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The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies

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THE LEGAL STATUS OF NORMATIVE PRONOUNCEMENTS OF HUMAN RIGHTS TREATY BODIES

Dinah Shelton

A. Introduction

State representatives who draft human rights treaties negotiate the rights and duties included in the agreement, establish institutions, and create procedures to monitor compliance with the obligations set forth in the text. The most common institutional arrangement involves the creation of an independent expert body with competence to review periodic reports by the states parties.[1] Jurisdiction to receive inter-state and individual communications or petitions may also form part of the mandate of a human rights treaty body, but complaint procedures generally are optional, requiring separate acceptance of the relevant article or protocol by each state party to the treaty. Only three human rights treaties,[2] all at the regional level, have foreseen the creation of courts with jurisdiction to render binding judgments and reparations when rights have been violated, and only one of these courts has mandatory jurisdiction over states parties.[3]

Many of the treaty bodies created pursuant to the UN "core" treaties,[4] as well as the Inter-American Commission on Human Rights

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[1] See, D. McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, at 62 (1991).

[2] The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5, 2113 UNTS 222 [hereinafter ECHR]; the American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, OASTS 36 [hereinafter American Convention]; and the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

[3] The European Convention provides for the European Court of Human Rights, whose jurisdiction is mandatory. ECHR, Art. 19. Any person claiming to be the victim of a violation of a right guaranteed by the Convention may bring a complaint to the court after exhausting local remedies, provided specified admissibility conditions are met. ECHR, Arts. 34, 35.

[4] The UN refers to nine *core* treaties, all but one of which have established a monitoring committee: the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 [hereinafter ICESCR]; the International

and the African Commission on Human and Peoples' Rights, issue general comments on the scope of guaranteed rights and/or observations on compliance by states parties with their treaty obligations.[5] The may also undertake fact-finding and issue "views", "recommendations" or "decisions" on the merits of communications brought before them. They also sometimes indicate interim, provisional, or precautionary measures when irreparable and serious harm is threatened to individuals or groups. These various pronouncements of human rights bodies, issued within the scope of their mandates, involve legal analysis, application of the law to the facts presented to them, and the further elaboration of often vaguely-written human rights norms. While the resulting texts are often referred to as "authoritative" pronouncements, their juridical value and the degree to which states have a duty to cooperate and give them deference, has not received much attention. In the light of Rüdiger Wolfrum's service on international tribunals and his attention to the topic of international cooperation and solidarity, it seems an appropriate topic for this volume in his honor.

The essay begins with a consideration of the mandates according to treaty texts, using the rules of interpretation contained in the Vienna Convention on the Law of Treaties, noting how these rules have been applied in practice by human rights tribunals. The first section also identifies the various types of pronouncements the different human rights bodies make. The second section examines the development over time of the practice of treaty bodies and what these institutions have said about the juridical value of their decisions, comments and views. The conclusion undertakes an assessment of the notion of

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Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 [hereinafter ICCPR]; the Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1954, 660 UNTS 195 [hereinafter CERD]; the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13 [hereinafter CEDAW]; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 [hereinafter CAT]; the Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 [hereinafter CRC]; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, 2220 UNTS 3 [hereinafter CPMW]; Convention on the Rights of Persons with Disabilities, 13 December 2006, UNTS No. 44910 [hereinafter CRPD]; and the Convention on the Protection of All Persons from Enforced Disappearance, 20 December 2006, not in force.

[5] The African Commission issues recommendations, African Charter Arts. 45.1(a), 58(2), and 53; the Human Rights Committee issues views, Optional Protocol Art. 5(4); as does the UN Committee against Torture, Convention Art. 22(7).

authoritativeness and the degree of deference owed by states to the pronouncements of human rights treaty bodies. Overall, this brief study indicates that the ambivalent, often reticent attitude of governments towards human rights law–revealed in the deliberately limited powers of treaty bodies–has failed to halt the creative development of procedures that allow for normative evolution and genuine scrutiny of compliance by states parties. In all instances, the bare-bones outlines of functions described in the constitutive treaties have evolved significantly through practice and acquiescence, even support, of States Parties. In this respect, the enhanced juridical status for the pronouncements of human rights bodies reflects the necessity for international accountability of States, to ensure the effective promotion and protection of internationally-guaranteed human rights, even if the role of international bodies is subsidiary to national implementation.

B. The Institutions and their Mandates

The earliest of the UN core treaties, the Convention on the Elimination of All Forms of Racial Discrimination (CERD), established an 18-member Committee of independent experts[6] (of which Rüdiger Wolfrum was once a member) and granted it supervisory authority to ensure the implementation of the obligations of States Parties.[7] CERD confers three main functions on the Committee: examine periodic reports; consider inter-state communications; and consider individual communications.[8] Article 9 on periodic reporting explicitly permits the CERD committee to "request further information from the States Parties;" the committee initially used this power to establish reporting guidelines[9] and to invite representatives of the reporting State to attend

[6] CERD, Art. 8(1). Note that the CERD Committee has emphasized its independence by refusing to allow members who could not attend the permission to send alternates and rejected a State Party's notification that a member had resigned. See, K. J. Partsch, The Committee on the Elimination of Racial Discrimination, in: P. Alston, The United Nations and Human Rights: A Critical Appraisal, 339, at 340–41 (1992).

[7] As Opsahl noted, the terms *monitor*, *supervise*, *enforce* or *protect* are freighted in and of themselves. T. Opsahl, The Human Rights Committee, in: P. Alston (note 6), at 369, 370.

[8] CERD, Arts. 8, 11–13, and 14. A fourth function, to aid other UN bodies in reviewing petitions from trust and other non-self-governing territories, has diminished with the gradual independence of trust and colonial territories. See CERD, Art. 15.

[9] CERD, Communication to States Parties, CERD/C/R/12 and A/8027 (1970), Annex IIIA.

the relevant meetings of the Committee.[10] CERD Article 9(2) provides that the CERD Committee may "make suggestions and general recommendations based on the examination of the reports and information received from the States Parties." As one of the Committee's original members has commented, "[t]he interpretation of this provision has caused significant Committee debate,"[11] not only about the sources of information the CERD Committee can access, but also about the legal weight of its suggestions and recommendations. While the CERD Committee has adopted an expansive interpretation of the substantive obligations contained in CERD,[12] it has exercised considerably more restraint than some of the other human rights bodies in claiming juridical value for its pronouncements.

The Human Rights Committee functions under the ICCPR whose Part IV sets out the Committee's composition, status, functions and procedures, the last mentioned supplemented by the Optional Protocol. The Covenant sets forth the competence and duties of the HRC in Articles 40 to 42; they are similar to those of the CERD Committee, with the exception that the individual communications procedure is set forth in the Optional Protocol rather than an optional clause in the treaty itself. In general the Committee monitors or supervises the implementation of the Civil and Political Covenant, although the drafting history indicates considerable disagreement over the precise role of the Committee.[13] That disagreement continued in the early years of the Committee, leading to a general discussion in 1980.[14] Consensus was reached on the need for general comments to be issued on matters of common interest to the States Parties. Subsequently, the Committee

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[10] In fact, the General Assembly recommended that CERD invite representatives of State Parties to be present for the discussions of their reports. GA Res. 2783 (XXVI) (1971). The practice was adopted in 1972. A/8718 (1972), para. 37, 1 December (V). It has been followed by all subsequent UN treaty bodies in the examination of State reports.

[11] Partsch (note 6), at 351. See also Legal Opinion of the UN Office of Legal Affairs to the Assistant Secretary-General for Inter-Agency Affairs, 1972 UN Judicial Yearbook 164 (1974) (asserting that the provisions of CERD do not limit the sources available to the Committee).

[12] See T. Meron, The Meaning and Reach of the International Reach of the International Convention on the Elimination of All Forms of Racial Discrimination, 79 American Journal of International Law 283, at 310–312 (1985); Partsch (note 6), at 358–360.

[13] See Opsahl (note 7), at 371–72.

[14] Report of the Human Rights Committee, A/35/40 (1980).

issued a Statement on the duties of the Human Rights Committee under Article 40 of the Covenant,[15] which represented a minimalist view of the powers of the Committee during the Cold War period.

The Optional Protocol labels the result of the Committee's consideration of individual communications "views" to be forwarded to the parties (Protocol Article 5 (4). The Optional Protocol states this "without explaining how these views shall be reached, for which purpose, and to what effect."[16] In practice, the Committee has acted as a judicial or quasi-judicial body in assessing the evidence and undertaking legal reasoning in its analysis, within the confines of the written procedure established by the Optional Protocol. Over time, the length of the opinions has increased, as have the recommendations on forms of reparation due when the Committee finds a violation.

The CEDAW Committee, established in 1981 following the entry into force of CEDAW, had a surprisingly limited mandate, given the precedents of earlier UN human rights treaties. The treaty provided for no inter-State or individual communications. The 23 members of CEDAW were thus limited to issuing general comments and observations on state reports[17] until the entry into force of the Optional Protocol to CEDAW in 2000. The Protocol created a communications procedure as well as an inquiry procedure for grave or systematic violations (Articles 8 and 9), but granted states parties the discretion to opt out of the inquiry procedure. As with the ICCPR, the consideration of individual communications results in "views" and "recommendations."

CAT, too, has monitoring procedures that involve state reporting and general comments, added to which are optional procedures for individual and inter-State complaints, as well as an optional inquiry procedure.[18] The treaty confirms the practice initiated by other treaty bodies, which is to address individual comments to each reporting state.

On the regional level, the Ministers of Foreign Affairs of the member states of the Organization of American States decided in 1959 to create

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[15] Statement on the duties of the Human Rights Committee under Art. 40 of the Covenant adopted on 30 October 1980, in Report of the Human Rights Committee, A/36/40 (1981), Annex IV.

[16] Opsahl (note 7), at 426.

[17] CEDAW Art. 18 requires states to file periodic reports on implementation of the treaty.

[18] CAT, Arts. 19–22.

a seven-member body to promote and protect human rights.[19] The resolution conferred on the OAS Permanent Council the authority to determine the powers and functions of the new institution. The Council adopted a statute for the resulting Inter-American Commission on Human Rights on May 25, 1960, granting it the power to make recommendations to the governments of the member states in general "if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights".[20]

Over the past half century, the mandate of the Commission has evolved with the adoption of the 1969 American Convention on Human Rights and other normative instruments. The Commission itself interpreted its powers broadly from its first session, addressing recommendations to individual governments, receiving complaints, hearing witnesses and carrying out on site investigations. After only two years of tacit acceptance of the Commission's work, the political bodies in 1962 began considering amendments to the Commission's Statute to expressly grant it the powers it was already exercising.[21] The amendments were adopted in 1965,[22] but the Commission remained limited to making proposals and recommendations, language retained in the American Convention which makes the Commission one of the two bodies granted "competence with respect to matters relating to the fulfillment of the commitments made by the States Parties" to the Convention.[23]

It is noteworthy that UN treaty bodies have called upon states to comply with the measures recommended by the Inter-American Commission.[24] The Commission has a mandate of promotion and

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[19] Res. VIII, OAS, Minutes of the Fifth Meeting of Consultation of Ministers of Foreign Affairs. Later, the CERD Committee requested the assistance of UNESCO in drafting more extensive reporting guidelines. A/37/18 (1982), chap. 9.

[20] Art. 9b, Statute of the Inter-American Commission on Human Rights of 1960.

[21] In 1962, the Eighth Meeting of Consultation of Ministers of Foreign Affairs, by Resolution IX recommended that the Permanent Council strengthen the mandate of the Commission.

[22] Res. XII, Expanded Functions of the Inter-American Commission on Human Rights, adopted a the Second Special Inter-American Conference (Rio de Janeiro, 1965).

[23] American Convention, Art. 33.

[24] See, e.g. HRC, Concluding Observations on the Periodic Report on Colombia, 59th Sess., mtg 1583, para. 11; CERD, Concluding Comments on the Country Report on El Salvador, 68th Sess., mtg 1758, para. 15; CERD, Concluding Comment on the Country Report of Suriname, adopted 74th Sess., mtg. 1928, para. 19.

protection of human rights. In this context, it holds hearings, undertakes on-site visits, publishes special country and thematic reports, issues guidelines and general recommendations, requests information of states, reviews periodic reports and hears cases.

Part II of the African Charter on Human and Peoples Rights, entitled "Measures of Safeguard" includes articles on the structure and functions of the African Commission on Human and Peoples' Rights. The mandate of the eleven member independent body is extensive, including both promotion and protection of human rights. It is explicitly given standard-setting authority, "to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation." (Article 45(1)(b)). The Commission is also to ensure the protection of human and peoples' rights and has the power to issue interpretive or advisory opinions about the provisions of the Charter at the request of a state party or an institution of the OAU. The African Charter provides for a state reporting procedure and grants the Commission power to consider individual and inter-state communications.

C. Interpreting the Treaty Texts

Commentators are generally in accord with key states that human rights treaties typically confer neither binding interpretive authority nor direct enforcement power on treaty bodies.[25] A contrasting view supports the authority of treaty bodies to define and interpret the obligations contained in human rights treaties and elaborate the scope and protection of human rights consistent with the treaty provisions. As a matter of legitimacy, states have conferred on treaty bodies a monitoring role, one of gathering information, developing a body of jurisprudence, and engaging in constructive dialogue to further the object and purpose of the treaty: moving states parties to achieve the effective implementation of the treaty's guaranteed rights. Each treaty body must walk the Goldilocks line, being neither too weak and limited, on the one hand, nor too strong and innovative on the other, recognizing

[25] See Robert Harris, Assistant Legal Advisor, Dep't of State, US Delegation Response to Oral /Questions from the Members of the Committee (18 July 2006): "As a general matter, only the parties to a treaty are empowered to give a binding interpretation of its provisions unless the treaty provides otherwise or the parties have otherwise so agreed."

that only states parties can amend treaties to provide for new rights and obligations.

Scholars have long noted that constitutions and "super-statutes"[26] are often supplemented or modified by subsequent written or unwritten practice.[27] Human rights treaties, to the extent that they are modeled in substantive parts on constitutional bills of rights have similarly developed through subsidiary rules and the unwritten practices of the treaty bodies they establish. States draft treaties with broad language, including the institutional structure and most basic rules, leaving the specifics for later elaboration through other processes, including delegation to treaty bodies and acquiescence in the procedures they adopt. This serves the purposes of human rights agreements, which are, in Cass Sustein's term, usually "incompletely theorized."[28] States may agree only on the most general articulation of rights, leaving it to other bodies to determine the matters that cannot be resolved through agreement of the drafters. The result shifts specific decision-making from the formal to less formal processes and creates a multilevel governance system.

The various treaty bodies have generally emphasized the "public order" or non-reciprocal nature of human rights treaties in insisting on the object and purpose of the treaties as the overriding concern. Thus, the IACHR has said that "the American Convention enshrines a system that constitutes a genuine regional public order the preservation of which is in the interests of each and every state party.[29] The Inter-American Court in its first decision declared that "the object of international human rights protection is to guarantee the individual's basic human dignity by means of a system established in the Convention."[30] Similarly, the European Court of Human Rights insists

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[26] W. Eskridge Jr. / J. Ferejohn, Super-Statutes, 50 Duke Law Journal 1215, at 1216 (2001) (referring to super-statutes as those that establish a new normative framework for state policy and have a broad effect in the law, including effects beyond the specific statute itself).

[27] See M. McDougal / H. Lasswell / W. Michael Riesman, The World Constitutive Process of Authoritative Decision, 19 Journal of Legal Education 253, at 260 (1967).

[28] See C. Sunstein, Incompletely Theorized Agreements, 108 Harvard Law Review 1733 (1995). The category includes those agreements between those who accept the basic principles but may not agree on what it entails in particular cases. Id., at 1739.

[29] IACHR, Report No. 11/07, Interstate Case 01/06, *Nicaragua v. Costa Rica*, 8 March 2007, 8, para. 197.

[30] I-A Court H.R., *In Re Viviana Gallardo et al*, decision of 13 November 1981, para. 15.

that the ECHR is a "living instrument" which must be applied to make the rights it contains *real and effective*."[31]

The legitimacy of treaty body pronouncements may decline when states perceive that the pronouncement is outside the functions conferred by the treaty. One of the controversial issues in this respect concerns pronouncements on the legality of reservations to human rights treaties. In 1976 the Committee on the Elimination of Racial Discrimination referred to the Office of Legal Affairs of the United Nations a request for expert advice on whether the Committee had the authority to decide upon the compatibility of reservations entered to the Convention on the Elimination of Racial Discrimination.[32] The Office of Legal Affairs responded unequivocally that the Committee had no competence to decide on the compatibility of reservations, as the Committee was not a representative organ of states parties which alone had general competence with regard to reservations to the Convention. The Office of Legal Affairs pointed out that "[w]hen a reservation has been accepted at the conclusion of the procedure expressly provided for by the Convention [Article 20], a decision–even a unanimous decision–by the Committee that such a reservation is unacceptable could not have any legal effect".[33] This position was subsequently adopted by the Committee.

The Committee on the Elimination of Discrimination against Women similarly referred to the Office of Legal Affairs a question concerning the role of the Committee with regard to reservations that were incompatible with the object and purpose of the Convention. The opinion expressed by the Office of Legal Affairs was that "the functions of the Committee do not appear to include a determination of the incompatibility of reservations, although reservations undoubtedly

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[31] See, e.g., ECtHR, *Demir and Baykara v. Turkey*, judgment of 12 November 2008 (GC), Appl. No. 34503/97 (GC), para. 48: "Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, ECtHR, *Stec and Others v. the United Kingdom* (GC), judgment of 12 April 2006, Appl. Nos. 65731/01 and 65900/01, paras. 47–48, ECHR 2005-X.

[32] CERD, Legal Effects of Statements of Interpretation and Other Declarations Made at the Time of Ratification or Accession, ST/LEG/SER.C/14, UN Juridical Yearbook 219 (1976).

[33] Id., at 221, para. 8. See also D. Shelton, State Practice on Reservations to Human Rights Treaties, 1 Canadian Human Rights Yearbook 206, at 229 (1983).

affect the application of the Convention and the Committee might have to comment thereon in its reports in this context".[34]

Treaties bodies continue to claim a role, however. The chairpersons of the treaty bodies, during their fifth meeting in 1994, asserted that treaty bodies should seek explanations from States parties regarding the reasons for making and maintaining reservations to the relevant human rights treaties and should state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law.[35] Yet, the Human Rights Committee's General Comment 24 (1994), on reservations, provoked considerable reaction with its claim that the Committee could review and pronounce on the legality of reservations, severing those deemed illegal from the state's ratification or accession to the treaty.[36]

D. Treaty Body Practice

I. *General Comments*

Close to 100 General Comments or General Recommendations have been adopted by UN treaty bodies.[37] The General Comment is a device used to express a committee's considered legal opinion on the scope of a right or obligation contained in one of the provisions of the treaty it supervises. It is a formal statement carefully drafted to which the committee attaches considerable importance.[38]

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[34] The Legal Opinion of the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat upon an Inquiry by the Committee Concerning the Implementation of Article 28 of the Convention on the Elimination of All Forms of Discrimination Against Women, in: CEDAW, Report of the Committee on the Elimination of Discrimination Against Women, 2 Official Records of the General Assembly, 39th Session, Supplement No. 45, UN Doc. A/39/45, 55, at 56.

[35] Office of the High Commissioner for Human Rights, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights, UN Doc. A/49/537 (19 December 1994).

[36] See Government Responses, Observations on General Comment No. 24(52), on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, CCPR A/50/40/Vol.1, Annex VI (1996) (HRC has no power to issue binding interpretations).

[37] The entire output is reproduced in the Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 9 (2 vols).

[38] On the development of general comments, see, P. Alson, The Historical Origins of the Concept of 'General Comments' in Human Rights Law, in: L. Boisson de

CERD was the first UN treaty to include a reference to the power of its Committee to "make suggestions and general recommendations."[39] The phrase was added late in the drafting process, just a month before the Convention was adopted.[40] A few states proposed deleting either the word "suggestions" or the word "general" but the overall power of the committee to adopt comments was neither controversial nor much discussed.[41] The only precedent CERD could draw upon was the 1953 initiative of the Commission on Human Rights to engage in periodic reporting, which would have authorized the Commission to make recommendations, comments and conclusions of "an objective and general nature."[42] It was clear from debates in the Commission and in the drafting of the Covenants that the word "general" was proposed by some states in order to preclude particular recommendations or comments to individual states.[43] There was also strong opposition to this view.[44]

In practice, the committees have come to distinguish General Comments from the country-specific final observations made to individual countries. General Comments are addressed to states parties as a whole, summarize the experience of the treaty body in monitoring application of the treaty, and address the implementation of obligations in the treaty. Yet, there is a clear interplay with views and final observations. On the issue of extraterritorial application of the ICCPR, for example, the Human Rights Committee has repeatedly taken the position that the ICCPR applies outside a state's territory in certain circumstances. It first articulated this approach in communications to individual states parties and in 2004 issued General Comment 31 to further elaborate its views. During the presentation of the third

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Chazournes / V. Gowlland-Debbas (eds.), The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab, at 763 (2001).

[39] CERD, Art. 9(2).

[40] UN Doc. A/C.3/L.1293 (1965), Art. VIII (bis).

[41] UN Doc. A/6181 (1965), paras. 113–114.

[42] CHR Res. 1 (XII)(1956) para. 1.

[43] On the Commission debate, see Report of the Commission on Human Rights, 12th Sess., UN Doc. E/2844 (1956), 7, para. 37; for the ICCPR, see J. F. Green, The United Nations and Human Rights, at 715 (1958); M. Bossuyt, Guide to the '*Travaux preparatoires*' of the International Covenant on Civil and Political Rights, at 629 (1987); for the ICESCR, see UN Doc. A/2929 (1955), 120, para. 19.

[44] When the General Assembly debated the ICCPR, the proposal to include the word *general* before comments was adopted by a vote of 44 in favor, 29 against, and 12 abstentions. UN Doc. A/C.3/SR 1427, para. 61 (1966), cited in Bossuyt (note 44), 630.

report of the United States, committee members and representatives of the government engaged in a debate over extraterritoriality and the proper interpretation of ICCPR Article 2(1).[45] In the end, the Committee criticized the United States in its Concluding Observations for maintaining its restrictive interpretation "despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice."[46] In its one-year follow-up report, the U.S. continued to adhere to its view that the Covenant does not govern extraterritorial acts, but it nonetheless provided information on its practices with regard to detainees at Guantanamo and policies on non-refoulement and rendition.[47]

In one sense, a General Comment represents a distillation of the case law or jurisprudence of the treaty body. As such, Philip Alston has called General Comments "one of the potentially most significant and influential tools available to each of the [eight] United Nations human rights treaty bodies in their endeavours to deepen the understanding and strengthen the influence of international human rights norms".[48] McGoldrick concurs, calling General Comments "potentially very important as an expression of the accumulated and unparalleled experience of an independent expert human rights body of a universal character in its consideration of the implementation of the ICCPR."[49]

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[45] Article 2(1) requires each state party to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

[46] UN Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 Dec 2006), para. 3. In response, the Legal Adviser to the State Department, John Bellinger, issued a statement about the Committee's comments: "We can understand the Committee's desire to have the Convention apply outside the territory of a State Party but we must accept the Convention the way it was written, not the way the Committee wishes it to be. Despite this clear limitation of its mandate, the Committee has made at least six separate recommendations that concern US activities outside the territorial United States that are governed by the laws of war. We find these conclusions outside the scope of the Committee's mandate an unfortunate diversion of the Committee's attention." US Mission to the United Nations in Geneva, Statement by United States Mission to the United Nations on behalf of the US Delegation to the U.N. Human Rights Committee (28 July 2006).

[47] UN Human Rights Committee, Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/REV.1/ADD.1 (2 February 2008), at 2–9.

[48] Alston (note 39), at 763 (2001).

[49] McGoldrick (note 1), at 95.

The fact that they are approved by consensus helps bolster their authoritativeness.

In practice, the Committee has asked States Parties to refer to General Comments in their periodic reports and some states do. In addition, some domestic courts have utilized General Comments in rendering judgments and decision. The Constitutional Court of South Africa, for example, relied on the ICESCR General Comment 7 in its decision *Government of the RSA et al v. Grootboom.*[50] The African Commission on Human and Peoples Rights similarly used ICESCR General Comments 4, 7 and 14 in *SERAC v. Nigeria.*[51] Regional tribunals frequently support their decisions with references to the jurisprudence of other bodies on similar issues.[52] Decisions concerning amnesties as a violation of human rights,[53] the treatment of detainees, rape as a form of torture,[54] and exceptions to the rule requiring exhaustion of local remedies, have all passed from one system to another.

II. *Observations on State Reports*

The outcome of the periodic reporting procedure in UN treaty bodies is the adoption of concluding observations on the reports of each state party under review. The process usually involves a legal determination that a given practice or situation does or does not comply with the

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[50] Constitutional Court of the Republic of South Africa, *Government of the Republic of South Africa. & Ors v. Grootboom & Ors*, judgment of 4 October 2000, (11) BCLR 1169. The applicants also presented arguments based on General Comment 3, the obligations of states parties, calling it "persuasive" authority for the Constitutional Court.

[51] Afr. Comm'n H.P.R., *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 of 27 October 2001.

[52] The European Court of Human Rights, for example, has referred to decisions and recommendations of the Inter-American Commission on Human Rights. See, e.g. *G.B. v. Bulgaria*, judgment of 11 March 2004, Appl. No. 42346/98, para. 53; *Iorgov v. Bulgaria*, judgment of 11 March 2004, Appl. No. 40653/98 (looking to the IACHR cases concerning death row); *Egri v. Turkey* (No. 6), judgment of 4 May 2006, Appl. No. 47533/99, para. 25 (military courts); *Bevacqua and S. v. Bulgaria*, judgment of 12 June 2008, Appl. No. 71127/01, para. 53 (violence against women); *Bankovic et al v. Belgium et al*, judgment of 12 Dec 2001, Appl. No. 52207/99, and *Issa and others v. Turkey*, judgment of 16 November 2004, Appl. No. 31821/96, para. 71 (extraterritorial obligations).

[53] African Comm'n H.P.R., *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, May 2006, Comm. No. 245/2002, paras. 204, 213.

[54] See, e.g. ICTY, Trial Chamber, Case No. IT-96-21 (*Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*), judgment of 16 November 1998, paras. 481–476; ECtHR, *Aydin v. Turkey*, judgment of 25 September 1997, Appl. No. 23178/94, para. 51 (using IACHR jurisprudence).

treaty. Any particular observation, if precisely drafted and reasoned, could have significance for all states parties, as it represents the consensus of the Committee on how provisions in the treaty should be interpreted and applied. Most observations, however, are not precisely drafted and reasoned, although they have become more detailed over time.

The Human Rights Committee at its first session included in its rules of procedure rule 70(3) which stated:

> If, on the basis of its examination of the reports and information supplied by a State party, the Committee determines that some of the obligations of that State party under the Covenant have not been discharged, it may, in accordance with article 40(4) of the Covenant, make such comments as it may consider appropriate.[55]

The issue remained contentious throughout the East-West divisions of the 1970s and 1980s[56] but in practice today the Committee and other treaty bodies make extensive legal findings and recommendations to states in the concluding observations on state reports. Most states parties do not treat these as legally binding, but the human rights bodies generally ask states to indicate in the state reports the measures they have taken to respond to the concluding observations made on their earlier reports.

III. *Interim Measures*

Most human rights treaty bodies issue interim or provisional measures where necessary to avoid irreparable harm to those presenting communications or, in some instances, witnesses. Increasingly, the treaty bodies assert that these measures are legally binding, at least when linked to the substance of an alleged violation, such as imposition of a death penalty following an unfair trial. The Human Rights Committee has called the failure to comply with such measures "a grave breach" of a state's obligations under the Covenant: "Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional

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[55] The Committee later withdrew the language about discharge of obligations. The provision today reads: "On the basis of its examination of the reports and information supplied by a State party, the Committee in accordance with article 40, paragraph 4, of the Covenant, may make such comments as it may consider appropriate." UN Doc. CCPR/C/3/Rev.5 (1997).

[56] See Alston (note 6), at 774–775.

Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile."[57] The Inter-American Human Rights Commission has taken a similar view in respect to petitions against the United States involving detainees at Guantanamo Naval Base.[58]

States parties to the Human Rights Committee declared that Canada violated the ICCPR by refusing, pursuant to an interim measure, to stay the deportation of a man seeking review before the HRC.[59]

IV. *Decisions on Cases*

The final views on the merits of complaints have received the most attention as a source of normative development. The jurisprudence of human rights bodies consists of the application of treaty provisions to specific facts and conclusions about whether or not those facts reveal the violation of a guaranteed right. As such, the decisions and recommendations are instructive to all states parties, not only the particular state subject of the complaint.

The Human Rights Committee adopts its views by way of a formal decision, based on the submissions to it, but there is general consensus that the views are not legally binding, at least directly.[60] There are thus no enforcement procedures similar to those conducted by the Council of Europe's Committee of Ministers. Nonetheless, Committee

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[57] CCPR, Communication No. 1150/2002, *Uteev v. Uzbekistan* (Views adopted on 26 October 2007) para. 5.2, Report of the Human Rights Committee, A/63/40 (Vol. II), at 14.

[58] On 25 February 2002, the Center for Constitutional Rights, a U.S. based non-governmental organization, filed a request for precautionary measures under article 25 of the Commission's regulations, in respect to detainees held by the United States in Guantanamo Bay, Cuba. The Commission accepted the petition and, on 12 March 2002, requested the United States "to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal." In its letter to the government, the Commission stated that decisions on precautionary measures, when considered "essential to preserving the Commission's mandate," are legally binding. Inter-Am. Comm'n H.R., 1 Annual Report 2002, OAS Doc. OEA/Ser.L/V/II.117 Doc. 1 rev. 1, para. 80 (7 March 2003).

[59] U.N. Human Rights Comm., *Ahani v. Canada*, Communication No. 1051/2002, at 1.2, 5.3, UN Doc. CCPR/C/80/D/1051/2002 (15 June 2004), available at http://www.worldlii.org/int/cases/UNHRC/2004/6.html.

[60] C. Pappa, Das Individualbeschwerdeverfahren des Falkultativprotokolls zum Internationalen Pakt über bürgerliche und politische Rechte, 316 et seq. (1996) argues that they are indirectly binding.

members and commentators have argued that the views are "the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them. [...] The presumption should be that the Committee's views in Optional Protocol cases are treated as authoritative interpretation of the Covenant under international law."[61] The Committee itself adopted in 2008 a General Comment on the obligations of states parties to the Optional Protocol. It is consistent with the views of most commentators as to the requirement of deference to Committee views. According to General Comment 33,[62]

> 11. While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

Because of this quasi-judicial character,

> 13. The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

To further support a juridical status for the Committee's views on individual petitions, General Comment 33 cites Article 2 of the Covenant, which obligates a party to provide a remedy to any individual whose rights are violated. According to the Committee, this obligation is triggered each time the Committee makes a finding of a violation after considering a communication under the Optional Protocol. In addition, according to the Committee, the character of the views it issues "is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional

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[61] R. Hansi / M. Scheinin, Leading Cases of the Human Rights Committee, 22 (2003).

[62] Human Rights Committee, General Comment 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33, 5 November 2008.

Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations".[63]

Commentators are more hesitant than the Committee: "It is clear from the drafting work that the views of the HRC do not constitute a legally binding decision as regards the State party concerned."[64] But they are the last word on the communication. Tomuschat has said: "Nonetheless any State party will find it hard to reject such findings in so far as they are based on orderly proceedings during which the defendant party had ample opportunity to present its submissions. The views of the HRC gain their authority from their inner qualities of impartiality, objectivity and soberness. If such requirements are met, the views of the HRC can have a far-reaching impact."[65] Helfler and Slaughter conclude that "[i]n numerous and diverse ways, the Committee, even without the power to issue legally *binding* judgments, is behaving more and more like a court. Although by no means a court in the formal sense and lacking many of the institutional characteristics possessed by the ECJ and the ECHR, the Committee has, within the limits of its powers, followed an increasingly judicial method of operation."[66] Its efforts to enhance its effectiveness as a supranational tribunal are nonetheless handicapped by a number of factors that are either within the control of the states party to the Covenant or inherent in the scope of its jurisdiction.

In the Inter-American system, the rules of procedure adopted in 2001 provide that if a state party to the Convention fails to comply with the recommendations of the Commission, it will forward the case to the Court unless it takes a decision not to do so or the state in question has not accepted the jurisdiction of the court. The Court's view about the nature of Commission recommendations has changed over time. When first presenting the issue, in the early case of *Caballero-Delgado*

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[63] General Comment 33, para. 15, citing the Vienna Convention on the Law of Treaties, art. 26.

[64] McGoldrick (note 1), at 151.

[65] C. Tomuschat, Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications, 1 HRLJ 249, at 255 (1980). See also N. Ando, The Future of Monitoring Bodies–Limitations and Possibilities of the HumanRights Committee, Can. Hum. Rts. Y.B. 169, at 172 (1991–1992) (arguing that it may be premature to expect states parties to authorize the Committee to issue legally binding decisions).

[66] L. Helfer / A.-M. Slaughter, Toward a Theory of Supranational Adjudication, 107 Yale Law Journal 273, at 280–281 (1997).

and Santa v. Colombia, the IACHR requested the Inter-American Court to "declare that based on the principle of *pacta sunt servanda*" the Colombian Government had violated the American Convention by failing to comply with the Commission's recommendations.[67] In response, the Court held that:

> In the Court's judgment, the term 'recommendations' used by the American Convention should be interpreted to conform to its ordinary meaning, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties. For that reason, a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility. As there is no evidence in the present Convention that the parties intended to give it a special meaning, Article 31(4) of the Vienna Convention is not applicable. Consequently, the State does not incur international responsibility by not complying with a recommendation which is not obligatory."[68]

The Commission made the same assertion in subsequent cases before the Court[69] and in its *Loayza Tamayo v. Peru* judgment, the Court modified its approach to the legal weight accorded to Commission recommendations. While it continued to state that the ordinary meaning of the term recommendations means that they are not legally binding, it added:

> However, in accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to comply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is 'to promote the observance and defense of human rights' in the hemisphere (OAS Charter, Articles 52 and 111).
>
> Likewise, Article 33 of the American Convention states that the Inter-American Commission is, as the Court, competent 'with respect to matters relating to the fulfillment of the commitments made by the States Parties,' which means that by ratifying said Convention, States Parties engage themselves to apply the recommendations made by the Commission in its reports."[70]

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[67] I-A Court H.R., *Case of Caballero-Delgado and Santa v. Colombia*, Merits, Judgment of 8 December 1995, para. 23.

[68] Id., para. 67.

[69] See, e.g. I-A Court H.R., *Case of Genie Lacayo v. Nicaragua*, Merits, Reparations and Costs, judgment of 29 January 1997, para. 11.

[70] I-A Court H.R., *Case of Loayza Tamayo v. Peru*, Merits, Judgment of 17 September 1997, paras. 80–81.

Thus, the principle of good faith requires due regard to the Commission's recommendations as a matter of applying the structure, object and purpose of the treaty, which confers a monitoring function on the Commission. The Court's analysis could also apply to OAS member states not party to the American Convention, since the Commission similarly derives a monitoring function from the OAS Charter. The Court now consistently reaffirms its insistence on a good faith obligation of compliance with recommendations of the Commission.[71]

In addition to the Court's reference to *pacta sunt servanda*, the Commission has relied on the principle of *effet utile* to insist that states have a duty to comply with its recommendations.[72] Should the state disagree with the Commission's interpretation of human rights norms or obligations, it has a mechanism of review:

> Insofar as the Commission is concerned, its reports are valid interpretations of the obligations freely acquire by the states. If a state does not concur with those interpretations it is at liberty to appeal to the Inter-American Court, in order to dispute the Commission's conclusions and procedures. It is significant that, to date, no state has ever lodged an appeal against the reports of the Commission in contentious cases.[73]

V. *Follow-up Mechanisms*

One indication of the emphasis given to good faith compliance with pronouncements of human rights treaty bodies is the fact that nearly all of them have now established follow-up mechanisms to evaluate compliance with the recommendations they make. In 1990, the HRC issued a statement concerning measures to monitor compliance with its views, appointing a special rapporteur for this purpose.[74] The special rapporteur ascertains and monitors the measures taken by States Parties to give effect to the Committee's views, by requesting information from the State parties in respect of all final views with a finding of a violation. In the Inter-American system, the Commission's Rules of

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[71] See, e.g. *Blake v. Guatemala*, Merits, Judgment of 24 January 1998, para. 108; *Castillo Petruzzi v. Peru*, Merits, Reparations and Costs, Judgment of 30 May 1999; *Case of Cesti Hurtado v. Peru*, Merits, Judgment of 29 September 1999, para. 186–187; and *Baena Ricardo v. Panama*, Merits, Reparations and Costs, Judgment of 2 February 2001, paras. 191–192.

[72] See, e.g. I-A Court H.R., *Case of the Penitentiary of Mendoza*, Request for Provisional Measures, Order of 22 November 2004.

[73] IACHR (2000).

[74] See A/45/40, II 205.

Procedure, Article 46, establish a follow up mechanism based on Convention Article 41.

E. State Practice

The Vienna Convention on the Law of Treaties, Article 31(3)(b) requires that treaty interpretation include, beyond the text and the context, consideration of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." No systematic study has been done of the response of states parties to the recommendations, observations, views and general comments of human rights bodies. Some courts have referred to them as "supplementary means of interpretation" in the sense of VCLT Article 32 and applied them to confirm the meaning of a provision in a treaty such as the ICCPR.[75] In the Czech Republic, the Constitutional Court has addressed some of the opinions of the ICCPR's Human Rights Committee. While the Committee had concluded that the Czech Republic breached Article 26 of the Covenant in certain cases concerning restitution in early 1990s, the Constitutional Court did not apply the Committee's conclusions, although it took cognizance of the Committee's opinions. Occasionally, Netherlands' courts have referred to General Comments of the Committee supervising the ICESCR.[76]

In Canada, courts have rejected enforcement of the decisions of human rights treaty bodies. The Canadian Supreme Court considered one matter, *Ahani*[77] in which the UN Human Rights Committee had issued interim measures, calling upon Canada to suspend deportation until the full consideration of the applicant's case. This was refused. In the second matter, *Suresh*,[78] which was heard by the Ontario Court

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[75] See: Judgment of the Ōsaka High Court of 28 October 1994, *Hanrei Jihō*, vol. 1513, p. 71, *Hanrei Taimuzu*, vol. 868, at 59; Judgment of the Hiroshima High Court of 28 April 1999, *Kōtō Saibansho Keiji Saiban Sokuhō-Shū*, vol. of 1999, at 136). Also, the Ōsaka District Court, in its judgment of 9 March 2004 (*Hanrei Jihō*, vol. 1858, at 79).

[76] An example albeit negative is: *Centrale Raad van Beroep* (Central Appeals Tribunal: Supreme court in matters of social security), 11 October 2007 (*LJN* BB 5687).

[77] *Ahani v. Canada (Attorney General)* (note 60).

[78] Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration)*, Judgment of 11 January 2002, 1 S.C.R. 3 (2002).

of Appeal, the petitioner sought and was denied[79] an injunction to suspend the deportation order on the basis of the Human Rights Committee's interim measure of protection, and thus "preserve an effective remedy in international law."[80] In the first case, the majority held that Ahani's position needed to be rejected because it "would convert a non-binding request in a Protocol [i.e. interim measure], 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."[81] Concerning the nature of the international interim measure of protection issued by the Human Rights Committee, the Court found it evident that neither the Committee's final views nor its requests for interim measures are binding or enforceable in international law, based on the wording of the Protocol and the Committee's Rule 86, from the Committee's own pronouncements, from the opinions of recognized international law scholars and from caselaw. It noted that the Committee itself has said that its "decisions" are not binding.[82]

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[79] See, generally on the case, J. Harrington, Punting Terrorist, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection, 48 McGill Law Journal 55 (2003).

[80] *Ahani v. Canada (Attorney General)* (note 60), para. 29.

[81] Id., para. 33.

[82] It is useful to note that the Committee is neither a court nor a body with a quasi-judicial mandate, like the organs created under another international Human Rights instrument, the European Convention on Human Rights (i.e., The European Commission of Human Rights and the European Court of Human Rights). Still, the Committee applies the provisions of the Covenant and of the Optional Protocol in a judicial spirit and, performs functions similar to those of the European Commission of Human Rights, in as much as the consideration of applications from individuals is concerned. Its decisions on the merits (of a communication) are, in principle, comparable to the reports of the European Commission, non-binding recommendations. The two systems differ, however, in that the Optional Protocol does not provide explicitly for friendly settlement between the parties, and, more importantly, in that the Committee has no power to hand down binding decisions as does the European Court of Human Rights. States parties to the Optional Protocol endeavour to observe the Committee's views, but in case of non-compliance the Optional Protocol does not provide for an enforcement mechanism or for sanctions. See H.R. Comm., Introduction, in: H.R. Comm., Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, at 1 (1990). See also J. H. Burgers / H. Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at 9 (1998). See also P. R. Ghandhi, The Human Rights Committee and the Right of Individual Communication: Law and Practice; Duxbury, Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights, 31 California Western International Law Journal 141 (2000).

In concluding on this issue, Judge Laskin for the majority held that, while the *Optional Protocol* gives a right to individuals to seek the Human Rights Committee's views, Canada was allowed to reject them and, more importantly, it "reserved the right to enforce its own laws before the Committee gave its views."[83] Accordingly, there was no violation of the terms of the *Optional Protocol* in the decision to maintain the deportation of Ahani, in spite of the Human Rights Committee's request for interim measure, since he "has no right to remain in Canada until the Committee gives its views."[84]

F. Conclusion

Compliance with human rights law, like other law, is produced through a process that involves normative development and internalization of the norms, involving a combination of national and international actors. Coercion, persuasion and acculturation are critical to the process.[85] Over time, human rights bodies have developed practices unforeseen by the authors of the treaties, practices now well-accepted. The deference shown through state acquiescence can be seen to reflect the authoritative role of treaty bodies, giving rise to even greater expectations of compliance in the future.

In practice, the recommendations, observations, and general comments of human rights treaty bodies will have persuasive force insofar as the organs retain their independence, deliver reasoned and consistent opinions using accepted methods of treaty interpretation, and establish a pattern of compliance by States Parties. Such bodies are created precisely to monitor compliance with the obligations of States Parties, and as a consequence their pronouncements have an authority lacking on the part of NGOs, commentators or other non-state actors. States parties have the power to reverse the interpretations of treaty bodies through amendment of the treaties; thus far, this has never happened. In practice, when treaty bodies establish a positive reputation for their work, they garner considerable authority. As it happens, the Human Rights Committee, the Inter-American Commission, and

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[83] *Ahani v. Canada (Attorney General)* (note 60), para. 42.

[84] Id.

[85] See R. Goodman / D. Jinks, How to Influence States: Socialization and International Human Rights Law, 54 Duke Law Journal 621 (2004).

the African Commission have brought about general acceptance of their pronouncements as authoritative interpretations of the legal obligations under their respective treaties. As domestic authorities, especially courts, incorporate and apply the interpretations, they shift from soft to hard law. As more states comply, it becomes increasingly difficult for a single state to hold out and ignore the decisions of human rights bodies.