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Treaty Bodies: Choreographing the Customary Prohibition against Torture

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This article expands on ideas set out in Kasey McCall-Smith, "Treaty Bodies and States: Shaping Custom", in S. Droubi and J. d'Aspremont (eds.), *International Organizations, Non-State Actors and the Formation of Customary International Law* (2019). With thanks to the peer reviewers for their comments and to Vivek Bhatt for research assistance. All errors remain my own.

Treaty Bodies: Choreographing the Customary Prohibition against Torture

Abstract
This article contributes to existing understandings about the contribution of human rights treaty bodies to the development of customary international law. It offers a method of assessing State responses to treaty body jurisprudence for the purposes of determining to what extent the responses push toward the reaffirmation or crystallisation of a customary rule of international law, namely the prohibition against torture. It speaks to the way in which, despite its status as a as a peremptory norm, the content of the norm is often challenged but also incrementally expanding due in large part to the way in which treaty bodies engage and guide States both inside and outside of the primary reporting procedures. Ultimately, this article demonstrates that State practice and *opinio juris* are increasingly influenced by the treaty bodies.

Keywords: treaty bodies, torture, ICCPR, UNCAT, customary international law

1 Treaty Bodies: Choreographing the Customary Prohibition against Torture

1.1 *Introduction*

The recent International Law Commission (ILC) Conclusions on the Identification of Customary International Law (2018) (CIL Conclusions) opened up the traditional narrow view of customary international law by challenging the idea that States are the sole architects of customary international law. Building upon the CIL Conclusions, this article argues that human rights treaty bodies can, and do, contribute to the development of customary international law in subtle, yet effective ways. However, it further argues that the evidence of this contribution is drawn from the traditional two-part determination of a rule of customary international law: State practice and *opinio juris*. If, as d'Aspremont alleges, 'the prison of customary international law has been replaced by a dance floor', then the treaty bodies are no doubt choreographers in the field of customary human rights law.[1]

As the primary interpreters of human rights treaties, treaty bodies orchestrate the common understandings of human rights obligations in many obvious ways, including concluding observations, final views and general comments. But, like all good choreographers, it is their repetitive, nuanced, guidance that tends to push States' practice toward specific interpretations of treaty obligations, which, after time, may cement into a rule of customary international law. It counters d'Aspremont's suggestion that the ILC has presented a short-lived 'anything goes' technique for the identification of customary law, but, instead, recognises that a multitude of actors may direct the development of customary international law more than previously acknowledged. The treaty bodies have long engaged in bilateral discursive relationships with States and through an examination of both their well-rehearsed exchanges with States Parties and the less publicly scrutinised follow-up procedures, a stronger influence on State practice can be detected.

[1] Jean d'Aspremont, "Customary International Law as a Dance Floor: Part I" (EJIL: Talk blog, 14 April 2014), <https://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/> (accessed 20 May 2019).

Rather than being viewed as an 'emancipation from the traditional theory of customary international law', this article seeks to refine the way in which treaty bodies guide States in the crystallisation of customary international law.[2] It offers a method of assessing State responses to treaty body jurisprudence for the purposes of determining to what extent the responses push toward the reaffirmation or crystallisation of a customary rule of international law, namely the prohibition against torture. In this context, jurisprudence refers to all outputs of the treaty bodies that deliver interpretation of a specific right. The prohibition against torture is the customary rule examined in this article. The analysis focuses on the follow-up procedures of the Human Rights Committee (HRC) and the Committee against Torture (CAT), both of which have been crucial in developing the customary prohibition so that the outer contours increasingly reflect the more far-reaching dimensions of the protection as defined in the practice of both the International Covenant on Civil and Political Rights[3] (ICCPR) and the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment[4] (UNCAT). It takes as a starting point the recognition that treaty bodies are acknowledged as the primary interpreters of their respective treaties and briefly examines why this designation lends credibility to their influence upon States.[5] Next, it introduces the customary prohibition against torture and distinguishes it from the prohibition as articulated the ICCPR and the UNCAT. It will speak to the way in which, despite its status as a as a peremptory norm, the content of the norm is often challenged but also incrementally expanding due in large part to the way in which treaty bodies engage and guide States both inside and outside of the primary reporting procedures. Ultimately, it demonstrates that State practice and *opinio juris* is increasingly influenced by the treaty bodies and that the CIL Conclusions acknowledge this reality while remaining loyal to the idea that identification of customary international law remains focused on States. While the identification of customary international law may indeed be a dance floor, the CIL Conclusions simply anticipate what international lawyers have long recognised, that as the dancers in d'Aspremont's tableau, States' approaches to the development of customary human rights law are choreographed to a greater extent that even they acknowledge.

1.2 ***Treaty Bodies as Choreographers of Customary International Law***

The value of utilising treaty bodies as the ultimate interpreters has been addressed on numerous occasions therefore, this section provides only a brief overview of the crucial interpretive role played by the treaty bodies in the human rights field.[6] Even for critics of the UN human rights system, the role of the treaty bodies as the ultimate

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[2] *Ibid.*

[3] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[4] Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT).

[5] *Ahmadou Sadio Diallo* (*Republic of Guinea/Democratic Republic of the Congo*), *Merits, Judgment, I.C.J. Reports 2010,* p. 639.

[6] See, generally, Kasey McCall-Smith, "Reservations and the Determinative Function of Human Rights Treaty Bodies", 54 *German Yearbook of International Law* (2011); Geir Ulfstein, "Law-making by Human Rights Treaty Bodies", in R. Liivoja and J. Petman (eds.)*, International Law-making: Essays in Honour of Jan Klabbers* (2013); Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012); Yogeshi Tyagi, *The UN Human Rights Committee: Practice and Procedure* (2011) esp pp. 56-58.

authorities on human rights treaty obligations has been broadly accepted. The International Court of Justice (ICJ) notes that clarity and consistency of human rights interpretation is necessary to give them effect and the 'ascribe[s] great weight to the interpretation adopted by [the Human Rights Committee]' as the body 'established specifically to supervise the application of [the ICCPR]' though it is under no obligation to do so.[7] The way in which treaty body interpretations reverberate through regional and national courts is a necessary consideration in the evaluation of a rule of customary international law.

Despite an international obligation to uphold duties outlined in human rights treaty, States have patchy compliance with the treaty reporting mechanisms and often reiterate the non-binding nature of treaty body opinions. National courts tend to offer inconsistent opinions on the applicability of international human rights obligations and the value of treaty body jurisprudence.[8] Hostility to treaty body interpretations fuels isolationist approaches to international law and disrupts the entrenchment of rights. Yet, even where there is tension, breach or even political abandonment, it does not negate the international rule.[9] Despite resistance to the treaty body machinery, there is undeniable evidence that States rely on treaty body jurisprudence, including the range of opinions expressed through concluding observations, final views and general comments, which assists the international community in developing consensus on the content of a normative rule.[10] The following sets out a methodology for the systematic examination of States' responsive activity in relation to treaty body jurisprudence. While it tracks the CIL Conclusions, it refines the examination in the specific context of the human rights treaty bodies and their multiple interpretative competences that contribute to both State practice and *opinio juris*.

In line with CIL Conclusion 7(1), the holistic practice contributing to the development of customary international law includes implementation of treaty body decisions and recommendations as well of other forms of engagement (CIL Conclusion 6(2)). The Conclusion highlights that repeated implementation of a rule helps crystallize State practice. Even State-proclaimed 'voluntary' compliance can ultimately generate customary law.[11] Inaction often marks a State's response to treaty

[7] *Diallo* case (n 5) para. 66. See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004*, p. 136, paras 66, 109, recounting the HRC interpretation of the applicability of the ICCPR outwith the territory of the State.

[8] e.g. *Perterer* v *Land Salzburg and Austria*, Appeal judgment, 1Ob8/08w [ORIL, ILDC 1592 (AT 2008)], 6 May 2008, Supreme Court of Justice [OGH], paras 9-10 (noting the need for direct implementation of the ICCPR); *Hauchemaille* v *France*, Judicial Review, Case no. 238849 [ORIL, ILDC 767 (FR 2001)], 11 October 2001, Council of State, para. 22; *PM* v *Criminal Chamber of the Supreme Court*, Constitutional appeal (*recurso de amparo*) [ORIL, ILDC 1794 (ES 2002)], 3 April 2002, Constitutional Court, para. 7.

[9] See discussions, e.g., Fleur Johns, *Non-Legality in International Law* (2013) p. 32; David Luban, *Legal Ethics and Human Dignity* (2007) p. 167.

[10] See generally Machiko Kanetake, "UN Human Rights Treaty Monitoring Bodies Before Domestic Courts", 7 *International & Comparative Law Quarterly* (2018); Kasey McCall-Smith, "Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer", in S. Lagoutte, T. Gamethoft-Hansen and J. Cerone (eds.), *Tracing the Role of Soft Law in Human Rights* (2016).

[11] See, for example, Senate (Australia), "Senate Select Committee on Ministerial Discretion in Migration Matters" (Report, March 2004), <www.aph.gov.au/~/media/wopapub/senate/committee/minmig_ctte/report/report_pdf.ashx> (accessed 4 November 2018), para. 2.24: 'However, the views of these committees are not legally binding or enforceable, and the efficacy of these committees relies on parties voluntarily agreeing to implement their views.'

body practice, as noted by CIL Conclusion 6(1). Therefore, both action and inaction by States in response to the bilateral supervisory dialogues with a treaty body must be examined for traces of interpretative coalescence of a particular rule. When a clear interpretative approach to the rule is identifiable and coupled with State practice, the signature of the treaty body will be evident. Three enquiries must be made to assess the extent to which the treaty body has influenced State practice or *opinio juris*: first, is the treaty body interpretation sufficiently clear in its articulation to the State; second, has the State responded directly to the treaty body's interpretation; and, third, has the State exercised the treaty body interpretation in policy or practice not in direct response to the treaty body supervision? This mixed methodology approach develops an archetype for consideration of the treaty body influence on the development of customary international law.

The first determination is ascertained easily in light of ready public access to the bulk of treaty body jurisprudence on the Office of the High Commissioner for Human Rights (OHCHR) website, which is consistent with the purpose behind the supervisory mechanism. Examining the varying ways in which treaty bodies articulate interpretations of specific rights enables clarification of the first step in the mixed methodology by establishing the baseline demanded to meet a specific treaty obligation. While treaty body outputs, including concluding observations, final views and general comments, are collectively viewed as soft law, they should be given great weight in light of their interpretative value in line with Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[12] As noted by d'Aspremont, there is commonality between the identification of customary international law and soft law,[13] thus it is unsurprising that treaty body outputs are a comfortable point of reference for customary law analysis.

The second step in the process is equally facilitated by the availability of States' direct responses to the distinct monitoring functions of the treaty bodies in the public domain. This inquiry is further supported by evidence of direct compliance or response to the treaty body's interpretation of in the national governance system. This dimension of the methodology requires examination of the State's express references to the treaty body interpretations of both the rights outlined in treaty and their view regarding the substantive implementation of the rights. The well-documented bilateral periodic reporting procedures offer significant, direct insight into States' responses to treaty body assessments of their treaty implementation. Direct responses to the final views of the treaty bodies in individual communications cases add a further, easily accessed source that feeds into the inquiry into individual States' responses. Additionally, the follow-up procedures exercised by some of the treaty bodies, for example, the process specified in HRC rule of procedure 71(5), clarify that States should provide continuing information about how they are implementing the treaty bodies' final views. These practices offer a realistic, albeit limited, overview of how States respond to the interpretations of the treaty bodies that engage with States Parties through this type of procedure. Even with the comprehensive and expansive human rights analysis produced by the treaty bodies, States continue to fail to

[12] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Article 31(3)(b) sets out that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' will be taken into account in its interpretation.
[13] d'Aspremont (n 1).

implement treaty body decisions.[14] As reflected in the CIL Conclusion 6(1), a State's failure to respond to treaty body opinion may also aid in a determination of customary international law. A State's inaction or partial response to treaty body jurisprudence assists in refining the outer contours of a human right in terms of both positive and negative duties on the State. In evaluating support for a rule of customary law, imperfect responses are a crucial component of the State's aggregate engagement with its treaty obligations and signify the extent to which the State is shaping its internal law and policy to reflect the interpretation of a human right as outlined by the treaty body. In other words, the treaty bodies provide States with a pattern for positive implementation but there is no guarantee that they will follow it.

The third and final prong of the methodology is the most difficult, yet telling, for the purposes of establishing the influence of a treaty body on the development of a customary rule. It requires close observance of the law and policy debates as well as the judicial practice within a State for mirrored interpretations of a specific rule without reference to a treaty obligation. Section 1.4 below will elaborate examples of the ways in which this third element can be derived. Much like a good choreographer leaves a lasting impression on a dancer's style, the treaty bodies' interpretation of a particular right can be revealed through a State's latent behaviour that is unrelated to its bilateral relationship with the supervisory mechanism.

1.3 *The Prohibition against Torture in International Law*

Though the Universal Declaration of Human Rights[15] (UDHR) is frequently identified as the starting point for any normative examination of human rights law, there is no universal agreement regarding the extent to which each of the rights set out in the UDHR has transformed into a customary rule.[16] In the context of examining the prohibition against torture, there is consistent support for its recognition as a rule of customary international law though discerning State practice and *opinio juris* are necessarily difficult to tease out due to the nature of the rule as a prohibition, a negative obligation. For the purposes of identifying customary international law, abstaining from prohibited practice sets up the conundrum of demanding that one 'ascertain the unascertainable' or engage in a 'speculative venture into nothingness'.[17]

The multidimensional nature of the prohibition developed through its codification in human rights treaties and in case law yields disparate understandings about which dimensions of the prohibition are purely treaty obligations or form part of the customary rule. Examining States' national and international responses to violations of the prohibition against torture suggest that the customary prohibition encompasses more than a simple restraint on State action. However, while certain aspects of the prohibition over and above this restraint are certainly accepted as part of customary international law, others appear only to be gradually morphing into the collective customary rule. The strong ratification rates of human rights treaties that include the prohibition against torture serve to cross-manifest the right and contribute

[14] See HRC 'Report of the Human Rights Committee' (2014) UN Doc A/69/40 (Vol. I), p. iii.
[15] Universal Declaration of Human Rights, UNGA Res 217A (10 December 1948) UN Doc A/810.
[16] Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", 25 *Georgia Journal of International & Comparative Law* (1995-96) p. 317 *et seq*.
[17] Jean d'Aspremont, "Customary International Law as a Dance Floor: Part II" (EJIL: Talk! Blog, 15 April 2014), <https://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/> (accessed 20 May 2019); Keith Ewing, "What Is the Point of Human Rights Law?", in R. Dickinson, E. Katselli, C. Murray and O.W. Pedersen (eds.), *Examining Critical Perspectives on Human Rights* (2012) p. 41.

to its development as a customary rule. The ICJ acknowledges that there is interplay between treaties and the identification or development of customary law.[18] The remainder of this section examines how observing treaty obligations on the prohibition against torture contributes to the development of the rule of customary international law.

The prohibition against torture is a fundamental norm in the international human rights law. It is a negative obligation on the State – the State and its representatives are prohibited from engaging in action that amounts to torture. Though, as will be examined below, a number of positive obligations are also recognised as essential to protecting the right. From the inception of the UN human rights system and the adoption of the UDHR in 1948, the right to be free from torture (UDHR article 5) was broadly supported by the international community, though, admittedly, there were different views as to what amounted to torture or whether a blanket ban necessitated any exceptions. In the following decades, the UN General Assembly affirmed the prohibition through the adoption of multiple resolutions.[19] The prohibition was codified in the Geneva Conventions,[20] the ICCPR Article 7, the UNCAT and the Convention on the Rights of the Child[21] (UNCRC) Article 37(a), as well as in four regional human rights conventions.[22] Even with high levels of treaty ratification–the ICCPR has been ratified by 172 States, the UNCAT by 164 States and the UNCRC by 196 States[23] ratification of treaties expressly outlining a rule does not automatically confer the status of customary law upon the rule.[24] The high levels of reservations to these treaties exacerbates the difficulty in determining a clear baseline

[18] *Continental Shelf* (*Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, para. 27.

[19] Among them, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 3452 (XXX) (9 December 1975) UN Doc A/RES/30/3452; Resolution on the adoption of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 39/46 (10 December 1984) UN Doc A/RES/39/46; Resolution adopting the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 57/199 (18 December 2002) UN Doc A/RES/57/199; Revised Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UNGA Res 70/175 (17 December 2015) UN Doc A/RES/70/175, Rule Nos. 1, 8d, 32d, 34, 43, 71, 76b.

[20] Common Article 3 of the following: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

[21] (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[22] European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; Arab Charter on Human Rights, 22 May 2004, reprinted in 12 Int;l Hum. Rts. Rep. 893 (2005)

[23] Ratification numbers as at the time of writing. All available on <https://treaties.un.org> (accessed 4 November 2018).

[24] *North Sea Continental Shelf* (*Germany/Denmark; Germany/Netherlands*), *Judgment, I.C.J. Reports 1969*, p. 3, paras 75-8; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua/United States), Merits, Judgment, I.C.J. Reports 1986*, p. 14, paras 183-4.

of protection, which makes the narrative developed by the treaty bodies crucial to gathering a broad understanding of the torture prohibition.[25]

Today, the prohibition against torture is recognised broadly as one of custom.[26] The prohibition is also recognised as a *jus cogens* norm, though for the purposes of this article, the analysis is limited to the expansion of the prohibition as a customary rule, rather than its peremptory status.[27] It is a rule that may not be abrogated even in a state of emergency or a situation that threatens the life of a nation.[28] The power of its customary status does not, unfortunately, equate to eradication of the practice.[29] Despite torture being 'long an outcast from the discourse of democracy', contemporary societies have seen and often ignored the resurgence of the practice.[30] As Johns adroitly confirms, 'illegality is one of the main dancing partners of international legality'.[31] Thus, even though there is great support for the core prohibition against torture, torture continues in practice in breach of the rule of customary international law. This reality has not suppressed the potential expansion of the customary rule to include dimensions over and above the basic negative obligation.

The CIL Conclusions make clear that the identification of customary international law is an imprecise legal inquiry. The ICJ has had repeated occasion to examine State practice and *opino juris*, the two elements that together form a rule of customary law.[32] The weight ascribed to each of the two elements is widely variable and the distinction between the two has been described by Kammerhofer as a *non sequitur* repeated by international lawyers to validate their craft.[33] The following

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[25] UNCHR, Twenty-first meeting of chairpersons of the human rights treaty bodies 2-3 July 1999 'Report on Observations' (2009) UN Doc HRI/MC/2009/5, p. 4.

[26] See, for example, *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium/Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 97; *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 884 (2nd Cir. 1980) ('…torture is prohibited by the law of nations'); Steven Greer, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?", 15 *Human Rights Law Review* (2015) p. 108; David Weissbrodt and Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Punishment", 29 *Law and Inequity* (2011) p. 348; Thomas P Crocker, "Overcoming Necessity: Torture and the State of Constitutional Culture", 61 *SMU Law Review* (2008) pp. 221, 222-223 (torture as a norm of *jus cogens*).

[27] The prohibition is always identified as a *jus cogens* or peremptory norm. See, for example, CAT 'General Comment No. 2 on the Implementation of Article 2 by States parties' (24 January 2008) UN Doc CAT/C/GC/2, para. 1.

[28] ICCPR, article 4; Ewing (n 17) p. 41; Luban (n 9) p. 167.

[29] See for example, US Senate Intelligence Committee, "Study on CIA Detention and Interrogation Program" (9 December 2014), <https://www.feinstein.senate.gov/public/index.cfm/senate-intelligence-committee-study-on-cia-detention-and-interrogation-program> (accessed 1 June 2018) (Senate Torture Report), detailing breaches of the prohibition by the US during its post-9/11 anti-terror campaigns.

[30] Karen J Greenberg, "From Fear to Torture", in K.J. Greenberg and J.L. Dratel (eds.), *The Torture Papers: the Road to Abu Ghraib* (2005) p. xvii.

[31] Johns (n 9) p. 32.

[32] e.g. *North Sea Continental Shelf* cases (n 24) paras 75-79; *Military and Paramilitary Activities in and against Nicaragua* (n 24) paras 183-85; *Jurisdictional Immunities of the State* (*Germany/Italy: Greece Intervening), Judgment, I.C.J. Reports 2012*, p. 99, para. 55.

[33] Kammerhofer notes, 'The range of uncertainty in international law' is often the result of basing our arguments 'on what other lawyers before us have said, not an any objective "proof".' Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems", 15 *European Journal of International Law* (2004) p. 524. Akehurst offered a similar introduction to the subject of custom: '…[international lawyers] invoke rules of customary international law every day, but they have great difficulty in agreeing on a definition of customary international law.' Michael Akehurst, "Custom as a Source of International Law", 47 *British Yearbook of International Law* (1977), p. 1.

analysis aims to distinguish State responses to treaty body jurisprudence following the widely accepted two-element identification process. However, the present author aligns with other recent literature to conclude that the distinction between *opinio juris* and State practice is fairly opaque particularly in terms of responses to the treaty bodies.[34]

1.3.1 The Prohibition as a Treaty Obligation and State Practice

Membership in a human rights treaty is a two-fold contribution to the development of customary rule or norm of international law. First, ratification affirms the obligation as a rule of law. Every international rule has the potential to crystallise into a customary rule. Human rights treaties generally demand implementation of the obligation[35] thereby delivering the initial element of a customary rule – State practice. Most States parties to the ICCPR and UNCAT have criminalised torture or recognise the prohibition through a constitutional or legislative provision, such as those found, for example, in the United Kingdom,[36] the United States, [37] and Spain.[38] For treaty bodies, particularly the CAT, the key issue is whether the national definition reflects the international definition generally viewed as UNCAT Article 1. Furthermore, States may directly or indirectly incorporate the treaty in whole or in part in order to enable the domestic enforcement of the treaty provisions and deliver more comprehensive protection. Illustrating this form of State practice, in 2010 Australia adopted new anti-torture legislation, the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010, specifically amending the Australian Criminal Code in order to directly incorporate provisions of the UNCAT and make specific reference to the ICCPR.[39] These legislative and constitutional acts amount to tangible evidence of State practice.[40]

While the general core of the right to be free from torture - requiring the State not to engage in or support behaviour that amounts to torture - is frequently reiterated as a rule of custom, the HRC and the CAT continue to deliver nuanced opinions as to what full observance of the prohibition requires under CAT Article 1. The treaty bodies deliver concluding observations and final views which aid in refining the nature of the prohibition without limiting the potential for evolutive interpretation. Treaty bodies also deliver general comments on aspects of the prohibition in response

[34] See, e.g., Jean d'Aspremont, "Unlearning Some Common Tropes", in S. Droubi and J. d'Aspremont (eds.), *International Organizations, Non-State Actors, and The Formation of Customary International Law* (2019); Maiko Meguro, "Between Anthropomorphism and Artificial Unity", in S. Droubi and J. d'Aspremont (eds.), *International Organizations, Non-State Actors, and The Formation of Customary International Law* (2019); Kammerhofer (n 33).

[35] e.g. ICCPR, article 2. Similar obligations are reflected in UNCAT, article 2.

[36] UK Criminal Justice Act 1988, §134; see discussion in Ewing (n 17) pp. 41-42, 52.

[37] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350; War Crimes Act of 1996, 18 U.S.C. § 2240-41. Case law has further entrenched the prohibition; see, for example, *Hudson v. McMillan*, 503 U.S. 1 (1992); *Filartiga* v. *Pena-Irala* (n 26) ('…torture is prohibited by the law of nations'); see discussion in Jeremy Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (2010) p. 192 *et seq.*

[38] Spanish Constitution of 1978, article 15; Penal Code (Organic Law No. 10/1995 of 23 November 1995) article 173.

[39] Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (replacing the Crimes (Torture) Act 1988, and amending the Criminal Code Act 1995), divisions 274.1, 274.2(4), respectively. Torture is otherwise criminalised on a state-by-state basis within Australia.

[40] See, e.g., Maiko Meguro, "Distinguishing the Legal Bindingness and Normative Content of Customary International Law", 6 *ESIL Reflections* (2017).

to trends noted across States as they carry out their variable supervisory functions. HRC General Comment No. 20 specifically acknowledges the value of maintaining a vague core concept of the prohibition:

> The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.[41]

The UNCAT elaborates further on the definition of torture by delivering a range of actions that amount to a breach of the prohibition but, as with the HRC, views the definition as permitting many as of yet unearthed machinations yet simultaneously calling on States to incorporate UNCAT Article 1.[42] Maintaining a vague definition of the core right leaves space for dynamic interpretation and ensures that the treaty bodies, courts and States can respond to any regression in the enforcement of the prohibition.

Consistent State practice implementing the prohibition is difficult to detect due to its nature as a negative obligation as well as the increasing impact national security agendas have had on driving torture practice underground.[43] However, State responses to treaty body interpretations of the prohibition assists in building an increasingly coherent understanding of the core obligation, which is essential for clarity in the international rule of law.[44] As an object of supervision by the relevant treaty bodies, the State becomes the recipient of the interpretations put forward by the treaty body as it carries out its multi-functional exercises in supervision. States' implementation of the core human rights set out in the various treaties is ultimately a demonstration of State practice but also may be indicative of *opinio juris*.

1.3.2 Treaty Implementation as *Opinio Juris*

Consensus among States on various human rights rules is difficult to ascertain due the very nature of the rules. Unlike more exacting rules of customary international law, the core human rights obligations are often more fluid, as indicated above with the perpetuation of a vague definition of torture. Establishing the minimum core right is further complicated due to the broad scope for limiting those rights that are not absolute by definition.[45] This section explores the ways in which responses to a treaty body interpretation might generate *opinio juris* and further refine the emerging contours of the prohibition against torture in customary international law. Section 4 will further contextualise how States implement the core obligation as well as emerging aspects of the prohibition.

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[41] HRC 'General Comment No. 20: Article 7' (10 March 1992) UN Doc CCPR/C/GC/20, para. 4.

[42] See, for example, CAT 'Report of the Committee against Torture' (16 September 1998) 53rd session (1998) UN Doc Supp No 44 (A/53/44), subjects of concern, concluding observations and recommendations to: Guatemala, para. 164(e); Germany, para. 190; Kuwait, para. 227; Israel, para. 239(b).

[43] See Waldron (n 37) 198 *et seq.*

[44] *Diallo* case (n 5) para. 66.

[45] This is often achieved through the use of reservations; see, for example, Kasey McCall-Smith, "Mind the Gaps: The ILC Guide to Practice and Reservations to Human Rights Treaties", 16 *International Community Law Review* (2014).

The prohibition against torture is a highly publicised and politically charged human rights issue due the variable dimensions of the right, such as *non-refoulement* (UNCAT Article 3), that are necessary to deliver complete observance of the prohibition. The tangential aspects of the core prohibition developed through treaty interpretation deliver a more complete understanding of the prohibition, however they are often controversial, as demonstrated in the *Abu Qatada*[46] case in the UK and the slowly progressing military commission proceedings and detention operations of the US in Guantánamo.[47] The incremental expansions of the prohibition offer a view into a State's understanding of the breadth of the customary norm. The standard defined by a norm of customary international law is subject to debate because States are responsible for determining how to achieve the standard.[48] As States do not always share common views, determining the baseline of protection elicits tension in both theory and practice but also sheds light on States' *opinio juris*.

In navigating the treaty bodies' emerging interpretations of the prohibition against torture, States offer what could fulfil the second component of customary international law, *opinio juris*. Although the ICJ has rejected the idea that implementation of a treaty obligation equates to *opinio juris*,[49] the interplay between States and treaty bodies suggests that States' responses to evolving interpretations may support identification of customary international law when taken as a whole along with other manifestations of their obligations.[50] This position is increasingly compelling in light of the literature recognising the obfuscation inherent in identifying distinctions between State practice and *opinio juris*.[51] The latent reflections of treaty body interpretations in law and policy delivered without reference to a treaty obligation lend support to a coalescing of *opinio juris*.

1.3.3 Summary

Ultimately, it is useful to have additional non-State actors feed into the development of customary international law. Particularly when practice sees States espousing legal rules publicly and flouting them internally.[52] Both the HRC and the CAT are instrumental in articulating the outer and evolving dimensions of the prohibition against torture as the primary supervisory mechanisms of the ICCPR and UNCAT, respectively. ICCPR Article 7 and the entirety of the UNCAT are directed at ensuring the prevention of all understood and emerging actions that breach the prohibition against torture. This work now turns to an examination of the nuances between the treaty bodies' interpretation of and the recognition of their opinions by States.

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[46] *Othman (Abu Qatada) v. United Kingdom* (2012) 55 EHRR 1.

[47] See, for example, AE200(MAH,RBS,WBA) (Defense Motion to Dismiss, *United States v. Khalid Shaikh Mohammad*, 12 August 2013) <https://www.mc.mil/CASES.aspx> (obligations to investigate allegations of torture and non-refoulement under UNCAT); Fiona de Londras, "Guantánamo Bay: Towards Legality?", 71 *Modern Law Review* (2008); Fleur Johns, "Guantánamo Bay and the Annihilation of the Exception", 16 *European Journal of International Law* (2005); Lord Steyn, "Guantánamo Bay: The Legal Black Hole", 53 *International & Comparative Law Quarterly* (2004).

[48] *Continental Shelf* case (n 18) para. 28.

[49] Notably with respect to the application of the equidistance principle in the *North Sea Continental Shelf* cases (n 24) para. 76.

[50] ILC, 'Draft Conclusions on Identification of Customary International Law' (in 'Report of the International Law Commission on the Work of its 70th Session' (2018) UN Doc A/73/10, para. 65) Conclusions 6(2), 7(1).

[51] d'Aspremont (n 34); Meguro (n 34); Kammerhofer (n 34).

[52] Waldron (n 37) p. 186 *et seq*; Luban (n 9) pp. 165, 171.

1.4 *Choreographing States Responses*

This section examines how States' responses to treaty body jurisprudence in the national setting can assist in identifying one or both elements of customary international law. The distinct executive, legislative and judicial branches of the State where these responses play out contribute to State practice and *opinio juris* in varying ways. Legislative acts can demonstrate State practice in the determination of a customary rule of international law. Judicial decisions are highly suggestive of *opinio juris* while policies and practice of the executive can support both elements of customary law. Importantly, the relationship of each of the branches to the development of an element of customary law is flexible and often responsive to the socio-political landscape at the particular point in time.

Entrenchment of treaty body interpretations is strengthened when judiciaries utilise treaty body jurisprudence as an aid in developing human rights norms,[53] particularly in States where no regional human rights system currently operates or where entrenchment of human rights has been arduous. Indirect incorporation the treaties or treaty body jurisprudence supports courts as they navigate the development of human rights norms. The Lebanese Code of Civil Procedure (Article 2), the 2010 Kenyan Constitution (Article 2(6)) and the Iranian Constitution (Article 9) speak to the ways in which courts take account of any relevant ratified treaties. These provisions offer an access point to treaty body jurisprudence in terms of applicability in the national legal system.[54]

The analysis below draws upon national law, policy and judicial opinions responding to treaty body jurisprudence. Applying the methodology outlined in section 1.2, it will chart the three-step evaluation of the way in which the treaty bodies choreograph the development of customary international law. This research uses treaty body jurisprudence, including General Comments, Concluding Observations and follow-up procedures, particularly those carried out by the HRC and the CAT in the context of reviewing the implementation of final views on individual communications under the Optional Protocol to the ICCPR[55] or UNCAT Article 22.[56] The bilateral treaty body-State party dialogues developed during the periodic reporting process or the review of individual communications offer a prime

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[53] Kanetake (n 10).

[54] See, for example, Kenya National Commission on Human Rights, "National Values & Principles of Governance: An Alternative Report of State Compliance on Obligations Under Article 132(c)(I), Constitution of Kenya 2010 on Realization of Article 10" (2016), p. 20 <www.knchr.org/Portals/0/CivilAndPoliticalReports/National%20Values%20and%20Principles%20of%20Governance.pdf?ver=2016-08-01-154241-273> (accessed 4 November 2018).

[55] Optional Protocol to the ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 5(4). As of March 2016, the HRC had delivered final views in 1155 of the 2756 individual communications received. The HRC maintains a Special Rapporteur for the express purpose of pursuing follow-up to individual communications and has since 1990 (figures available at time of writing). The HRC has repeatedly reminded States parties of their obligation to comply with the views of the body: see HRC 'General Comment No. 33 on the Obligations of States Parties under the Optional Protocol to the ICCPR' (5 November 2008) UN Doc CCPR/C/GC/33.

[56] As of 13 May 2016, the CAT had reviewed a total of 376 of the 400 State reports received pursuant to article 19 and as of 15 August 2015 had delivered final views in 272 of the 697 cases submitted to it under article 22(1) (most recent figures available at time of writing). The CAT adopted similar follow-up procedures as a way of assessing State compliance with its final observations on UNCAT implementation. See, CAT 'Guidelines for follow-up to concluding observations' (17 December 2015) UN Doc CAT/C/55/3.

opportunity for the development and dissemination of progressive rights interpretation. This, in turn, can influence States' law, policy and practice. These monitoring procedures also allow States to moderate conflicting interpretations of the treaty bodies. For example, the CAT has repeatedly interpreted the prohibition against torture as limited to actions by a State or its agents. The HRC, however, has gone a step further to imply a further positive obligation on the State to prevent torture by non-state actors, in line with other regional human rights court opinions on the obligations of the State to prevent human rights breaches by third parties or private actors.[57] This suggests that in terms of the treaty regime, the observance of the prohibition against torture is limited by the terms of the treaty. However, in terms of the development of rule of customary international law, these subtle differences can influence the uptake of a potential new rule. States' responses to treaty body guidance on various aspects of the prohibition against torture aid in assessing the development of the customary international law prohibition.

1.4.1 Reinforcing the Core Prohibition: Redress and Compensation

The core prohibition against torture is the negative obligation on the State not to engage in acts amounting to torture in any situation, including emergencies that threaten the life of a nation. In other words, the prohibition is non-derogable and this is frequently reiterated by the treaty bodies.[58] In General Comment No 20, the HRC 'observe[d] that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons'.[59] Excusing a breach of the prohibition includes enabling impunity or failing to facilitate the claim of a torture victim. When torture is committed, it follows that the victim must be afforded redress or remedy, including compensation, as is outlined in UNCAT Article 14. ICCPR Article 7 does not explicitly mention compensation; however, the HRC reads this dimension into the core prohibition and has clarified this interpretation through a number of general comments.[60]

Through concluding observations in the periodic reporting processes of Argentina, for example, the treaty bodies have maintained that redress and remedy speak to ensuring against the impunity of perpetrators.[61] When coupled with the general comment references to compensation for torture victims, the treaty body fulfils the first step of the analysis by establishing a clear interpretation of how to give

[57] *X and Y v. the Netherlands*, Ser. A No. 91 [1985] 8 EHRR 235; in *Velásquez-Rodríguez v. Honduras* (Merits), Ser. C, No. 4, (1988), paras 172 – 175, the Inter-American Court of Human Rights opined that the failure to prevent harm by a third party triggered the international responsibility of the State; reaffirmed in *Ximenes-Lopes v. Brazil*, Ser. C, No. 149 (2006); 55/96, *SERAC and CESR v. Nigeria*, 15th Annual Report of the ACHPR [2002] 10 IHRR 282 (2003).

[58] ICCPR, article 4; CAT 'Conclusions and Recommendations of the Committee: Argentina' (10 November 2004) UN Doc CAT/C/CR/33/1, para. 5; HRC 'General Comment No. 29: States of Emergency (Article 4)' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para. 7.

[59] HRC 'General Comment No. 20' (1992) para. 3.

[60] *Ibid.*, paras 14-15; HRC 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para. 18.

[61] See, for example, HRC 'Concluding observations on the fifth periodic report of Argentina' (10 August 2016) UN Doc CCPR/C/ARG/CO/5, paras 13-14; HRC 'Concluding observations on the fourth periodic report of Argentina' (31 March 2010) UN Doc CCPR/C/ARG/CO/4, paras 7, 18; HRC Follow-up on *L.N.P. v. Argentina,* Communication No. 1610/2007 (2014) UN Doc A/69/40 (Vol. I), p. 182; CAT 'Conclusions and Recommendations of the Committee: Argentina' (10 November 2004) UN Doc CAT/C/CR/33/1, para. 7.

full effect to the prohibition against torture. In response to the HRC's repeated findings that the ICCPR prohibition against torture was breached, Argentina has increasingly implemented the treaty body's decisions recognising that compensation is necessary for torture victims and that impunity must be eliminated by adopting a range of initiatives, including compensation, as required by the UNCAT.[62] Fulfilling compensation awards determined by the CAT amounts to State practice in demonstrating compliance with UNCAT Article 14 and satisfies step two in the analysis of how treaty bodies shape the development of law. Executing compensation awards determined by the HRC for breach of ICCPR Article 7 equally suggests State practice in support of this dimension of the prohibition – recalling that CIL Conclusion 6(2) recognises compliance as part of the holistic development of a customary rule. Changes to Argentinian law and policy to ensure compensation and end impunity may be regarded as *opinio juris*. In practice, the issue of awarding compensation as a means of redress is not straightforward and the inherent difficulties are borne out by State responses to both treaty bodies. However imprecise the implementation, both direct and indirect State responses aid in identifying how compensation for torture victims fits into the customary international law prohibition.

Further support for considering indirect responses to treaty body interpretations in the development of customary law is evident in national courts, which increasingly recognise the value of treaty body jurisprudence.[63] Various courts have relied upon findings of the treaty bodies to sustain redress compensation in civil claims even where domestic criminal proceedings failed to deliver a guilty verdict against a State actor for engaging in torture.[64] These instances of adherence to the treaty body interpretation are particularly interesting where the government of the State explicitly denies the non-binding nature of treaty bodies' views in domestic law in direct opposition to the ultimate findings of the highest national court.[65] In these instances of tension between different branches of a government, support for a customary is difficult to identify. However, reconciling the competing views within the State will eventually play into the holistic approach to determining a customary rule.

1.4.2 Investigating Claims of Torture

Another fundamental component of the prohibition is the full and impartial investigation into claims of torture. Both the HRC and the CAT have reinforced this as part and parcel of the core prohibition.[66] Failure to investigate claims is a basis upon which States are frequently deemed in breach of the torture prohibition.[67] In

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[62] HRC Follow-up on *L.N.P. v. Argentina* (2014); CAT 'Conclusions and Recommendations of the Committee: Argentina' (2004) para. 7.

[63] See generally Kanetake (n 10).

[64] e.g. CAT Follow-up on *Gerasimov v. Kazakhstan,* Communication No. 433/2010 (11 December 2014) UN Doc CAT/C/53/2, para. 26.

[65] *Ibid.*, para 27

[66] CAT 'General Comment No. 3: Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3; CAT 'General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22' (4 September 2018) UN Doc CAT/C/GC/4.

[67] HRC Follow-up on *Baustista de Arellana v. Colombia*, Communication No. 563/1993 (2014) UN Doc A/69/40 (Vol. I), p. 191; HRC Follow-up on *Zhumabaeva v. Kyrgyzstan*, Communication No. 1756/2008 (2014) UN Doc A/69/40 (Vol. I), p. 195; HRC Follow-up on *El Hagog v. Libya*, Communication No. 1755/2008 (2014) UN Doc A/69/40 (Vol. I), p. 199; CAT Follow-up on *Aarrass v. Morocco*, Communication No. 477/2011 (11 December 2014) UN Doc CAT/C/53/2 2014, paras 32-33; CAT Follow-up on *Sonko v. Spain*, Communication No. 368/2008 (22 December 2015) UN Doc

response, the final views on individual communications before the treaty bodies, States are generally advised to amend their internal procedures and or take action to ensure an effective investigation. When the executive or judicial branches respond directly to final views or concluding observations, or both, the treaty body's influence on national practice is clear.[68] Engaging with the treaty body decisions on core issues of implementation reinforces the State's realisation of its treaty obligations and supports national reform.

Responding to a treaty body decision on the failure to investigate torture claims will be even more important when a State is engaged in a multi-party, multi-level dialogue to address institutional torture. For example, in the follow-up dialogue to a 2011 complaint against Morocco for breaches of the UNCAT, the State reported that had it reopened the case in question even prior to the CAT's decision and highlighted that it was committed to working with other anti-torture proponents, including the Special Rapporteur on Torture and Amnesty International.[69] Responses such as these suggest that changes in both State practice and *opinio juris* are influenced by a multitude of actors, including the treaty bodies. The next sections review further dimensions of the prohibition against torture in order to demonstrate how treaty body-State engagements could expand the prohibition against torture in terms of development of the customary international law.

1.4.3 The Emerging Recognition of Non-*refoulement*

Non-*refoulement*, also known as non-return, is expressly outlined in UNCAT Article 3 and the HRC has interpreted ICCPR Article 7 to include the principle where there is a strong possibility that the individual might be subjected to torture by the receiving State.[70] The treaty bodies' interpretations are clear: non-*refoulement* is a crucial component of the comprehensive prohibition. Direct State responses through bilateral dialogues with the treaty bodies on non-*refoulement* highlight how the principle is not yet solidified as part of the customary rule on the prohibition of torture despite the tendency of scholars to refer to it as such.[71]

Australia's bi-lateral engagement with the CAT demonstrates the incremental progress in the entrenchment of non-*refoulement*. In 1998, the CAT determined that Australia had failed to comply with the obligation of non-*refoulement*.[72] Subsequently, the CAT recommended that Australia consider 'providing a mechanism for independent review of ministerial decisions in respect of cases coming under

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CAT/C/56/2, p. 2; CAT Follow-up on *Ntikarahera v. Burundi*, Communication No. 503/2012 (22 December 2015) UN Doc CAT/C/56/2, pp. 8-9.

[68] e.g. elements of both the Spanish executive (Fiscalía General del Estado) and the judiciary adopted measures and took action to implement the CAT decision in *Sonko v. Spain*: CAT Follow-up on *Sonko v. Spain* (2015) p. 2.

[69] CAT Follow-up on *Aarrass v. Morocco* (2014) paras 32-33.

[70] HRC 'General Comment No. 21: Article 10' (29 July 1994) UN Doc HRI/GEN/1/Rev.1, p. 33; HRC 'General Comment No. 20' (1992) para. 8; see also, HRC 'General Comment 36 on article 6 of the ICCPR on the right to life' (30 October 2018) UN Doc CCPR/C/GC/36, para. 55.

[71] See Cathryn Costell and Michelle Foster, "Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test", 46 *Netherlands Yearbook of International Law* (2015) p. 282 *et seq*; Catherine Moore, "The United States, International Humanitarian Law and the Prisoners at Guantanamo Bay", 7 *International Journal of Human Rights* (2003) p. 16.

[72] See, for example, CAT, *Elmi v. Australia*, Communication No. 120/1998 (25 May 1999) UN Doc CAT/C/22/D/120/1998.

article 3 of [UNCAT].'[73] This spurred the responsible government minister to allow a subsequent protection visa application in relation to the case determined by the CAT, which was also rejected and the applicant was expelled. Following the fourth treaty body determination of a breach of non-*refoulement*, the Senate Select Committee on Ministerial Discretion aligned itself with the CAT and HRC in recommending that a new system be put in place to record immigration cases and establish the compliance of the ministerial decisions with treaty obligations.[74] Despite changes to domestic procedures, Australia has been the subject of additional complaints of non-*refoulement* and further indicated that it will take heed of the CAT's decisions in complaints where the treaty body determines a breach of non-*refoulement* under Article 3.[75] How non-*refoulement* will eventually be entrenched remains to be seen in Australia, though increasing recognition of this principle is discernible across various government organs and each recognition of the principle contributes to developing State practice, as well as Australia's understanding of non-*refoulement* as part of the prohibition against torture. As entrenchment continues, the development of new policies will reflect the Australian view of non-*refoulement,* therefore contributing to *opinio juris* in the evolution of the prohibition against torture.

The CAT continues to press compliance with non-*refoulement* in expulsion cases in follow-up procedures with Kazakhstan,[76] Norway,[77] Sweden,[78] Switzerland,[79] and other States.[80] Some States have noted that national law has evolved to more accurately reflect their international obligations in terms of non-*refoulement*.[81] Well-articulated opinions deliver interpretative value as in the case of *Mr X and Mr Z v. Finland* (examining non-return to Iran), which demonstrates the strength of conviction with which counsel for complainants place upon decisions of the treaty bodies. In the follow-up procedure to the case it was determined that Finland had complied with the CAT's decision that it had breached the obligation of non-return, thereby negating the need for follow-up.[82] Finland requested that the CAT remove the

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[73] CAT 'Report of the Committee against Torture' (26 October 2001) 25th session (2000) UN Doc Supp No 44 (A/56/44), pp. 22-24 (concluding observations on Australia).
[74] Senate (Australia) (n 11) Report Recommendation 18, para. 8.29.
[75] CAT Follow-up on *Dewage v. Australia*, Communication No. 387/2009 (11 December 2014) UN Doc CAT/C/53/2, para. 19 (stay of deportation to Sri Lanka or any other country that might return him to Sri Lanka on humanitarian grounds); CAT Follow-up on *Ke Chun Rong v. Australia*, Communication No. 46/2010 (11 December 2014) UN Doc CAT/C/53/2, para. 21 (stay of deportation to China).
[76] CAT Follow-up on *Nasirov v. Kazakhszan*, Communication No. 475/2011 (11 December 2014) UN Doc CAT/C/53/2, para. 30 (stay of extradition to Uzbekistan).
[77] CAT Follow-up on *Eftekhary v. Norway*, Communication No. 312/2006 (11 December 2014) UN Doc CAT/C/53/2, paras 8-9 (stay of deportation to Iran on humanitarian grounds).
[78] CAT Follow-up on *Njamba and Balikosa v. Sweden*, Communication No. 322/2007 (11 December 2014) UN Doc CAT/C/53/2, para. 10 (stay of deportation to Democratic Republic of the Congo on humanitarian grounds).
[79] CAT Follow-up on *K.N., F.W. and S.N. v. Switzerland*, Communication No. 481/2011 (11 December 2014) UN Doc CAT/C/53/2, para. 30 (stay of deportation to Iran).
[80] CAT Follow-up on *E.K.W. v. Finland*, Communication No. 490/2012 (22 December 2015) UN Doc CAT/C/56/2, p. 1 (removal to the Democratic Republic of the Congo).
[81] CAT Follow-up on *Mopongo et al. v. Morocco*, Communication No. 321/2007 (22 December 2015) UN Doc CAT/C/56/2, p. 3: 'The State party had provided information on the introduction of a new migration policy in September 2013 that is more humane and in conformity with its international obligations.'
[82] CAT Follow-up on *Mr. X and Mr. Z v. Finland*, Communication No. 483/2011 (11 December 2014) UN Doc CAT/C/53/2, para. 38 (obligation to refrain from forcibly returning the complainants to Iran). Finland granted the complainant refugee status shortly after the decision.

decision from its follow-up procedures in light of compliance. However, recognising the need for reinforcement of non-*refoulement*, applicant's counsel argued that the decision should not be struck from the list because it could serve as a model for similar cases.[83]

The HRC determination in *Thuraisamy v. Canada* similarly found that the applicant's claim of torture in violation of ICCPR Article 7 if returned to Sri Lanka mandated reconsideration of his asylum claim based on humanitarian and compassionate grounds.[84] Responding to the HRC's views, Canada reconsidered the application and ultimately granted leave to remain.[85] The pattern of enforcing non-*refoulement* suggests that the right of non-return is increasingly recognised. Incremental changes to law and policy in Australia, Finland and Canada aid the development of customary international law even when they are variable across the States. Where State and treaty body views diverge, the protection in its wider context is still developing as the various intricacies of the prohibition remain in flux.[86] Firmly recognising non-*refoulement* as part the customary prohibition against torture awaits the tipping point in practice and *opinio juris* across States. When that point is reached, in many ways it will be due to the treaty bodies' consistent elaboration of non-*refoulement*.

1.4.4 Rehabilitation as a Remedy for Victims of Torture

Medical and psychological rehabilitation for victims of torture is a further dimension of the prohibition against torture that could gain traction as part of the customary rule of international law. Unlike the core prohibition, this dimension of the right acknowledges the breach and demands that States deliver redress in the form of both physical and mental rehabilitation. Since 1992, the HRC has maintained that 'States may not deprive individuals of the right to an effective remedy, including compensation and *such full rehabilitation* as may be possible.'[87] Though the ICCPR does not expressly outline this dimension of the prohibition, rehabilitation is protected by UNCAT Article 14 and forms part of the holistic approach to redress, encompassing both procedural and substantive components that has been advocated by the CAT since its inception.[88] The CAT frequently clarifies verbatim through general comments that the 'comprehensive reparative concept ... entails restitution, compensation, rehabilitation, [etc]' and 'that victims of torture…may require sustained availability of and access to specialized rehabilitation services.'[89] It mirrors this language in concluding observations.[90] The European Court of Human Rights has repeatedly found that failure to provide victims of torture with rehabilitative medical treatment is a breach of the prohibition.[91] The CAT and the HRC have consistently

[83] *Ibid.*, para 39
[84] HRC, *Thuraisamy v. Canada*, Communication No. 1912/2009 (31 October 2012) UN Doc CCPR/C/106/D/1912/2009.
[85] HRC Follow-up on *Thuraisamy v. Canada*, Communication No. 1912/2009 (2014) UN Doc A/69/40 (Vol. I), p. 190.
[86] CAT Follow-up on *Khan v. Canada*, Communication No. 015/1994 (22 December 2015) UN Doc CAT/C/56/2, pp. 7-8.
[87] HRC 'General Comment No. 20' (1992) para. 15, emphasis added.
[88] CAT 'General Comment No. 3' (2012) para. 5
[89] CAT 'General Comment No. 3' (2012) para. 2; CAT 'General Comment No. 4' (2018) para. 22.
[90] CAT 'Report of the Committee against Torture' (1998) para. 205 (recommendations to Peru).
[91] *Kudla v. Poland* (2000) 35 EHRR 198, para. 94; *McGlinchey v. the United Kingdom* (2003) 37 EHRR 41, paras 57-58; *Sarban v. Moldova*, ECtHR Judgment of 4 October 2005, Application No.

confirmed that physical and psychological rehabilitation are necessary to fulfilling the prohibition against torture.[92]

The variable physical and psychological symptoms resulting from torture make it difficult to apply a one-size-fits-all approach to rehabilitation but the CAT makes clear that rehabilitation is a holistic concept and includes 'medical and psychological cares as well as legal and social services'.[93] There are countless contingencies that influence rehabilitation options regardless of whether the victim is living freely or in detention. States vary considerably as to how they approach the issue of rehabilitation, regardless the ability to provide direct rehabilitation or to subsidise services. The danger of re-victimisation is increased when torture is directly attributable to a State actor that exercises an authoritative role over the victim, such as a police officer or prison guard. In these instances, the duty to ensure appropriate medical care often requires that torture victims, especially those who are incarcerated, balance their safety and their health, thus complicating the fulfilment of a comprehensive interpretation of the torture prohibition.[94]

Ensuring accessible treatment further complicates this dimension of the prohibition. Cameroon's response to an HRC final view outlining compensation to facilitate rehabilitation of an ill-treatment victim provides a clear example of the difficulty in delivering this aspect of the prohibition. The complainant suffered post-traumatic stress disorder and severe physical symptoms in relation to a breach of ICCPR Article 7.[95] While Cameroon acknowledged the need for medical rehabilitation of the victim, it offered an amount substantially lower than that sought by the victim, noting that the HRC did not require a specific amount of compensation for rehabilitation.[96] The State based its compensation on public provision of rehabilitation services, rather than the private services sought by the victim. This demonstrates the fluid nature of this dimension enforcing the torture prohibition and to the leeway given to States to determine how rehabilitation is to be delivered. Depending on service provision across different States, which will no doubt be variable, the difference between public and private medical services will no doubt raise other issues of concern. However, the CAT has firmly held its position that the obligation of rehabilitation does not relate to available resources and may not be delayed.[97]

Currently, provision of physical and psychological rehabilitation remains solely a demand of the treaty prohibition against torture. There is no bright line test to determine what amounts to adequate rehabilitation that equates to 'the extent

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3456/06, paras 83, 89-91; *Hummatov v. Azerbaijan*, ECtHR Judgment of 29 November 2007, Application Nos. 9852/03 and 13413/04, para. 121 (mental suffering).

[92] CAT, *Gerasimov v. Kazakhstan*, Communication No. 433/2010 (24 May 2012) UN Doc CAT/C/48/D/433/2010; CAT Follow-up on *Keremedchiev v. Bulgaria*, Communication No. 257/2004 (22 December 2015) UN Doc CAT/C/56/2, p. 3; CAT, *Ntikarahera v. Burundi*, Communication No. 503/2012 (12 June 2014) UN Doc CAT/C/52/D/503/2012, para. 6.5; CAT 'General Comment No. 3' (2012) paras 11-14; HRC 'General Comment No. 20' (1992) para. 15.

[93] CAT 'General Comment No 3' (2012) para. 11.

[94] CAT Follow-up on *Aarrass v. Morocco* (2014) pp. 4-6. This case has repeatedly been the subject of follow-up procedures due to the tension between the complainant's health needs and the risk to his personal security following complaints of ill-treatment by prison guards in prison.

[95] HRC, *Afuson Njaru v. Cameroon*, Communication No. 1353/2005 (19 March 2007) UN Doc CCPR/C/89/D/1353/2005.

[96] HRC Follow-up on *Afuson Njaru v. Cameroon*, Communication No. 1353/2005 (2014) UN Doc A/69/40 (Vol. I) p. 188.

[97] CAT 'General Comment No. 3' (2012) para. 13.

possible' demanded by the CAT and the HRC. While providing rehabilitation is a crucial, yet highly variable form of redress, the State has wide discretion as to how to comply with this element of the prohibition; therefore, mirror-image rehabilitation need not be identified across State practice in order to support an expansion of this dimension of the prohibition.[98] Therefore, how States respond to this treaty body driven development of the prohibition in future will determine whether rehabilitation becomes solidified as part of the customary prohibition.

1.5 *Conclusion*

This article delivers an account of the way in which the engagement between States and treaty bodies plays a clear, but generally underappreciated, role in shaping customary international law by examining the entrenchment of the prohibition against torture as both a treaty obligation and a rule of custom. While the core prohibition is broadly recognised as a rule of customary international law this article demonstrates that further dimensions of the prohibition reflecting treaty body interpretations are on the horizon. While the seemingly casual use of the term 'torture' may lead to a watering down of the core prohibition,[99] expanding the core customary prohibition is necessary to support the absolute nature of the ban. It is incumbent on treaty bodies to define and defend the prohibition, as the only specified guardians with global reach. Though State engagement with the treaty bodies varies extensively, certain aspects of the prohibition against torture see consistent manifestations across States parties that must be viewed holistically in terms of identifying both State practice and *opinio juris*.

Treaty bodies aim to deliver consistent interpretations of treaty obligations in order to guide States in their treaty implementation. If '[t]he inconsistency and deceitfulness of customary international law have long been proven', subscribing to the methodology presented here can assuage the inconsistencies that previously have plagued customary international law at least in terms of human rights.[100] As States move around the dance floor of customary international law the imprint of the treaty bodies is obvious in many expressions of the customary prohibition against torture, particularly as most States demonstrate the same choreographed responses to certain aspects of the prohibition, such as on the issue of compensation and claim investigation. Though slightly fewer States appear to support the principle of non-*refoulement* as part of the customary prohibition and fewer yet comply with compulsory rehabilitation of torture victims, the power of the treaty body-State relationship cannot be underestimated. In navigating their bilateral relationships with States parties, treaty bodies have done more to shape the development of the prohibition against torture than any other singular actor. For this reason, they must be applauded in their role as choreographers in the development of customary international law.

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[98] *Continental Shelf* case (n 18) para. 28.
[99] Marcy Strauss, "Torture", 48 *New York Law School Review* (2003) p. 208.
[100] d'Aspremont (n 1).