human rights treaties to which Israel is party: *Ka'adan v The Israel Lands Administration*, H CJ 6698/95, PD 57, 573, at paras 24 and 30 (references to the ICCPR and the Racial Discrimination Convention in the context of the principles of equality and non-discrimination); *Stemka v The Minister of Interior Affairs*, H CJ 3648/97 PD 43(2), 730, at paras 58 and 73 (references to the ICESCR and the ICCPR in the context of family rights and protection of the family); and *Rabbi Ido Elba v The State of Israel*, H CJ 2831/95, PD 50 (5), 221, at para 10 (reference to Israel's accession to the Racial Discrimination Convention in the context of discussing criminal prohibitions on incitement to racism).

⁶¹ See, e.g. *Attorney-General of Botswana v Unity Dow* [1991] LRC (Const) 574 (High Court of Botswana); [1992] LRC (Const) 623 (Court of Appeal of Botswana); *State v Ncube*, 1990 (4) SA 151 (Supreme Court of Zimbabwe); *In re Corporal Punishment*, 1991 (3) SA 76 (Namibian Supreme Court); *Rattigan v Chief Immigration Officer of Zimbabwe* (1994) 103 ILR 224, [1994] 1 LRC 343, 1995(2) SA 182 (Supreme Court of Zimbabwe). See generally John Dugard, “The Role of Treaty-Based Human Rights Standards in Domestic Law: The Southern African Experience”, in Alston and Crawford, *supra* note 4, 269.

⁶² See, e.g. *Matadeen v Pointu* [1999] AC 98 (Judicial Committee of the Privy Council on appeal from the Supreme Court of Mauritius); Kirby J in *Kartinyeri v Commonwealth* (1998) 152 ALR 540, at 598 (HCA), who comments: “[W]here the Constitution is ambiguous, this court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than interpretation that would involve a departure from such rights”, citing Cooke P in *Tavita v Minister of Immigration* [1994] 2 NZLR 257, at 266 (New Zealand Court of Appeal) (who refers to the “duty of the judiciary to interpret and apply national constitutions in the light of the universality of human rights”).

⁶³ See, e.g., *Athukorale v Attorney General of Sri Lanka* (1997) 2 BHRC 610 (Supreme Court of Sri Lanka).

⁶⁴ See, e.g., Agnès Hurwitz, “Report on the Domestic Impact of Findings of the UN Human Rights Treaty Bodies in Belgium”, background note prepared for the Committee, September 2001. Hurwitz notes that “[w]hile the UN human rights treaties are frequently invoked before Belgian courts, there is little if no reference to the work of the treaty bodies before the three main highest courts [the *Cour de cassation*, the *Conseil d'Etat*, and the *Cour d'arbitrage*]”. *Id.* at 1. She refers to one case before the *Conseil d'Etat* in which the court referred to the “report presented by the Committee on the Rights of the Child and to the fact that the Committee had not indicated that the Belgian legislation would lead to the violation of the Convention on the question at stake [Conseil d'Etat (IV ch), 10 July 1990, *Sluys*, No. 35442, *R.A.C.E.*] *Id.* at 2.

following sections provide a number of examples of how national courts have used the output of the various treaty bodies.

1. Case law of the committees under the individual communications procedures⁶⁵

a. *Human Rights Committee*

49. National courts have frequently cited decisions and views of the Human Rights Committee under the Optional Protocol when they are interpreting constitutional guarantees of human rights, national legislation, or treaty provisions which form part of domestic law. Those references have frequently been accompanied by references to European Convention jurisprudence, as well as to other international and national case law. In many of the cases the national court has adopted an interpretation of the relevant treaty or construed a constitutional provision in a manner that is consistent with the treaty, especially where the treaty body interpretation accords with other international and national jurisprudence. In other cases, however, courts have declined to follow the views of a treaty body, or the views of the treaty body turn out not to be the determinative of the critical issue under domestic law.

50. The following are examples of references by national courts to views of the Human Rights Committee under the First Optional Protocol:

- *Quilter v Attorney-General* [1998] 1 NZLR 523 (New Zealand Court of Appeal): This case includes one of the more extensive national judicial discussions of treaty body materials. The case involved a challenge to provisions of the Marriage Act by two women who wished obtain a licence to marry. They argued that the guarantee of equality and non-discrimination in the New Zealand Bill of Rights overrode the restriction of the right to marry under the Marriage Act to different-sex couples. Among the issues which was considered by various members of the Court was whether this exclusion amounted to "discrimination" under article 26 of the ICCPR (which was held to be of significance for the interpretation of the New Zealand Bill of Rights, since the latter had been enacted to fulfil New Zealand's obligation under the ICCPR in part). A majority of the Court held that the exclusion was not a violation of article 26 of the ICCPR (or, indeed of article 23). A number of the judges in both the majority and the minority referred in detail to the Human Rights Committee's *General comment 18* (37) and to the case law on article 26 to support their (conflicting) conclusions.⁶⁶
- *Rattigan and Others v The Chief Immigration Officer and Others*, 1995 (1) BCLR 1, 1994 SACLR LEXIS 255 (Supreme Court of Zimbabwe): The court referred to *Aumeeruddy-Cziffra v Mauritius*, European Convention authorities and comparative constitutional case law in support of its conclusion that the constitutional guarantee of right to privacy was infringed by differential treatment of alien husband of citizen wife compared with the treatment of the alien wife of a citizen husband as regards granting of residence permits.
- *Matia v Uganda*, High Court of Uganda, 30 June 1999 (summary at www.interights.org): The court held that in "assessing what degree of delay justifies a stay of prosecution the court may consider judgments from other common law jurisdictions and international tribunals with jurisdiction over treaties or conventions to which Uganda has acceded" (referring to *Lubuto v Zambia*).
- *Matadeen v Pointu* [1999] 1 AC 98 (Judicial Committee of the Privy Council on appeal from the Supreme Court of Mauritius): The court referred to article 26 of the ICCPR and case law under that article (*Zwaan-de Vries v Netherlands*), as a general freestanding guarantee of equality, but rejecting the argument that section 16 of the Constitution of Mauritius should be interpreted as embodying such a guarantee in the light of the ICCPR, since the Covenant right could be guaranteed in other ways (such as legislation).⁶⁷

⁶⁵ A list of the cases mentioned in the following section, together with references, appears in an Annex at the end of this report.

⁶⁶ [1998] 1 NZLR 523 at 562-563, 564 (Keith J, who refers to *General comment 18* and case law under article 26, and at 564 distinguishes the holding in *Toonen* that "sex" included "sexual orientation"), at 576-77 (Tipping J, who refers to *General comment 18*), and at 550-552 (Thomas J, dissenting on the issue of whether there is discrimination within the meaning of article 26 of the ICCPR (and the New Zealand Bill of Rights), who cites more than a dozen cases relating to article 26, including *Toonen*, *Broeks*, and *Zwaan de Vries*, and undertakes a detailed discussion of article 26 and *General comment 18*, at 550-552). Thomas J also refers to CEDAW's *General recommendation 21* (at 553).

⁶⁷ [1999] 1 AC at 114-116

- *Länsman and Others v The Government Forest Agency*, KKO 1995:117 (Supreme Court of Finland): Four reindeer herders who were members of the indigenous Sami people, instituted a lawsuit in order to prevent logging within areas formally recognised as government property but traditionally used by the Sami for reindeer herding. Throughout the proceedings they referred to a number of cases decided by the Human Rights Committee in order to base their claim on article 27 of the ICCPR, including *Ominayak v Canada*, *Kitok v Sweden*, and *I Länsman et al v Finland*. The court of first instance referred to the *Ominayak* and *Kitok* cases in its reasoning and all three domestic court instances found that article 27 of the ICCPR provided legal standing for the plaintiffs. However, the case was dismissed on the merits on the ground that the hardship caused by logging to reindeer herding did not amount to "a denial" of the authors' right to enjoy their culture. Later, the Human Rights Committee (to which the Sami took their case), found no violation of article 27, partly basing itself on the fact that "the domestic courts considered specifically whether the proposed activities constituted a violation of article 27 rights" (*J Länsman et al v Finland*, Communication 671/1995, para 10.5).
- *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1998 (12) BCLR 1517 (South African Constitutional Court): The court referred to the decision of the Human Rights Committee in *Toonen v Australia*, as part of a survey of international and national jurisprudence on the criminalisation of certain homosexual conduct.⁶⁸
- *S v Makwanyane and Another*, 1995 (6) BCLR 665 (CC); 1995 SACLX LEXIS 218 (South African Constitutional Court): The court considered whether the imposition of the death penalty amounted to cruel, inhuman or degrading punishment and referred in its discussion to a number of Human Rights Committee decisions in support of its conclusions (*Kindler v Canada* and *Ng v Canada*), concluding that:

"Despite these differences of opinion, what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning.

(The Court also cited *Cox v Canada* and *Ng v Canada* in relation to the use of *travaux préparatoires* in interpreting a treaty.)
- *Muller v President of the Republic of Namibia and another* [2000] 1 LRC 654, 2000 (6) BCLR 671 (Supreme Court of Namibia): The court held that differential treatment of men and women in relation to changing one's surname was not a violation of the guarantee of equality under the Constitution of Namibia, and referred to the individual dissenting opinion of Mr Nisuke Ando in *Coeriel and Aurik v Netherlands* (although the court did not refer to the fact that it was citing a dissenting opinion).
- Judgment of 28 October 1994, Osaka High Court: The court referred to *General comments 15, 18 and 20* of the Human Rights Committee and decisions under the Optional Protocol (*Gueye v France*, *Aumeeruddy-Cziffra v Mauritius*), but concluded that mandatory fingerprinting of resident aliens in Japan did not violate articles 7 or 26 of the ICCPR.⁶⁹
- Judgment of 22 November 1996, Tokyo District Court (referring to *Gueye v France*, Communication 196/1985, views of 3 April 1989, in deciding an unsuccessful challenge to laws concerning compensation for injuries suffered during the second world war on the ground that they discriminated against aliens who had served in the Japanese forces)⁷⁰
- Judgment of 31 July 1998, Tokyo District Court, 1657 HANREI JIHO 43 (admitting that views of the Human Rights Committee may be taken into consideration as supplementary means of interpretation, and analyzing in detail *Gueye v France* in interpreting Article 26 of the ICCPR and concluding that *Gueye* was not relevant to the present case)
- *Promoting Entrepreneurship and Publishing Ltd v the National Broadcast Authority*, HCJ 606/93, P D 48 (2), 1 (Supreme Court of Israel): In a case involving freedom of expression and freedom of occupation, Judge Dorner (at para 8) refers to the interpretation of the freedom of expression in article 19 of the ICCPR as set out in the Human Rights Committee's decision in *McIntyre et al v Canada*.

⁶⁸ 1998 (12) BCLR 1517 at 1577

⁶⁹ Summarised in Iwasawa, *supra* note 23, at 260-261; extracts in (1995) 38 *Japanese Annual of International Law* 118, at 129-131

⁷⁰ Summarised in Iwasawa, *supra* note 23, at 264-265. Iwasawa refers to a number of other cases on the same issue in which reference was made to international materials.

- *B v Caisse compensation AVS commerce de gros et Commerce de transit*, Judgment of 20 November 1995, Swiss Federal Supreme Court (*Bundesgerichtshof*), BGE 121 V 229: In this case the court referred to Human Rights Committee decisions in *Zwaan de Vries v Netherlands* and *Pauger v Austria*, in a case in which a 62-year old man challenged the different ages for eligibility for old age pensions for men and women on the ground of discrimination under the ICESCR and ICCPR;⁷¹ the claim was unsuccessful in view of Switzerland's reservation to article 26 of the ICCPR in relation to this matter.
- *B v Regierungsrat des Kantons Luzern*, Judgment of 15 November 1996, Swiss Federal Supreme Court (*Bundesgerichtshof*), BGE 122 II 433: The court referred to the Human Rights Committee decision in *Hammel v Madagascar* in relation to the issue of whether it was consistent with article 12 of the ICCPR -- in particular whether the phrase his "own country" in article 12 could apply to aliens -- and other guarantees to expel a second generation alien from Switzerland on account of his criminal offences.⁷²
- *Grüne Bewegung Uri gegen Landrat des Kantons Uri*, Judgment of 7 October 1998, Swiss Federal Supreme Court (*Bundesgerichtshof*), BGE 125 I 21, at 34-35: In a challenge to a cantonal initiative to ensure that the level of representation of women in elected and appointed public bodies by setting a target of equal representation and setting a quota of one third membership of each sex on all such bodies, the court held the initiative in part invalid. In its judgment the Court considered articles 25 and 26 of the ICCPR and the Human Rights Committee's *General comments 4* and *18*, as well as the case of *Stalla Costa v Uruguay*, and accepted that positive measures were in certain circumstances compatible with the guarantees of non-discrimination in the ICCPR; the court also referred to the CEDAW Convention and CEDAW's *General recommendation 7 (1988)* to support this conclusion.⁷³
- *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (New Zealand Court of Appeal): In this case a majority of the New Zealand Court of Appeal held that the absence of an explicit remedies provision in the New Zealand Bill of Rights Act did not mean that remedies were not available against the State. Two members of the Court specifically referred to Human Rights Committee case law on the granting of remedies,⁷⁴ with one member of the court referring to the "strong lead" taken by the Committee in this regard.⁷⁵
- *Manga v Attorney-General (No 2)* (1999) 17 CRNZ 18, [1999] NZAR 506 (New Zealand High Court): The Court upheld a claim by a prisoner who had been detained longer than was provided for by New Zealand law that this constituted a violation of his right not to be arbitrarily detained. In so doing, it drew on case law of the Human Rights Committee⁷⁶ that "all unlawful detentions are arbitrary; and lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality."⁷⁷
- *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at 405 (New Zealand Court of Appeal): In this case, involving the question of the availability of legal aid for appeal or review proceedings in criminal matters and the criteria that were to be applied in determining whether a person was eligible for legal aid, members of the Court made extensive reference to Human Rights Committee case law interpreting article 14(3)(d) of the ICCPR.
- *R v Goodwin (No 2)* [1993] 2 NZLR 390 (New Zealand Court of Appeal): The case involved detention for questioning on suspicion of the commission of a crime (unlawful under New Zealand law), and the Court held that the defendant had been "arbitrarily" detained (referring to the views of the Human Rights Committee in *Van Alphen v The Netherlands*, at para 5.8 that to avoid arbitrariness a remand in custody must not only be lawful but reasonable and necessary in all the circumstances).

⁷¹ BGE 121 V 229, at 233-234

⁷² BGE 122 II 433, at 443-444

⁷³ BGE 125 I 21, at 34-35

⁷⁴ [1994] 3 NZLR 667, at 676 (Cooke P) (referring to *Luyeye Magana ex-Philibert v Zaire*) and at 699-700 (Hardie Boys J) (referring to *Mbenge v Zaire*, *Acosta v Uruguay*, and *Valenzuela v Peru*)

⁷⁵ [1994] 3 NZLR at 699 (Hardie Boys J)

⁷⁶ *Van Alphen v Netherlands*, para 5.8; *Mukong v Cameroon*, para 9.8; *A v Australia*, para 9.2; *Bolaños v Ecuador*, para 9.

⁷⁷ (1999) 17 CRNZ at 24

- *Abu v Superintendent Mt Eden Women's Prison and Anor* [2000] NZAR 260 (High Court of New Zealand): In holding that detention beyond a reasonable time would be arbitrary within the meaning of article 9 of the ICCPR and the corresponding provision of the New Zealand Bill of Rights, the court referred to *A v Australia*; however it concluded that the limit had not been exceeded in the present case.
- Judgment of 18 April 1995, Supreme Court of the Netherlands, NJ 1995, 611: The court held that the fact that only Jehovah's witnesses are automatically exempted from the duty to perform both military service and alternative service is not incompatible with article 26 of the ICCPR. The court referred extensively to the views of the Human Rights Committee (referred to by the court as the Human Rights Commission) in *Brinkhof v Netherlands*, and to the Committee's *General Comment 22* on article 18 of the ICCPR.
- *United States v Duarte-Acero*, 208 F 3d 1282 (11th Cir 2000): In considering whether article 14(7) of the ICCPR was restricted to protection against double jeopardy in the same State, the United States Court of Appeals for the Eleventh Circuit considered a range of materials, including the Human Rights Committee decision in *A P v Italy*, Communication 204/1986, decision on admissibility of 2 November 1987 (which it followed, it being in accord with other indications of meaning).⁷⁸
- *Knight v Florida*, 528 US 990, 120 SCt 459 (United States Supreme Court 1999): Breyer J, dissenting from a denial of certiorari in a case challenging the length of time a prisoner had been on death row as "cruel and unusual punishment", referred to comparative jurisprudence, including decisions of the Privy Council in *Pratt v Attorney General for Jamaica* and of the Human Rights Committee in *Barrett v Jamaica*, Communications 270 and 271/1998, views of 30 March 1992.⁷⁹
- *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] EWCA Civ 1512, [2001] 4 All ER 961 (EWCA): In an unsuccessful challenge to a policy of detaining asylum-seekers whose claims were expected to be processed within a very short time, the court referred to *A v Australia*, in which the Human Rights Committee had held Australia in violation of the ICCPR for prolonged detention of certain asylum-seekers. The court upheld the policy on the grounds that it would not involve prolonged detention.
- *Higgs and Mitchell v Minister of National Security* [2000] 2 AC 228, [2000] 2 WLR 1368 (Privy Council on appeal from the Court of Appeal of The Bahamas): A majority of the Privy Council rejected a claim by two prisoners sentenced to death that the conditions and length of their incarceration on death row amounted to cruel, inhuman or degrading treatment or punishment under the Constitution. In a dissenting judgment, Lord Cooke of Thorndon referred to a number of decisions of the Human Rights Committee in which the Committee had found violations of articles 7 and 10 by Jamaica in its treatment of convicted prisoners, to support his finding in favour of the prisoners.⁸⁰
- *Lee Miu Ling v Attorney General (No 2)* (1995) 5 HKPLR 585 (Hong Kong Court of Appeal): This case involved a challenge to the Hong Kong electoral system on the basis that it was inconsistent with the guarantee of universal and equal suffrage contained in article 25 of the ICCPR. While rejecting the claim on the basis that the system was entrenched in the Hong Kong Letters Patent (a constitutional document), judges both in the High Court and the Court of Appeal referred with approval to decisions of the Human Rights Committee under the Optional Protocol.⁸¹
- *Lui Tat Hang Louis v Post-Release Supervision Board* [2000] HKCFI 897 (Hong Kong Court of First Instance): The court considered a challenge to legislation providing for early release of prisoners subject to various conditions, it being claimed that the imposition of these conditions was less favourable than the previous arrangements for release on parole and therefore constituted the imposition of a heavier penalty than was applicable at the time of the offence and therefore constituted a violation of article 15 of the ICCPR/article 12 of the Hong Kong Bill of Rights. In concluding that the change in release conditions was not a "heavier penalty" within the meaning of article 15⁸², considered and followed the Human Rights Committee decision in *ARS v Canada*, and also quoted from *Van Duzen v Canada*, para 10.2.

⁷⁸ 208 F 3d at 1287-1288

⁷⁹ 528 US at 994, 120 SCt at 463

⁸⁰ [2000] 2 AC at 263 (referring to *Leslie v Jamaica*; *Finn v Jamaica*; *Whyte v Jamaica*; *Perkins v Jamaica*).

⁸¹ Bokhary JA referred to *Broeks v Netherlands*, para 12.5, while at first instance Keith J also referred in general terms to decisions cited to him: (1995) 5 HKPLR 181.

⁸² [2001] HKCFI 897

b. *Committee against Torture*

51. The overwhelming majority of the cases heard by the Committee against Torture have involved challenges under article 3 of the treaty to threatened deportations of individuals to countries where, they allege, they run a serious risk of being tortured. The substantial body of case law on article 3 (summarised in the Committee's *General comment 1*) has been cited by national courts and tribunals in two main contexts. The first is as a source of normative authority for the interpretation of provisions of the Torture Convention itself (in general involving the argument either that the national law in question does not provide the protection against refoulement required by article 3 or, if it does, that the national authorities are not applying that provision with the same stringency as the Torture Convention as interpreted by the Committee against Torture does.

52. In *Nagaratnam v Minister for Immigration & Multicultural Affairs*⁸³ the Full Federal Court of Australia upheld a challenge to the refusal of a claim for refugee status by a Tamil from Sri Lanka. Among other claims, the applicant had claimed that he had been subjected to torture within the meaning of the Torture Convention. Two members of the court (Lee and Katz JJ) noted in passing that, if the tribunal decision had been upheld (and the applicant denied asylum in Australia), returning him to Sri Lanka might involve a violation by Australia of its obligations under the Convention, for which it could be held accountable by the Committee under the individual complaint procedure, as in light of the Committee's case law such a claim would have a high chance of success.⁸⁴

53. In *Farhadi v Canada*,⁸⁵ a challenge to a decision to return the applicant to Iran (where he had been tortured as a result of his labour union activities), the court considered a number of decisions of the Committee against Torture dealing with article 3 claims under the Convention, as an aid to ascertaining the appropriate standard of proof that should be applied under Canadian law. The court concluded the Convention required that an appropriate risk assessment procedure be available under Canadian law in relation to a person who claimed that he would be tortured if returned to Iran. On appeal, the finding that there had not been an adequate risk assessment in the present case was overturned without reference to the case law of the Torture Committee.⁸⁶

54. The second use of Committee against Torture decisions has been reliance on findings by the Committee as *factual* material, to support a claim that a person may face torture if returned to a country where the CAT Committee has already found that there is torture. This category has tended more to involve the use of concluding comments or the results of article 20 inquiries than decision on individual communications (see below), though there have been a number of cases in which individual communications have been cited.⁸⁷

2. General comments and general recommendations

a. Human Rights Committee general comments

55. The *General comments* of the Human Rights Committee have been considered on many occasions by national courts and tribunals:

- *Northern Regional Health Authority* [1998] 2 NZLR 218, at 233 (New Zealand High Court, Cartwright J): In this case the court referred to the Human Rights Committee's *General comment 18* as an aid to the interpretation of the concept of discrimination under domestic law relating to racial discrimination

⁸³ (1999) 164 ALR 119

⁸⁴ (1999) 164 ALR at 129-130

⁸⁵ [1998] 3 FC 315, (1998) 144 FTR 76 (Federal Court of Canada, Trial Division)

⁸⁶ *Farhadi v Canada* (Minister of Citizenship and Immigration) (2000) 97 ACWS (3d) 728 (Federal Court of Appeal)

⁸⁷ One example is *R v Secretary of State for the Home Department ex parte Somasundaran and another*, High Court of England and Wales, Queen's Bench Division, 19 October 1999, Burton J, in which two asylum-seekers who had come to England via Sweden, challenged a decision to return them to Sweden for processing of their applications. They argued by reference to seven cases under article 22 of the Torture Convention in which the Committee against Torture had held against Sweden that the level of protection afforded by Swedish procedures was inadequate. The court rejected the application. See also *R v Secretary of State for the Home Department, ex parte Kapanza Milong Lumbalas* [1997] EWHC Admin 202, 28 February 1997, in which the High Court of England and Wales, in an application by an unsuccessful asylum-seeker from Zaire, considered, among other documents, a decision of the CAT upholding a claim under article 3 of the Torture Convention (*Kisoki v Sweden*).

- *Quilter v Attorney-General* [1998] 1 NZLR 523 (New Zealand Court of Appeal) (discussed above, section D.1.a))
- *Attorney General (Hong Kong) v Lee Kwong-kut* [1993] AC 951: In a case involving challenges to a reverse onus provisions on the ground of inconsistency with the presumption of innocence in the Hong Kong Bill of Rights, the Privy Council referred with approval to the Human Rights Committee's *General comment 13* on article 14 of the Covenant.⁸⁸
- *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 (*Bundesgerichtshof*), BGE 122 I 109: The court referred to the Human Rights Committee's *General comment 18* in holding that differential treatment by cantonal authorities of lawyers from different cantons in providing access to dossiers in criminal cases violated articles 2, 14(1) and (3)(b), and 26 of the ICCPR, among other norms.⁸⁹
- *P v Psychiatrische Universitätsklinik Basel und Psychiatrie-Rekurskommission Basel-Stadt*, Judgment of 22 March 2001, Swiss Federal Supreme Court (*Bundesgerichtshof*), BGE 127 I 6: The court referred to Human Rights Committee *General comment 20* on article 7 of the ICCPR in a case involving the question of whether the administration of medication without the patient's consent to a person committed to a psychiatric hospital was consistent with article 7 and the corresponding guarantees in the Swiss Federal Constitution and the European Convention.⁹⁰
- *German Border Guards case*, Judgment of 3 November 1992 of the German *Bundesgerichtshof* (5 StR 370/92), BGHSt 39, 1 (ZaöRV 54 [1994], 489 and 531), 100 ILR 364: The Court, in considering the legality of the criminal conviction of border guards at the FRG/DDR border for murder committed prior to the reunification of Germany, referred to the Human Rights Committee's *General comment 6* on the right to life in order to establish that limitations of the right to life are subject to a strict standard of scrutiny.⁹¹
- *Sepet and Bulbul v Secretary of State for the Home Department* [2001] EWCA Civ 681 (Court of Appeal of England and Wales): The court referred to Human Rights Committee *General comment 22* on freedom of religion under the ICCPR in the context of deciding whether there was a right to conscientious objection to military service.⁹²
- *In re The School Education Bill of 1995 (Gauteng)*, 1996 (4) BCLR 537 (CC); 1996 SACLR LEXIS 5 (South African Constitutional Court): In this case the court considered a claim that the South African Constitution imposed on the government the obligation to establish schools based on a common culture, language or religion. The court surveyed the state of international law with respect to the rights of minorities, discussing among other sources the Human Rights Committee's *General Comment 23* on article 27.
- *S v Williams*, 1995 (7) BCLR 861 (South African Constitutional Court): The court considered whether the judicial imposition of whippings on juveniles amounted to "cruel, inhuman or degrading treatment" referred as part of a review of international and national jurisprudence to both *General comment 20* of the Human Rights Committee and *Vuolanne v Finland*.
- *Martin v Tauranga District Court* [1995] 1 NZLR 491 (High Court of New Zealand): The court considered an application by a criminal defendant for discharge of the case on the ground that his right to be tried without undue delay had been infringed by a 17-month delay in bringing him to trial. In rejecting the application, the Court reviewed international and comparative national case law concerning to right and referred to Human Rights Committee's *General comment 13* (para 10) on article 14 of the ICCPR, as well as the case of *Fillaistre v Bolivia*, in which the Committee, dealing with a 4-year delay, observed: "The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases."⁹³
- *The Republic v Mathews Chinthiti* (1997) 2 CHRLD 267 (High Court of Malawi) (summary available on line at www.interights.org): In this case the defendants in a criminal case challenged the legislative

⁸⁸ [1993] AC at 967-968

⁸⁹ BGE 122 I 109, at 114

⁹⁰ BGE 127 I 6, at 16-17

⁹¹ 100 ILR at 384

⁹² [2001] EWCA Civ 681, para 34:

⁹³ [1995] 1 NZLR at 498

provision that provided that all criminal trials before the High Court should be by jury but that the relevant Minister could direct that any case or class of case should be triable by the High Court without a jury. The defendants argued that differential treatment of their case (to be tried without a jury) was a violation of their right to equality. The court rejected the argument, citing among other sources the Human Rights Committee's *General comment 18*.

- Judgment of 28 October 1994, Osaka High Court: The court referred to *General comments 15, 18 and 20* of the Human Rights Committee and decisions under the Optional Protocol but finding that mandatory fingerprinting of resident aliens in Japan did not violate articles 7 or 26 of the ICCPR)⁹⁴
- Judgment of 28 April 1999, Hiroshima High Court: The court recognized that general comments and similar output of the Human Rights Committee are supplementary means of interpretation of the ICCPR in accordance with article 32 of the Vienna Convention on the Law of Treaties, and referred to *General comment 25* in interpreting article 25 of the ICCPR).
- Judgment of 21 July 1998, Tokushima District Court, 1674 HANREI JIHO 123 (stating that the ICCPR should be interpreted, as much as possible, in conformity with general comments of United Nations treaty bodies and standards adopted by the United Nations).
- *Beazley v Johnson*, 242 F 3d 248 (5th Cir 2001): a person sentenced to death for acts committed before he was 18 sought to challenge the State law under which he had been convicted and sentenced on the ground that it involved a violation of article 6(5) of the ICCPR. As the United States had entered a reservation to that article when it ratified the ICCPR, he argued that, taking into account the Human Rights Committee's *General comment 24*, the reservation was invalid and should be severed. The court rejected the argument, noting that the Human Rights Committee in its Concluding observations on the US initial report had expressed its concern about incompatibility of the reservation and recommended its withdrawal and, by so doing, in the court's view "declined to void or to sever the reservation". The court concluded that in any event the reservation was valid.⁹⁵
- Judgment of the Netherlands Supreme Court, 18 April 1995, NJ 1995, 611 (see above, section D.1.a) (reference to the Committee's *General comment 22* on article 18)
- In *Chan Shu Ying v Chief Executive of the Hong Kong Special Administrative Region* [2001] 1 HKLRD 405 (Hong Kong Court of First Instance): The court considered a challenge to the reorganisation of district and local councils, on the ground that the changes involved a violation of article 25 (a) of the ICCPR. While rejecting the challenge, the court examined and applied the approach of the Human Rights Committee in *General comment 25*⁹⁶ and *Marshall v Canada*⁹⁷) construing the provision broadly, so as to include a range of public affairs and not just institutions exercising formal legislative, executive administrative powers. The court noted that the *General comment* and the decision were of "persuasive value" and reiterated the caution of Silke VP in *Sin Yau-ming*.⁹⁸
- *Tse Wa Chun Paul v Solicitors Disciplinary Tribunal* [2001] HKCFI 854 (Hong Kong Court of First Instance): The court considered a challenge to the proceedings of the Solicitors Disciplinary Tribunal, on the ground that its holding of its hearings in private was a violation of article 14(3) of the ICCPR (and the identical guarantee in article 10 of the Hong Kong Bill of Rights Ordinance). In considering the issue the court looked at *General comment 13*, though it held that the Tribunal was not a public authority and that, even if it were, there was no violation of the ICCPR, as there was a full appeal to the Court of Appeal, which satisfied the requirements of article 14.
- *Equal Opportunities Commission v Director of Education* [2001] HKCFI 654, [2001] 2 HKLRD 690 (Hong Kong Court of First Instance): The court, in a challenge to a system allocating secondary school places on sex discriminatory grounds, considered and approved the approach of the Human Rights

⁹⁴ Summarised in Iwasawa, *supra* note 23, at 260-261

⁹⁵ To similar effect, following *Beazley*, is *Patterson v Johnson*, 2001 US Dist LEXIS 14159 (2001).

⁹⁶ [2001] 1 HKLRD at 417-420

⁹⁷ [2001] 1 HKLRD at 416-417, 419

⁹⁸ [2001] 1 HKLRD at 421-422

Committee in *General comment 18* for construing the Sex Discrimination Ordinance⁹⁹ (which it also held should be interpreted in accordance with the CEDAW Convention¹⁰⁰).

- *Chan Mei Yee v Director of Immigration* [2000] HKCFI 854 (Hong Kong Court of First Instance): The court considered a challenge to a removal order on a number of grounds, including violation of the ICCPR. The application of the ICCPR, however, had been limited by the entry of a number of reservations including in relation to immigration decisions, and the decisions in question were covered by the reservations. The applicants argued that the reservations were invalid under international and should therefore be severed, relying on *General comment 24*. Noting the United Kingdom's response to *General comment 24*, the court concluded that the reservation in question did not fall into the examples of impermissible reservations given in *General comment 24* (para 8) and that it had to proceed on the basis that the reservations were valid. In relation to the question of whether article 10 of the ICESCR could be invoked (it not being subject to such a reservation, the court referred to a *General comment 3* (para 9, misdescribing it), but concluded that the ICESCR was promotional and not directly applicable before the courts. In *Chan To Foon* the ICESCR was once again relied on and the court referred to portions of a later *General comment* of the CESCR,¹⁰¹ though it did not refer to other sections that more clearly supported the direct applicability of the Covenant under domestic law.¹⁰²
- b. General recommendations of the Committee on the Elimination of Discrimination against Women
- *Vishaka v State of Rajasthan*, AIR 1997 SC 3011, at 3015, (1998) 3 BHRC 261 (Supreme Court of India): In this case the court not only referred to the *General recommendation 19* on violence against women adopted by the CEDAW Committee, but drew up rules to govern sexual harassment in employment (pending the enactment of legislation) which drew extensively on the wording of the *General recommendation*.
 - *Grüne Bewegung Uri v Landrat des Kantons Uri*, Judgment of 7 October 1998, Swiss Federal Supreme Court (*Bundesgerichtshof*), BGE 125 I 21, at 34-35) (see above, section D.1.a) (reference to the CEDAW Convention and CEDAW's *General recommendation 7* (1988).
 - *Carmichele v Minister of Safety and Security and Another*, 2001 (10) BCLR 995 (CC) (South African Constitutional Court): In this case the court referred to CEDAW's *General recommendation 19* on violence against women, in particular its reference to the obligation of the State to take preventive, investigative or punitive steps in relation to private violations.
 - *R v Ewanchuk* [1999] 1 SCR 330, 169 DLR (4th) 193 (Supreme Court of Canada): In a case in which the court upheld an appeal against an acquittal of a person charged with sexual assault and substituted a conviction. Heureux-Dubé and Gonthier JJ in a concurring judgment referred to CEDAW's *General recommendation 19*.¹⁰³
 - *Quilter v Attorney-General* [1998] 1 NZLR 523 (New Zealand Court of Appeal): For details see above. The dissenting judge, Thomas J (at 553) refers to CEDAW's general recommendation on the family (*General recommendation 21*, paras 13 and 16) in his discussion of whether refusal to permit same-sex marriages was a violation of the guarantee of equality.
- c. General comments of the Committee on Economic, Social and Cultural Rights
- *K v L AG*, Judgment of 28 June 1999, Swiss Federal Supreme Court (*Bundesgerichtshof*), BGE 125 III 277: The court referred to CESCR *General comment No 3*, para 5, in a case involving the question of whether article 8 of the ICESCR guaranteeing the right to strike was a directly effective provision of the treaty for the purposes of Swiss law. The court held that the guarantee was directly applicable in Swiss law, following the general comment and the views of writers.¹⁰⁴

⁹⁹ [2001] HKCFI 654, at para 6

¹⁰⁰ [2001] HKCFI 654, at para 90; HKLRD at 725

¹⁰¹ [2001] 3 HKLRD at 133-134

¹⁰² [2001] 3 HKLRD 109

¹⁰³ (1999)169 DLR (4th) at 219

¹⁰⁴ BGE 125 V 277, at 281

- *Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (South African Constitutional Court): In this case the court considered the meaning of the right of access to adequate housing contained in the South African Constitution. In interpreting that right the Court made extensive reference to the provisions of the ICESCR¹⁰⁵ and the work of the CESCR, including in particular the Committee's *General comment No 3*.
- *Gosselin v Quebec*, (1999) 89 ACWS (3d) 252 (Quebec Court of Appeal): In a case challenging the inadequacy of certain social benefits, the plaintiff invoked the Canadian Charter of Rights and Freedoms, the Quebec Charter and the ICESCR. In a dissenting judgment of Judge Robert refers to CESCR *General comment No 3*, paras 9, 10.
- *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (High Court of New Zealand): The court made reference to *General Comment No 4* in a challenge to a policy decision to increase rents for public housing to market levels.¹⁰⁶
- *Chan To Foon v Director of Immigration* (Hong Kong Court of First Instance): The court referred to certain sections of *General comment 9* of the CESCR,¹⁰⁷ though it did not refer to other sections that more clearly supported the direct applicability of the Covenant under domestic law.¹⁰⁸

3. Reference to reports of inquiries by the Committee against Torture

- *Hanna v Minister for Immigration and Multicultural Affairs* [2000] FCA 1413 (11 October 2000) (Full Court of the Federal Court of Australia): The court, in considering an challenge to refuse asylum to an applicant from Egypt, took into account the report of the Committee against Torture's inquiry into Egypt published in 1996¹⁰⁹ as part of the relevant factual background to the determination of the case.¹¹⁰

4. Reference to concluding observations/comments adopted by the treaty bodies in respect of individual countries

a. *Concluding observations on a country other than the country whose courts are hearing the case*

56. The Supreme Court of Argentina referred to the concluding observations¹¹¹ adopted by the Committee on Economic, Social and Cultural Rights in its 1990 review of the report of Switzerland under the Covenant to support the conclusion that in federal states, even where primary responsibility for health services was that of the provinces, the federal government the nevertheless bore the legal responsibility for ensuring that the obligations under the ICESCR were carried out.¹¹²

57. The Australian Refugee Review Tribunal has cited the Committee against Torture's concluding observations on individual countries in a number of cases. For example, in one case it cited the Committee's conclusions (and other material) on the situation in Peru to support its factual conclusions that a refugee applicant was likely to be subject to persecution if returned to Peru.¹¹³ The Tribunal has also referred to

¹⁰⁵ Article 11(1) guarantees "the right to an adequate standard of living ... including ...adequate food, clothing and housing".

¹⁰⁶ [1997] 2 NZLR at 496 and 498-499

¹⁰⁷ [2001] 3 HKLRD at 133-134

¹⁰⁸ [2001] 3 HKLRD 109

¹⁰⁹ Summary account of the proceedings concerning the inquiry on Egypt, *Report of the Committee Against Torture in 1996*, A/51/44, paras 180-221 (1996)

¹¹⁰ para 8

¹¹¹ UN Doc E/C.12/1/Add 30 (1998), para 9.

¹¹² *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Acción Social*, Judgment of 24 October 2000, at para 19.

¹¹³ Refugee Review Tribunal, RRT Reference: N93/01742, 7 April 1995, para 176.

hearings before the Human Rights Committee in relation to Sri Lanka.¹¹⁴ In a slightly different context in *R v Sin Yau-ming* the Hong Kong Court of Appeal referred to consideration by the Human Rights Committee of the report of Canada in 1990.¹¹⁵

58. In a 1998 case the Osaka High Court considered an application by a child born of a Japanese father and recognized as his child after birth asked the court to affirm that he had a Japanese nationality, citing the Human Rights Committee's *General comment 17*, the Human Rights Committee's concluding observations on Japan, as well as the concluding observations of the Committee on the Rights of the Child on the United Kingdom. The court dismissed the action, stating that general comments and concluding observations of the Human Rights Committee and concluding observations of the Committee on the Rights of the Child do not legally bind the interpretation of the conventions by national organs of States Parties.¹¹⁶

59. In *Pretty v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61 (29 November 2001) the House of Lords considered case of a person who suffered from motor neurone disease, who wished to end her own life but who was unable to do so without assistance. The court considered whether the fact that assisted suicide was a criminal offence under English law and that the prosecuting authorities were unwilling to give an undertaking not to prosecute in the applicant's case if her husband assisted her to end her life constituted a violation of various articles of the European Convention. In reviewing developments in other countries, one judge, Lord Steyn, referred to the situation in the Netherlands where assisted suicide was not criminal under certain conditions. He referred to concluding observations of the Human Rights Committee on the Netherlands:¹¹⁷ "It is to be noted, however, that the UN Human Rights Committee in a report dated 27 August 2001 expressed serious concerns about the operation of the system."

b. *Concluding observations on the country whose courts are hearing the case*

- *Gosselin v Quebec*, Quebec Court of Appeal, 23 April 1999, in his dissenting judgment, Judge Robert (at 219-223) refers to the concluding observations of the CESCR on Canada's report under the ICESCR.
- Judgment of 29 September 1998, Tokyo High Court, 1659 HANREIJIHO 35: In this case, Koreans who had served in the Japanese Army invoked the concluding observations of the Human Rights Committee in which the Human Rights Committee had concluded that "persons of Korean and Taiwanese origin who serve in the Japanese Army and who no longer possess Japanese nationality are discriminated against in respect of their pensions". The court dismissed the claims, stating that "the concluding observations of the Human Rights Committee do not directly affect the validity of laws of the State Party".
- *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* (2000) 118 DLR (4th) 718, 76 CRR (2d) 251 (Supreme Court of Ontario) In an unsuccessful constitutional challenge to section 43 of the Criminal Code,¹¹⁸ the court considered the concluding observations of the Committee on the Rights of the Child on the initial report of Canada under the Convention,¹¹⁹ in which the Committee recommended reconsideration of the laws regulating physical chastisement in school and recommended the prohibition of physical punishment of children in families.¹²⁰
- *R v H (Assault of Child: Reasonable Chastisement)* [2001] EWCA Crim 1024, [2001] 2 FLR 431, [2001] 3 FCR 144: In this case, involving the prosecution of a man for the beating of his son, the issue was whether the actions had been reasonable, the court referred to the judgment of the European Court in *A v United Kingdom* (1998) 27 EHRR 611, which had referred to the concluding observations of the Committee on

¹¹⁴ Refugee Review Tribunal, RRT Reference V94/02151, 4 November 1994, at para 141 (reference to examination in 1991 by the Human Rights Committee of the second report submitted by Sri Lanka under the ICCPR).

¹¹⁵ (1991) 1 HKPLR 88 at 99

¹¹⁶ Judgment of 25 September 1998, Osaka High Court, (2000) 43 *Japanese Annual of International Law* 190. (2000).

¹¹⁷ UN Doc CCPR/CO/72/NET, para 5 (2001)

¹¹⁸ Section 43 provided a justification for a parent, a person in the place of a parent or a teacher who uses force to correct a child in his or her care, where the force used is "reasonable in the circumstances".

¹¹⁹ UN Doc CRC/C/15/Add. 37, para 25

¹²⁰ (2000) 118 DLR (4th) at 219

the Rights of the Child of 15 February 1995 on the reports of the United Kingdom. (at para 14), which "expressed concern about the national legal provisions dealing with reasonable chastisement within the family, observing that the 'imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner'."

5. Reference to reports submitted to the treaty bodies

a. *Reference to reports submitted by a country other than the one before whose courts the case is being heard*

- Refugee Review Tribunal (Australia), RRT Reference: V97/06156, 3 November 1997: The Tribunal referred to the initial report of Nigeria to the CEDAW Committee in order to support its factual finding that female circumcision was still widespread in parts of the country as part of assessment of a refugee claim by a woman and her daughter who did not wish to be returned to Nigeria from Australia.

b. *Reference to reports submitted by the country before whose courts the case is being heard*

- *Ankers v Attorney-General* [1995] 2 NZLR 595, [1995] NZFLR 193 (High Court of New Zealand): In this case an attack on the reduction of certain social benefits was brought before the court; one of the arguments made was that the change was unlawful because the Minister had failed to take into account New Zealand's obligations under the ICESCR and that the changes involved a violation of various articles of the Covenant. The court referred to two reports submitted under the ICESCR to the Committee on Economic, Social and Cultural Rights in 1991 and 1994, concluding that it could be assumed that the Minister had been aware of the contents of the reports and the discussion of the reductions and their relationship to New Zealand's treaty obligations in taking his decision.¹²¹
- In *Prabakar v Secretary for Security* [2001] HKCFI 945 (20 September 2001), the Hong Kong Court of First Instance considered a challenge to a decision to deport the applicant to Sri Lanka, who claimed that he would be tortured if returned and that this would be contrary to article 3 of the Torture Convention. He argued that he had a legitimate expectation that his claim would be examined by the government itself (as opposed to by UNHCR, as had happened in this case). He claimed that, this expectation arose both from the application of the Convention itself to Hong Kong but also from statements made by the government in Hong Kong's initial report under the Convention.¹²² The court appeared to accept that a report could give rise to a such legitimate expectation, though it concluded that the only expectation here was that there would be careful assessment of the claim not necessarily directly by the Hong Kong authorities.¹²³

6. Reference to other documents produced by the Committees

60. Other types of output of the committees have occasionally found their way into court judgments. For example, in late 2000 the Swiss Federal Supreme Court decided a case involving a challenge to increases in university fees on the ground (among others) that this involved a violation of article 13 of the ICESCR.¹²⁴ One of the issues was whether the ICESCR as a whole was directly applicable or, if not, whether article 13(2) was nevertheless directly applicable. The Bundesgerichtshof had held in earlier decisions that the ICESCR as a whole was not directly applicable, although individual provisions might be. The issue had come up before the CESCR when it reviewed the Swiss report under the ICESCR in 1998 and the Committee had written to the Swiss government in advance of the consideration of the report in order to raise its concerns about the approach taken by the Bundesgerichtshof to the nature of ICESCR obligations, as well as on the university fees issue.¹²⁵

¹²¹ [1995] 2 NZLR at 601

¹²² [2001] HKCFI 945, at para 60

¹²³ [2001] HKCFI 945, at para 63

¹²⁴ *A and B v Regierungsrat des Kantons Zürich*, Judgment of 22 September 2000, Swiss Federal Supreme Court (*Bundesgerichtshof*)

¹²⁵ As to this exchange, see also Philip Alston, "Beyond 'Them' and 'Us': Putting Treaty Body Reform into Perspective" in Crawford and Alston, *supra* note 4, 501 at 508.

The Court referred to this letter in its judgment, although it eventually concluded that article 13(2) did not embody a justiciable individual right in the context of the case.¹²⁶

Decisions of the committees

61. In *Ashby v Minister of Immigration*¹²⁷ the New Zealand Court of Appeal had to consider the relevance of the CERD Convention and actions of the CERD Committee in the context of a challenge to the decision of the Minister of Immigration to issue temporary entry permits to members of the Springbok rugby team who were due to tour New Zealand, on the ground (among others) that he was required to exercise his discretion in accordance with New Zealand's obligations under the CERD Convention or at least to take those obligations into account. The members of the Court accepted that the Convention imposed obligations on States parties not to support, sustain or encourage apartheid, with one member of the Court referring to a decision of the CERD Committee on this matter.¹²⁸ However, the Court considered that it was not clear that the Convention extended to sporting contacts, despite the fact that the "decisions of the [CERD] Committee ... clearly indicate that the sporting relations with regimes practising apartheid are considered by the Committee to fall within the scope of the Convention."¹²⁹ (One judge also referred to the biennial reports submitted by New Zealand under the Convention as indicating NZ's view: per Somers J at 233).

E. PRELIMINARY CONCLUSIONS

62. The survey of a sample of cases at the national level that which appears above suggests that the work of the human rights treaty bodies are becoming better-known at the domestic level, and that national courts have begun to refer to them in an increasing number of occasions. However, the use made by national courts of such material is still relatively limited so far as the reasoning of national decisions is concerned - frequently treaty body material is cited as part of a lengthy listing of other international sources and comparative national case law, even where it can be argued that the treaty body material is of greater relevance to the norm being interpreted. It is clear that even in many countries which are not party to the European Convention, that Strasbourg jurisprudence is cited at least as frequently (and often given as much if not more weight) than treaty body jurisprudence. This is a result in part of the sheer volume of the Strasbourg case law, but also reflects the fact that the output of the treaty bodies may be difficult to use productively in a national case (for example, because the general comments/recommendations are too general, or the decision and views contain little or no persuasive reasoning).¹³⁰

63. Nevertheless, with the continuing development (and improvement) of the treaty bodies' output, and the increasing knowledge of these documents among advocates and courts, there is every chance that these materials will become an increasingly important source of assistance for national courts and tribunals.

F. SUGGESTED PLAN OF ACTION FOR THE SECOND STAGE OF THE STUDY

64. This interim study has shown that the output of the treaty bodies has begun to be cited increasingly before national courts and tribunals, and in some cases has had a significant impact on the decision-making of national courts. However, the survey above is only a partial survey of the extent to which the national tribunals have drawn on the materials. The officers of the Committee propose that the Committee further develop the interim study into a comprehensive final study to be presented to the conference in 2004. In order to do this, the following will be necessary:

- (a) the collection of further information about the use of treaty body output by courts in a wider range of countries and an analysis of these cases, in particular non-English language materials, with this material to be provided to the extent possible by members of the Committee who have access to such material;

¹²⁶ *Id* at § 3. The Court decided (§ 3(b)) that it was therefore unnecessary to consider the contents of the Swiss report under the ICESCR or the Committee's response to that report (see, in particular, Committee on Economic, Social and Cultural Rights, *Report on the eighteenth and nineteenth sessions*, UN Doc E/1999/22, para 348).

¹²⁷ [1981] 1 NZLR 222

¹²⁸ Decision 2 (XI), of 7 April 1975, cited by Richardson J in *Ashby* [1981] 1 NZLR at 227

¹²⁹ *Ashby*[1981] 1 NZLR at 228, per Richardson J

¹³⁰ See Byrnes, *supra* note 53, at 365.

- (b) the collection of illustrative examples of references to treaty body findings by non-judicial bodies, e.g. human rights commissions, ombudspersons, parliamentary committees with a role of previewing human rights conformity or constitutionality secretariats; and
- (c) cooperation with other international bodies such as Interights which have access to a wide range of such material.

ANNEX

LIST OF DECISIONS AND GENERAL COMMENTS/RECOMMENDATIONS OF THE UNITED NATIONS TREATED BODIES CITED BY NATIONAL COURTS AND REFERRED TO IN THIS STUDY

A. CASE LAW OF THE UN HUMAN RIGHTS TREATY BODIES CITED BY NATIONAL COURTS*

All the decisions or views listed below can be found at: www.unhchr.ch

Human Rights Committee

A v Australia, Communication 560/1993, views of 3 April 1997
A P v Italy, Communication 204/1986, decision on admissibility of 2 November 1987
Acosta v Uruguay, Communication 110/1981, views of 29 March 1984
ARS v Canada, Communication 91/1981, decision on admissibility of 28 October 1981
Aumeeruddy-Cziffra et al. v. Mauritius, Communication 35/1978, Views of 9 April 1981
Barrett and Sutcliffe v Jamaica, Communications 270 and 271/1998, views of 30 March 1992
Bolaños v Ecuador, Communication 238/1987, views of 26 July 1989
Bolaños v Ecuador, Communication 238/1987, views of 26 July 1989
Brinkhof v Netherlands, Communication 402/1990, views of 27 July 1993
Broeks v Netherlands, Communication 172/84, views of 9 April 1987
Coeriel and Aurik v Netherlands, Communication 453/1991, views of 31 October 1994 (individual dissenting opinion of Mr Nisuke Ando)
Cox v Canada, Communication 539/1993, views of 3 November 1993
Fillastre v Bolivia, Communication 336/88, views of 5 November 1991
Finn v Jamaica, Communication 617/1995, views of 31 July 1998
Gueye v France, Communication 196/1985, views of 3 April 1989
Hammel v Madagascar, Communication 155/1983, views of 3 April 1987
I Länsman et al v Finland, Communication 511/1992, views of 26 October 1994
J Länsman et al v Finland, Communication 671/1995, views of 30 October 1996
Kindler v Canada, Communication 470/1991, views of 30 July 1993
Kitok v Sweden, Communication 197/1985, views of 27 July 1988
Leslie v Jamaica, Communication 564/1993, views of 31 July 1998
Lubuto v Zambia, Communication 390/1990, views of 31 October 1995
Luyeye Magana ex-Philibert v Zaire, Communication 90/1981, views of 21 July 1983
Marshall v Canada, Communication 205/1986, views of 4 November 1991
Mbenge v Zaire, Communication 16/1977, views of 25 March 1983
McIntyre et al v Canada, Communication 395/1989, views of 31 March 1993
Mukong v Cameroon, Communication 458/1991, views of 21 July 1994
Mukong v Cameroon, Communication 458/1991, views of 21 July 1994
Ng v Canada, Communication 469/1991, views of 5 November 1993
Ominayak v Canada, Communication 167/1984, views of 26 March 1990
Pauger v Austria, Communication 415/1990, views of 26 March 1992
Perkins v Jamaica, Communication 733/1997, views of 30 July 1998
Pratt and Morgan v Jamaica, Communications 210/1986 and 225/1987, views of 6 April 1989
Stalla Costa v Uruguay, Communication 198/1985, views of 9 July 1987
Toonen v Australia, Communication 488/1992, views of 31 March 1994
Torres v Finland, Communication 291/1988, views of 2 April 1990
Valenzuela v Peru, Communication 309/1988, views of 14 July 1993
Van Alphen v Netherlands, Communication 305/1988, views of 23 July 1990
Van Duzen v Canada, Communication 50/1979, views of 7 April 1982
Vuolanne v Finland, Communication 265/1987, views of 7 April 1989

* This list includes only those cases explicitly mentioned in the text of this report and does not include cases that courts may have referred to in judgments but which are not mentioned above.

Whyte v Jamaica, Communication 732/1997, views of 27 July 1998
Zwaan de Vries v Netherlands, Communication 182/84, views of 9 April 1987

Committee against Torture

Alan v Switzerland, Communication 21/1995, views of 8 May 1996
Khan v Canada, Communication 15/1994, views of 15 November 1994
Kisoki v Sweden, Communication 41/1996, views of 8 May 1996
Tala v Sweden, Communication No 43/1996, views of 15 November 1996

B. GENERAL COMMENTS OR GENERAL RECOMMENDATIONS OF THE UN HUMAN RIGHTS TREATY BODIES CITED BY NATIONAL COURTS

All the general comments or general recommendations listed below can be found in UN Doc HRI/GEN/1/Rev 5 (2001), available at www.unhchr.ch

Human Rights Committee

General Comment 4 (1981)
General Comment 6 (1982)
General Comment 13 (1984)
General Comment 15 (1986)
General Comment 17 (1989)
General Comment 18 (1989)
General Comment 20 (1992)
General Comment 22 (1993)
General Comment 23 (1994)
General Comment 24 (1994)
General Comment 25 (1996)

Committee on Economic, Social and Cultural Rights

General Comment 3 (1990)
General Comment 4 (1991)
General Comment 9 (1998)

Committee on the Elimination of Discrimination against Women

General recommendation 7 (1988)
General recommendation 19 (1992)
General recommendation 21 (1998)
