

# INTERNATIONAL LAW ASSOCIATION

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### INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE

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## FINAL REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES\*

### A. INTRODUCTION

- Following the London Conference of the Association in 2000, at which the Executive Council approved the proposal of the Committee to undertake a study of the impact of the United Nations human rights treaty bodies established under the principal United Nations human rights treaties, the Committee commenced work on that subject. The Committee presented an *Interim Report* on the topic to the 70<sup>th</sup> Conference of the International Law Association in New Delhi, and this report for the Berlin Conference of the Association is the Committee's *Final Report* on the topic.
- The principal purposes of the study were 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 use of the international sources by courts, tribunals and advocates by disseminating information about how they were already being used.
- The *Interim Report* presented to the New Delhi conference commenced with a brief overview of the work of the United Nations treaty bodies and their output, and of previous assessments of the utility of this material. This was followed by a general discussion of the status of the findings of the

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treaty bodies under international law, the views taken by domestic courts of their status and usefulness, and an exploration of some of the factors that are conducive to the use of these and other international materials by national courts and tribunals. The longest section of the report followed, comprising the documentation of a large number of cases in which national courts and tribunals had referred to findings of the UN human rights treaty bodies. The *Interim Report* offered some preliminary conclusions, and suggested a plan of action for the second stage of the project.

4. The New Delhi meeting of the Committee welcomed the *Interim Report* and decided that the *Final Report* should, so far as possible, include:

- (a) more examples of the use of treaty body output by national courts and tribunals, both from those jurisdictions already represented but also and equally importantly from jurisdictions/language groups which had not been well-represented in the materials covered by the *Interim Report*;
- (b) an examination of the use of treaty body output by *international* courts and tribunals;
- (c) illustrative examples of the use of treaty body output at the national level by bodies other than courts and tribunals (e.g. law reform commissions, human rights commission, Ombuds procedures);
- (d) a more detailed analysis of the impact and use of treaty body output, in particular legal aspects of the use of these materials, and the circumstances which lead to an increased use of them; and
- (e) consideration of recommendations and future action in relation to the development and use of these materials.

### Meeting in Turku

5. Since the New Delhi conference, the Committee has met on one occasion. The meeting was held in Turku, Finland, from 26-27 September 2003, and was organised by the Institute for Human Rights, Åbo Akademi University, with considerable financial assistance from the Government of Finland. The Committee gratefully acknowledges the support of the Institute for Human Rights and the Government of Finland in making this very constructive meeting possible. The purpose of the meeting in Turku was to review the progress of the Committee's work and to provide the opportunity for contributions by members of the Committee and others relevant experts to contribute to the preparation of the 2004 report of the Committee. Many members of the Committee were able to attend, and some of those who were not able to make written contributions that were considered at the meeting. A number of other experts in the field and representatives of the Office of the UN High Commissioner for Human Rights also attended the meeting or made written contributions, for which the Committee would like to express its appreciation.<sup>1</sup>

6. The Turku meeting considered the *Interim report* of the Committee and the recommendations of the New Delhi meeting, as well as the written and other presentations made in Turku. As a result of the discussions, the meeting made a number of recommendations about the structure and content of the *Final Report*. The principal recommendations were that the *Final Report* should, if possible, include sections on:

- (a) The use of treaty body output by international courts and tribunals;
- (b) The use of treaty body output by national bodies other than courts and tribunals;
- (c) How the treaty body output fits into the traditional approaches to and sources for the interpretation of treaties;
- (d) Factors conducive to the increased use of treaty body output at the national level (including the manner in which the output itself is generated);
- (e) Implementation of treaty body output in individual cases (including the relationship of case law to individual legal systems);

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<sup>1</sup> A list of the written papers presented to the meeting appears at the end of this report. Most of these papers, as well as further material supplied after the meeting, are available through the website of the Institute for Human Rights: [www.abo.fi/instut/imr](http://www.abo.fi/instut/imr) (under Seminars).

- (f) Appropriate recommendations to promote the increased use of treaty body output by international and national bodies; and
  - (g) How the collection and dissemination of information about the use of treaty body output could be continued in a coordinated manner after the conclusion of this project, and whether suitable partners could be identified for this purpose.
7. This structure and content of this *Final Report* has been developed in response to the decisions and recommendations of the New Delhi and Turku meetings.<sup>2</sup>

## **B. THE STATUS OF HUMAN RIGHTS TREATY BODY FINDINGS**

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

8. The *Interim Report* contained many references to statements made by domestic courts about the relevance and utility of treaty body findings (in particular decisions in individual cases, and general comments or recommendations), as well as to discussions of the status of particular treaty bodies (especially when compared with international and domestic courts). In general, courts have noted that, while the treaty bodies are not courts, their findings are relevant and useful in some contexts. However, they have usually stopped short of concluding that they are obliged to follow treaty body interpretations, even in cases in which the treaty body has expressed a view on a specific case or law from the jurisdiction in question.
9. Some further examples may be added to those in the earlier report. For example, the Constitutional Court of Spain has considered the status of the Human Rights Committee and its views in response to cases in which the Committee has found violations of the ICCPR by Spain.<sup>3</sup> In one case in which it considered a finding by the Human Rights Committee<sup>4</sup> that the procedures under Spanish law for review of criminal convictions fell short of the guarantee of an appeal contained in article 14(5) of the ICCPR, the Court noted that the Committee was not a court and that its views did not constitute a binding interpretation of the ICCPR.<sup>5</sup>
10. In *Kavanagh v Governor of Mountjoy Prison*,<sup>6</sup> Fennelly J, delivering the judgment of the court, commented in relation to the argument that the views of the Human Rights Committee could be given effect to directly under Irish law, notwithstanding article 34(1) of the Irish Constitution:<sup>7</sup>
- “The notion that the ‘views’ of a Committee even of admittedly distinguished experts on international human rights experts, though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is patently unacceptable. To be fair, even in international law, neither the Covenant nor the Protocol make[s] such a claim. Neither the Covenant nor the Protocol at any point purports to give any binding effect to the views expressed by the Committee. The Committee does not formulate any form of judgment or declare any entitlement to relief. Its status in international law is not, of course, a matter for this court. It suffices to say that the appellant has not furnished any arguable case for the effect of the Committee’s views.”
11. In the South African case, *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*<sup>8</sup> the High Court stated that “General Comments have authoritative status under international law” and continued by quoting *General Comment No 12* of the Committee on Economic, Social and Cultural Rights in explaining the duty to respect “rights of access”.<sup>9</sup> Budlender AJ also made it clear

<sup>2</sup> For reasons of space, it was not possible to provide a consolidated table of all the cases referred to in the *Interim and Final Reports*.

<sup>3</sup> Discussed in more detail below.

<sup>4</sup> *Gómez Vásquez v Spain*, Communication No 701/1996, UN Doc CCPR/C/69/D/701/1996 (11 August 2000)

<sup>5</sup> STC 70/2002, 3 April 2002, para 7.

<sup>6</sup> [2002] IESC 11 (1 March 2002)(Supreme Court of Ireland)

<sup>7</sup> Article 34, section 1 of the Constitution of Ireland provides:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

<sup>8</sup> (2002) 6 BCLR 625 (High Court Witwatersrand, Local Division).

<sup>9</sup> *Id* at 629, paras 17-18.

that he relied upon international law to interpret the Bill of Rights “where the Constitution uses language similar to that which has been used in international instruments”.<sup>10</sup>

12. The Full Court of the Federal Court of Australia has recently commented on the appropriateness of referring to treaty body views:<sup>11</sup>

“Although the views of the [Human Rights] Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Committee's functions under the *Optional Protocol to the International Covenant on Civil and Political Rights*, to which Australia has acceded (effective as of 25 December 1991) are particularly relevant in this respect. They include receiving, considering and expressing a view about claims by individuals that a State Party to the *Protocol* has violated covenanted rights. The conclusion that it is appropriate for a court to have regard to the views of such a body concerning the construction of a treaty is also supported by the observations of Kirby J in *Johnson v Johnson* (2000) 201 CLR 488 at 501-502, and of Katz J in *Commonwealth v Hamilton* (2000) 108 FCR 378 at 387, citing some observations of Black CJ in *Commonwealth v Bradley* (1999) 95 FCR 218 at 237. See also *The Queen v Sin Yau-Ming* [1992] 1 HKCLR 127 at 141. It is appropriate, as well, to have regard to the opinions expressed in works of scholarship in the field of international law, including opinions based upon the jurisprudence developed within international bodies, such as the Committee.”

13. Finally, a bill of rights adopted in the Australian Capital Territory in 2004, which expressly gives effect to provisions of the ICCPR, provides that “international law, and the judgments of international and foreign courts and tribunals, relevant to a human rights may be considered in interpreting the human right.”<sup>12</sup> “International law” is defined as including “general comments and views of the United Nations human rights treaty monitoring bodies.”<sup>13</sup>

### **Constitutional interpretation by reference to international human rights standards**

14. In the South African case of *Bon Vista Mansions*<sup>14</sup> Budlender AJ made it clear that he relied upon international law to interpret the Bill of Rights “where the Constitution uses language similar to that which has been used in international instruments”.<sup>15</sup> Justice Kirby of the High Court of Australia has on a number of occasions stated that in his view it is appropriate to look to international human rights standards in constitutional interpretation, including the jurisprudence of the United Nations human rights treaty bodies.<sup>16</sup>

<sup>10</sup> *Id* at 629, para 15. Article 39(1)(b) of the Constitution of the Republic of South Africa 1996 provides: “When interpreting the Bill of Rights, a court, tribunal or forum . . . (b) must consider international law”.

<sup>11</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70, at para 148 (15 April 2003), <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/70.html>. The case is on appeal to the High Court of Australia. See also Kirby J in *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20, at paras 147-155.

<sup>12</sup> Human Rights Act 2004 (ACT), s 31

<sup>13</sup> Human Rights Act 2004 (ACT), Dictionary (definition of “international law”, para (b))

<sup>14</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) 6 BCLR 625 (High Court Witwatersrand, Local Division).

<sup>15</sup> *Id* at 629, para 15.

<sup>16</sup> Recent examples are *Austin v Commonwealth of Australia* [2003] HCA 3, at para 252 n 335 (referring to *Karttunen v Finland*, Human Rights Committee, 23 October 1992); *Attorney General (WA) v Marquet* [2003] HCA 67, paras 173-180 (referring to *General comment No 25*; concluding observations on Hong Kong, Paraguay, and Chile; and *Landinelli Silva v Uruguay* (Communication No 34/78), and *Pietrarola v Uruguay* (Communication No 44/79)). However, some other members of the Court do not share this view. See, for example, the views of Callinan J in *Western Australia v Ward* (2002) 191 ALR 1, noted in (2003) 23 *Australian Yearbook of International Law* 234.

### THE STATUS OF TREATY BODY FINDINGS

15. The question of the status of treaty body findings as binding rulings on the provisions of the treaties was discussed in the *Interim report*.<sup>17</sup> It seems to be well accepted that the findings of the treaty bodies do not themselves constitute binding interpretations of the treaties.<sup>18</sup> The Human Rights Committee and the Committee against Torture have emphasised -- particularly in the context of the individual complaints procedures (and requests for interim measures) -- that the *legal norms* on which the treaty bodies pronounce are binding obligations of the States parties, and therefore the pronouncements of the treaty bodies are more than mere recommendations that can be readily disregarded because a State Party disagrees with the interpretation adopted by the Committee or with its application to the facts.

16. Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty.<sup>19</sup> While States will give them careful consideration, they may not give effect to them as a matter of course. Even so, the actions of States do not always seem consistent with their rhetoric, as States on occasion take issue with the decisions of treaty bodies applicable to themselves and contest the findings either as questions of law or on the application of the law to the facts.<sup>20</sup> This reluctance is particularly true of executive responses, but is also seen in the responses of some courts to decisions in which the treaty bodies disagree directly with them or find aspects of the domestic legal system inconsistent with the treaty concerned.

17. A more difficult question is where treaty body findings fit into the traditional sources of international law, whether for the purposes of treaty interpretation or as a source relevant to the development of customary international law.

18. None of the human rights treaties explicitly confers on the relevant treaty bodies the power to adopt binding interpretations of the treaties, and the practice of at least some States suggest that this power has not been conferred implicitly, as part of the implied power that a body established by treaty is considered to possess in order to carry out the functions conferred on it by the States parties. At the same time, it can be accepted that the treaty bodies have, as a practical matter, the power to adopt interpretations of the treaty in question, since that is essential to their carrying out their functions.

19. Notwithstanding this general statement, the question arises as to whether the findings of a Committee nevertheless may be viewed as a legitimate (or even persuasive or binding) source for interpreting the treaty, both as a matter of principle and in relation to particular findings or types of findings.

20. It has, for example, been suggested that treaty body findings may constitute, or may generate, "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", which article 31(3) of the Vienna Convention of the Law of Treaties (VCLT) provides is to be taken into account in the interpretation of the treaty. It has also been suggested that treaty body findings may also be taken into account in interpretation as a

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<sup>17</sup> See also J S Davidson, "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" [2001] *New Zealand Law Review* 125.

<sup>18</sup> See Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2003) 812-813.

<sup>19</sup> For example, the Norwegian Foreign Affairs Ministry has commented:

"While the recommendations and criticism of the monitoring committees are not legally binding, the Norwegian authorities attach great importance to them and they constitute important guidelines in the continuous efforts to ensure the conscientious implementation of the human rights conventions."

(Norwegian Ministry of Foreign Affairs, *Report No 21 to the Storting (1999-2000): Focus on Human Dignity—A Plan of Action for Human Rights*, Chapter 4, Box 4.2, <http://odin.dep.no/ud/engelsk/publ/p10001859/032001-040007/index-hov004-b-n-a.html>.)

"The treaty bodies also have other tasks besides the processing of reports as described above. They have been mandated to produce so-called general comments on the interpretation of particular provisions of the conventions. These comments are not legally binding but are of great significance when interpreting the conventions, and may contribute to the development of customary international law."

(*Ibid*, chapter 5, <http://odin.dep.no/ud/engelsk/publ/p10001859/032001-040007/index-hov005-b-f-a.html>)

<sup>20</sup> See Tomuschat, *supra* note 18, at 183.

“supplementary means of interpretation”<sup>21</sup> within the meaning of article 32 of the VCLT,<sup>22</sup> though presumably use of the treaty bodies’ output would have to satisfy the other requirements of article 32.<sup>23</sup>

21. If one adopts a traditional approach to interpretation of the human rights treaties - an approach strongly endorsed by the International Law Commission and some States parties in the specific context of reservations -- the findings of the committees themselves would not amount to State practice (or “practice” for the purposes of article 31, if that is a different concept<sup>24</sup>). However, the responses of individual States or of the States parties as a whole to the findings of the committees would constitute such practice. Accordingly, in any given case, a positive or supportive response by a State or group of States, or the acquiescence of States in a finding by a committee might constitute “subsequent practice . . . which establishes the agreement of the parties regarding its interpretation”.

22. In this context the question arises of the relationship between the specific provisions of the VCLT and the norms of customary international law relating to treaty interpretation that are reflected in those provisions. While it is clear that similar or identical norms can be contained in a treaty as well as embodied in rules of customary international law, it does not follow that the overlap in this case must be seen as total. The reference in article 31 to subsequent practice – as with so many other provisions in the VCLT – is written as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other’s compliance and to react to non-compliance. Human rights treaties *are* different in some important respects from the presumed ideal type of a multilateral treaty which underpins the formulation of the individual provisions of the VCLT.<sup>25</sup> Given these differences, it appears arguable that in interpreting these types of treaties (with third-party beneficiaries and an independent monitoring mechanism), relevant subsequent practice might be broader than subsequent *State* practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties.

23. For example, the general comments and general recommendations of the treaty bodies are circulated to all States parties following their adoption, generally in the form of the annual report of the committee concerned to the General Assembly or to the Economic and Social Council. States have the opportunity to express their views on the correctness of the interpretations at that stage, as well as in their reports under the treaty and in their discussions with the committees during the consideration of those reports. Some States parties have occasionally expressed their disagreement with general comments adopted by the Human Rights Committee, for example the *General comment* relating to the right to life on the possession of nuclear weapons, and its *General comment* on reservations.<sup>26</sup> There

<sup>21</sup> “Subsequent practice which does not fall within [the] narrow definition [of Article 31 (3) (b)] may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention”. Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> ed 1984) 138.

<sup>22</sup> The Osaka High Court has expressed the view that general comments and other output of the committees can be considered as “supplementary means of interpretation”, Osaka High Court, Judgment of 28 October 1994, 1513 HANREI JIHO 71, 87, 38 JAPANESE ANN. INT’L L. 118 (1995). The Court reiterated this view in its Judgment of 28 June 1996, not yet reported.

<sup>23</sup> “Article [32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in Article [31]”. [1966] II YB INT’L L COMM’N 223. “Cet article ne donne pas d’énumération exhaustive de ces moyens; il en mentionne les plus importants, les travaux préparatoires et les circonstances dans lesquelles le traité a été conclu.” Mustafa Kamil Yasseen, “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, (1976) 151 RCADI 1, 79.

<sup>24</sup> Compare the comment by the WTO Appellate Body in *Japan – Alcoholic Beverages Case*: “We do not agree with the Panel’s conclusion . . . that ‘panel reports adopted by the GATT Contracting Parties and the WTO Dispute Settlement Body constitute subsequent practice in a specific case’ as the phrase ‘subsequent practice’ is used in Article 31 of the Vienna Convention.” However, Herdegen argues that the practice of organs such as the treaty bodies can be seen as falling within article 31(3): “Inasmuch as the States parties have entrusted to these organs [the European Court of Human Rights, the Human Rights Committee, the UN Security Council, and WTO panels] the competence to adjudicate on disputes within the framework of their respective treaties or to progressively give detailed content to treaty provisions which require interpretation, the practice of these bodies can be seen as tantamount to subsequent practice of the parties to the treaty which establishes the agreement of the parties regarding its interpretation” Matthias Herdegen, *Völkerrecht* (3<sup>rd</sup> ed 2004), 125 (translation by Andrew Byrnes). See also Robert McCorquodale, “An Inclusive International Legal System” (2004) *Leiden Journal of International Law* (forthcoming).

<sup>25</sup> See, for example, Theodor Meron, *The Implications of the European Convention on Human Rights for the Development of Public International Law* (2000), report prepared for the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, at 4-6.

<sup>26</sup> See Tomuschat, *supra* note 18, at 156-157.

appear to have been few similar responses to other general comments and recommendations, so one could argue that the acquiescence of States parties in those statements could be seen as establishing the agreement of the parties on the interpretation of those provisions. Indeed, States frequently refer to case law and general comments or recommendations in their submissions to treaty bodies under the various individual complaint procedures, and some have also done so in other fora (such as the International Court of Justice<sup>27</sup>), examples which in most cases show acceptance of those materials. In addition, States parties are asked by committees to report on specific matters identified in general comments and recommendations and to reply to such issues in lists of issues sent to them by committees, and they generally do so (or at least do not take exception to such requests by committees).

24. In this context, the pronouncements by courts and their application of treaty body interpretations are also relevant, if it is accepted that national court decisions are relevant practice for the purpose of article 31. If courts consistently accept or follow the interpretation pronounced by a treaty body, then this would be relevant to the question of the agreement of the parties. This analysis might be complicated by the need to analyse in more detail the circumstances of particular cases, as well as the attitude of the executive government of the State in question.

25. So far as decisions and views in individual cases are concerned, once again the issue of what is relevant State practice arises. The response of the State directly concerned is obviously of importance (though whether one State by its dissent would suffice to delegitimize a decision as a correct interpretation of the treaty is unclear<sup>28</sup>). Other States may also respond to these decisions in various ways that are relevant, for example, by referring to these decisions in their own pleadings before a committee, in their reports to the committee, in the judicial decisions of their courts, or in the form of demarches calling on another State to implement or respect a committee's views.

26. A similar analysis might be applied to the concluding observations or concluding comments of the committees. In the first instance, the response of the State party concerned (and the organs of the State, including the courts and legislature) would be relevant, but other States also use this form of output in other contexts (for example, a number of cases refer to concluding observations in assessing whether a refugee claim has been made out).

27. If this analysis is preferred, then the consequence is that in any given case the status of a particular general comment or recommendation or decision, or other findings would depend on the results of a detailed analysis of how States parties has responded to that output in the various ways referred to above.

### C. USE OF TREATY BODY FINDINGS BY NATIONAL COURTS

#### *General*

28. This section of the *Final report* continues the work of documentation of the use of treaty body findings that formed a central part of the *Interim report*. In addition to noting new cases from jurisdictions referred to in the *Interim report*, the Committee has attempted to address one limitation of that report by endeavouring to obtain information about other cases in other jurisdictions in which treaty body findings have been referred to. While this has involved the examination of the practice in many additional countries (including, in particular, the countries of Eastern Europe and Southern Africa), the harvest has been relatively small: while the provisions of treaties are frequently cited by courts in dozens of jurisdictions, there is often little or no reference to the findings of the treaty bodies in many of those judicial decisions.<sup>29</sup>

<sup>27</sup> See the examples at paras 154-155.

<sup>28</sup> According to Harris, "[t]he International Law Commission thought that only practice establishing the understanding of 'the parties as a whole' should be used. The phrase 'agreement of the parties' in Article 31 (3) (b) can probably be taken as reinforcing this view. Presumably, however, acquiescence is relevant...". D J Harris, *Cases and Materials on International Law* (5<sup>th</sup> ed 1998), 815. "It is not necessary that every one of the parties should have engaged in the particular practice. It is sufficient that there is evidence that every party has accepted the practice, even by tacit consent or acquiescence." T O Elias, *The Modern Law of Treaties* (1974) 76.

<sup>29</sup> Although the Committee has made some efforts to ascertain the existence of such material in the countries of Francophone Africa, the Arab region, and other regions, in many cases it has been unable to identify examples of cases in which treaty body findings have been referred to by domestic courts. For example, the surveys in papers presented to the Turku meeting by Christina Cerna, Irina Moulechkova, and Sameer Jarrah, as well as research by the rapporteurs in relation to a number of other countries did not identify any cases in the jurisdictions covered in which treaty body findings were cited. These included Bulgaria, Jordan, Egypt, Saudi Arabia, Colombia, Ecuador, Chile, Argentina, Malaysia, Singapore, and Brunei. In her analysis of State party reports submitted under the UN human rights treaties, Ineke Boerefijn notes that there are very few references to the use by national courts of

### Cases in which a person sought to have a decision of a treaty body given effect within the national legal system<sup>30</sup>

29. The constitutional and other legal difficulties that may stand in the way of giving effect to treaty body decisions in individual cases were referred to in the *Interim Report*.<sup>31</sup> While States may be able to provide remedies in some cases by means of executive or administrative action, in other cases it may be necessary to reopen court proceedings or to overturn verdicts, or to enact legislation in order to provide an appropriate remedy or the remedy recommended by the treaty body. There appear to be relatively few countries in which a formal procedure has been adopted by legislation for giving effect to such decisions or in which constitutional provisions and procedures can be used for this purpose, where a remedy cannot be provided by executive or administrative means.<sup>32</sup> This may be so even in countries where treaties form part of and are directly enforceable as domestic law.

30. The *Interim report* referred to a number of cases in which persons who had been successful before one of the treaty bodies sought to have the favourable decision implemented through the courts of the State against which the complaint had been brought. Those examples showed that few States have explicit provisions to allow decisions of international bodies to be implemented by reopening a national case, and that there were some technical barriers that made implementation difficult.<sup>33</sup> This *Final Report* refers to further cases in which the implementation of a treaty body decision is sought through the domestic legal system.<sup>34</sup>

31. The *Interim report* discussed the case of Joseph Kavanagh, who had sought to have his conviction before the Irish courts reopened following a finding by the Human Rights Committee that his conviction by a Special Court had involved a violation of the ICCPR.<sup>35</sup> Following the dismissal of his appeal by the High Court, Kavanagh took the matter on appeal to the Supreme Court of Ireland, which unanimously dismissed the appeal.<sup>36</sup> The Court held that the provisions of the Constitution of Ireland were clear that treaties did not form part of domestic law, and also rejected the argument that ratification of the ICCPR and the First Optional Protocol had created a legitimate expectation enforceable before the courts that the State would, by means of a judicial decision, give effect to the views of the Committee (including any expectation that the prosecutor would apply for a conviction to

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treaty body findings. She attributes this to a number of factors, including the fact that many courts simply do not refer to this material, compounded by the failure of many governments to include in their reports such cases: Boerefijn, *Turku paper*. The material presented by Christina Cerna in her paper on Latin America clearly shows that, at the national level, the international jurisprudence cited by domestic courts and tribunals is overwhelmingly that of the Inter-American human rights organs.

<sup>30</sup> On the more general question of follow-up to the findings of treaty bodies (of which the implementation of views in individual cases is just one aspect), see the general discussion in the contribution to the Turku meeting by the Office of the UN High Commissioner for Human Rights, *The Follow-Up activities by the UN Human Rights Treaty Bodies and the OHCHR* (presented by Markus Schmidt). See also the discussion in Heli Niemi, *National Implementation of Findings by United Nations Human Rights Treaty Bodies: A Comparative Study* (Institute for Human Rights, December 2003), available at <http://www.abo.fi/instut/imr/norfa/Heli.pdf>.

<sup>31</sup> At 521-523

<sup>32</sup> 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](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. In the Czech Republic under Act No. 517/2002 Coll. of Laws on *Some Measures in the System of Central State Organs*, the Ministry of Justice has been charged with the co-ordination of the implementation of the views of the UN Human Rights Committee.

<sup>33</sup> See generally T Barkhuysen, M L van Emmerik and Piet Hein van Kempen (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague: Martinus Nijhoff, 1999).

<sup>34</sup> By contrast, see *McVeagh v Attorney-General* [2002] 1 NZLR 808; 2001 NZLR LEXIS 88, the New Zealand Court of Appeal dismissed an appeal against the striking out of a proposed cause of action based directly on article 9 of the ICCPR by a person who had been detained in a mental health psychiatric hospital, noting that not only was it contrary to principle, but that McVeagh had already unsuccessfully brought a communication before the Human Rights Committee, in *A (name withheld) v New Zealand* (Communication No 754/997, views of 3 August 1999).

<sup>35</sup> *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.

<sup>36</sup> *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 11 (1 March 2002), Supreme Court of Ireland, judgment delivered by Fennelly J.



be quashed in a case such as the present one).<sup>37</sup> Kavanagh lodged a further communication with the Human Rights Committee, complaining of the inadequacy of the remedy offered by the Irish government (an offer of £1,000 made after receipt of the Committee's views but which Kavanagh had rejected as inadequate); the Committee rejected this communication as inadmissible.<sup>38</sup>

32. A number of recent cases before the Human Rights Committee against Spain have also highlighted the potential difficulties in giving effect to decisions of the treaty bodies,<sup>39</sup> but have also shown that dialogue between the Committee and national courts can result in the adaptation of national laws to conform with the Covenant. International treaties ratified by Spain and properly published form part of the internal legal order, and constitutional rights are required to be interpreted in accordance with applicable treaties. However, decisions of the Human Rights Committee are not directly applicable by the courts, especially if the appropriate remedy involves the revision of an earlier decision. In such a case implementation of these decisions would normally require recourse to a special procedure (*amparo*) of the Constitutional Court.

33. The first case arose from the communication submitted to the Human Rights Committee by Michael and Brian Hill,<sup>40</sup> who had been convicted by the Spanish courts of offences relating to their involvement in a firebombing of a bar in Gandía. The Human Rights Committee had concluded that there had been violations of a number of provisions of the ICCPR<sup>41</sup> and that "the authors are entitled to an effective remedy, entailing compensation".<sup>42</sup>

34. Following the Committee's decision, Brian Hill brought his case back before the Spanish courts, seeking to have his conviction declared a nullity and to be granted a new trial. The case eventually came before the Supreme Court.<sup>43</sup> Under the applicable criminal procedure law, a court did not have the power to revise a verdict in a criminal case, unless new evidence were submitted that demonstrated that the person previously convicted was innocent. The Supreme Court held that a decision of the Human Rights Committee or a judgment of the European Court of Human Rights did not constitute new facts that would permit a reopening of the criminal proceedings against Hill.<sup>44</sup>

35. A second case decided by the Human Rights Committee adverse to Spain, *Gómez Vázquez v Spain*,<sup>45</sup> has given rise to a number of discussions by the Spanish Constitutional Court of the manner in which it should approach decisions of the Human Rights Committee. This case involved a claim by the author that the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) violated article 14(5) of the ICCPR. Under that law, those charged with serious crimes initially had their cases heard by a single judge (*Juzgado de Instrucción*) who conducted all the pertinent investigations and who, once (s)he considered the case ready for hearing, referred it to the Provincial Court (*Audiencia Provincial*), where a panel of three judges hears the case, reaches a verdict and imposes any sentence. The decision of the *Audiencia Provincial* was subject to a judicial review only on very limited legal grounds, and there was no possibility of a re-evaluation of the evidence by the Court of Cassation,<sup>46</sup> as all factual determinations by the lower court were final. Gómez Vázquez argued that, as the Supreme Court did not re-evaluate evidence, these arrangements meant that there was a violation of his right to have his conviction and sentence reviewed by a higher court according to law.<sup>47</sup>

<sup>37</sup> "I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution": Fennelly J in *Kavanagh*

<sup>38</sup> Communication No 1114/2002, decision on admissibility of 25 October 2002, CCPR/C/76/D/1114/2002/Rev.1

<sup>39</sup> This section draws on Natalia Alvarez Molinero, *Turku paper*.

<sup>40</sup> *Hill and Hill v Spain*, Communication No 526/1993, views of 2 April 1997

<sup>41</sup> Articles 9 (3), 10 and 14 (3)(c) and (5) of the ICCPR, in respect of both Michael and Brian Hill and of article 14 (3)(d), in respect of Michael Hill only.

<sup>42</sup> *Hill and Hill v Spain*, Communication No 526/1993, views of 2 April 1997, para. 16

<sup>43</sup> Supreme Court (*Tribunal supremo*), auto 69/2001, 25 July 2002

<sup>44</sup> The Supreme Court also stated that the Human Rights Committee had not explicitly recommended that Spain annul the earlier criminal sentence, but rather left the matter open to the assessment of domestic courts as to the most appropriate way provide an effective remedy.

<sup>45</sup> Communication 701/1996, 11 August 2000.

<sup>46</sup> The Supreme Court carries out the function of cassation.

<sup>47</sup> Communication No 701/1996, 11 August 2000, para 3.1.

36. The Human Rights Committee had concluded that “[t]he lack of any possibility of fully reviewing the author’s conviction and sentence, as shown by the decision referred to in paragraph 3.2, the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met” and that the author was “entitled to an effective remedy”:

“The author’s conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5, of the Covenant. The State Party is under the obligation to take all the necessary measures to ensure that similar violations do not occur in future.”<sup>48</sup>

37. In a decision of 14 December 2000 the Supreme Court held that the case should be re-evaluated in a revision procedure, but subsequently reversed its decision, deciding that a re-evaluation of the case would automatically be made by one of the judges of the Court. This procedure did not require any re-assessment of the facts of the case. Since the scope of this review was less than the Human Rights Committee’s decision indicated was necessary, the case was brought once again before the Constitutional Court in an *amparo* procedure, which has recently been declared admissible. The Committee’s decision has also been discussed in a number of other Constitutional Court decisions, in which the correctness of the Committee’s views of article 14(5) has been examined and contested, especially in the light of divergent European Convention case law.<sup>49</sup> The disagreement between the Spanish courts and the Committee continued, as the Committee subsequently adopted views in a number of other cases in which it reasserted its position in *Gómez Vázquez v Spain*.<sup>50</sup>

38. However, on 23 December 2003 Spain adopted legislative amendments in response to the Committee’s views in these cases.<sup>51</sup> The amended law provides (a) the Criminal Chambers of the Superior Courts of Justice with full appellate review over decisions of first instance of the *Audiencias Provinciales*, and (b) establishes an Appellate Chamber of the *Audiencia Nacional* for cases heard at first instance in that court. Of interest is that the publication of the law in the *Bulletin of State* expressly refers to the Committee’s jurisprudence.<sup>52</sup>

39. The status of the treaty bodies themselves (ie as bodies which are not courts) and the status of their decisions as not being binding judgments in formal terms may also be a factor which impedes the implementation of a decision in the domestic legal system,<sup>53</sup> particularly when contrasted with the binding nature of judgments of courts such as the European Court of Human Rights. For example, the Constitution of the Czech Republic<sup>54</sup> authorises and obliges the Constitutional Court to decide on measures necessary for the implementation of a decision of an international court that is binding on the Czech Republic if it cannot be implemented otherwise.<sup>55</sup> As the Constitution does not define the term “international court”, some commentators had suggested that the Human Rights Committee should be given the status of an “international court”<sup>56</sup> under this provision. However, § 117 of the Act on the Constitutional Court<sup>57</sup> has excluded this interpretation: it provides that for the purposes of that provision, “international court” means an “international organ entitled to decide about complaints about the infringements of human rights and basic freedoms the decisions of which are binding for the Czech Republic on the basis of published international treaties, the ratification of which was confirmed by Parliament and which are binding for the Czech Republic”. Only the European Court on Human Rights

<sup>48</sup> *Id* at para 13.

<sup>49</sup> See Natalia Alvarez Molinero, *Turku paper*.

<sup>50</sup> *Sineiro Fernández v Spain*, Communication No. 1007/2001, views of 7 August 2003, UN Doc CCPR/C/78/D/1007/2001, para 7; *Semey v Spain*, Communication No. 986/2001, views of 30 July 2003, UN Doc CCPR/C/78/D/986/2001, para 9.5.

<sup>51</sup> Ley Orgánica 19/2003, de 23 de diciembre, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial [Organic Law 9/2003, modifying Organic Law 6/1985 on the Judicial Power, *Boletín del Estado*, No 309, 26 December 2003, p 46025.

<sup>52</sup> *Id.* at section II

<sup>53</sup> This section draws largely on Hofmann, *Turku paper*.

<sup>54</sup> Constitution of the Czech Republic of 16 December 1992, as amended, Coll of Laws No. 1/1993.

<sup>55</sup> Article 87 (1)(i) provides:

‘The Constitutional Court decides on . . . i) measures indispensable for the implementation of a decision by an international court that is binding for the Czech Republic and cannot be implemented otherwise.’

<sup>56</sup> S J Malenovský, *Ústavní soud České republiky a mezinárodní právo*, *Právník* 2 (2000), 126 ff.

<sup>57</sup> Act No 182/1993 Coll of Laws as amended inter alia by Act No. 48/2002 Coll of Laws.

fulfils these criteria; proposals to extend the applicability of this provision to other international human rights bodies, such as the Human Rights Committee, by amending the Act on the Constitutional Court,<sup>58</sup> failed.

40. Among the few specific constitutional or legislative provisions dealing with the appropriate response by national organs to international decisions of this sort was that introduced in 2000 in Slovakia. While the Slovak Constitution<sup>59</sup> does not contain any special provision on this matter, an amendment to the Act on the Constitutional Court of the Slovak Republic introduced such a procedure.<sup>60</sup> Under this procedure, if the Human Rights Committee were to submit to the attention of the Slovak Government a communication alleging violations of provisions of the ICCPR which had been declared admissible, the Government was obliged to submit the case without delay to the Constitutional Court.<sup>61</sup> The Court was to treat this communication as an individual complaint (§ 75 para 3).<sup>62</sup> However, the fact that this procedure was viewed as possibly leading to a breach of the principle of *res judicata*<sup>63</sup> led to its repeal.<sup>64</sup>

41. Even under that procedure, there were difficulties in meshing the treaty body system with the national legal system. In decision ES 6/2001 of 25 June 2001,<sup>65</sup> the Constitutional Court dealt with the views of the Human Rights Committee in *Mátyus v Slovak Republic*<sup>66</sup> concerning the electoral law in Slovakia (article 25(1) and (3) of the ICCPR). In accordance with the then applicable § 75 para 1 of Act No 38/1993 Coll of Laws, the Government of the Slovak Republic initiated proceedings before the Constitutional Court; the case was expected to be dealt with as an individual complaint pursuant to § 75 para 3 of that Act. However, the Constitutional Court stressed that the interpretation and application of constitutional and other legal norms had to conform not only with the international obligations of the Slovak Republic, but also with its constitutional norms. According to the Court, the 1993 Constitution had construed the constitutional complaint system on the principle that this action was initiated by natural or legal persons themselves; the text of the Constitution could not be interpreted in such a way as to enable the initiation of the procedure of constitutional complaints by other subjects. For these reasons, the proceedings were suspended by the Constitutional Court.

42. In Hungary, while there is no specific provision allowing decisions to be given direct effect, the Code on Criminal Procedure<sup>67</sup> provides that the decisions of international human rights organs are to be considered as “new evidence” for the purpose of reopening criminal cases. A similar provision is expected to be included in a new Code on Civil Procedure.<sup>68</sup>

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<sup>58</sup> Governmental Draft of the Amendment to the Act on the Constitutional Court, 2003, Parliamentary doc.No 284, <http://www.psp.cz/sqw/historie.sqw?O=4&T=284>.

<sup>59</sup> Act No 460/1992 Coll. of Laws as amended.

<sup>60</sup> Amendment to Act No. 38/1993 Coll. on the Constitutional Court of the Slovak Republic, Act No 226/2000 Coll.

<sup>61</sup> § 75 (1) of Act No 226/2000 Coll of Laws reads as follows:

“In case the Committee on Human Rights submits an admitted communication to the attention of the Government of the Slovak Republic alleging that by a measure, decision or other act of an organ of public power of the Slovak Republic any right of the claimant according to the International Covenant on Civil and Political Rights was violated, the Government submits the case without delay to the Constitutional Court which initiates proceedings according to Part III, Chapter two, Paragraph fourth of this Act”

<sup>62</sup> § 75 (3) of Act No 38/1993 Coll of Laws reads as follows:

‘For the purposes of the proceeding before the Constitutional Court, the communication according to para 1 and 2 is considered as a constitutional complaint admitted for further proceedings.’

<sup>63</sup> The same procedure was envisaged also for the complaints before the European Court on Human Rights (§ 75 para 2 of Act No 37/1993 Coll. of Laws).

<sup>64</sup> Amendment to Act No 38/1993 Coll of Laws, Act No 124/2002 Coll, entered into force on 20 March 2002.

<sup>65</sup> Coll of Decisions 2001, 575ff.

<sup>66</sup> *Mátyus v Slovak Republic*, Communication 923/2000, views of 26 July 2002.

<sup>67</sup> Quoted from H Bokor-Szegő/ M Weller, “Hungary”, in R Blackmann and J Polakiewicz (eds), *Fundamental Rights in Europe* (2001), at 397.

<sup>68</sup> *Ibid*

43. Neither the 1997 Constitution of the Republic of Poland<sup>69</sup> nor the 1997 Act on Constitutional Court<sup>70</sup> deal with the question of the reaction of Polish state organs to the views of the Human Rights Committee or other treaty bodies. The provision of article 91 para 3 of the Constitution which provides for the direct applicability of the “laws established by an international organisation” is interpreted as giving direct applicability not to the individual acts (decisions, views) but rather to the generally binding acts (directives, resolutions etc.). However, under the 1997 Code of Criminal Procedure,<sup>71</sup> the decisions of international human rights organs which act on the basis of an international treaty ratified by the Republic of Poland are considered to be a ground for an automatic reopening of criminal proceedings to the benefit of the convicted person.

### *Requests for interim measures and national legal systems*

44. In *Ahani v Canada (Attorney General)*<sup>72</sup> the Canadian courts had to deal with the issue of the status of requests for interim measures under the Canadian legal system. Mansour Ahani was a Convention refugee who had been ordered to be deported to Iran on the ground that he was a threat to national security. Ahani had lodged a communication with the Human Rights Committee shortly before the decision of the Supreme Court of Canada in his case (which turned out adverse to him<sup>73</sup>), and the Committee requested that Canada not return him to Iran until the Committee had considered the communication. Canada refused to undertake not to do so, and Ahani applied to the courts for an order staying the deportation pending the outcome of the Committee’s consideration of the matter. Ahani was unsuccessful at first instance,<sup>74</sup> the Ontario Court of Appeal by a majority dismissed his appeal,<sup>75</sup> and the Supreme Court of Canada refused leave to appeal.<sup>76</sup>

45. In the Court of Appeal<sup>77</sup> Laskin JA made a number of comments on the status of the ICCPR and the Optional Protocol and the Committee’s views and requests:<sup>78</sup>

“[32] A further answer to Ahani’s submission is found in the nature of Canada’s international commitment under the Covenant and the Protocol. The nature of that commitment is the second undisputed fact. In signing the Protocol, Canada did not agree to be bound by the final views of the Committee, nor did it even agree that it would stay its own domestic proceedings until the Committee gave its views. In other words, neither the Committee’s views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law. The party states that ratified the Covenant and the Optional Protocol turned their minds to the question of whether they should agree to be bound by the Committee’s views, or whether they should at least agree to refrain from taking any action against an individual who had sought the Committee’s views until they were known. They decided as a matter of policy that they should not, leaving each party state, on a case-by-case basis, free to accept or reject the Committee’s final views, and equally free to accede to or not accede to an interim measures request.

[33] To give effect to Ahani’s position, however, would convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result.

...

<sup>69</sup> Coll of Laws 1997, No 78, pos. 483.

<sup>70</sup> Coll of Laws 1997, No 102, pos. 643.

<sup>71</sup> Coll of Laws 1997, no 89, pos. 555, as amended.

<sup>72</sup> (2002) 58 OR (3d) 107; 2002 Ont Rep LEXIS 38 (Ont CA)

<sup>73</sup> *Ahani v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 208 DLR (4<sup>th</sup>) 1 (SCC)

<sup>74</sup> *R v Ahani* (2002) 90 CRR (2d) 292; 2002 CRR LEXIS 13 (Ont CA)

<sup>75</sup> *Ahani v Canada (Attorney General)* (2002) 58 OR (3d) 107; 2002 Ont Rep LEXIS 38 (Ont CA)

<sup>76</sup> *Ahani v Minister of Citizenship and Immigration (Ontario)*, Case 29058, 16 May 2002.

<sup>77</sup> (2002) 58 OR (3d) 107; 2002 Ont Rep LEXIS 38 (Ont CA)

<sup>78</sup> *Id* at paras 32-33, and 42, citing in support of this conclusion the anonymous “Introduction”, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Vol. 2 (New York: UN, 1990), at p 1, as well as an article by David Kretzmer. For a detailed discussion of the case and related issues, see Joanna Harrington, “Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection” (2003) 48 *McGill Law Journal* 55.

[42] By signing the Protocol, Canada did provide an individual like Ahani an opportunity to seek the Committee's views. But it qualified that right in two important ways. In any given case, Canada first reserved the right to reject the Committee's views, and, second, reserved the right to enforce its own laws before the Committee gave its views. In deporting Ahani, Canada is acting consistently with the terms under which it signed the Protocol. It is not denying Ahani procedural fairness or depriving him of any remedy to which he is entitled. Even under the Protocol, Ahani has no right to remain in Canada until the Committee gives its views. He can therefore hardly claim that the principles of fundamental justice give him that right."

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

46. The *Interim report* referred to a large number of cases in which national courts and tribunals had referred to the work of the UN human rights treaty bodies. The section below gives further examples of such cases; these comprise largely new cases (most decided since the *Interim report*), but also include further proceedings in cases which were referred to in the *Interim report*.<sup>79</sup>

**1. Case law of the committees under the individual communications procedures**

**a. Human Rights Committee**

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

*Australia*

48. In *Al Masri*<sup>80</sup> the Full Court of the Federal Court of Australia was faced with the task of interpreting broad legislative powers permitting the detention of asylum-seekers. The Court noted the general principle of statutory interpretation that statutes should, where possible, be interpreted consistently with Australia's international obligations, in this case the guarantees against arbitrary detention and of the right to judicial review of the legality of detention under articles 9 (1) and (4) of the ICCPR. Referring to the *travaux* of article 9 and relying on the Human Rights Committee's views in *Van Alphen v Netherlands*<sup>81</sup> and *A v Australia*,<sup>82</sup> the Court followed the interpretation of the Committee in that case, holding that article 9 required not only that deprivation of liberty be authorised by law but that it also satisfy a substantive standard of non-arbitrariness. In this case this meant that the power to detain "it would be necessary to read it as subject, at the very least, to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention."<sup>83</sup>

*Belize*

49. In *Reyes v R (Belize)*,<sup>84</sup> in considering the constitutionality of the mandatory death penalty for murder, the Privy Council referred to the decision of the Human Rights Committee in *Thompson v Saint Vincent and the Grenadines*,<sup>85</sup> in which the Committee had held that the imposition of the death

<sup>79</sup> This report includes references to those cases of which the Committee was aware as of the end of 2003. Selected cases from 2004 have also been included.

<sup>80</sup> *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70 (15 April 2003), <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/70.html>. The case is on appeal to the High Court of Australia. In *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004), the High Court of Australia, came to a different conclusion to that reached in *Al Masri* and overruled that case.

<sup>81</sup> Communication No 305/88

<sup>82</sup> Communication No 560/93

<sup>83</sup> At para 155

<sup>84</sup> [2002] UKPC 11

<sup>85</sup> Communication No 906/1998

penalty for murder without regard to the individual circumstances of the case was a violation of article 6(1) of the ICCPR.<sup>86</sup>

#### Canada

50. In *Romans v Minister of Citizenship and Immigration*,<sup>87</sup> the Federal Court noted the references by counsel to jurisprudence of the Human Rights Committee (and the European Court of Human Rights) on whether long-term residents of a country have an absolute right to which they have immigrated,<sup>88</sup> but followed what it considered to be a binding Supreme Court decision to the contrary.<sup>89</sup>

#### Czech Republic

51. There have been a number of decisions of the Constitutional Court of the Czech Republic, in which the Court has essentially refused to follow Human Rights Committee decisions against the Czech Republic, invoking seemingly divergent Strasbourg jurisprudence on the same issues and also purporting to apply the Human Rights Committee's own jurisprudence of discrimination to the cases but reaching a different result to that the Committee itself has reached.

52. In its decision of 4 June 1997,<sup>90</sup> the Constitutional Court explicitly rejected the views of the Human Rights Committee. The question was whether the provisions of Act No 8/1991 Coll on Extra-judicial Rehabilitation which confined the right to restitution of properties expropriated by the communist regime to Czech citizens only -- was compatible with the 1993 Constitution of the Czech Republic (in particular with article 1 of the Constitution and article 3 (1) of the 1992 Czech Charter on Human Rights). The Constitutional Court accepted that in *Šimůnek v Czech Republic*<sup>91</sup> and *Adam v Czech Republic*<sup>92</sup> the Human Rights Committee had concluded that the differentiation between non-citizens and Czech citizens in the legislation was unreasonable and infringed the prohibition of discrimination under article 26 of the ICCPR. However, the Court argued that in analogous cases the European Commission on Human Rights had come to different conclusions.<sup>93</sup> Moreover, the Human Rights Committee had itself accepted that a differentiation in treatment -- if based on reasonable grounds -- could not be deemed to be discriminatory under article 26 of the ICCPR.<sup>94</sup> The Constitutional Court considered the differentiation in the restitution regime based on grounds of Czech citizenship as such a "reasonable ground" and rejected the challenge to the legislation.

53. In its decision of 25 March 1995<sup>95</sup> the Constitutional Court had already addressed other provisions of the same legislation which made the restitution of nationalised property contingent upon the relevant nationalisation having taken place between 25 February 1948 (the date of the Communist take-over) and 1 January 1990. The Constitutional Court stated its understanding of the Human Rights Committee's jurisprudence as holding that the national legal order could not differentiate between former and later victims of nationalisation.<sup>96</sup> However, in the opinion of the Court, the setting of the time limits had an objective and reasonable basis, and any other approach could lead to a chain of

<sup>86</sup> The Privy Council reached the same conclusion referring to Human Rights Committee case law and Inter-American Commission authority in *Matthew v State* [2004] UKPC 33 (on appeal from the Court of Appeal of Trinidad) and *Boyce v Barbados* [2004] UKPC 32, paras 22 and 81 (on appeal from the Court of Appeal of Barbados). Both cases referred to *Kennedy v Trinidad and Tobago*, Communication No 845/1999.

<sup>87</sup> (2001) 86 CRR (2d) 139, at para 14; 2001 CRR LEXIS 86, 2001 FCT 466

<sup>88</sup> The judgment is not explicit, but presumably the reference is to *Stewart v Canada*, Communication 538/1993.

<sup>89</sup> At para 28 (following *Chiarelli v Minister of Employment and Immigration* [1992] 1 SCR 711, 72 CCC (3d) 214, 90 DLR (4th) 289).

<sup>90</sup> Nr 67 of 4 June 1997, Pl ÚS 33/96, Coll of the decisions 8 (1997 – II. Part), 163 ff.

<sup>91</sup> Communication No 516/1992

<sup>92</sup> Communication No 586/1994

<sup>93</sup> However, the cases in question appear all to have been decisions on admissibility rather than decisions on the merits of a discrimination claim under article 14 of the European Convention. See *Brežný v Slovak Republic*, Application No 23131/93, decision on admissibility of 4 March 1996; *Pezoldová v Czech Republic*, Application No 28390/95, decision on admissibility of 11 April 1996; *Nohejl v Czech Republic*, Application No 23889/93, decision on admissibility of 13 May 1996; *Jonas v Czech Republic*, Application No 23063/93, decision on admissibility of 13 May 1996.

<sup>94</sup> *Zwaan de Vries v Netherlands*, Communication No 182/1984, 9 April 1987, para 13.

<sup>95</sup> Nr 41, 25 March 1998, Pl ÚS 45/97, Coll of the decisions 10 (1998 – I. Part), 277ff.

<sup>96</sup> *Šimůnek*, Communication 516/1992, views of 19 July 1995. It is not clear that the Court's understanding of the import of the Committee's case law is correct.

restitution claims which could extend back into the Czechoslovak Pre-Munich Republic or perhaps even further back into history.

54. In its decision of 22 September 1999<sup>97</sup> the Constitutional Court dealt with the constitutionality of the provisions of Act No 229/1991 Coll on the Regulation of the Property Relations to Land and Other Agricultural Property. This limited eligibility for restitution of the land concerned to persons who had held Czechoslovak or Czech citizenship on 31 January 1991 or 1 September 1993 respectively. The Court stressed that in its views in the *Šimůnek* and *Adam* cases, the Human Rights Committee had stated that the precondition of citizenship was incompatible with the prohibition of discrimination under Article 26 of the ICCPR. This provision of the Covenant did not, however, require the same treatment if there were sufficient reason for differential treatment. The Court held that the differentiation on the basis of the possession of citizenship at a particular point in time was compatible with this condition.

55. Finally in this group of cases, in its decision of 6 October 1999<sup>98</sup> the Czech Constitutional Court analysed the constitutionality of the precondition of holding Czech citizenship for the restitution of nationalised property of those persons whose property had been expropriated under the communist regime on the basis of criminal proceedings and who had been rehabilitated by the courts on the basis of §19 para 1 of the 1991 Act on Judicial Rehabilitation.<sup>99</sup> According to the Constitutional Court, the Human Rights Committee had repeatedly accepted differential treatment under article 26 of the ICCPR if arbitrariness was excluded or if this inequality was based on reasonable and objective criteria. According to the Court, the aims of the restitution legislation and the legal regulation of citizenship fulfilled these requirements; the risk of creating further inequalities made it impossible to abolish for this group the requirement of Czech citizenship.

56. The decision of the Czech Constitutional Court of 21 January 2003<sup>100</sup> mentioned the views of the Human Rights Committee only in general terms. The case involved a challenge to provisions of the 1995 Act on Pension Security<sup>101</sup> (§ 78) which gave former miners certain preferences among the categories of disabled workers. The Constitutional Court referred to the “numerous decisions of the control organs” existing under international human rights instruments which had confirmed that not every differential treatment of persons has to be considered as a breach of the principle of equality. The Court stressed that these decisions differentiate between a formal equality and material equality which aims at the abolition of factual discrimination between persons in unequal situations. The Court held that the preferential treatment of miners in the legislation was based on objective and reasonable criteria: for years they had performed work which was physically and mentally extremely demanding and that under very harsh conditions; for these reasons, there was no arbitrariness in the legislative classification.

#### *Germany*

57. In a 1986 decision<sup>102</sup> the German Federal Constitutional Court considered the question of whether criminal trials in absentia were inconsistent with international law. Citing jurisprudence which included *Mbenge v Zaire*, the Court commented: “It cannot be seen from State practice in the area of public international law that in absentia proceedings in criminal law cases would constitute a breach of the minimum standard of public international law even in cases where the party concerned was informed of the proceeding pending against him, but escaped and was, according to the minimum requirements of international law, defended during the proceedings by a duly appointed public defender.”

#### *Hong Kong SAR*<sup>103</sup>

58. In *Yau Kwong Man v Secretary for Security*<sup>104</sup> the Hong Kong Court of First Instance considered a challenge to a statutory system under which prisoners who had been sentenced to

<sup>97</sup> Pl. ÚS 24/98, Coll of the decisions 15(1999 – III. Part), 211 et seq.

<sup>98</sup> Pl. ÚS 9/99, Coll of decisions 16(1999 – IV Part), 9 et seq.

<sup>99</sup> Act No 119/1990 Coll of Laws.

<sup>100</sup> Pl. ÚS 15/02, No 40/2003 Coll. of Laws.

<sup>101</sup> No 155/1995 Coll. of Laws.

<sup>102</sup> Bundesverfassungsgericht, 3rd Chamber 2nd Senate, 24 January 1991, 2 BvR 1704/90.

<sup>103</sup> Hong Kong Special Administrative Region of the People’s Republic of China

<sup>104</sup> [2002] 3 HKC 457 (HKCFI), 2002 HKCU LEXIS 1461; [2002] 1065 HKCU 1 (HKCFI, Hartmann J)

indeterminate life sentences "at the Governor's pleasure" subsequently had a minimum term fixed by the Chief Executive. They argued that this administrative decision violated their rights under article 14(1) and 9(4) of the ICCPR.<sup>105</sup> In addressing the question of whether the prisoners would be able to challenge the lawfulness of their detention in accordance with article 9(4), the Court, citing *A v Australia*,<sup>106</sup> held that the remedy of habeas corpus was sufficiently broad to satisfy this guarantee.<sup>107</sup> 59. In *Lau Cheong and another v HKSAR*<sup>108</sup> the Hong Kong Court of Appeal considered a challenge to the law of Hong Kong relating to murder based on an intent to inflict grievous bodily harm, and the mandatory nature of the sentence for murder. The Court upheld the validity of the rule, referring in its judgment to *Van Alphen v Netherlands*<sup>109</sup> and *A v Australia*<sup>110</sup> in relation to the argument that the challenged rules violated the guarantee of freedom from arbitrary detention.

#### *Ireland*

60. In *Kavanagh v Governor of Mountjoy Prison*<sup>111</sup> the Supreme Court of Ireland considered the status of the views of the Human Rights Committee and their relationship to Irish law in a case brought to give effect to a decision of the Committee.

#### *Japan*

61. In its judgment of 23 June 1998,<sup>112</sup> the Tokyo District Court was not persuaded by the plaintiffs' invocation of the views of the Human Rights Committee in *Gueye v France* and rejected the relevance of the views to the case "even if the 'view[s]' given in the case may be considered as supplementary means of interpretation".<sup>113</sup> In its judgment of 25 November 1997,<sup>114</sup> the Takamatsu High Court referred to *Morael v France*<sup>115</sup> in discussing the relevance of general legal principles, European Convention concepts, and other non-binding instruments to the interpretation of the ICCPR.

#### *Namibia*

62. In *Muller v President of the Republic of Namibia and Another*<sup>116</sup> the Supreme Court of Namibia considered a constitutional equality challenge to section 9(1) of the Aliens Act 1 of 1937. That provision required the alien husband of a wife with Namibian citizenship to comply with certain formalities if he was to adopt his wife's surname, while not requiring the alien wife of a Namibian husband to comply with similar procedures.<sup>117</sup> The Court referred to the decision of the Human Rights Committee in *Coeriel et al v The Netherlands*<sup>118</sup>, and rejected the challenge, explaining that "surnames fulfil important social and legal functions to ascertain a person's identity for various purposes such as social security, insurance, license, marriage, inheritance, election and voting, passports, tax, police and public records as well as many other instances where proper identity plays a role".<sup>119</sup>

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<sup>105</sup> The provisions of the ICCPR and ICESCR as applied to Hong Kong are incorporated into Hong Kong Law by virtue of article 39 of the Basic Law of the Hong Kong SAR and the Hong Kong Bill of Rights Ordinance (Cap 383).

<sup>106</sup> *Id* at para 127

<sup>107</sup> *Ibid*

<sup>108</sup> [2002] 3 HKC 146; 2002 HKC LEXIS 69

<sup>109</sup> Communication No 305/1988, views of 15 August 1990

<sup>110</sup> Communication No 560/ 1993

<sup>111</sup> [2002] IESC 11, discussed at para 10 above

<sup>112</sup> Not yet reported

<sup>113</sup> See also Judgment of 15 March 1996, Tokushima District Court, 1597 HANREI JIHO 115, cited in Yuji Iwasawa, *International Law, Human Rights, and Japanese Law* (1998), at 119 n 402, translated and published in 40 JAPANESE ANN. INT'L L. 118 (1997).

<sup>114</sup> 1653 HANREI JIHO 117, 120-121, 41 JAPANESE ANN. INT'L L. 87 (1998).

<sup>115</sup> Communication No 207/1986

<sup>116</sup> 2000 (6) BCLR 655 (SC)

<sup>117</sup> At 669.

<sup>118</sup> Communication No 453/1991

<sup>119</sup> At 668.



63. Notwithstanding the Supreme Court's reference to the Committee's case law, when the case came to the Committee, it did not agree with the ultimate conclusion of the Court, but found that the different requirements constituted discrimination on the basis of sex contrary to article 26 of the ICCPR.<sup>120</sup>

#### *New Zealand*

64. In *Ahmed Zaoui v Attorney General*,<sup>121</sup> the High Court of New Zealand considered a challenge by a person who had been detained on security grounds. While upholding the detention as lawful, Paterson J referred to the decision of the Human Rights Committee in *A v Australia* on the concept of arbitrary detention, concluding that the detention was not arbitrary.<sup>122</sup>

#### *Nigeria*

65. In *Onuoha Kalu v The State*<sup>123</sup> the Supreme Court of Nigeria held that the death penalty is not unconstitutional in Nigeria. The advocates who appeared before the Court referred to various decisions of the Human Rights Committee (in particular *Ng v Canada*<sup>124</sup> and *Cox v Canada*<sup>125</sup>) and "submitted that what international human rights jurisprudence finds objectionable and violative of the guarantee against torture contained in international instruments is not so much the imposition of the death penalty per se but the manner of its execution, including the attendant agony upon the delay in waiting on death row before execution".<sup>126</sup>

#### *Norway*

66. In *Federation of Offshore Workers Trade Unions (Oljearbeidernes Fellessammenslutning, OFS) case*<sup>127</sup> the Supreme Court of Norway (*Høyesterett*) considered a challenge to a provisional (temporary) ordinance which required referral of a dispute between a number of offshore oil industry unions and their employers to compulsory mediation and which prohibited strike action. In rejecting the union's argument that the prohibition of strikes was a violation of Norway's international legal obligations,<sup>128</sup> the Court considered the decision of the Human Rights Committee in *J B v Canada*,<sup>129</sup> in which the Committee concluded that while the right to strike was expressly included in article 8(1)(d) of the ICESCR, it did not fall within the scope of article 22 of the ICCPR. The Court also considered in detail jurisprudence of the European Court of Human Rights, and views of ILO bodies.<sup>130</sup>

67. In the *KRL case*<sup>131</sup> the Supreme Court (*Høyesterett*) considered a challenge to the refusal by Norwegian authorities to grant applications by certain parents for total exemptions for their children from instruction in a school subject entitled "Christianity and religious and philosophical orientation" (*kristendomskunnskap med religions- og livssynsorientering* or *KRL-faget*). (A partial exemption was available from certain parts of the course.)

68. The plaintiffs argued that the system was inconsistent with the applicable international guarantees of freedom of religion or of the right of parents to have their children educated in accordance with their own religious and philosophical convictions, or with guarantees of non-discrimination under various provisions of the European Convention, the ICCPR, the ICESCR and the CRC. The Court considered the Human Rights Committee's *General comment No 22* (on article 18)

<sup>120</sup> *Müller and Engelhard v Namibia*, Communication No 919/200, views adopted on 26 March 2002.

<sup>121</sup> High Court of New Zealand, 16 July 2004

<sup>122</sup> *Id* at para 81.

<sup>123</sup> Supreme Court of Nigeria, SC 24/1996 [1998] 13 NWLR 531; [1998] ICHRL 169

<sup>124</sup> Communication 469/1991

<sup>125</sup> Communication 539/1993

<sup>126</sup> At 582, para H, and 583, para A.

<sup>127</sup> Supreme Court of Norway, Rt 1997-580

<sup>128</sup> Under the ICCPR, the ICESCR, various ILO Conventions, the European Social Charter and the European Convention on Human Rights

<sup>129</sup> Communication No 118/1982

<sup>130</sup> A detailed description of the background to the case can be found in the *Federation of Offshore Workers' Trade Unions and others v Norway*, European Court of Human Rights, Application No 38190/97, decision on admissibility of 27 June 2002, in which the Court rejected the case as inadmissible.

<sup>131</sup> Supreme Court of Norway, Rt 2001-1006 (192-2001)

and *General comment No 18* (on non-discrimination), its views in *Hartikainen v Finland*,<sup>132</sup> and its concluding observations on Norway's periodic reports under the ICCPR,<sup>133</sup> as well as concluding observations of the CRC on Norway.<sup>134</sup> The Court also discussed at length the case law under the European Convention.<sup>135</sup>

#### *South Africa*

69. In *Freedom Front v South African Human Rights Commission*,<sup>136</sup> a case involving a claim of hate speech under section 16(2) of the Constitution, the South African Human Rights Commission discussed the case of *Faurisson v France* in upholding the claim.

#### *Spain*

70. In a number of cases involving challenges to appellate and review procedures under Spanish criminal procedure law,<sup>137</sup> the Spanish Supreme Court and the Constitutional Court considered the impact of the views of the Human Rights Committee in *Gómez Vázquez v Spain*,<sup>138</sup> this followed consideration by the Supreme Court of the decision of the Committee in *Hill and Hill v Spain*.<sup>139</sup>

#### *Tanzania*

71. In *Mbushuu and Another v Republic of Tanzania*,<sup>140</sup> an appeal from the High Court, the death penalty was held to be constitutional and the sentences of life imprisonment imposed by the High Court were quashed.<sup>141</sup> The state attorney, for the respondent, referred to the decision of the Human Rights Committee in *Sutcliffe v Jamaica*,<sup>142</sup> to support their submission that a delay in the execution of the death penalty did not make the death penalty cruel and inhuman.<sup>143</sup> The respondent argued that "on the contrary ... any delay in the execution of the punishment kindles some hope in the condemned prisoner".<sup>144</sup>

#### *United Kingdom*

72. In *R v Secretary of State for the Home Department, Ex parte Bateman and Another*,<sup>145</sup> Bateman sought compensation for his detention following a conviction that was eventually reversed on appeal following a reference of the case to the Court of Appeal by the Home Secretary. Bateman relied on article 14(6) of the ICCPR,<sup>146</sup> which had been given effect to in UK law by section 133 of the

<sup>132</sup> Communication No 40/1978

<sup>133</sup> CCPR/C/79/Add.27 and CCPR/C/79/Add.12.

<sup>134</sup> CRC/C/15/Add.23, and CRC/C/15/Add.126

<sup>135</sup> The case has been taken to the European Court of Human Rights: *Folgerø and others v Norway*, Application No 15472/02.

<sup>136</sup> 2003 (11) BCLR 1283, [http://www.sahrc.org.za/hate\\_speech.PDF](http://www.sahrc.org.za/hate_speech.PDF)

<sup>137</sup> Discussed at paras 9 and 32-38 above.

<sup>138</sup> Communication 701/1996, 11 August 2000.

<sup>139</sup> Communication No 526/1993, discussed at paras 33-34 above.

<sup>140</sup> [1995] 1 LRC 216

<sup>141</sup> The High Court had held in *Republic of Tanzania v Mbushuu and another* [1994] 2 LRC 335 that the death penalty was unconstitutional and commuted the death sentences of the two accused to sentences of life imprisonment.

<sup>142</sup> *Barrett and Sutcliffe v Jamaica*, Communications 270 and 271/1988, paras 3.5 and 3.4

<sup>143</sup> At 223, para f.

<sup>144</sup> *Id* at paras e-f

<sup>145</sup> Queen's Bench Division (Crown Office List), *The Times*, 10 May 1993, CO/1170/92

<sup>146</sup> Article 14(6) provides: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered

Criminal Justice Act.<sup>147</sup> The issue was whether compensation was payable whenever a conviction was reversed or whether the phrase “on the ground that a new or newly discovered fact shows conclusively [beyond reasonable doubt] that there has been a miscarriage of justice” applied only to cases of pardon. The Divisional Court considered the views of the Human Rights Committee in *Muhonen v Finland*<sup>148</sup> in reaching its conclusion that the qualifying phrase applied both to cases of pardon as well as to reversal of convictions by an appellate court.

73. In *R v Secretary of State for the Home Department, ex parte Mullen*,<sup>149</sup> a decision of the House of Lords addressing the interpretation to be given to section 133 in the light of article 14(6) of the ICCPR and the presumption of innocence in article 14(2) of the ICCPR, various members of the House of Lords considered the *travaux préparatoires* of the ICCPR and cases decided by the Human Rights Committee.<sup>150</sup>

74. In *R v Special Adjudicator, ex parte Ullah*<sup>151</sup> Lord Bingham cited with approval the decision of the Human Rights Committee in *ARJ v Australia*<sup>152</sup> in relation to the issue of the obligations of the United Kingdom not to return a person to a country where he would suffer a real risk of violation of his human rights.<sup>153</sup> In *Nadarajah v Secretary of State for the Home Department*<sup>154</sup> the Court of Appeal referred to the references by counsel to decisions of the Human Rights Committee to support a general principle that asylum-seekers should not be detained (the Court did not analyse these decisions).<sup>155</sup>

#### Zimbabwe

75. In *State v Banana*<sup>156</sup> the Supreme Court of Zimbabwe, in ruling on the constitutionality of the crime of sodomy, held that the “social norms and values of Zimbabwe did not push the Court to decriminalise consensual sodomy”.<sup>157</sup> The Court also held that, “it was important to bear in mind that what was forbidden by s 23 of the Zimbabwe Constitution was discrimination between men and women and not between heterosexual men and homosexual men”.<sup>158</sup> In arriving at this conclusion, Gubbay CJ (who delivered the majority judgment) relied on the dissenting opinion of Mr Bertil Wennergren in the case of *Toonen v Australia*.<sup>159</sup>

76. In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others*,<sup>160</sup> the Supreme Court of Zimbabwe ordered the death sentences imposed on four prisoners to be vacated, upon finding that the delay of 52 and 72 months between the dates on which the prisoners had been sentenced to death and the date on which it was proposed that they be executed was in violation of section 15(1) of the Constitution.<sup>161</sup> In reaching this conclusion,<sup>162</sup> the Court relied on

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punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

<sup>147</sup> This provided for compensation for a person “when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.”

<sup>148</sup> Communication No 89/1981

<sup>149</sup> [2004] UKHL 18

<sup>150</sup> *Id* at paras 9 and 10 (Lord Bingham, referring to *Muhonen*, *Irving v Australia*, Communication No 880/1999, and *WJH v Netherlands*, Communication No 408/1990); and at paras 38 and 51 (Lord Steyn, referring to *WJH*).

<sup>151</sup> [2004] UKHL 26

<sup>152</sup> Communication No 692/1996

<sup>153</sup> [2004] UKHL 26, at para 23.

<sup>154</sup> [2003] EWCA Civ 1768, [2003] All ER (D) 129 (Dec)

<sup>155</sup> *Id* at para 49 (referring to counsel’s arguments relying on *B v Australia*, Communication No 1014/2001, views of 18 September 2003, para 7.2).

<sup>156</sup> 2000 (3) SA 885 (ZS)

<sup>157</sup> *Id* at 888.

<sup>158</sup> *Ibid*

<sup>159</sup> Communication No 488/1992.

<sup>160</sup> 1993 (4) SA 239

<sup>161</sup> The Court held (at 241) that section 15(1) “embodies broad and idealistic notions of dignity, humanity and decency”.

the dissenting opinion of a member of the Human Rights Committee in the communication of *Randolph Barrett and Clyde Sutcliffe against Jamaica*.<sup>163</sup> The Court also referred to other cases decided by the Committee.<sup>164</sup>

**b. Committee against Torture**

*Canada*

77. In *Bouaouni v Canada (Minister of Citizenship and Immigration)*<sup>165</sup> Blanchard J of the Federal Court considered in detail the views of the Committee in *Khan* and *Tala* in deciding the standard that should be applied in the interpretation of the legislation which defined as a person needing protection one whose removal would subject him or her personally “to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture”.<sup>166</sup>

*United Kingdom*

78. In *Abdurahman Hariri v Secretary of State for the Home Department*<sup>167</sup> the Court of Appeal referred to the case law of the Committee against Torture in *Kisoki*<sup>168</sup> cited in the judgment of the Court of Appeal) in considering whether appropriate test for determining whether a person who faced no direct personal risk of persecution nonetheless faced a real risk because of a gross and systematic pattern of violation of rights.

79. In *A and others v Secretary of State for the Home Department*,<sup>169</sup> the Court of Appeal heard an appeal from the decision of the Special Immigration Appeals Commission by a number of persons detained under British anti-terrorism legislation, in which one issue was whether evidence that may have been obtained by torture committed outside the United Kingdom by persons other than British officials might be used in any way against the detainees. All members of the court refer to the decision of the Committee against Torture in *P E v France*,<sup>170</sup> while two members of the court refer to the Human Rights Committee, *General comment* on article 7).

**2. General comments and general recommendations**

**a. Human Rights Committee general comments**

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

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<sup>162</sup> *Id* at 264.

<sup>163</sup> Communications No 270 and 271/1988

<sup>164</sup> At 264. These included *Earl Pratt and Ivan Morgan*, Communication No 210/1985 and 225/1987 (24 March 1988); *Carlton Reid*, Communication No 250/1987 (20 July 1990) and *Randolph Barrett and Clyde Sutcliffe*, Communication No 270/271/1988 (30 March 1992). Gubbay CJ, in delivering the majority opinion, quoted para 10 from the *Sutcliffe* communication: “The conduct of the person concerned with regard to the exercise of remedies ought to be measured against the States involved. Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly...In this type of case, the elements involved in determining the time factor cannot be assessed in the same way if they are attributable to the State party as if they can be ascribed to the condemned person. A very long period on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the State party from its obligations under art 7 of the Covenant...” The judge concluded by stating “It is the latter approach that I find the more compelling”.

<sup>165</sup> [2003] FCJ No 1540, at paras 38-40; 2003 Fed CC LEXIS 1534; 2003 FC 1211

<sup>166</sup> Immigration and Refugee Protection Act, SC 2001, c 27, s 97(1)(a). See also *Thamotharampillai v Minister of Citizenship and Immigration* (2001) 84 CRR (2d) 346; 2001 CRR LEXIS 45; 2001 FCT 370, at para 29 (Federal Court Trial Division) (referring to *Khan v Canada*, Comm No 15/1994, CAT/C/13/D/15/1994, 18 November 1994).

<sup>167</sup> [2003] EWCA Civ 807, at para 6

<sup>168</sup> Communication No 41/1996, in discussing the decision of the Immigration Appeal Tribunal in *Muzafar Iqbal* [2002] UKIAT 02239, the relevant section of which was quoted in *Hariri*.

<sup>169</sup> [2004] EWCA Civ 1123 (Eng CA) (11 August 2004)

<sup>170</sup> At paras 108, 136 (Pill LJ), 271 (Laws LJ), and 450 (Neuberger LJ).

### Canada

81. In *Sauvé v Canada (Chief Electoral Officer)*<sup>171</sup> the Supreme Court of Canada held that s 51(e) of the Canada Elections Act, which prohibited prison inmates serving a sentence of two years or more from voting in federal elections, violated the right to vote guaranteed by section 3 of the Canadian Charter of Rights and Freedoms and that the violation was not justified under section 1 of the Charter. The majority judgment of McLachlin CJC (Iacobucci, Binnie, Arbour and LeBel JJ, concurring) referred to article 25 of the ICCPR and noted the Human Rights Committee's statement in *General comment No 25* "that restrictions on the right to vote should be 'objective and reasonable' and that '[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence'."<sup>172</sup>

82. In *Suresh v Canada (Minister of Citizenship and Immigration)*<sup>173</sup> which involved a challenge to a decision to deport to Sri Lanka a Convention refugee who belonged to the LTTE (Tamil Tigers) on grounds of national security, the Supreme Court considered whether the ICCPR and the CAT prohibited such expulsion and the relationship between the CAT and the Convention on Refugees. In relation to whether article 7 of the ICCPR prohibited deportation to a country where a person was likely to be subject to torture, the Court commented:<sup>174</sup>

"[66] ... While the provisions of the ICCPR do not themselves specifically address the permissibility of a state's expelling a person to face torture elsewhere, General Comment No. 20 to the ICCPR makes clear that art. 7 is intended to cover that scenario, explaining that States parties must not expose individuals to the danger of torture . . . upon return to another country by way of their extradition, expulsion, or refoulement (para. 9).

[67] We do not share Robertson J.A.'s view that General Comment No. 20 should be disregarded because it contradicts the clear language of art. 7. In our view, there is no contradiction between the two provisions. General Comment No. 20 does not run counter to art. 7; rather, it explains it. Nothing would prevent a state from adhering both to art. 7 and to General Comment No. 20, and General Comment No. 20 does not detract from rights preserved or provided by art. 7. The clear import of the ICCPR, read together with the General Comments, is to foreclose a state from expelling a person to face torture elsewhere."

### Hungary

83. In its decision 719/B/1998 the Constitutional Court considered a challenge to punitive measures contained in the 1996 Act on Credit Institutions and the 1996 Act on the Stock Exchange. The applicant's argument was that the provisions permitted criminal penalties to be imposed without respecting the presumption of innocence in article 14(1) of the ICCPR, invoking *General comment No 12*. The Constitutional Court stressed that the legislation in question did not belong to the sphere of criminal law but financial law which was based on other principles than that of the presumption of innocence.

### India

84. In *TMA Pai Foundation and others v State of Karnataka*<sup>175</sup> the Supreme Court of India considered the Human Rights Committee's *General comment* on article 27 of the ICCPR.<sup>176</sup>

### Japan

85. In its judgment of 28 June 1996,<sup>177</sup> the Osaka High Court repeated what it had said two years before in another case.<sup>178</sup>

"One may consider that the 'general comments' and 'views' . . . should be relied upon 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

<sup>171</sup> (2002) 98 CRR (2d) 1; 2002 CRR LEXIS 140

<sup>172</sup> *Id* at para 133, citing *General comment 25(57)*, para 4

<sup>173</sup> (2002) 90 CRR (2d) 1; 2002 CRR LEXIS 4; 2002 SCC 1

<sup>174</sup> Para 66

<sup>175</sup> [2002] 4 LRI 329

<sup>176</sup> *Id* at para 70

<sup>177</sup> Not yet reported

<sup>178</sup> Judgment of 28 October 1994, Osaka High Ct, 1513 HANREI JIHO 71, 87, 38 JAPANESE ANN INT'L L 118 (1995)

Rights and jurisprudence under it can also be treated as supplementary means of interpretation of the ICCPR.”

86. In its judgment of 26 February 1999, the Tokyo District Court dismissed arguments based on article 23 of the ICCPR and *General comment No 19*, stating that “the General Comment has no binding force in Japan”.<sup>179</sup>

87. In its judgment of 15 March 2001, the Tokyo District Court considered a case in which the immigration authorities had decided to deport an illegal alien to Bolivia. The alien had been born in China of Chinese parents and had little connection with Bolivia, even though he was formally a Bolivian national. The alien filed a lawsuit, invoking the ICCPR and the Human Rights Committee’s *General comment No 15*, which states that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”. The court annulled the decision of the Minister of Justice to deport him, but dismissed his arguments based on the *General comment*, stating that “the General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan”.<sup>180</sup>

#### Latvia

88. In its judgment of 23 September 2002,<sup>181</sup> the Constitutional Court considered a challenge to the electoral laws, which provided that a political party had to achieve a minimum of 5% of the vote for that parties to be eligible to receive a seat in the Legislature. The challenge invoked provisions of the Latvian Constitution, article 3 of Protocol No 1 to the European Convention on Human Rights, and article 25 of the ICCPR. The Court considered *General comment No 25* of the Human Rights Committee, as well as the case law of the European Court of Human Rights, in reaching its conclusion that the legislative provisions challenged were not unreasonable restrictions on the right to vote and were consistent with the requirement that the free expression of the will of the voters be ensured.

89. In an earlier judgment of the Constitutional Court of 30 August 2000 also dealing with electoral law,<sup>182</sup> a number of judges who dissented from the result referred to the *General comments* of the Human Rights Committee. The case involved a challenge to legislative provisions which limited the right of certain categories of Latvian citizens, as well as present and past employees of various organisations to stand as candidate for national and local elections.<sup>183</sup> Those who had been or who were active in these organisations were considered to be working against the establishment of the democratic state. The Constitutional Court upheld the restrictions, arguing that they were reasonable restrictions on the exercise of political rights. The dissenting judges referred to the need to take into account articles 25 and 26 of the ICCPR, and that article 26 should be interpreted in light of *General comment No 18*.

#### Norway

90. In the *KRL case*<sup>184</sup> (discussed above) the Supreme Court (*Høyesterett*) considered the Human Rights Committee’s *General comment No 22* (on article 18) and *General comment No 18* (on non-discrimination).

#### Poland

91. The Civil Chamber of the Supreme Court in its decision of 18 August 1999<sup>185</sup> dealt with the question whether a person who was not the biological father of a child could declare his paternity in order to avoid a very time-consuming adoption procedure. The Court stated that the doubts about the legal validity of such a declaration did not infringe the right to privacy enshrined in article 17 of the ICCPR and other international human rights instruments. In its reasoning, the Court referred only in a very general way to “considerations of the Committee on Human Rights” concerning the right to privacy: It also noted that the term “prohibition of unlawful interference” meant that no interference

<sup>179</sup> 47 SHOMU GEPPU 3640, 3682.

<sup>180</sup> 1784 HANREI JIHO 67, 74.

<sup>181</sup> Case No 2002-08-01

<sup>182</sup> Case No 2000-03-01

<sup>183</sup> These included those who “5) belong or have belonged to the regular staff of the USSR, Latvian SSR or foreign state security, intelligence or counterintelligence services; 6) after January 13, 1991 have been active in CPSU (CP of Latvia), Working People’s International Front of the Latvian SSR, the United Board of Working Bodies; Organization of War and Labour Veterans; All-Latvia Salvation Committee or its regional committees.”

<sup>184</sup> Rt 2001-1006 (192-2001)

<sup>185</sup> II CKN 321/99 of 18 August 1999.

was allowed, except for the situations envisaged by law. The corresponding national legislation regulating the private sphere protected by article 17 of the ICCPR had to correspond to this provision, the aim and the object of the Covenant.

92. In its decision of 27 January 1999<sup>186</sup> the Constitutional Court considered the constitutionality of legislation which stated in a general manner that an attorney (*adwokat*) could not exercise his or her profession if his or her spouse held a position as judge, as prosecutor or as a member of the control organs of the chamber of attorneys.<sup>187</sup> The ombudsman as one of the applicants referred in his argumentation to the *General comment 13* which sets out criteria for the impartiality of judges. He referred to the fact that the preconditions for the impartiality of judges as laid down in article 14 of the ICCPR concerned only the form of their appointment, the required qualification, the conditions of their promotion, their pension, as well as their factual independence from the executive and legislative powers but did not require a State party to go as far as the legislation went. The Constitutional Court came to the conclusion that these statutory measures rigidly limiting the freedom to exercise a profession were disproportionate to the aim pursued and, consequently, declared them null and void.

#### *South Africa*

93. In *Jacobs v Dept of Land Affairs In re The Farm UAP 28A*<sup>188</sup> the plaintiff applied for restitution of land rights on behalf of family seeking redress for dispossession of land. At some point a deed of transfer was signed by members of the family, alienating the land in question to a third party. The family denied that this was a valid transfer, alleging that it was fraudulent and a forgery. The main issue was whether the dispossession was the result of racially discriminatory practices. This was answered by the Court in the negative after considering the definitions involved in that term. One such definition considered by the Court<sup>189</sup> was that of the Human Rights Committee as set out in *General comment No 18*.<sup>190</sup>

#### *United States*

94. In *Dubai Petroleum v Kazi*<sup>191</sup> the Supreme Court of Texas considered *General comment No 13* in concluding that the guarantees of article 14 of the ICCPR were not confined to criminal proceedings. The court concluded that the ICCPR therefore conferred “equal treaty rights” on a citizen of India and thus under Texas law his survivors were permitted to bring a wrongful death suit in Texas. In *United States v Bakeas*<sup>192</sup> a federal district court referred to the *General comments No 15* and *18* of the Human Rights Committee in relation to the question of discrimination against aliens.<sup>193</sup>

### **b. General recommendations of the Committee on the Elimination of Discrimination against Women**

#### *United States*

95. In *Abankwah v INS*,<sup>194</sup> an asylum case, the Second Circuit Court of Appeals cited CEDAW’s *General recommendation 14* on female circumcision in support of its conclusion that “the practice of FGM has been internationally recognized as a violation of women’s and female children’s rights”.

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<sup>186</sup> K/1/98 of 27 January 1999.

<sup>187</sup> E.g. Art. 4 b of Act no 106 pos. 668 of 22 May 1998 on Attorneys.

<sup>188</sup> [2000] JOL 6203 (Land Claims Court, South Africa):

<sup>189</sup> At 14-15, para 34.

<sup>190</sup> At para 7.

<sup>191</sup> 12 SW 3d 71, at 82; 2000 Tex LEXIS 19 (Supreme Court of Texas 2000)

<sup>192</sup> 987 F Supp 44 at 46 n 4 (D Mass 1997)

<sup>193</sup> *Taveras-Lopez v Reno*, 127 F Supp 2d 598 (MD Penn 2000) (reference in argument of counsel to *General comment 16*, para 4, quoted in earlier case, *Maria v McElroy*, 68 F Supp 2d 206, 232 (EDNY 1999))

<sup>194</sup> 185 F 3d 18, at 23; 1999 US App LEXIS 15545 (2d Cir 1999)

### c. General comments of the Committee on Economic, Social and Cultural Rights

#### Canada

96. In her dissenting judgment in the case of *Gosselin v Quebec (Attorney General)*<sup>195</sup> before the Supreme Court of Canada, L'Heureux-Dubé J refers with approval to the reference made by Robert JA (also in dissent in the court below) to *General comment No 3* of the Committee on Economic, Social and Cultural Rights.<sup>196</sup>

#### Latvia

97. In a case involving a challenge to a law on social insurance on the ground that it was inconsistent with provisions of the Latvian Constitution and article 9 and 11 of the ICESCR,<sup>197</sup> the Constitutional Court referred to *General comment No 3* of the Committee on Economic, Social and Cultural Rights in considering the nature of the obligations imposed by the Covenant. While noting the “progressive implementation” obligation in article 2, the Court noted that the Committee “has stressed that the measures, undertaken to reach the objective, shall be implemented in a reasonably short time after the Covenant has taken effect in a Member State and that every Member State has the obligation of securing implementation of the most essential liabilities at least on the basic level.” The Court stated: “Not doubting the close connection of implementation of the social rights with the feasibility of every state, the following human rights’ conclusion shall still be taken into consideration – if some social rights are included in the fundamental law, the State cannot relinquish them. These rights do not have just a declarative nature.”

#### Mauritius

98. In *Tengur v The Minister of Education and the State of Mauritius*<sup>198</sup> the Supreme Court of Mauritius relied on *General comment No 13* on the right to education<sup>199</sup> to decide whether discriminatory treatment towards non-Catholic secondary school pupils by the co-defendants constituted “unlawful discrimination or a lawful differentiation of treatment which is justifiable or valid on the ground that the criteria for such differentiation are reasonable and objective and the aim of the differentiation is to achieve a purpose which is legitimate under the Constitution or any other law”.<sup>200</sup> The Court quoted in full paragraphs 6(b), 13, 31 to 34, 46 and 47 of the *General comment*.<sup>201</sup> The Court finally held that the admission policy of the co-defendants, whereby they reserved 50 percent of seats in secondary schools for pupils of Catholic faith, was in violation of section 16(2) of the Constitution of Mauritius.<sup>202</sup>

#### South Africa

99. In *Bon Vista Mansions*<sup>203</sup> an urgent application for interim relief had been filed in the High Court by the residents of a block of flats whose water supply was allegedly unlawfully discontinued. Budlender AJ granted an order for interim relief to restore the water supply, pending the final determination of the application.<sup>204</sup> In furnishing reasons for this order the judge stated that he relied on international law to interpret the Bill of Rights “where the Constitution uses language similar to that which has been used in international instruments. The jurisprudence of the International Covenant on Economic, Social and Cultural Rights, which is plainly the model for parts of our Bill of Rights, is an

<sup>195</sup> [2002] 4 SCR 429. This case was an appeal from the judgment of the Quebec Court of Appeal referred to in the *Interim Report*.

<sup>196</sup> At para 147

<sup>197</sup> Case No 2000-08-0109, judgment of 13 March 2001:

<sup>198</sup> Record no 77387

<sup>199</sup> The judgment was delivered by Chief Justice A G Pillay, a member of the Committee on Economic, Social and Cultural Rights.

<sup>200</sup> At 13.

<sup>201</sup> At 13-14.

<sup>202</sup> At 16.

<sup>203</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) 6 BCLR 625 (W).

<sup>204</sup> At 626-627, paras 1-3



example of this”.<sup>205</sup> The Court quoted *General comment No 12*, in explaining the duty to respect “rights of access”.<sup>206</sup> The judge commented that “General Comments have authoritative status under international law”.<sup>207</sup>

100. In a subsequent case, *Treatment Action Campaign v Minister of Health and Others*,<sup>208</sup> the Constitutional Court drew on *General comment No 3* in order to define the “minimum core” of section 27(1) of the Constitution.<sup>209</sup> The Constitutional Court held that the finding of the High Court “that the policy of government insofar as it confined the use of Nevirapine to hospitals and clinics which were research and training sites constituted a breach of the State’s obligations under s 27(2) read with s 27(1) (a) of the Constitution was correct”.<sup>210</sup>

#### **d. General comments of the Committee against Torture**

##### *Hong Kong SAR*

101. In its judgment dismissing an appeal against the Court of Appeal’s judgment in *Prabakar v Security for Security* (discussed below), the Court of Final Appeal referred to *General comment No 1* of CAT as a “useful reference” for the Security of Security in assessing individual claims that a person would face torture if returned to his country of origin.<sup>211</sup>

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

102. There were no cases identified in this category in addition to those mentioned in the *Interim Report*.

#### **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**

##### *United Kingdom*

103. In *R v Secretary of State for the Home Department, on the application of Bagdanavicius and another*<sup>212</sup> the Court of Appeal referred to the material put before it by counsel to establish the satisfactory state of the legal system in Lithuania, including the concluding observations of the Committee on the Elimination of Racial Discrimination on the report of Lithuania.<sup>213</sup>

104. In *Attorney General (WA) v Marquet*<sup>214</sup> a case involving a challenge to electoral laws, Kirby J of the High Court of Australia referred to the general comments and case law of the Human Rights Committee, as well as to concluding observations of the Committee on Hong Kong, Paraguay, and Chile.<sup>215</sup>

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<sup>205</sup> At 629, para 15

<sup>206</sup> At 629, paras 17-18

<sup>207</sup> At 629, para 17

<sup>208</sup> 2002(5) SA 721 (CC).

<sup>209</sup> At 737, para 26 (quoting para 10 of *General comment No 3*)

<sup>210</sup> At 750C-F, paras 80-81. The Constitutional Court further held that “its (the government’s) policy failed to meet constitutional standards because it excluded those who could reasonably be included where such treatment was medically indicated to combat mother-to-child transmission of HIV. That did not mean that everyone could immediately claim access to such treatment, although the ideal was to achieve that goal. Every effort, however, had to be made to do so as soon as reasonably possible”: at 762 G-H, para 125.

<sup>211</sup> *Secretary for Security v Prabakar* [2004] HKCFA 39, at paras 10 and 52.

<sup>212</sup> [2003] EWCA Civ 1695, [2003] All ER (D) 150 (Nov)

<sup>213</sup> CERD/C/60/CO/8 (2002). See also *ZB (Russian prison conditions)* [2004] UKIAT 00239, para 14 (reference to Human Rights Committee comments, as well as European Court of Human Rights case law, on prison conditions in Russia, in context of assessing refugee claim)

<sup>214</sup> [2003] HCA 67

<sup>215</sup> *Id* at nn 177 and 178, paras 173-180 (referring also to *General comment No 25*; and *Landinelli Silva v Uruguay* (Communication No 34/78), and *Pietraroia v Uruguay* (Communication No 44/79)). See also Kirby J’s comments

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

*Canada*

105. *Suresh v Canada (Minister of Citizenship and Immigration)*:<sup>216</sup> In rejecting the argument (accepted by the Federal Court of Appeal below) that the prohibition in article 3 of the Torture Convention of deportation of a person if the person would face a substantial risk of torture must defer to article 33(2) of the Refugee Convention, the Court referred to the concluding observations of Committee against Torture in relation to Canada:

“[73] Recognition of the dominant status of the CAT in international law is consistent with the position taken by the UN Committee against Torture, which has applied art. 3(1) even to individuals who have terrorist associations. (The CAT provides for the creation of a Committee against Torture to monitor compliance with the treaty: see CAT, Part II, arts. 17-24.) More particularly, the Committee against Torture has advised that Canada should [c]omply fully with article 3(1) . . . whether or not the individual is a serious criminal or security risk: see Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Canada, CAT/C/XXV/Concl. 4, at para. 6(a).”

*Hong Kong SAR*

106. In *Prabakar v Security for Security*<sup>217</sup> the Hong Kong Court of Appeal allowed an appeal from a decision of the Hong Kong Court of First Instance in which that court had dismissed a challenge to a decision to deport Prabakar. Prabakar had claimed that he would be tortured if returned to Sri Lanka, and that he had a legitimate expectation that his torture claim would be examined by the Hong Kong government itself (rather than by the Office of the United Nations High Commissioner for Refugees in the context of a refugee claim, as had happened). In holding that the government had not acted fairly in dealing with Prabakar's claim, the Court of Appeal referred to doubts expressed by the Committee against Torture in its concluding observations on the initial report of China in respect of Hong Kong under the Torture Convention as to whether the existing system provided for proper consideration of article 3 claims.<sup>218</sup> It also referred to statements made in the initial report of Hong Kong under the Torture Convention about how such claims were dealt with.<sup>219</sup>

*Japan*

107. Article 900(4) of the Japanese Civil Code provides that a child born out of wedlock will receive a share of inheritance half that of a legitimate child. In concluding observations adopted in 1998, the Human Rights Committee recommended that this provision be amended. In two judgments rendered on 28 March 2003, the Supreme Court of Japan found article 900(4) of the Civil Code to be constitutional. However, in a number of dissenting and separate opinions, four Supreme Court justices referred to the concluding observations of the Human Rights Committee, reaching a conclusion that the provision was unconstitutional or that it should be amended.<sup>220</sup>

*Norway*

108. In the *KRL case*<sup>221</sup> (discussed above) the Supreme Court (*Høyesterett*) considered the Human Rights Committee's concluding observations on Norway's periodic reports under the ICCPR,<sup>222</sup> as well as concluding observations of the CRC on Norway.<sup>223</sup>

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in *Coleman v Power* [2004] HCA39, at nn 234, 235, and 237 and paras 240-253 (referring to Article 19 of the ICCPR and various cases decided by the Human Rights Committee under the Optional Protocol).

<sup>216</sup> (2002) 90 CRR (2d) 1; 2002 CRR LEXIS 4; 2002 SCC 1 (Supreme Court of Canada)

<sup>217</sup> [2002] HKCA 418, [2002] 4 HKC 552

<sup>218</sup> *Id* at para 20

<sup>219</sup> *Id* at paras 19 and 24

<sup>220</sup> 1820 HANREI JIHO 62

<sup>221</sup> Rt 2001-1006 (192-2001)

<sup>222</sup> CCPR/C/79/Add.27 and CCPR/C/79/Add.12.

<sup>223</sup> CRC/C/15/Add.23, and CRC/C/15/Add.126

## United Kingdom

109. In *R (Williamson and others) v Secretary of State for Education and Employment*<sup>224</sup> Arden LJ noted the concluding observations of the CRC on the report of the United Kingdom on the subject of whether reasonable chastisement was consistent with the Convention (though did not pursue the matter as the parties had not relied on the CRC).<sup>225</sup>

### 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

110. There were no cases identified in this category in addition to those mentioned in the *Interim Report* (though see *Hollins v Crozier* below).

#### b. Reference to reports submitted by the country before whose courts the case is being heard Hong Kong SAR

111. In *Prabakar v Security for Security*<sup>226</sup> (discussed above) the Hong Kong Court of Appeal referred to statements made in the initial report of Hong Kong under the Torture Convention about how such claims were dealt with.<sup>227</sup> In its judgment dismissing an appeal against the Court of Appeal's judgment, the Court of Final Appeal also referred to the report to the Committee against Torture and the *General comment No 1* of CAT.<sup>228</sup>

## New Zealand

112. In *Hollins v Crozier*,<sup>229</sup> which involved a case brought under Hague Convention on the Civil Aspects of International Child Abduction, the New Zealand District Court referred in general terms to statements made by both New Zealand and Australia to the CRC that their legislation and policies were consistent with the CRC. The Court refused to order the return of the child to Australia, giving considerable weight to the importance of the child's views expressed under article 12 of the CRC in interpreting the legislation implementation of the Hague Convention.<sup>230</sup>

## United Kingdom

113. In *R (on the application of G) v London Borough of Barnet*,<sup>231</sup> Lord Hope of Craighead referred to the initial report of the United Kingdom under the CRC,<sup>232</sup> noting that Part III of the Children Act had been intended to reflect article 18(2) of the CRC and that this had been recognised in the UK's report to the Committee.<sup>233</sup>

<sup>224</sup> [2002] EWCA Civ 1926, [2003] QB 1300

<sup>225</sup> *Id* at para 243 (referring to a "report" of the Committee, the reference being to CRC/C/21 (2002), paras 127-130). Arden LJ also referred to Human Rights Committee, *General comment No 7*, though concluded that in the circumstances of the case, it was not relevant to the issues: para 311.

<sup>226</sup> [2002] HKCA 418, [2002] 4 HKC 552

<sup>227</sup> At paras 19 and 24

<sup>228</sup> *Secretary for Security v Prabakar* [2004] HKCFA 39, at paras 10 and 52.

<sup>229</sup> [2000] NZFLR 775; 2000 NZFLR LEXIS 22 (District Court, Otahuhu)

<sup>230</sup> Guardianship Amendment Act 1991, s 13(1)(d), which provided the court with the discretion to refuse to order the return of a child where "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views".

<sup>231</sup> [2003] UKHL 57

<sup>232</sup> *Id* at para 68

<sup>233</sup> See also *Chagos Islanders v Attorney General, Her Majesty's British Indian Ocean Territory Commission* [2003] EWHC 2222, at paras 326 and 629, referring to concessions made by the UK before the Human Rights Committee [CCPR/C/SR.1963, para 14 (2001)].

## 6. Reference to other documents produced by the Committees

### *South Africa*

114. In *S v Kwalase*<sup>234</sup> the accused was convicted of robbery and sentenced to three years' imprisonment, 18 months of which were suspended for three years on condition that he was not convicted of housebreaking, attempted robbery or robbery committed during the period of suspension.<sup>235</sup> The accused had been 15 years and 11 months old at the time of the commission of the offence, and had one previous conviction for housebreaking with the intent to steal and theft for which the sentence was postponed for a period of three years.<sup>236</sup> This case was subject to automatic review by virtue of sections 302 and 304 of the South African Criminal Procedure Act 51 of 1977.<sup>237</sup> On review the High Court questioned the sentencing of the accused juvenile by the magistrate.<sup>238</sup> In setting aside the initial sentence, the Court noted that in the determination of appropriate sentences for youthful offenders South African courts had to take into consideration the post-1994 constitutional dispensation and the international legal norms.<sup>239</sup> The Court justified its use of the Beijing Rules in the context of South Africa's obligations under the Convention on the Rights of the Child by reference to the fact that:

“The Committee on the Rights of the Child . . . has stated categorically that the provisions of CRC relating to juvenile justice have to be considered in conjunction with other relevant international instruments, for example the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) (the “Beijing Rules”), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (1990)”<sup>240</sup>

115. *Kirsh v Kirsh*<sup>241</sup> involved the removal of a minor child from South Carolina to Cape Town by the mother (respondent), in defiance of two court orders ordering that the father (applicant) should be granted access to the minor child (and later temporary custody) and that the child should not be removed from South Carolina without giving the applicant 60 days' notice.<sup>242</sup> The High Court ordered that the child should be returned to the jurisdiction of the York County Family Court.<sup>243</sup> In reaching this conclusion the Court used the principle of “best interests of the child” as incorporated in both the South African Constitution and the Convention on the Rights of the Child (ratified by SA). The Court stated the following:<sup>244</sup>

“The ‘best interests of the child’ standard has in fact been identified by the Committee on the Rights of the Child, the supervisory body provided for by the Convention on the Rights of the Child for the implementation of its provisions, as one of the four key articles in the Convention, “those articles which in its opinion provide the ‘soul’ of the Convention...the value system on which the Convention is based”<sup>245</sup>

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<sup>234</sup> 2000 (2) SACR 135 (C)

<sup>235</sup> At 135 C-D.

<sup>236</sup> At 135 C-D.

<sup>237</sup> At 136 F.

<sup>238</sup> At 136 H.

<sup>239</sup> At 135 E-G.

<sup>240</sup> At 138 J – 139 A-B.

<sup>241</sup> (1999) 2 All SA 193 (Cape of Good Hope, Provincial Division)

<sup>242</sup> At 194-195.

<sup>243</sup> At 216 (b).

<sup>244</sup> At 203.

<sup>245</sup> Although the court did not refer to specific findings of the Committee, it cited in support Julia Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” (1995) 11 *SAJHR* 401, at 408-411 and Thomas Hammarberg “Children” in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 289, at 291-294.

## D. USE OF TREATY BODY FINDINGS BY INTERNATIONAL COURTS AND TRIBUNALS

### *General*

116. This section of the report examines the use of human rights treaty body findings by a number of international courts and tribunals.<sup>246</sup> It does not purport to be an exhaustive analysis of all existing international tribunals or of the case law of those which it does survey. The purpose of the examination is to assess the extent to which international tribunals make use of the output of the treaty bodies and the factors that may influence this, and the significance of this use for the development of the international law of human rights and for the work of the treaty bodies.<sup>247</sup>

117. The tribunals selected for examination are the regional human rights tribunals (the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights), the international criminal tribunals (International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda), the International Court of Justice, and the Human Rights Chamber for Bosnia and Herzegovina.<sup>248</sup>

### *International human rights courts and tribunals*

#### *European Court of Human Rights*

118. Although the European Convention on Human Rights and the ICCPR are closely linked substantively and historically, the jurisprudence of the European Commission and European Court, which is now voluminous, was already substantial before the UN human rights treaty bodies began to develop a substantial body of jurisprudence of their own. This has meant that, while the UN human rights treaties have been referred to on many occasions, there are relatively few references to the work of the UN human rights treaty bodies in the case law under the European Convention.

119. In *Mamatkulov and Abdurasulovic v Turkey*,<sup>249</sup> the European Court drew on the case law of both the Human Rights Committee<sup>250</sup> and the Committee against Torture<sup>251</sup> (as well as other international tribunals) in concluding that a state acting contrary to a request for interim measures was in breach of its obligations under the European Convention.<sup>252</sup>

120. In *Öcalan v Turkey*,<sup>253</sup> the European Court drew on Human Rights Committee case law relating to the importance of observing guarantees of due process in proceedings which may involve the imposition of the death penalty (and a failure to do so would involve a violation of the right to life).<sup>254</sup> In *Kurt v Turkey*,<sup>255</sup> the Court drew on the case law of the Human Rights Committee relating to

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<sup>246</sup> The Committee gratefully acknowledges the research on this issue carried out by Saskia Hufnagel, on which this section largely draws. The more detailed findings of that research can be found in Hufnagel, *Turku paper*.

<sup>247</sup> Nor does this *Final Report* consider the use that is made by the treaty bodies themselves of their own jurisprudence and findings.

<sup>248</sup> The research also encompassed the case law of the ILO Administrative Tribunal. While there are a number of cases in which the provisions of the UN human rights treaties themselves are cited to the Tribunal and occasionally cited by the Tribunal, there appear to have been no references to the output of the treaty bodies either in the proceedings before or in the decisions of the Tribunal.

<sup>249</sup> European Court of Human Rights, Judgment of 6 February 2003

<sup>250</sup> *Glen Ashby v Trinidad and Tobago*, Communication No 580/1994; *Piandiong et al v The Philippines*, Communication No 869/1999.

<sup>251</sup> *Cecilia Rosana Núñez Chipana v Venezuela*, 10 November 1998, Committee against Torture, Communication No 110/1998, para 8; and *T P S v Canada*, Communication No 99/1997, decision of 16 May 2000, at para 15.6.

<sup>252</sup> European Court of Human Rights, Judgment of 6 February 2003, at paras 45-48 and 102.

<sup>253</sup> European Court of Human Rights, Judgment of 4 March 2003

<sup>254</sup> *Reid v Jamaica* (Communication No 250/1987); *Daniel Mbenge v Zaire* (Communication No 16/1977, 8 September 1977), and *Wright v Jamaica* (Communication No 349/1989).

<sup>255</sup> Judgment of 25 May 1988. See also *Ertak v Turkey*, Judgment of 9 May 2000.

disappearances,<sup>256</sup> in considering whether a similar claim fell within the provisions of the European Convention. In *Hirst v United Kingdom (No 2)*, a challenge to laws denying convicted prisoners the right to vote, the European Court of Human Rights referred to *General comment No 25*<sup>257</sup> in its survey of international and comparative law relating to the right to vote.<sup>258</sup>

121. In *Streletz, Kessler and Krenz v Germany* and *K.-H.W. v Germany*<sup>259</sup> the Court considered the consistency with the European Convention of a number of convictions of former officials of the German Democratic Republic in relation to the killing of GDR citizens who had attempted to escape across the border. As part of the Court's consideration of whether the GDR practice in this regard was inconsistent with international human rights, the Court referred to criticism of the policy and practice by the Human Rights Committee during hearings on the reports of the GDR submitted to the Committee.<sup>260</sup>

122. Case law of the Human Rights Committee,<sup>261</sup> concluding observations of the Human Rights Committee and the Committee against Torture,<sup>262</sup> and reports of the Convention against Torture under article 20<sup>263</sup> have also been invoked in argument before the Court on a small number of occasions.

#### *The human rights organs of the Organisation of American States*

123. By contrast, the OAS human rights bodies -- in particular the Inter-American Commission and to a lesser extent, the Inter-American Court of Human Rights -- have referred on many more occasions to the work of the UN human rights treaty bodies.

#### *Inter-American Commission on Human Rights*

124. The Inter-American Commission on Human Rights has referred to the case law of the Human Rights Committee in a number of cases involving procedural issues.

125. In relation to the admissibility *ratione temporis* of allegations relating to acts which occurred before the entry into force of the Convention for a State, the Commission has followed the Human Rights Committee's jurisprudence relating to continuing violations,<sup>264</sup> as well as the case law of other systems. The Commission has also relied on Human Rights Committee case law in support of its position that "a law may violate the right of an individual, even in the absence of a specific measure applied later, ordered by the authorities, in those cases in which the persons are directly affected or run

<sup>256</sup> *Quinteros v Uruguay* (Communication No 107/1981), para 14; *Mojica v Dominican Republic*, (Communication no. 449/1991); and *Bautista v Colombia* (Communication No 563/1993). The Court also referred to the case law of the Inter-American Court of Human Rights.

<sup>257</sup> Para 13, which refers to the requirement of proportionality in imposing any limitation on the right to vote.

<sup>258</sup> Judgment of 30 March 2004, at para 23. See also *Fretté v France*, Judgment of 26 February 2002 (joint partly dissenting opinion of Judges Bratza, Fuhrmann and Tulkens, referring to *Toonen* in relation to discussion of whether discrimination no the basis of sexuality covered by article 14 of the European Convention).

<sup>259</sup> Judgment of 22 March 2001

<sup>260</sup> *Id* at para 41 (referring to the summary records of the 533<sup>rd</sup> and 534<sup>th</sup> meetings of the Human Rights Committee). See also the decision of the Human Rights Committee in *Baumgarten v Germany*, Communication No 960/2000.

<sup>261</sup> *Ergi v Turkey*, Judgment of 28 July 1998, para 71 (referring to *Bleier v Uruguay* A/37/40, p. 130, § 13.3, on the issue of burden of proof).

<sup>262</sup> *L and V v Austria*, Judgment of 9 January 2003, para 39 (referring to HRC's view [A/54/40, para 190 (1999)] that article 209 of the Austrian Criminal Code dealing with consensual homosexual acts was discriminatory); *S L v Austria*, Judgment of 9 January 2003, para 31 (same); *Magee v United Kingdom*, Judgment of 6 June 2003, para 35 (referring to concluding observations of the Committee against Torture on the report of the UK [A/51/44, paras 58-65]).

<sup>263</sup> *Aksoy v Turkey* (App. no. 21987/93), Judgment of 18 December 1996, paras 46 and 80 (referring to *Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey* (9 November 1993)); *Orhan v Turkey* (App no 25656/94), Judgment of 18 June 2002, para 34 (same).

<sup>264</sup> *Andres Aylwin Azocar et al v Chile*, Inter-American Commission, Report No 137/99, Case 11.863, December 27, 1999, at para 93 (citing *Torres Ramirez v Uruguay*, Communication No. 4/1977, para. 18 and *Millan Sequeira v Uruguay*, Communication No. 6/1977, paras. 16 and 17).

an imminent risk of being directly affected by a legislative provision.”<sup>265</sup> The Commission has followed the Human Rights Committee approach in holding that only individuals and not corporations can file a petition as corporations lack locus standi.<sup>266</sup>

126. The Commission has also drawn on the case law of the Human Rights Committee (and of the Strasbourg organs) in many cases involving substantive issues, including in relation to: (a) the imposition of the death penalty, in particular the case law of the Committee concerning the consequences of a violation of the right to fair trial where a death sentence is imposed as a result of the trial;<sup>267</sup> (b) the meaning of the term “arbitrary” in the context of the guarantee against arbitrary deprivation of life;<sup>268</sup> (c) whether the principle of equality of arms forms part of the right to a fair trial;<sup>269</sup> (d) whether conditions of detention constitute cruel, inhuman or degrading treatment;<sup>270</sup> (e) rights of political participation;<sup>271</sup> and (f) the requirement to exhaust local remedies.<sup>272</sup>

127. The Commission has also on occasion drawn both on Human Rights Committee jurisprudence and the *General recommendations* of CEDAW, for example in one case against Guatemala in which it had to consider whether sex-based distinctions in legislation amounted to discrimination.<sup>273</sup> It has also referred to the concluding observations of the Human Rights Committee following the Committee’s consideration of a report submitted by a country under the ICCPR.<sup>274</sup>

### *Inter-American Court of Human Rights*

128. The Inter-American Court of Human Rights has made less frequent reference to the work of the treaty bodies than the Inter-American Commission. However, there have been a number of

<sup>265</sup> *Id* at para 152 (citing *Ballantyne, Davidson, and McIntyre v Canada*, Communication No Communications Nos 359/1989 and 385/1989, views of 31 March 1993).

<sup>266</sup> *Bernard Merens and family v Argentina*, Inter-American Commission, Report No 103/99, 27 September 27, 1999 (citing *A newspaper publishing company v Trinidad and Tobago*, Communication No 360/1989, decision of 14 July 1989; *A publication and a printing company v Trinidad and Tobago*, Communication No 361/1989, decision of 14 July 1989).

<sup>267</sup> *Rudolph Batiste v Grenada*, Inter-American Commission, Report No 38/00, Case 11.743, April 13, 2000; *Ramón Martínez Villareal v United States*, Inter-American Commission, Report No. 52/02, Merits Case 11.753, 10 October 2002 (citing *Baboheram-Adhin et al v Suriname*, Communication Nos 148-154/1983, adopted 4 April 1985, para 14.3). See also *Domingues v United States*, Inter-American Commission, Report No 62/02, Case No 12.285, 22 October 2002, para 62 (referring to HRC, Comments on the United States of America, CCPR/C/79/Add.50 (1995)).

<sup>268</sup> *Rudolph Batiste v Grenada* (citing *Kindler v Canada*, Communication No. 470/1991, U.N.Doc. CPR/C/48/D/470/1991 (1993)).

<sup>269</sup> *Benedict Jacob v Grenada*, Inter-American Commission, Report No 56/02, Merits Case 12.158, 21 October 2002 (citing *B d B et al v Netherlands*, Communication No 273/1989, views of 30 March 1989).

<sup>270</sup> *Rudolph Batiste v Grenada*, Report No 38/00, Case 11.743, 13 April 2000; *Damion Thomas v Jamaica*, Report No 50/01, Case 12.069, 4 April 2001; *Joseph Thomas v Jamaica*, Report No 127/01, Case 12.183, 3 December 2001; *Dave Sewell v Jamaica*, Report No 76/02, Case 12.347, 27 December 2002; *Denton Aitken v Jamaica*, Report No 58/02, Merits Case 12.275, 21 October 2002; *Benedict Jacob v Grenada*, Report No 56/02, Merits Case 12.158, 21 October 2002; *Paul Lallion v Grenada*, Report No 55/02, Merits Case 11.765, , 21 October 2002. The Human Rights Committee cases referred to include *Antonaccio v Uruguay*, Communication No R.14/6, views of 28 October 1981; *De Voituret v Uruguay*, Communication No. 109/1981, views of 190 April 1984; and *Mukong v Cameroon*, Communication No. 458/1991, views of 21 July 1994.

<sup>271</sup> *Andres Aylwin Azocar et al v Chile*, Inter-American Commission, Report No 137/99, Case 11.863, 27 December 1999, at para 20 (citing the Human Rights Committee’s *General comment No 25*, paras 10, 15 and 21).

<sup>272</sup> *Mario Alfredo Lares-Reyes et a. v The United States*, Inter-American Commission, Report No. 19/02, Inadmissibility Petition 12.379, 27 February 2002 (citing *Hervé Barzhig v France*, Communication No. 327/1288, views of 11 April 1991, para. 5.1).

<sup>273</sup> *Maria Eugenia Morales de Sierra v Guatemala*, Inter-American Commission, Report No 4/01, Case 11.625, 19 January 2001 (citing *Broeks v The Netherlands*, Communication No 172/1984, para 13; *Zwaan de Vries v The Netherlands*, Communication No 182/1984, para 13, and CEDAW *General recommendation No 21*, paras 7 and 24).

<sup>274</sup> *Carlos Florentino Molero Coca Rodolfo Gerbert Asencios Lindo, Rodolfo Dynnik Asencios Lindo and Marco Antonio Ambrosio Concha v Peru*, Inter-American Commission, Report No. 49/00, Case 11.182, 13 April 2000, para 96 and n 24 (citing Human Rights Committee preliminary suggestions and recommendations on the third report submitted by Peru under the ICCPR, A/51/40, para 356).

occasions on which it has done so. The Court has referred to the practice of the Human Rights Committee in cases which include the following issues: (a) international practice relating to reparations for violations of human rights;<sup>275</sup> (b) disappearances;<sup>276</sup> (c) standards relevant to the treatment of detainees;<sup>277</sup> (d) rights to free legal assistance;<sup>278</sup> (e) restrictions on the imposition of the death penalty and the right not to be arbitrarily deprived of one's life;<sup>279</sup> (f) the content of the guarantee of freedom of expression;<sup>280</sup> (g) the burden of proof;<sup>281</sup> and (h) in relation to the decision that the next of kin of a detained or disappeared person should be considered a victim of ill treatment among other violations.<sup>282</sup>

*African Commission on Human and Peoples' Rights*<sup>283</sup>

129. The African Commission on Human and Peoples' Rights established under the African Charter on Human and Peoples' Rights, has a two-fold mandate of promotion and protection of human rights under the African Charter.<sup>284</sup> As part of its protective mandate the Commission considers individual communications in terms of article 55 of the African Charter.<sup>285</sup> From an analysis of the Commission's decisions since 1988 it is apparent that although the Commission frequently refers to the text of various UN human rights treaties and other instruments by reference to articles 60 and 61 of the African Charter, the Commission has made use of the findings of UN human rights treaty bodies in only five cases.<sup>286</sup> Three of these cases were against Nigeria, one against Zambia, and one against The Gambia.

130. In *Legal Resources Foundation against Zambia*<sup>287</sup> the parties challenged a constitutional provision that required both parents of a person who wished to contest the office of the president to be Zambians by birth or descent. The Commission noted that "international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations", quoting *General comment No 9* of the Committee on Economic, Social and Cultural

<sup>275</sup> *Velasquez Rodriguez Case (Compensatory Damages (Art. 63(1) American Convention on Human Rights))*, Series C, No 7, Judgment of 21 July 1989 and the *Godinez Cruz Case*, Series C, No 8, Judgment of 21 July 1989 (citing Human Rights Committee jurisprudence).

<sup>276</sup> *Caballero-Delgado Case*, Series C, No 22, Judgment of 8 December 1995 (citing Human Rights Committee's General comments and *Quinteros v Uruguay*)

<sup>277</sup> *Cantoral Benavides Case*, Judgment of August 18, 2000, Ser C No 69, Inter-American Court of Human Rights; *Hilaire, Constantine and Benjamin Case*, Judgment of 21 June 2002, Ser C. No 94, Inter-American Court of Human Rights (citing *Moriana Hernandez Valentini de Bazzano v Uruguay*, Communication No 5/1997, views of 15 August 1979, paras. 9 and 10)

<sup>278</sup> *Hilaire, Constantine and Benjamin*, Series C, No 94, Judgment of 21 June 2002 (citing *Currie v Jamaica*, Communication No. 377/1989, views of 29 March 1994, para 19(4); *Willard Collins v Jamaica*, Communication No. 240/1987, views of 1 November 1991, para 7 (6); and *Lubuto v Zambia*, Communication No. 390/1990, views of 31 October 1995, para 7.2).

<sup>279</sup> *Bámaca Velásquez case*, at para 172 (citing Human Rights Committee, *General comment 6* on the right to life in relation to the obligation of a State to prevent and punish arbitrary killing by its own security forces)

<sup>280</sup> *Ivcher Bronstein Case*, Series C, No 74, Judgment of 6 February 2001

<sup>281</sup> *Bámaca Velásquez case*, Series C, No 70, Judgment of 25 November 2000, at para 153 (citing *Hiber Conteris v Uruguay*, Communication No. 139/1983, views 17 July 1985, paras 182-186).

<sup>282</sup> *Id* at para 164 (citing *Quinteros v Uruguay*, Communication 107/1981, views of 21 July 1983, para.14)

<sup>283</sup> This section draws largely on the paper prepared by Lirette Louw for the Turku meeting, as well as on the paper prepared by Saskia Hufnagel for the same meeting.

<sup>284</sup> The African Commission is established under art 30 of the African Charter and its mandate is set out in art 45. The African Commission held its first session in Addis Ababa, Ethiopia, in November 1987.

<sup>285</sup> The Reports adopted by the Commission under the Charter may be found at [www.achpr.org/html/communications.html](http://www.achpr.org/html/communications.html).

<sup>286</sup> Article 60 of the African Charter reads as follows: "The Commission shall draw inspiration from international law on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members".

<sup>287</sup> Communication No 211/98, Decisions on communications brought before the African Commission, 29th Ordinary Session, Tripoli, Libya, May 2001.



Rights in support of this statement.<sup>288</sup> The Commission also referred to *General comment No 18* of the Human Rights Committee in defining non-discrimination.<sup>289</sup> More substantially, the Commission referred to *General comment No 25* of the Human Rights Committee, in which the Committee states that persons who are otherwise eligible to stand for election that should not be excluded by unreasonable or discriminatory requirements.<sup>290</sup> The Commission came to the conclusion that Zambia had violated the African Charter and urged the Government to bring its Constitution into conformity with the provisions of the Charter.

131. In the first of the three Nigerian cases, *Media Rights Agenda v Nigeria*,<sup>291</sup> the Commission stated that “notwithstanding the fact that neither the African Charter nor the Commission’s Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to public trial the Commission is empowered by articles 60 and 61 to draw inspiration from international law on human rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine”.<sup>292</sup> Invoking these provisions, the Commission called in aid *General comment No 13* of the Human Rights Committee on the right to fair trial to interpret the phrase “fair hearing”.<sup>293</sup> The Commission also referred to *General comment No 13* and to the Committee’s concluding observations on the initial report of Egypt<sup>294</sup> to stress the exceptional nature of the circumstances that would justify the use of military or other special courts and the requirement that these courts are also obliged to provide a fair trial.<sup>295</sup>

132. In *Civil Liberties Organisation and others v Nigeria*,<sup>296</sup> the Commission explained the role of decisions and general comments by the UN treaty bodies in its work as follows:

“In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly fifteen years. This Commission is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by UN treaty bodies”.<sup>297</sup>

133. The Commission makes extensive use of the Human Rights Committee’s *General comment No 13*<sup>298</sup> and refers to the findings of the Committee in the cases of *Burgos v Uruguay* and *Estrella v Uruguay*.<sup>299</sup> The Commission notes the particular relevance of the general comments of the Human Rights Committee to clarify the human rights situation with regard to the right to public trial inasmuch as the African Charter makes no explicit mention of the guarantee.<sup>300</sup> In analysing this communication it is clear that the Commission goes beyond merely referring to the general comments of the Committee as an interpretative tool and bases its arguments directly upon them in the absence of similar provisions in the Charter.

134. The last Nigerian case, *Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v Nigeria*,<sup>301</sup> dealt with the plight of the Ogoni people of the Niger delta. Referring to *General comment No 14* of the Committee on Economic, Social and Cultural Rights (as

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<sup>288</sup> *Id* at para 59 and fn 1.

<sup>289</sup> *Id* at para 63 and fn 3.

<sup>290</sup> *Id* at para 70 and fn 4 (citing *General comment No 25*, para 15).

<sup>291</sup> Communication No 224/98, *Decisions on Communications before the Commission*, 28<sup>th</sup> Ordinary Session, Cotonou, Benin, 23 October-6 November 2000.

<sup>292</sup> *Id* at para 51.

<sup>293</sup> *Ibid* (citing para 6 of *General comment No 13*).

<sup>294</sup> *Id* at para 65 (the reference is apparently to UN Doc CCPR/C/79/Add.23 (8 August 1993), para 11).

<sup>295</sup> *Ibid* (citing para 4 of *General comment No 13*).

<sup>296</sup> Communication no 218/98, *Decisions on communications brought before the African Commission*, 29<sup>th</sup> Ordinary Session, Tripoli, Libya, May 2001.

<sup>297</sup> *Id* at para 24.

<sup>298</sup> *Id* at para 25 fn 5, para 27 and para 35 fn 7.

<sup>299</sup> *Id* at para 29.

<sup>300</sup> *Id* at para 35.

<sup>301</sup> Communication No 155/96, *Decisions on Communications brought before the African Commission*, 30<sup>th</sup> Ordinary Session, Banjul, The Gambia, October 2001.

well as on other materials), the Commission noted the close link between a clean and safe environment and the enjoyment of economic, social and cultural rights.<sup>302</sup> The Commission further stated that it “draws inspiration from the definition of the term “forced evictions” by the Committee on Economic Social and Cultural Rights in its *General comment No 7*,<sup>303</sup> which defines this term as “the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.<sup>304</sup> The Commission also relied upon *General comment No 4* of the Committee on Economic, Social and Cultural Rights to clarify the impact of the right to housing where families were evicted.<sup>305</sup>

135. In one of the most recent cases against The Gambia, *Purohit and Moore v The Gambia*,<sup>306</sup> the Commission stated that “the provisions of article 13(1) of the African Charter are similar in substance to those provided for under article 25 of the ICCPR. In interpreting article 13(1) of the African Charter, the African Commission would like to endorse the clarification provided by the Human Rights Committee in relation to article 25”.<sup>307</sup> The Commission made use of the criteria stipulated in the Human Rights Committee’s *General comment No 25* to declare that there was no objective basis within the legal system of The Gambia to exclude mentally disabled persons from political participation.

136. Although only five communications are discussed here, these communications are among the most recent case law of the Commission. It would therefore not be surprising if the Commission continues with this trend of relying on the output of UN human rights treaty bodies to interpret similar provisions in the African Charter or to clarify certain violations where the Charter do not provide for specific violations but the UN treaties do.

137. A close reading of the African Commission’s reasoning in individual communications indicates that the Commission relied on the output of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights in a manner that goes beyond merely viewing the findings of these bodies as interpretive tools but rather in actual fact using these outputs to determine the substantive outcome of a communication. Furthermore, an analysis of the jurisprudence of the Commission makes it clear that UN treaty body findings are cited more frequently by the Commission than the findings from the other two regional human rights systems.<sup>308</sup>

#### ***International criminal tribunals: International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda***

138. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were established by the Security Council and given the jurisdiction to try certain persons for violations of international humanitarian law that had occurred in the former Yugoslavia and in Rwanda. The case law of the two tribunals contains a small number of references not only to UN human rights treaties themselves but also to the jurisprudence of the treaty bodies (exclusively that of the Human Rights Committee).

139. The main area in which the tribunals have drawn on treaty body jurisprudence is that of evidence and procedure. This reflects the fact that the Statutes of the two Tribunals contain a number of procedural and substantive guarantees relating to the conduct of procedures which are modelled closely on those contained in the ICCPR.<sup>309</sup>

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<sup>302</sup> *Id* at para 51 fn 6.

<sup>303</sup> *Id* at para 53 and fn 15 (citing *General Comment No 7 (1997) on the right to adequate housing (Art. 11.1): Forced Evictions*, para 3).

<sup>304</sup> *General Comment No 7 (1997) on the right to adequate housing (Art. 11.1): Forced Evictions*, para 3.

<sup>305</sup> Communication No 155/96, at para 63 (citing *General comment No 4*, para 8(a)).

<sup>306</sup> Communication No 241/2001, *Decisions on communications brought before the African Commission*, 33<sup>rd</sup> Ordinary Session, Niamey, Niger, 15-29 May 2003.

<sup>307</sup> *Id* at para 76 and n 25.

<sup>308</sup> The decisions of the European Court of Human Rights or the findings of the Inter-American Commission or the decisions of the Inter-American Court of Human Rights.

<sup>309</sup> See in particular ICTY Statute, article 21 and ICTR Statute, article 20, and the Rules of Procedure and Evidence adopted by each Tribunal, available at [www.un.org/icty](http://www.un.org/icty) and [www.icttr.org](http://www.icttr.org).

140. In *Prosecutor v Tadic*<sup>310</sup> the ICTY Appeals Chamber addressed the question of whether the concept of “equality of arms” was included in the right to a fair trial contained in the ICTY Statute. Noting that the guarantee in article 20(1) of the Statute of a “fair and expeditious” trial mirrored that of article 14 of the ICCPR and similar provisions in regional human rights treaties and referring to case law under of the Human Rights Committee<sup>311</sup> and the European Court of Human Rights, the Appeals Chamber accepted that the principle of equality of arms fell within the right to fair trial in the Statute.<sup>312</sup> The Chamber also referred to Optional Protocol case law in addressing the issue of whether the principle of equality of arms related to procedural equality only, or was broader in scope.<sup>313</sup>

141. In *Prosecutor v Akayesu*,<sup>314</sup> the ICTR Appeals Chamber, in considering a claim that the appellant had been denied effective representation referred to case law of the ICCPR, as well as cases under the European Convention.<sup>315</sup> In *Prosecutor v Kambanda*,<sup>316</sup> in addressing the question of whether a party could raise issues on appeal that had not been raised at the trial, the ICTR Appeals Chamber stated its agreement with the views of the Human Rights Committee that this would not be permitted, absent special circumstances.<sup>317</sup> In the same case the ICTR Appeals Chamber rejected the appellant’s argument that his inability to choose his counsel was a violation of his right to a fair trial, drawing on decisions of the Human Rights Committee and under the European Convention to the effect that the right to free legal assistance does not entail the right to choose one’s own lawyer.<sup>318</sup>

142. In *Barayagwiza v Prosecutor*,<sup>319</sup> the ICTR Appeals Chamber Judgment considered a number of claims by the appellant that his procedural rights had been violated, including excessive length of pre-trial detention, a failure of the authorities to inform him of the charges against him promptly, and a failure to bring him before the Tribunal within a reasonable time. In upholding the claims of violation, the Appeals Chamber referred to a number of Human Rights Committee decisions in relation to each of these rights.<sup>320</sup>

#### ***Other international courts and tribunals***

##### *Human Rights Chamber for Bosnia and Herzegovina*

143. The Human Rights Chamber for Bosnia and Herzegovina was established under the General Framework Agreement for Peace in Bosnia and Herzegovina. Under that Agreement the parties agreed to respect a range of human rights provided for in the European Convention on Human Rights and its Protocols, and in other international agreements, including the two International Covenants, the Racial Discrimination Convention, the Torture Convention, the CEDAW Convention and the Convention on the Rights of the Child.<sup>321</sup>

144. The Chamber has the power to receive and decide on certain allegations of violations of human rights, namely alleged violations of the European Convention on Human Rights or its Protocols, discrimination on any ground in the enjoyment of the rights provided for in the treaties listed in the Appendix (where those violations have been committed by a public authority). Thus, the Chamber may

<sup>310</sup> ICTY Appeals Chamber, Judgment of 15 July 1999

<sup>311</sup> *Morael v France*, Communication No 207/1986; *Robinson v Jamaica*, Communication No 223/1987,; 426; and *Wolf v Panama*, Communication No 289/1988.

<sup>312</sup> ICTY Appeals Chamber, Judgment of 15 July 1999, para 44

<sup>313</sup> *Id* at para 50 (referring to *B d B et al v Netherlands*, Communication No 273/1989, and *Nqalula Mpandanjila et al v Zaire*, Communication No 138/1983).

<sup>314</sup> ICTR Appeals Chamber, Judgment of 1 June 2001

<sup>315</sup> *Id* at para 77 and fn 148 (referring to *Hezekiah Price v Jamaica*, Communication No 572/594, views of 20 November 1996; and *O Brown and B Parish v Jamaica*, Communication No 665/1995, views of 5 August 1999).

<sup>316</sup> *Kambanda v Prosecutor*, ICTR Appeals Chamber, Judgment of 19 October 2000

<sup>317</sup> *Id* at para 27 (citing *Albert Berry v Jamaica*, Communication No 330/1998, para 11.6; and *Glenford Campbell v Jamaica*, Communication No 248/1997).

<sup>318</sup> *Id* at para 33 (citing *Osbourne Wright and Eric Harvey v Jamaica*, Communication No 459/1991, para. 11.6).

<sup>319</sup> *Barayagwiza v Prosecutor*, ICTR Appeals Chamber Judgment, 3 November 1999

<sup>320</sup> *Id* at paras 63 and 84 (*Glenford Campbell v Jamaica*); at para 64, *Moriana Hernández Valentini de Bazzano; Monja Jaona; Alba Pietraroia; and Leopoldo Buffo Carballal*; and para 70 (*Kelly v Jamaica*)

<sup>321</sup> Dayton Accord, Annex 6, articles VIII(1) and II (2)

directly apply the non-discrimination guarantees of the UN human rights treaties, and has done so in a number of cases. However, the main treaty that is applied is the European Convention on Human Rights and its Protocols, and the jurisprudence under that Convention.

145. Although it has applied provisions of the UN human rights treaties themselves on quite a number of occasions,<sup>322</sup> the Chamber has made very limited use of the output of the treaty bodies. One example is *Selimovic et al v The Federation of Bosnia and Herzegovina*.<sup>323</sup> In this case the Chamber considered a claim of age discrimination in access to the public service, which invoked article 25(c) of the ICCPR in conjunction with article II (2)(b) of the Annex. Article 25(c) guarantees the right of access “without any of the distinctions mentioned in article 2” of the ICCPR. Age is not one of the factors listed in article 2 of the ICCPR, though it does refer to “other status”. The Chamber relied on the Human Rights Committee’s *General comment No 25* (as well as European Convention case law) to conclude that differential treatment on the ground of age in eligibility for a public service position must be based on reasonable grounds.<sup>324</sup> As such grounds were, in the present case, not apparent, the applicants were granted compensation on the basis of violation of their right not to be discriminated against in the enjoyment of their right to equal access to public service. Thus the Chamber used international human rights provisions in this case as an independent basis for its decision and drew on the Human Rights Committee’s jurisprudence for their interpretation.

146. In *Unkovic v The Federation of Bosnia Herzegovina* the Chamber drew on the Human Rights Committee’s views in *Quinteros v Uruguay*<sup>325</sup> in determining whether the disappearance of a relative constitutes inhuman treatment for other family members and thereby breaches article 3 of the European Convention.<sup>326</sup>

147. In *Gogic v the Republika Srpska*<sup>327</sup> the Chamber cited both the Human Rights Committee’s *General comment No 16* on article 17 of the ICCPR and the decision of the European Court of Human Rights in *Niemietz v Germany*<sup>328</sup> to define the term “home”.

148. The Chamber has also drawn on the jurisprudence of the Human Rights Committee in relation to the definition of discrimination. For example, in *D M v The Federation of Bosnia and Herzegovina*,<sup>329</sup> as well as in many other similar cases,<sup>330</sup> the Chamber refers to the jurisprudence of Human Rights Committee generally in relation to discrimination, as well as to that of the European Court of Human Rights. The approach the Chamber derives from this jurisprudence is first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

#### *International Court of Justice*

149. There are very few references either to international human rights law or to the work of the United Nations human treaty bodies in the judgments of the International Court of Justice. The few occurrences are to be found in the separate or dissenting opinions of individual judges, as well as in arguments before the court.

<sup>322</sup> See Hufnagel, *Turku paper*

<sup>323</sup> *Selimovic and others v The Federation of Bosnia And Herzegovina*, Case no. CH/01/7952, Decision On Admissibility and Merits, 11 January 2002.

<sup>324</sup> *Id* at paras 60-61.

<sup>325</sup> *Elena Quinteros v Uruguay*, Communication No 107/1981, para 14

<sup>326</sup> See also the reference in the Concurring Opinion of Mr. Manfred Nowak in *Matanovic v The Republika Srpska* to the Human Rights Committee’s decision *Laureano v Peru* (Communication No. 540/1993) to stress that enforced disappearances constitute a violation of articles 6, 7 and 9 of the ICCPR and violate inter alia the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.

<sup>327</sup> *Ljiljana Gogic v The Republika Srpska*, Case No CH/98/800, Decision on Admissibility and Merits, 11 June 1999, para 50

<sup>328</sup> *Niemietz v Germany*, European Court of Human Rights, judgment of 16 December 1992, Series A No 251–B, paras 30–31.

<sup>329</sup> *D M v The Federation of Bosnia and Herzegovina*, Case No CH/98/756, Decision on Admissibility and Merits, 14 May 1999, para 72

<sup>330</sup> *Ubovic and others v The Federation of Bosnia and Herzegovina*, Cases Nos CH/99/2425-2431 and 2433-2435, Decision on Admissibility and Merits, 7 September 2001. For other references, see Hufnagel, *Turku paper*.

150. For example, in his dissenting opinion in the case in which the Court delivered its *Advisory opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons*<sup>331</sup> Judge Weeramantry pointed out that basic human rights, as embodied in the Universal Declaration of Human Rights, are endangered by nuclear weapons.<sup>332</sup> In relation to the protection of the right to life, he cites article 6(1) of the ICCPR,<sup>333</sup> as well as the Committee's *General comment No 14*, in which the Committee endorsed the view of the General Assembly that the right to life is pertinent to nuclear weapons and nuclear weapons are amongst the greatest threats to life and the right to life up to the point where their use should be recognised as crimes against humanity.<sup>334</sup>

151. In *Bosnia and Herzegovina v Yugoslavia*<sup>335</sup> Judge Weeramantry delivered a separate opinion in which he quoted the statements made by the Human Rights Committee<sup>336</sup> and the Commission on Human Rights<sup>337</sup> in relation to the special nature of human rights treaties, according to which a successor state has to assure for the people within the territory of a former state party to a Covenant that the guarantees embodied in the Covenant are being upheld.

152. In various separate opinions<sup>338</sup> in relation to the question of temporal jurisdiction where a violation arises out of previous events, Judge Higgins cites the decisions of the Human Rights Committee (of which she was formerly a member) on the issue of "continuing violations" to illustrate how other bodies approach such jurisdictional questions.<sup>339</sup>

153. Most recently, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>340</sup> the Court made reference to case law of the Human Rights Committee under the Optional Protocol, proceedings before the Committee and its concluding observations on Israel, the Committee's *General comment No 27*, as well as to the concluding observations of the Committee on Economic, Social and Cultural Rights on Israel.

154. States appearing before the Court have also invoked treaty body findings on various occasions without the sources being referred to explicitly by the Court in its final judgment or opinion. For example, the *LaGrand Case* involved claims by Germany that the United States had failed to observe its obligation under article 36 of the Vienna Convention on Consular Relations to provide two German nationals arrested following an attempted bank robbery with the opportunity to contact German consular officials (the pair were charged with murder and other offences, convicted and sentenced to death). In oral argument Germany submitted<sup>341</sup> that article 36 was a procedural guarantee that needed to be read in light of the human rights standards applicable between the two countries and noted the jurisprudence of the Human Rights Committee<sup>342</sup> that in any case in which the death penalty is a possible sentence, a failure to observe the procedural guarantees of a fair trial resulting in the

<sup>331</sup> Dissenting Opinion of Judge Weeramantry, Section III.10(f).

<sup>332</sup> Preamble, Article 1, 3, 25(1), 16(1), 25(2), 27(1) of the Universal Declaration of Human Rights

<sup>333</sup> Article 6 (1) of the ICCPR states "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

<sup>334</sup> *General comment 14* and GA Resolution 38/75, "Condemnation of Nuclear War", first operative paragraph.

<sup>335</sup> *Bosnia and Herzegovina v Yugoslavia*, Judgment of 11 July 1996, Separate Opinion of Judge Weeramantry,

<sup>336</sup> Statement of Mr Serrano Caldera, CCPR/C/SR.1178/Add. 1, 5 November 1992, p 9; and *Report of the Human Rights Committee to the General Assembly*, A/49/40, paras 48-49 (1994).

<sup>337</sup> CHR Resolution 1993/23 of 5 March 1993, CHR Resolution 1994/16 of 25 February 1994, and E/CN.4/1995/80, 28 November 1994, p 4.

<sup>338</sup> See paragraph 5 in each of Judge Higgins' substantially identical separate opinions to the orders of the Court of 2 June 1999 in the response to a request for preliminary measures in the cases brought by Serbia-Montenegro ((then the Federal Republic of Yugoslavia) against Belgium, Canada, Netherlands, Portugal, and the United Kingdom, as part of the series of cases brought against NATO.

<sup>339</sup> *Gueye et al v France*, Communication No 196/1985, views of 3 April 1989; and *Šimůnek v Czech Republic*, Communication No 516/1992, views of 31 July 1995.

<sup>340</sup> Advisory Opinion of 9 July 2004, paras 109, 110, 112 and 136 (reference to various outputs of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights)

<sup>341</sup> *LaGrand Case (Germany v United States of America)*, Oral Pleadings, 13 November 2000, Verbatim Record, CR 2000/27 (Professor Bruno Simma)

<sup>342</sup> *Mbenge v Zaire*, Communication No 16/1977, views of 25 March 1983, para 17; *Reid v Jamaica*, Communication No 250/1987, views of 20 July 1990, para 4.5; *Wright v Jamaica*, Communication No 459/1991, views of 27 October 1995, para 8.7; and *General comment No 6* (1982).

imposition of a death sentence is a violation of the rights to life.<sup>343</sup> The reference to international human rights law was nevertheless not taken up by the Court in its final judgment.<sup>344</sup>

155. In *Spain v Canada*<sup>345</sup> the Counter-Memorial of Canada refers to various international human rights conventions<sup>346</sup> to determine how the term “measures” is used by them, as well as referring to Spain’s use of the term in its reports under the ICCPR on the “measures” it had taken in relation to its constitutional order.<sup>347</sup>

## E. USE OF TREATY BODY FINDINGS BY OTHER NATIONAL INSTITUTIONS

156 The jurisprudence of the treaty bodies has become a frequent reference standard in much political and legal analysis in many countries, as well as at the international level. Non-governmental organisations and advocacy groups, academics, and others invoke treaty body findings in their analysis and in advocacy for legal and policy reform, and in some cases this international jurisprudence can be a hot topic in public debate. In addition, State institutions, such as national human rights commissions, law reform commissions and legislatures (especially legislative scrutiny committees) draw on these materials to inform their analysis and recommendations, though the extent of this varies widely.<sup>348</sup>

157. This section of the report gives a number of examples of the use made of treaty body findings by national bodies other than courts. The selection is limited due to space and is intended to be no more than illustrative. There are doubtless many other examples that could be given from other jurisdictions.

### *The legislative process in Finland*

158. The legislative process in Finland provides an example of the frequent reference to international standards (including the treaty body material) in the development and scrutiny of legislative proposals.<sup>349</sup> The work of the Constitutional Law Committee is of particular importance in this respect. The constitutional framework is provided for in section 22 of the Constitution of Finland (2000) which provides that “the public authorities shall guarantee the observance of basic rights and liberties and [international] human rights” and section 74, which provides that “the Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.”<sup>350</sup>

159. The Constitutional Law Committee of Parliament is composed of members of the Parliament, with a majority made up of those from the parties in government. Its function is to review the consistency of proposed bill with the Constitution and human rights standards, and it provides opinions to the Parliament and to other committees on these matters. In its work, the Committee relies heavily on external academic expertise.

160. There are a significant number of cases in which the Constitutional Law Committee<sup>351</sup> has drawn on the output of the treaty bodies, both as part of its function of scrutinising human rights

<sup>343</sup> *Lynden Champagnie et al v Jamaica*, Communication No. 445/1991, views of 18 July 1994, para. 7.4

<sup>344</sup> *LaGrand Case (Germany v United States of America)*, Judgment of 27 June 2001.

<sup>345</sup> *Fisheries Jurisdiction Case (Spain v Canada)*, Counter-Memorial of Canada (*Jurisdiction*), February 1996, para 96 and n 150

<sup>346</sup> ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child.

<sup>347</sup> CCPR/C/4/Add.1 (1978), pp 2-3, 6.

<sup>348</sup> For the example of the Netherlands, see Ineke Boerifijn and Menno Kamminga, “The Use of Products of UN Treaty Bodies in the Netherlands Legal Order”, May 2003

<sup>349</sup> This section draws on Scheinin, *Turku paper*.

<sup>350</sup> Other relevant sections are section 42 (role of the Parliamentary speaker in ensuring observance of the Constitution and referral of disputed rulings to the Constitutional Law Committee), and sections and 109 (role of the Chancellor of Justice and the Parliamentary Ombudsman respectively in ensuring the observance of human rights).

<sup>351</sup> The reports of the Constitutional Law Committee (in Finnish and Swedish) can be found at [www.eduskunta.fi](http://www.eduskunta.fi) (under “The Committees of the Parliament”).

compliance,<sup>352</sup> as well as in other contexts.<sup>353</sup> Other Parliamentary Committees have also referred to treaty body material on some occasions.<sup>354</sup>

161. There are many examples of references in government Bills to treaty body findings (or to pending cases), both in relation to Finland and other countries.<sup>355</sup> These include references in legislation which has responded to treaty body findings of a violation<sup>356</sup> which makes changes to laws while a case is pending before a committee,<sup>357</sup> or which respond to concluding observations by a Committee on a Finnish report.<sup>358</sup>

<sup>352</sup> These include the following (all of which refer to only Human Rights Committee output): *Opinion 21/1994 Health Insurance Act* (concluding that in the light of *Broeks* (Communication No 172/1984) and *Zwaan de Vries v Netherlands* (Communication No 182/1984) the Bill's proposed distinction based on sex in the rules for calculation of parent's benefits was contrary to article 26 of the ICCPR); *Opinion 9/1997 reform of appeal procedures* (referring to *Salgar de Montejo v Colombia* (Communication No 64/1979) in discussion of whether article 14(5) of the ICCPR requires a full appeal in all criminal cases); *Opinion 13/1998 Schengen Conventions* (referring to HRC's concluding observations on France as a justification for removing rules on carrier sanctions from the proposed implementing legislation); *Opinion 23/1998 Aliens Act* (referring generally to concluding observations by the Human Rights Committee when criticizing a definition of "safe countries" that would be based on "compliance" with the ICCPR); *Opinion 16/2000 Aliens Act* (referring to HRC *General Comment No 15* to the effect that a decision on the lawfulness of stay must be taken in accordance with article 13 of the ICCPR); *Opinion 59/2001 Juvenile Punishment Testing Act* (referring to *Kavanagh v Ireland* (819/1998) and *Gueye et al v France* (Communication No 196/1985) when criticizing different punishments for the same crime); *Opinion 9/2002 Languages Act* (referring to *Diergaardt et al v Namibia* (Communication No 760/1997) in support of a position that translations to Finnish or Swedish should not be required when both the authority and the parties understand the original document; and to *Ignatane v Latvia* (Communication No 884/1999) in support of a position that strict language requirements for public office may be problematic); *Opinion 31/2002 Criminal Code* (referring to HRC concluding observations on Trinidad and Tobago (2000) in support of the conclusion that article 15 of the ICCPR required the deletion of a clause that would have restricted the scope of the principle of lighter penalty).

<sup>353</sup> *Opinion 27/1997 Fishing Act* (referring to the practice of the Human Rights Committee in support of conclusion that fishing constitutes a part of Sami culture); *Opinion 4/2002 Revised European Social Charter* (referring to CESCR concluding observations on Finland (1996 and 2000) on the absence of legislation on minimum wages; used in support of also accepting article 4(1) of the European Social Charter); *Opinion 57/2001 Church Act* (referring to HRC *General Comment No 22* in support of the internal autonomy of churches); *Opinion 7/2002 Åland Islands Autonomy Act* (referring to the domestic compensation case resulting from *Torres v Finland* (Communication No 291/1988)).

<sup>354</sup> See, for example, Committee on Education and Culture, *Report 9/1994* (the notion of culture used in Government Bill 248/1994 on Sami cultural autonomy was in accordance with the practice of the HRC); and Committee on Social Affairs and Health, *Report 23/2002* (critique of government report on the well-being of children and adolescents, referring to concluding observations of the CRC which criticised Finland for lack of coordination among authorities).

<sup>355</sup> Other examples of the reference to treaty body findings in Government Bills include: Government Bill 107/1997 on ratification of the Framework Convention on National Minorities (discussion of the scope of article 27 of the ICCPR article 27 on the basis of *General Comment No 23*); Government Bill 3/1999 for an Act on Security Checks in Courts (reference to *Delgado Páez v. Colombia* (Communication No 195/1985)); Government Bill 135/2000 on ratification of the CEDAW Optional Protocol (discussion of the legal effect of views adopted by UN treaty bodies, noting that while they are not legally binding, Finland strives to implement them); Government Bill 160/2000 for amending the Act on Alternative Service (referring to HRC concluding observations on France (1997) as justification for shortening the term of alternative service from 13 to 12 months; Parliament did not approve this part of the Bill); Government Bill 200/2000 for an Act on Registered Partnership (implicit reference to *Toonen v Australia* (Communication No 488/1992) and explicit reference to *Danning v Netherlands* (Communication No 180/1984) when justifying equal treatment of marriage and registered same-sex couples); Government Bill 92/2002 for a new Languages Act (referring to HRC *General Comment No 23* in support of positive measures under article 27 of the ICCPR; reference to the reporting guidelines of CERD); and Government Bill 265/2002 and Government Bill 28/2003 for a new Aliens Act (noting that, according to HRC *General Comment No 15*, the lawfulness of an alien's stay is to be decided in conformity with article 13 of the ICCPR).

<sup>356</sup> See, for example, Government Bill 100/1989, which involved amendment of the Act on Military Disciplinary Procedure, allowing for court review of arrest, and which refers directly to *Antti Vuolanne v Finland* (Communication No 265/1987), views of 7 April 1989 (Finland informed the Committee before the adoption of the views that an amendment was being prepared: para 6.3).

<sup>357</sup> See, for example, Government Bill 29/1990, which involved an amendment of the Aliens Act to allow court review of detention and which was before the Parliament when the HRC decided *Torres v Finland* (291/1988); Government Bill 107/1998, which amended the Code of Judicial Procedure to give courts more discretion in ordering costs, including cases between the State and an individual; the then pending case of *Äärelä and Näkkäljärvi v Finland* (Communication No 779/1997) figured in the public debate. See also legislative responses



162. The case of Finland shows fairly extensive reference to treaty body output in the legislative process. The work of the Human Rights Committee is the most frequently cited treaty source, although there are also references to other treaty bodies. The references are to a variety of types of treaty body output, primarily to individual cases and general comments, but also to concluding observations, reporting guidelines and other material. The country-specific material includes references not only to that involving Finland, but to other countries as well. In some cases the reference to the treaty body source is a direct result of an international or constitutional legal obligation to comply, whether the obligation to amend a law after a finding of a violation, or as result of the constitutional requirement to ensure compliance with human rights. A range of different actors draws on the treaty body material (including government and parliamentary committees); the role of independent academic expertise seems to be particularly important in ensuring that this information is before the body concerned

#### *Independent national institutions in Australia*

163. National human rights institutions are bodies which one would expect to draw on treaty body material, especially if the charter of the institution involves reference to international standards as guiding or binding principles for the work of the institution. The following material illustrates the important role that national human rights institutions can play in the dissemination and enforcement of international human rights norms and the use of human rights treaty body output.

164. The Australian Human Rights and Equal Opportunity Commission (HREOC) is one such body,<sup>359</sup> with jurisdiction defined in certain respects by reference to a number of UN human rights instruments (in particular the ICCPR). In its inquiries into various situations the Commission has consistently referred to treaty body findings – in particular those of the Human Rights Committee -- for example in relation to the definition of “arbitrary detention”,<sup>360</sup> detention beyond the expiration of a criminal sentence,<sup>361</sup> conditions of detention,<sup>362</sup> the concept of discrimination and its application to asylum-seekers,<sup>363</sup> native title issues,<sup>364</sup> rights of indigenous peoples as minority rights,<sup>365</sup> and to various aspects of the rights of the child.<sup>366</sup>

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to “qualified non-violation” findings, for example, Government Bill 30/1982 on a total reform of the legislation on schools (*Hartikainen v Finland* (Communication No 40/1978) figured in the discussion and was reflected in Opinions 12-13/1982 by the Constitutional Law Committee; and Government Bill 149/1991 on a new Act on Alternative Service (*Järvinen v Finland* (Communication No 285/1988) mentioned in support for the proposal to shorten alternative service).

<sup>358</sup> See, for example, Government Bill 182/1997 on amendment of the Passport Act (referring to the critique by the Human Rights Committee expressed in 1990 when considering Finland’s report); and Government Bill 192/2001 on the establishment of separate facilities for immigration detention (referring to Human Rights Committee concluding observations of 1998 and CAT concluding observations of 1996 and 1999).

<sup>359</sup> For copies of the Commission reports referred to here, see [www.humanrights.gov.au](http://www.humanrights.gov.au). This discussion draws on Jason Söderblom, *Turku paper*.

<sup>360</sup> *Report of an inquiry into a complaint by Mr XY concerning his continuing detention despite having completed his criminal sentence*, HREOC Report No 22 (2002) (citing *A v Australia*, Communication No 560/1993, 30 April 1997; *Spakmo v Norway*, Communication No 631/1995, 11 November 1999; and *van Alphen v The Netherlands*, Communication No 560/1993, 23 July 1998).

<sup>361</sup> *Report of an inquiry into a complaint by Mr XY concerning his continuing detention despite having completed his criminal sentence*, HREOC Report No 22 (2002), [http://www.hreoc.gov.au/human\\_rights/human\\_rights\\_reports/hrc\\_22.html](http://www.hreoc.gov.au/human_rights/human_rights_reports/hrc_22.html) (referring to Communication No 8/1977, 3 April 1980; Communication No 277/1988, 4 July 1990; Communication No 25/1978, 26 July 1982); and *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights*, HRC Report No. 13 (2001), [www.hreoc.gov.au/human\\_rights/human\\_rights\\_reports/hrc\\_report\\_13.html](http://www.hreoc.gov.au/human_rights/human_rights_reports/hrc_report_13.html) (citing Communication No 8/1977, adopted 3 April 1980; Communication No. 277/1988, adopted 26 March 1992; Communication No 25/1978, adopted 26 July 1982, *Van Alphen v The Netherlands*, 305/1988, adopted 23/7/1990; *A v Australia* Communication No. 560/1993, adopted 30 April 1997).

<sup>362</sup> *Report of an inquiry into a complaint by Mr Hassan Ghomwari concerning his immigration detention and the adequacy of the medical treatment he received while detained*, HREOC Report No 23 (2002) [http://www.hreoc.gov.au/human\\_rights/human\\_rights\\_reports/hrc\\_23.html](http://www.hreoc.gov.au/human_rights/human_rights_reports/hrc_23.html) (citing Human Rights Committee, *General Comment No 8* (1982), at para 2).

<sup>363</sup> *Report of an inquiry into a complaint by the Asylum Seekers Centre concerning changes to the Asylum Seekers Assistance Scheme*, HREOC Report No 17 (2002) [http://www.hreoc.gov.au/human\\_rights/human\\_rights\\_reports/hrc\\_report\\_17.html](http://www.hreoc.gov.au/human_rights/human_rights_reports/hrc_report_17.html) (citing CESCR *General comment No 3*, in relation to the obligation of progressive realisation, as an aid to interpreting the provisions of the



165. Law reform commissions are also institutions which might be expected to make use of treaty body output in their work. In Australia, the federal law reform commission, the Australian Law Reform Commission, is established under legislation which requires it to take into account Australia's treaty obligations.<sup>367</sup> The Commission frequently refers to treaty body material in its final reports,<sup>368</sup> as well as in its background and discussion papers.<sup>369</sup>

166. In these two examples, it appears to have been important that the enabling legislation required specific consideration of relevant international treaties (both ALRC and HREOC) or defined the jurisdiction of the HREOC to inquire into situations in terms of specific treaties (although the HREOC has not confined its references to treaty body material under the specific treaties).

167. The Aboriginal and Torres Strait Islander Commission (ATSIC)<sup>370</sup> has also drawn on treaty body findings in a wide range of reports and submissions it has made to Parliamentary committees, UN treaty bodies and in publications for general information.<sup>371</sup> Although ATSIC's enabling legislation<sup>372</sup>

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CRC; *General comment No 18* on the nature of "discrimination"; and the Dutch cases *Broeks*, and *Zwaan de Vries*) on the scope of the obligation of non-discrimination under article 26 of the ICCPR, and to HRC case law on the meaning of "other status" in article 26 *Vos v The Netherlands*, (Communication No 218/86), *Van Oord v Netherlands* (Communication No 658/95), *Gueye v France* (Communication No 196/85) and *Adam v Czech Republic* (Communication No 586/94), *Oulajin and Kaiss v Netherlands* (Communication No. 426/90), and *Blom v Sweden* (Communication No 191/85).

<sup>364</sup> *Information concerning native title provided by the Human Rights and Equal Opportunity Commission to United Nations Committees in 2000*, [http://www.hreoc.gov.au/social\\_justice/nt\\_report/append2.htm](http://www.hreoc.gov.au/social_justice/nt_report/append2.htm), (citing Concluding observations of the Committee on the Elimination of Racial Discrimination (the CERD) on Australia, CERD/C/54/Misc.40/Rev.2 (1999), paras 6 and 9)

<sup>365</sup> *Ibid* (citing *Kitok v Sweden* (Communication No 197/85), *Ominayak v Canada* (Communication No 167/87), and the *Länsman* cases (Communications Nos 511/92 and 671/95), and its *General Comment No 23*, at paras 3.2 and 7.

<sup>366</sup> *Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, HREOC Report No 25 (2002), [http://www.hreoc.gov.au/human\\_rights/human\\_rights\\_reports/hrc\\_25.html](http://www.hreoc.gov.au/human_rights/human_rights_reports/hrc_25.html) (citing Committee on the Rights of the Child in relation to the relevance of the Beijing Rules to the interpretation of the CRC (see eg Paraguay, Preliminary Observations, CRC/C/15/Add. 27, para 13; and the Committee's comments in its Report on General Discussion on administration of juvenile justice, Report on the Tenth Session, October-November 1995, CRC/C/46, para 214) and reference to the best interests principle in the area of budgetary allocation (citing Committee on the Rights of the Child, Guidelines for Periodic Reports, para 35 and its Concluding Observations on the *Initial Report of Colombia*, CRC/C/15/Add.30, para 16; and citing the case law of the Human Rights Committee in *A v Australia* on what constitutes arbitrary detention). See also HREOC, *Report of the National Inquiry into Children in Immigration Detention* (May 2004), Chapter 4 ("Human Rights Obligations"), [www.hreoc.gov.au/human\\_rights/children\\_detention\\_report/report/index.htm](http://www.hreoc.gov.au/human_rights/children_detention_report/report/index.htm).

<sup>367</sup> Law Reform Commission Act 1996 (Cth), s 24 (1) and (2).

<sup>368</sup> See, for example, ALRC, *Making Rights Count – Services for people with a disability, New disability services legislation for the Commonwealth, Review of legislation administered by the Department of Health and Family Services*, ALRC Report No 79 (1996), para 3.9 (referring to CESCR, *General comment No 5*, and Human Rights Committee, *General comment No 18* in support of conclusion that general guarantees of equality in the treaties cover persons with disability by implication); ALRC, *Compliance with the Trade Practices Act 1974*, ALRC Report 68 (1994), at para 9.5 and n 13 (referring to Human Rights Committee decision in *RTZ v Netherlands* (Communication No 245/1987) cited in submissions, to reject argument that use of civil penalties in trade practices enforcement would contravene article 26 of the ICCPR); and ALRC, *Equality before the Law – Women's Equality (Part II)*, ALRC 69, para 4.5 and n 95 (referring to *General comment No 18* on the need for affirmative action in order to achieve equality) and para 4.39 and n 101 (referring to CEDAW's *General recommendation No 19* on violence against women in relation to the importance of eliminating violence as part of the struggle to achieve equality for women).

<sup>369</sup> See, for example, ALRC, *Protecting Classified and Security Sensitive Information*, Discussion Paper 67 (2004), at 175 and n 10 (referring to *VMRB v Canada* 235/1987 on the meaning of "suit at law" in article 14 of the ICCPR); at 185 and n 70 (referring to Human Rights Committee, *General Comment 29*, para 11 and 16), at 186 and n 73 (reference to *General comment 13*); 205 and n 173 (referring to *Hamilton v Jamaica* in relation to the requirement that reasons be given for a judicial decision), at 290 n 431 (referring to *Estrella v Uruguay* in relation to the requirement to justify a trial not held in public).

<sup>370</sup> This paragraph draws on material provided by Greg Marks.

<sup>371</sup> For example, ATSIC, *Submission to the Inquiry into the Consistency of the Native Title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of All Forms of Racial*

does not specifically require it to do so, the Preamble to that legislation does state that the Australian Government has acted to protect the rights of its Indigenous citizens by recognising international standards for the protection of universal human rights and fundamental freedoms. Parliamentary bodies also draw on treaty body findings. For example, in 1998 CERD invoked its early warning and urgent action procedures to request the Australian Government to provide it with information on certain matters concerning Indigenous policy, in particular amendments made in 1998 to the Native Title Act 1993.<sup>373</sup> In 1999 CERD found that a number of these amendments were racially discriminatory.<sup>374</sup> The 1999 CERD decision was referred to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC) of the Federal Parliament to investigate the CERD finding and to consider what amendments might be required to ensure that Australia's international obligations were complied with. The PJC presented a detailed report to Parliament in June 2000.<sup>375</sup> The significance of this development lies in the interaction between findings by the CERD and scrutiny of legislation by a Committee of the Federal Parliament."

### *Examples from the Netherlands*

168. This section refers to a number of examples of references to treaty body findings in the Netherlands. While provisions of UN human rights treaties are often referred to, reference to the products of the supervisory bodies is haphazard and extremely limited in comparison to the products of the European Court of Human Rights.

169. *Human Rights Committee*: In 1995, a Member of Parliament asked the Government what action it had taken to implement the Human Rights Committee's recommendation in *Brinkhof v the Netherlands*, according to which the Netherlands should review its legislation to ensure that all persons holding objections to military and substitute service receive equal treatment (Jehovah's witnesses had been receiving preferential treatment). The Government responded that the matter – including the implications of *Brinkhof* – was still under consideration by the Netherlands Supreme Court (*Hoge Raad*) and that it would make up its mind inter alia in the light of a Supreme Court judgement on a related case that was still pending.<sup>376</sup>

170. In 1998, the Netherlands Foreign Minister in a report to Parliament on the international protection of the right to freedom of religion or conscience, stated that the Government regarded the Human Rights Committee's *General comment No 22* as an authoritative interpretation of Article 18 of the ICCPR.<sup>377</sup> In 1998, in a taxation dispute, the Procurator-General at the Supreme Court relied on *General comment No 18* and *Broeks v Netherlands* in support of his view that there had been no discrimination in the case.<sup>378</sup>

171. In 2000, a Member of Parliament asked the Government whether the lack of appellate review of penalties imposed by the tax inspector was not incompatible with the views of the Human Rights Committee in *Gomez Vazquez v Spain*. The Government responded that it did not think so.<sup>379</sup> That same year, the Procurator-General with the Supreme Court (*Hoge Raad*) relying inter alia on

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*Discrimination (CERD)*, February 2000; ATSIC, *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations under the UN ICCPR – a Report submitted by ATSIC to the Human Rights Committee* June 2000; ATSIC, *Proposed Amendments to the Native Title Act 1993 – Issues for Indigenous Peoples*, ATSIC Canberra 1996. See also [www.atsic.gov.au](http://www.atsic.gov.au).

<sup>372</sup> *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

<sup>373</sup> CERD, *Decision 1 (53) concerning Australia*, 11 August 1998. UN Doc CERD/C/53/Misc.17/Rev.2.

<sup>374</sup> CERD, *Decision 2 (54) on Australia – Concluding Observations/Comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev. 2. CERD confirmed this Decision on 16 August 1999 (UN Doc CERD/C/55/Misc.31/Rev.3.), and confirmed and broadened its criticism of Australia on 24 March 2000 (UN Doc CERD/C/304/Add.101).

<sup>375</sup> Parliament of the Commonwealth of Australia, *Sixteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund - CERD and the Native Title Act 1998*, at [www.aph.gov.au](http://www.aph.gov.au)

<sup>376</sup> TK 1994-1995, Aanhangel van de Handelingen, 1139, p. 2345.

<sup>377</sup> TK 1997-1998, 25 992, nr. 1, p. 10.

<sup>378</sup> Hoge Raad, 15 July 1998, no. 31922.

<sup>379</sup> TK 2000-2001, Aanhangel van de Handelingen, 405, p. 837.

*Domukovsky et al v Georgia*, reached the opposite conclusion.<sup>380</sup> In an explanatory memorandum accompanying draft amendments to legislation on the role of the judiciary the Government referred to the views of the Human Rights Committee on the right of appeal in *Salgar de Montejo v Colombia*. It stated that although the views of the Committee are not binding, it preferred to remedy a situation that might be disapproved of by the Committee.<sup>381</sup>

172. In 2001, the quasi-judicial Equal Treatment Commission (*Commissie Gelijke Behandeling*) relied on *Vos v Netherlands* to declare inadmissible a case concerning discrimination on the grounds of sex in the administration of pensions.<sup>382</sup>

173. *CEDAW*: In 2001, the Equal Treatment Commission when considering a complaint from a woman who had been denied membership of the fundamentalist-Christian political party SGP, referred to CEDAW's concluding observations on the periodic report of the Netherlands.<sup>383</sup> In those concluding observations the Committee had recommended that the Netherlands take urgent measures against the admissions policy employed by that political party.

174. *CAT*: In 1999, a Member of Parliament referred to the views of the Committee against Torture in *Nunez Chipana v Venezuela* and asked the Government to explain whether it shared the Committee's opinion that state parties should comply with requests under rule 108 of its rules of procedure to refrain from expelling or extraditing authors of communications still being considered by the Committee. The Government responded that in principle such requests are granted unless there are good reasons not to do so. It pointed out that by not including the contents of rule 108 in the Convention itself, the drafters of the Convention had made it clear that they wished to allow states parties a certain amount of freedom of action in this area.<sup>384</sup>

## F. CONCLUSIONS AND RECOMMENDATIONS

175. The *Interim* and *Final Reports* have not comprehensively surveyed all aspects of the use of treaty body findings and the relevance of those various uses for the development of international law.<sup>385</sup> The Committee recognised that the materials referred to in the two reports are not an exhaustive selection (they represent what was available to the Committee as of late 2003, with some more recent additions). However, the material surveyed in the two reports, shows that treaty body output has become a relevant interpretive source for many national courts in the interpretation of constitutional and statutory guarantees of human rights, as well as in interpreting provisions which form part of domestic law, as well as for international tribunals.<sup>386</sup> While national courts have generally not been prepared to accept that they are formally bound by committee interpretations of treaty provisions, most courts have recognised that, as expert bodies entrusted by the States parties with functions under the treaties, the treaty bodies' interpretations deserve to be given considerable weight in determining the meaning of a relevant right and the existence of a violation.

176. While the material included in the *Interim* and *Final Reports* does not purport to be comprehensive, it shows clear patterns both in the types of material cited by national courts and the committees whose material they cite. The overwhelming number of references documented in the two reports are to cases decided under individual communications procedures and to general comments or recommendations adopted by the treaty bodies; concluding observations, States parties' reports and other output has been referred to on a relatively small number of occasions. The Human Rights

<sup>380</sup> Hoge Raad, 14 June 2000, no. 33557.

<sup>381</sup> TK 1999-2000, 27 181, nr. 3, par. 3.2.

<sup>382</sup> Commissie Gelijke Behandeling, case 2001/95.

<sup>383</sup> Commissie Gelijke Behandeling, case 2001/150.

<sup>384</sup> TK 1998-1999, Aanhangsel van de Handeligen, 1207, p. 2375. In the same vein, *ibid.*, 897, p. 1837.

<sup>385</sup> For example, the reports have not considered whether and how States refer to treaty body findings in their reports to the various committees, or in their submissions under the various communications procedures, or of the use made by treaty bodies of each other's output.

<sup>386</sup> See on the role of complaints procedures in this regard, Andrew Byrnes, "An effective individual complaint mechanism in an international human rights context", in Anne F Bayefsky (ed), *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (2000) 139, at 141-142.

Committee has received the majority of references, both as regards cases<sup>387</sup> and general comments.<sup>388</sup> References to the other committees' work have been less frequent.

177. This pattern of citation reflects a number of factors, including the relative volume of the material produced by the Human Rights Committee so far as case law and general comments are concerned, the range of rights protected by the ICCPR, the fact that domestic courts have a clear preference for drawing on material that will help them to resolve a concrete case before them (thus the dominance of reference to cases), the fact that the Human Rights Committee's period of operation is the second longest of the treaty bodies, and a higher level of public awareness of the Committee and its work. For example, by comparison the Committee against Torture has heard far fewer cases – most of them relating to article 3 of the Torture Convention – and its output is cited at the domestic level almost exclusively in cases in which a challenge is made to a deportation or expulsion order by person.

178. One would reasonably expect that as time passes advocates and judges will become more familiar with the increasing jurisprudence emanating from other committees. However, given the factors mentioned above, it seems likely that the output of the Human Rights Committee will continue to be the predominant source cited.

179. Against this background, it is important to recall that the mode of citation of treaty body materials varies widely, from inconsequential references in passing, to more substantive references, to detailed analysis of a particular source that may be important in influencing or supporting a court's decision in a given case. The number of cases in which a treaty body finding is a significant factor in influencing the outcome of a decision is a small minority of the cases referred. This reflects the pertinence of the findings to the issue in the case, the detail and persuasiveness of the reasoning in the treaty body source, the particular norm that is being interpreted, and the receptiveness of the court to the international source material. The availability of other international or national material that deals with the issues in a more detailed manner also influences the use made of treaty body material, as does the membership of a regional organisation in which there exists an organ (such as the European or Inter-American Courts of Human Rights) which can deliver binding judgments.

180. The *Interim Report* identified a number of factors that appear to influence the extent of use made of treaty body findings by national courts.<sup>389</sup> The Committee recognises the limitations of its data collection and analysis and that any persuasive predictive analysis of the features of a State's system or behaviour that may lead to greater use of treaty body output would require a much more systematic analysis of the available data.

181. Nevertheless, it may be useful to make a few comments as to factors which at least in individual cases appear to have been conducive to the use of treaty body findings. They are partly those which help to explain why some national courts are more amenable to using international law in other contexts, and partly factors which are specific to the area of international human rights law. There appears to be no one critical factor that is determinative, other than perhaps an awareness on the part of advocates of the material and a preparedness on the part of judges to consider it with an open mind when it is placed before them. The fact that international law (including human rights treaties) forms part of domestic law under a country's constitution does appear to assist, although there are many common law countries (where treaties do not form part of domestic law) in which courts have made quite extensive use of treaty body products.

182. One factor which does seem to contribute to the use of treaty body output is a direct incorporation of provisions of a treaty in a domestic statute or constitution. A number of the common law jurisdictions referred to have adopted Bills of Rights which are an enactment of terms of one or both Covenants, or very similar; this has made reference to the output of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights frequent. Another important factor appears to be the general awareness in the country concerned of the treaty bodies; in particular, public awareness of, and engagement in, the treaty reporting procedures may encourage knowledge of the work of the treaty bodies and the use of that output in advocacy before the courts and other national

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<sup>387</sup> Approximately 74 of the special references in the national decisions referred to in the *Interim* and *Final reports* are to decisions under individual complaint procedures and some 53 cases refer to general comments or recommendations; there are 12 references to concluding comments, 12 references to reports of States parties to committees and 8 references to other committee output.

<sup>388</sup> Of the 53 references to general comments and recommendations, 36 are to general comments of the Human Rights Committee, 9 to CESCR general comments, 7 to CEDAW general recommendations, and 1 to CAT general comments.

<sup>389</sup> Cp Christof Heyns and Frans Viljoens, "The Impact of the United Nations Human Rights Treaties on the Domestic Level" (2001) 232 *Human Rights Quarterly* 483, at 521.

institutions. The availability of relevant treaty body findings in local languages would also appear to be a factor.

### ***Recommendations***

183. The Committee considers that the spread of the use of the UN treaty bodies findings is a process that might be further encouraged in a number of ways, and recommends that:

(a) the Office of the UN High Commissioner for Human Rights and the Division for the Advancement of Women prepare a Fact Sheet or similar publication which would provide judges, legal practitioners and policymakers with information about how national courts and tribunals have drawn on the findings of the treaty bodies;

(b) the OHCHR, DAW and other bodies incorporate in training of judges, practitioners and policymakers material demonstrating how national courts and tribunals have drawn on the jurisprudence of the treaty bodies;

(c) the treaty bodies, with the secretariat assistance of OHCHR and DAW, specifically request States parties through Lists of Issues and, if necessary, through follow-up oral questions and concluding observations and comments to provide a comprehensive catalogue of cases over the reporting period in which treaty body jurisprudence has been cited in national courts and tribunals (where this has not been provided in State reports);

(d) the OHCHR and DAW prepare a regularly updated list of instances where national courts and tribunals have cited treaty body jurisprudence, drawing on the information supplied through paragraph (c) above, other sources and their own research; and

(e) the Secretary-General of the International Law Association disseminate the *Interim Report* and the *Final Report* broadly and explore ways in which they could be brought to the attention of judges and judicial officers and to national human rights institutions.

184. The Committee also requests the Secretary-General of the International Law Association send a copy of the *Interim Report* and this *Final Report* to the UN High Commissioner for Human Rights and the Division for the Advancement of Women.

### **G. FUTURE WORK OF THE COMMITTEE**

185. The Committee's current mandate is scheduled to expire with the submission of this *Final report*, and it is necessary to identify possible topics for the future work of the Committee. A number of topics for the future work of the Committee have been suggested at the New Delhi and Turku meetings of the Committee. These include the issue of reservations, the relevance of the Vienna Convention on the Law of Treaties to human rights treaties, issues of complementarity, the feasibility and potential role of an International Court of Human Rights, the existence and scope of an international right to habeas corpus, the exhaustion of domestic remedies, and the relationship between human rights law and general international law. The Committee will need to discuss this matter at the Berlin meeting and sketch a programme of work for the next two years.

**Meeting of the International Law Association's Committee on International Human Rights Law and Practice, Institute of Human Rights, Åbo Akademi University, Turku, 26-27 September 2003**

**Domestic Impact of Findings by United Nations Treaty Bodies**

**Papers presented at the meeting or provided subsequently  
and available at available through the website of the Institute for Human Rights:  
[www.abo.fi/institut/imr](http://www.abo.fi/institut/imr) (under Seminars)**

Natalia Alvarez Molinero, *Implementation of the Views of the UN Human Rights Committee in Spain: New Challenges*

Ineke Boerefijn, *References in States Parties' Reports*

Christina M. Cerna, *Domestic Effect of UN Human Rights Treaties in the Americas (including references to findings by UN treaty bodies)*

Mahulena Hofmann, *Impact of the Views of the UN Human Rights Committee in the National Legal Order of Some Eastern and Central European Countries*

Saskia Hufnagel, *Selected Materials on the Recent Use of UN Human Rights Treaty Body Output by International Courts and Tribunals. Background note prepared for the ILA Committee on Human Rights Law and Practice meeting in Turku, 26-27 September 2003*

Yuji Iwasawa, *The Impact of the Work of the United Nations Human Rights Treaty Bodies on Japanese Courts*

Sameer Jarrah, *Note for the File on "The Preparatory Workshop on the Impact of the work of the United Nations human rights treaty bodies on National Courts and tribunals in Jordan*

Sameer Jarrah, *A Brief Note on the Judicial Protection of Human Rights in Jordan, Egypt and Saudi Arabia*

Lirette Louw, *Domestic Effect of UN Human Rights Treaties in Africa (including references to findings by treaty bodies)*

Irina Moulechko, *A Brief Report on the Issues Covered in the New Delhi Interim Report (Republic of Bulgaria)*

Office of the UN High Commissioner for Human Rights, *The Follow-Up activities by the UN Human Rights Treaty Bodies and the OHCHR*

Martin Scheinin, *Use of Treaty Body Output by National Bodies other than Courts and Tribunals: The Legislative Process in Finland*

Jason D Söderblom, *Selected Materials on the Recent Use of UN Human Rights Treaty Body Output by Australian Courts and Public Bodies Other Than Courts: Background note prepared for the ILA Committee on Human Rights Law and Practice meeting in Turku 26-27 September 2003*

Heli Niemi, *National Implementation of Findings by United Nations Human Rights Treaty Bodies: A Comparative Study* (Institute for Human Rights, December 2003), available at <http://www.abo.fi/institut/imr/norfa/Heli.pdf>.

**CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION in New Delhi, India, 2002**

Committee on International Human Rights Law and Practice. Interim Report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals

Working Session of the Committee on International Human Rights Law and Practice. Chair of

Meeting: Professor Paul De Waart (Netherlands). Co-Rapporteur: Professor Yuji Iwasawa (Japan). Co-Rapporteur: Professor Andrew Byrnes (Australia)