Treaty bodies and states

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Treaty Bodies, States and the Shaping of Customary Law

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1 Introduction

With the proliferation of international legal actors, each of whom has the potential to contribute to the creation of international law, it is timely to consider the influence of the UN human rights treaty bodies on the development of customary international law. These supervisory mechanisms warrant special attention as several of them enjoy an easily recognised status as the longest continual treaty supervisory mechanisms in the international legal system.[1] The significance of treaty bodies has, in fact, made such an impact on the international community's understanding of 'law' that multiple International Law Commission (ILC) studies have acknowledged the relevance of the human rights treaty bodies, including the on-going work on subsequent agreement and subsequent practice in relation to interpretation of treaties,[2] the 2011 Guide to

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[1] e.g., the Human Rights Committee (HRC) commenced its supervisory role in 1976, with the entry into force of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976 (ICCPR). This excludes the European Court of Human Rights, as its function is solely adjudicatory rather than supervisory with the same competences as the UN human rights treaty bodies.

[2] International Law Commission (ILC), Fourth report of the Special Rapporteur on Subsequent agreements and subsequent practice in relation to the interpretation of treaties, UN Doc. A/CN.4/694 (2016), paras. 17 *et seq*., looking at the pronouncements of expert bodies and the decisions of domestic courts.

Practice on Reservations to Treaties[3] and its current examination of customary international law.

This contribution proceeds from the accepted notion that international organisations contribute to international law-making in a number of ways.[4] Tracking the possibility acknowledged in the ILC draft conclusions on the identification of customary law,[5] the chapter argues that the responses by States to human rights treaty body interpretations supports a conclusion that treaty bodies can, and do, contribute to the development of customary international law, albeit in often subtle ways and through their relationships with States parties. Draft conclusion 4(2) speaks specifically on the practice of organizations and draft conclusion 6(1) admits a 'wide range of forms'. Yet, the more telling measure of the contribution of the treaty bodies is the way in which the broad range of States parties to the various human rights treaties have engaged with the practice and jurisprudence of the treaty bodies. Thus, the following looks not only at the practice of the treaty bodies, but at State responses to, and reliance on, rules as interpreted by treaty bodies and how the responses ultimately do and could support the development of customary international law.

Responses to treaty body practice are often marked by inaction, a point recognised in draft conclusion 6(1). However, conduct in connection with

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[3] ILC, Guide to Practice on Reservations to Treaties, UN Doc. A/66/10 (2011), para 75, guidelines 3.2 – 3.2.5. Although not expressly referring to the human rights treaty bodies in the guidelines, the commentary to the guidelines makes clear that human rights treaty bodies are a consideration.

[4] See, e.g., José Alvarez, *International Organizations a Law-Makers* (OUP 2005).

[5] ILC, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee, UN Doc. A/CN.4/L.872 (30 May 2016) (Identification of CIL).

treaties (draft conclusion 6(2)) can be charted across States in their engagement with the treaty bodies and must be considered as a whole, as outlined in draft conclusion 7(1). For this reason, State practice in response to the supervisory dialogues with the treaty bodies, whether marked by inaction or further responsive measures, warrants attention in the determination of customary international law. Treaty body jurisprudence is almost entirely in the public domain and includes the decisions taken in regard to the review of States' periodic reports and individual communications, their observations in General Comments on States parties' conduct across all parties, and on their procedural practices. Collectively, treaty body outputs are viewed as soft law, though arguably should be assumed as further means of interpreting the treaty texts in line with the rules on interpretation in Article 31(3)(b) the Vienna Convention on the Law of Treaties.[6] Furthermore, there is demonstrable evidence that this body of soft law is influencing domestic human rights accounts.[7] In light of the readily available exchanges between treaty bodies and States, this contribution will examine how, within the regimented parameters of the various treaty body

[6] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art 31(3)(b): 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.
[7] Kasey McCall-Smith, 'Interpreting International Human Rights Standards – Treaty Body General Comments as a Chisel or a Hammer' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016); Rosanne Van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 356, 357; International Law Association (ILA), *Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (ILA 2004)

competences, an effective account of the existence of customary law is delivered in a way that ably presents evidence both of State practice and *opinio juris*.

As a starting point, this chapter delivers an account of the treaty bodies as primary interpreters of human rights treaties and contributors to the development of human rights law. Section 3 follows with consideration of the prohibition against torture as a human right that is also recognised as a customary rule of international law. In line with the ILC's decision to keep the consideration of customary international law and peremptory norms separate, the prohibition as a peremptory norm (*jus cogens*) will not be addressed.[8] Section 4 will present the interplay between States and the treaty bodies in terms of developing rules of customary international law. Section 5 will offer final comments on how the engagement between States and treaty bodies plays a clear, but often overlooked, role in the identification and development of customary international law.

2 Human Rights Treaty Bodies as Interpreters

Because the value of utilising the treaty bodies as the ultimate interpreters has been addressed by the author and others elsewhere, this section simply will recap the important role played by the treaty bodies in interpreting human rights.[9] UN human rights treaty bodies have been accepted as expert interpreters

[8] ILC, 'First report on formation and evidence of customary international law', UN Doc. A/CN.4/663 (17 May 2013) (First report on CIL), paras 24-27. See also Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 EJIL 491

[9] McCall-Smith, 'Interpreting International Human Rights' (n 7); Kasey McCall-Smith, 'Reservations and the Determinative Function of Human Rights Treaty

of human rights treaty obligations across many international fora, though this idea is equally contested. The International Court of Justice (ICJ) has clarified that even though under no obligation to do so, it 'ascribe[s] great weight to the interpretation adopted by [the Human Rights Committee]' as the body 'established specifically to supervise the application of [the International Covenant on Civil and Political Rights].'[10] The ICJ further opined on clarity and the consistent interpretation of the rights of aliens lawfully in a foreign state to review an expulsion order by a competent authority and how the HRC's interpretation of this right echoed across regional human rights systems.[11] This 'echo' and the way in which States respond to it feeds into a determination of a rule of customary international law.

In the national context, States often underscore the non-binding nature of treaty body opinions.[12] This overt eschewing of treaty body interpretations

Bodies' (2012) 54 German YbIL 521. See, generally, Geir Ulfstein, 'Law-making by Human Rights Treaty Bodies' in Rain Liivoja and Jarna Petman (eds*), International Law-making: Essays in Honour of Jan Klabbers* (Taylor and Francis 2013); Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012); Yogeshi Tyagi, *The UN Human Rights Committee: Practice and Procedure* (CUP 2011), esp 56-8

[10] *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), 2010 ICJ Reports 639, para 66. See also, *Legal Consequences of the Construction of a Wall in the Occupied* Palestinian *Territory,* Advisory Opinion, 2004 ICJ Reports 136, para 109, recounting the HRC interpretation of the applicability of the ICCPR outwith the territory of the State.

[11] *Diallo* (n 10) para 66

[12] e.g. *Perterer* v *Land Salzburg and Austria*, 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

tends to feed into the State-centric, sovereigntist arguments necessary to massage isolationist approaches to international law that bubble underneath the skin of even the most human rights-forward States. Even with resistance to treaty body interpretations, there are clear instances of States' uptake of treaty body jurisprudence, which speak directly to the development of consensus on the content of a normative rule.[13] In line with ILC draft conclusion 7(1), implementation of treaty body decisions and recommendations is part of the holistic practice that contributes to the development of customary law as repeated implementation of a rule helps crystallize State practice. Even where a government asserts that compliance with a treaty body decision is 'voluntary',the way in which the State implements that decision can ultimately generate customary law.[14]

Pursuant to rule 71(5) of the HRC's rules of procedure, a State should provide follow-up information as to how it is implementing the Committee's concluding observations. This practice has been in place since 2001 and offers a realistic, albeit limited, overview of how States respond to the interpretations of the HRC. Even with the substantial amount of legal analysis produced by the HRC

[13] McCall-Smith, 'Interpreting International Human Rights' (n 7). Although the chapter discusses general comments primarily, final views have been of similar interest to national courts.

[14] e.g. Senate (Australia) *Select Committee on Ministerial Discretion in Migration Matters*, Report, March 2004, Recommendation 18, 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.' <www.aph.gov.au/~/media/wopapub/senate/committee/minmig_ctte/report/report_pdf.ashx> accessed 20 December 2017

and other treaty bodies, it is clear that many States continue to fail to implement the decisions made by the treaty bodies.[15] This failure to respond to treaty body opinion is reflected in the ILC's current draft conclusions on customary international law noting that inaction may also aid in a determination of customary international law (draft conclusion 6(1)). This is particularly true when it is necessary to refine the further reaches of a human rights rule in terms of both positive and negative duties of the State. Whether interpreted as inaction or as a partial response to treaty body jurisprudence, the key is that a State's aggregate engagement with treaty obligations may be considered when evaluating evidence of a rule of customary international law (draft conclusion 7(1)).

3 The Interplay between Treaties and Customary International Law

The Universal Declaration of Human Rights[16] (UDHR) is often asserted as the basis for several customary international rules for human rights.[17] Although there is not universal agreement to what extent each of the rights set out in the UDHR has transformed into a customary rule, a survey of State actions across national and international practice suggests that a number of the rules are definitively accepted as customary whilst others are slowly gathering support in a transition toward customary rules. Support for this proposition can be found in

[15] See Report of the Human Rights Committee, vol. I, UN Doc. A/69/40 (vol. I), p iii

[16] Universal Declaration of Human Rights, UNGA Res. 217A, UN Doc. A/810 (1948)

[17] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995-96) 25 Ga J Int'l & Comp L 287, 317 et seq

the strength of the ratifications across the core human rights treaties, particularly where there is cross-manifestation of the same right, such as the right to life or the prohibition against torture. The ICJ has acknowledged that there is interplay between treaties and the identification or development of customary law.[18] Due to the brevity of this contribution, the following only examines the prohibition against torture as a treaty obligation and a rule of customary international law.

3.1 The Prohibition against Torture as a Treaty Obligation and State Practice

The prohibition against torture is a bedrock norm in the international human rights paradigm. It is usually expressed as a negative obligation on the State – the State and its representatives are prohibited from engaging in action that amounts to torture. Subsequent to the adoption of the UDHR in 1948, which recognised the right to be free from torture in Article 5, the UN General Assembly affirmed the prohibition on a number of occasions through the adoption of several resolutions, including: Resolution on the Protection of All Person from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975);[19] Resolution on the adoption of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985);[20] Resolution adopting the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[18] *Continental Shelf case* (*Libya* v *Malta*) 1985 ICJ Reports 13, para 27
[19] UNGA Resolution 3452 (XXX), UN Doc. A/RES/30/3452, 9 December 1975
[20] UNGA Resolution 39/46, UN Doc. A/RES/39/46, 26 June 1987

(2002);[21] and, more recently, in the Revised Standard Minimum Rules for the Treatment of Prisoners[22] (Mandela Rules) (2015). Ultimately, it was also codified in the Geneva Conventions,[23] the International Covenant on Civil and Political Rights[24] (ICCPR) Article 7, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[25] (UNCAT) and the Convention on the Rights of the Child[26] (UNCRC) Article 37(a), as well as in three regional human rights conventions.[27] Despite high levels of ratification–the ICCPR has been ratified by 168 States, the CAT by 160 States, the CRC by 196 States-[28] it is clear that ratification of treaties expressly outlining a rule does not automatically confer the status of customary law upon the rule,[29] though today the prohibition

[21] UNGA Resolution 57/199, UN Doc. A/RES/57/199, 18 December 2002
[22] Revised Standard Minimum Rules for the Treatment of Prisoners, UNGA Resolution 70/175, U.N. Doc. A/RES/70/175 (17 December 2015), Rule Nos. 1, 8d, 32d, 34, 43, 71, 76b
[23] 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, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287
[24] (n 1)
[25] 10 December 1984, 1465 UNTS 85 (UNCAT)
[26] 20 November 1989, 1577 UNTS 3 (UNCRC)
[27] European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221; American Convention on Human Rights, 22 November 1969, 1144 UNTS 144; African Charter on Human and People's Rights, 27 June 1981, 21 ILM 58 (1982)
[28] Ratifications numbers at the time of writing. All available on <https://treaties.un.org> accessed 22 June 2017
[29] *North Sea Continental Shelf* (*Germany* v. *Denmark/Netherlands*) 1969 ICJ Reports 3, paras 75-8; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*) 1986 ICJ Reports 14, paras 183-4

against torture is generally recognised as one of custom.[30] In fact, the high levels of reservations to these treaties make the determination of a clear baseline of protection inherently difficult.[31]

The identification of customary international law is an imprecise legal inquiry. A number of ICJ decisions have examined the two elements that together form a rule of customary law, state practice and *opino juris*;[32] yet, across the decisions there are unspoken variables that are understood to influence the weight ascribed to each of these elements and it is acknowledged that the distinction between the two is, at best, a *non sequitur* oft repeated by international lawyers to validate their craft.[33] Nonetheless, the following

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[30] e.g. *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), 2012 ICJ Reports 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' (2015) 15 Human Rights Law Review 101, 108; David Weissbrodt and Cheryl Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 Law & Inequity 343, 348; Thomas P Crocker, 'Overcoming Necessity: Torture and the State of Constitutional Culture' (2008) 61 SMU Law Review 221, 222-23 (torture as a norm of *jus cogens*)

[31] UNCHR, Chairpersons of the human rights treaty bodies Report on Reservations, UN doc. HRI/MC/2009/5 (2009), 4. See also Kasey McCall-Smith, 'Mind the Gaps: The ILC Guide to Practice and Reservations to Human Rights Treaties' (2014) 16 International Community Law Review 263

[32] e.g. *North Sea Continental Shelf* case (n 29) paras 75-79; *Military and Paramilitary Activities in and against Nicaragua* (n 29) paras 183-5; *Jurisdictional Immunities of the State* (*Germany* v. *Italy, Greece Intervening*) 2012 ICJ Reports 99, para 55

[33] As Kammerhofer sagely notes that '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' (2004) 15 EJIL 523, 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

discussion attempts to distinguish State responses to treaty body jurisprudence in line with the traditionally accepted distinct elements. However, this examination cannot help but conclude that the distinction between *opinio juris* and State practice is often blurred in terms of responses to the treaty bodies and, therefore, this chapter ultimately aligns with other recent literature to demonstrate that the finite distinction between the two is untenable in practice and, ultimately, an unwarranted distraction in the articulation of customary international law.[34]

In terms of UN human rights treaties, membership is a two-fold contribution to the development of customary law. Initially, it is the affirmation of the obligation as a rule of law that could potentially be recognised as a customary rule. Implementation of the obligation is demanded under the terms of each of the treaties[35] and this delivers the initial element of a customary rule – State practice. The majority of States have criminalised torture or recognise the prohibition through a constitutional or legislative provision, such as those found

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definition of customary international law.' Michael Akehurst, 'Custom as a Source of International Law' (1977) 47 BYBIL 1, 1.

[34] See, e.g., Jean d'Aspremont, 'Non-State Actors and the Formation of International Customary Law: Unlearning Some Common Tropes' in Iain Scobbie and Sufyan Droubi (eds), *Non-State Actors and the Formation of Customary International Law*, Melland Schill Perspectives on International Law (*forthcoming* Manchester University Press 2018); Maiko Meguro, 'Customary International Law and Non-State Actors: Between Anthropomorphism and Artificial Unity' in Iain Scobbie and Sufyan Droubi (eds), *Non-State Actors and the Formation of Customary International Law*, Melland Schill Perspectives on International Law (*forthcoming* Manchester University Press 2018); Kammerhofer, 'Uncertainty in the Formal Sources' (n 33)

[35] e.g. ICCPR art 2. Similar obligations are reflected in UNCAT art 2 and UNCRC art 4

in the United Kingdom,[36] the United States, [37] and Spain,[38] to name but a few. To deliver more comprehensive protection, States may choose to incorporate the treaties explicitly. Australia's most recent legislation on torture, the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010, specifically amended the Australian Criminal Code in order to directly incorporate provisions of the UNCAT and make specific reference to the ICCPR.[39] These instances of legislative and constitutional action amount to tangible physical evidence of State practice.[40]

While the general core of the right – not to engage in or support behaviour that amounts to torture – is broadly accepted (though notably not always observed), the HRC and the CAT spend a great amount of effort addressing the nuances of what observance of the rule specifically requires. Much of this effort is invested in the bilateral relationship between States allegedly in breach of the obligation under the ICCPR or the UNCAT, but also in the delivery of general comments on aspects of the prohibition. The HRC's

[36] UK Criminal Justice Act 1988, §134
[37] Torture Victims Protection Act, 28 U.S.C. § 1350; War Crimes Act, 18 U.S.C. § 2240-41.
[38] Constitution of Spain, 1978, art. 15; Organic Law 10/1995 (23 November 1995) of the Penal Code, art 173
[39] Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010, No. 37, 2010 (replacing the Crimes (Torture) Act, 1988 and amending the Criminal Code Act 1995), Division 274.1 – Torture (in total) and para 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' (2017) 6:11 ESIL Reflection;

General Comment No. 20 is illuminating for the present analysis as it 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]

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 the evolving problems across societies. Though it is difficult to discern identical or even consistent State practice in implementation, State engagement with and response to treaty body interpretations of human rights over the past few decades have delivered a more coherent understanding of the core human rights obligation. Ensuring a consistent interpretation of core rights is essential for clarity in the international rule of law.[42]

In addition to being obliged to implement the rules outlined in human rights treaties upon ratification, in the UN system States parties also become objects of supervision by the treaty bodies. With this objectification, the State

[41] HRC, General Comment No. 20 (replacing General Comment No. 7) on Article 7, UN Doc. CCPR/C/GC/20 (1992), para 4
[42] *Diallo* (n 10) para 66

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 rights set out by a human rights treaty is ultimately a demonstration of State practice but also may be indicative of *opinio juris.*

3.2 Implementation and Recognition of a Treaty Obligation as *Opinio Juris*

One reason that makes consensus among States on various human rights rules difficult to ascertain is the very nature of the rules. Unlike more exacting rules of customary international law, the core of a human rights obligation can be more fluid. Establishing the minimum core right is further complicated due to the broad scope for limiting those rights that are not absolute by definition, which is often manifested through the use of reservations to the various treaties. This section considers the way in which responses to a treaty body interpretation might generate *opinio juris* in order to further entrench emerging contours of the prohibition against torture into customary international law. The specific ways in which States implement the core obligations as well as emerging aspects of the rule will be examined below in section 4 in an effort to demonstrate how treaty bodies contribute to customary international law.

The prohibition against torture is one of the most highly publicised and politically charged human rights due the range of associated issues, such as *non-refoulement* (UNCAT Article 3), that are inherent in the complete observance of the prohibition. While the core of the right is widely accepted across States, the tangential aspects mandated by the complete prohibition are often controversial,

as was demonstrated repeatedly in the *Abu Qatada* case in the UK.[43] However, it is the implementation of these incremental expansions of the right that offer a view into a State's understanding of the breadth of the rule. As acknowledged in the *Continental Shelf* case, the application of a norm of customary international law can be debated because though a particular standard might be defined by the norm, States determine how to achieve the standard.[44] Both the Human Rights Committee (HRC) and the Committee against Torture (CAT) have been 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, the entirety of the UNCAT and UNCRC Article 37(a) are directed at ensuring the prohibition and articulating emerging actions that breach the prohibition. The nuances between the treaty bodies and the recognition of their opinions by States are addressed below.

It is in negotiating the emerging interpretations of the prohibition by the treaty bodies that States offer what might establish *opinio juris* and therefore shape customary international law. Although the ICJ has rejected the idea that implementation of a treaty obligation equates to *opinio juris*, notably in the application of the equidistance principle in the *North Sea Continental Shelf* case,[45] the interplay between States and treaty bodies suggests that State responses to new, evolutive interpretations may support identification of customary international law when taken as a whole along with other manifestations of their

[43] *Othman (Abu Qatada) v. United Kingdom* (2012) 55 EHRR 1
[44] *Continental Shelf* case (n 18) para 28
[45] *North Sea Continental Shelf* case (n 29) para 76

obligations, in line with ILC draft conclusions 6(2) and 7(1) and the increasing literature recognizing the obfuscation identifying distinctions between State practice and *opinio juris*.[46] This phenomenon will now be examined.

4 States Responses to Treaty Bodies

This section examines how responses to treaty body jurisprudence in the national setting can be drawn upon to identify either or both elements of customary international law – State practice or *opinio juris*. As acknowledged by the ILC in the course of its study of customary international law, States operate in their own domestic legal order.[47] In most systems there is a distinct separation between the executive, legislative and judicial branches of the State. Each contributes to State practice and *opinio juris* in varying ways. Legislative acts can be drawn upon to 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 lend support to both elements of customary law. Admittedly, none of these assignments of a particular branch of the State to an element of customary law is definitive.

The following analysis draws upon domestic law, policy decisions and judicial opinions responding to treaty body jurisprudence. It relies heavily upon the follow-up procedures of the treaty bodies, especially that of the HRC and the CAT in the context of reviewing the implementation of final views on individual

[46] (n 34)
[47] ILC, First report on CIL (n 8) paras 83-84

communications under the Optional Protocol to the ICCPR[48] or UNCAT Article 22.[49] The treaty body-State party dialogues produced in the furtherance of the periodic reporting process or the review of individual complaints for convention breaches deliver a prime opportunity for the development and dissemination of progressive rights interpretation and can influence the law, policy and practice of States. These processes 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 international opinions on the obligations of the State to prevent human rights breaches by third parties or private actors.[50] This suggests that at least in terms

[48] Optional Protocol to the ICCPR, 16 December 1966, 999 UNTS 171, art 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. The HRC has repeatedly reminded States parties of their obligation to comply with the views of the body, see General Comment No. 33 on the Obligations of States Parties under the Optional Protocol to the ICCPR, UN Doc. CCPR/C/GC/33 (5 November 2008).

[49] As of 13 May 2016, the CAT had reviewed a total of 376 of the 400 State reports received pursuant to art 19 and as of 15 August 2015 had delivered final views in 272 of the 697 cases submitted to it under art 22(1). 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, UN Doc. CAT/C/55/3 (17 December 2015).

[50] *X and Y v. the Netherlands*, Ser. A No. 91 [1985] 8 EHRR 235; *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)

of the treaty regime, the observance of the prohibition is limited by the nature of the specific 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. The way in which States have responded to treaty bodies on various aspects of the prohibition against torture is highly relevant for assessing the development of customary international law. The following analysis provides a glimpse into the ways in which treaty bodies may shape the development of law through their engagement with, and influence on, States.

4.1 Why States respond to issues of core implementation

Core to the right to be free from torture is the negative obligation on the State not to engage in acts amounting to torture in any situation and this is frequently reiterated by the treaty bodies.[51] Where torture is determined to have been committed, a concomitant obligation is one of compensation to the victim. In response to determinations of breaches against the prohibition against torture, Argentina, for example, has increasingly implemented the decisions of the HRC recognising that compensation is necessary for victims of torture and that impunity must be eliminated by adopting a range of initiatives, as required by the UNCAT.[52] Compensation for victims of torture is not explicitly mentioned in ICCPR Article 7 but has been 'read in' to its interpretation by the HRC. Therefore,

[51] e.g. CAT, Conclusions and Recommendations of the Committee: Argentina, UN Doc. CAT/C/CR/33/1 (10 November 2004), para 5

[52] HRC, Follow up on *L.N.P. v. Argentina*, UN Doc. A/69/40 (Vol. I) (2014), 182, see original case Communication No. 1610/2007, UN Doc. CCPR/C/102/1610/2007 (18 July 2011); CAT, Conclusions and Recommendations of the Committee: Argentina, UN Doc. CAT/C/CR/33/1 (10 November 2004), para 7

fulfilment of compensation awards amounts to compliance with treaty obligations under the CAT (Article 14); however, in terms of the ICCPR the same behaviour could be viewed as State practice in support of this dimension of the prohibition while changes to the law to ensure compensation or promote impunity may be regarded as *opinio juris*. For Argentina, which is party to both treaties, implementation continues to be the subject of review by both by the HRC and the CAT. On this issue, therefore, it appears that giving effect to the core obligation is far from straightforward in practice and its difficulties are borne out by its responses to both committees and its collective responses aid in the identification of customary international law.

National courts have increasingly recognised the interpretative value of treaty body jurisprudence and some 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.[53] These cases are particularly interesting where the government of the State has explicitly denied the lack of status for treaty bodies in domestic law in direct opposition to the ultimate findings of the highest national court.[54] In these instances where the branches of a government compete, support for custom is difficult to identify. However, how these

[53] e.g. CAT, Follow-up on *Gerasimov v. Kazakhstan*, Communication No. 433/2010, UN Doc. CAT/C/53/2 (11 December 2014), para 26. See generally Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2018) 67 ICLQ 201

[54] ibid, para 27

competing views are ultimately reconciled within the State will either lend or detract from the determination of a customary rule.

Also fundamental to the prohibition is the impartial and full investigation into claims of torture. Many States reported as running afoul of the torture prohibition do so expressly due to a failure to investigate claims of torture or ill-treatment.[55] In these instances, the treaty body will generally request that the State amend its procedures or take action to ensure an effective investigation. When the executive or judicial branches respond directly to a treaty body decision in an individual complaint or review of a periodic report, or both, the influence of the treaty body on national practice is clear.[56] Engaging with the treaty body decisions on core issues of implementation highlights the State's commitment to its treaty obligations and reform at the national level and often assuages pressure from civil society organisations.

The potential for judicial activism in terms of utilising treaty body jurisprudence is important in the development of human rights norms, particularly in States where no regional human rights system currently operates

[55] HRC, Follow-up on *Baustista de Arellana v. Colombia*, Communication No. 563/1993, UN Doc. A/69/40 (Vol. I) (2014), 191; HRC, Follow-up on *Zhumabaeva v. Kyrgyzstan*, Communication No. 1756/2008, UN Doc. A/69/40 (Vol. I) (2014), 195; HRC, Follow-up on *El Hagog v. Libya*, Communication No. 1755/2008, UN Doc. A/69/40 (Vol. I) (2014), 199; CAT, Follow-up on *Aarrass v. Morocco*, Communication 477/2011, UN Doc. CAT/C/53/2 (11 December 2014), paras. 32-33; CAT, Follow-up on *Sanko v. Spain*, Communication 368/2008, UN Doc. CAT/C/56/2 (22 December 2015), 2; CAT, Follow-up on *Ntikarahera v. Burundi*, Communication 503/2012, UN Doc. CAT/C/56/2 (22 December 2015), 8-9.

[56] 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 *Sanko v. Spain*, CAT, Follow-up on *Sanko v. Spain* (n 55), 2

or where entrenchment of human rights has been arduous. Article 2 of the Lebanese Code of Civil Procedure outlines that courts must consider any relevant ratified treaties. A similar provision is found in Article 9 of the Iranian Constitution. These provisions, along with provisions such as Article 2(6) of the 2010 Kenyan Constitution, suggest that these are monist States in terms of the relationship between international and national law. From a strictly legal view, this ensures a fairly simple access point to treaty body jurisprudence in terms of applicability in the national legal system as the obligation to take the treaty body decisions into account is inherent in the treaty. National Human Rights Institutions (NHRIs) also offer a strong voice in this context when reminding States about their international obligations.[57]

Further impetus for a State to respond to a treaty body decision is that it may be engaged in a multi-party, multi-level dialogue or campaign to address institutional torture. For example, in the follow-up dialogue to a 2011 complaint against Morocco for breaches of the UNCAT, the State party reported that had it reopened the complainant's case even prior to the CAT's decision and highlighted that it was committed to working with the UN human rights mechanisms, including the Special Rapporteur on torture, and was also considering Amnesty International's torture eradication campaign.[58] This type of

[57] e.g. 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*, 20 <www.knchr.org/Portals/0/CivilAndPoliticalReports/National%20Values%20and%20Principles%20of%20Governance.pdf?ver=2016-08-01-154241-273> accessed 20 December 2017.

[58] CAT, Follow-up on *Aarrass v. Morocco* (n 55), paras 32-33

report by a State suggests that changes in both State practice and *opinio juris* are influenced by a multitude of actors, including the treaty bodies. The remainder of section 4 will review further dimensions of the prohibition against torture in order to demonstrate how treaty body-State engagements might expand the outer reaches of the rule in terms of development of the customary rule of international law.

4.2 Non-*refoulement*

The principle of non-*refoulement*, also known as non-return, has been at the heart of many political controversies during the war on terror years.[59] This aspect of the prohibition is expressly outlined in UNCAT Article 3 and the HRC has interpreted ICCPR Article 7 to include the principle of non-return when there is a strong possibility that the individual might be subjected to torture by the receiving State.[60] An examination of the bilateral dialogues between States and treaty bodies on non-*refoulement* highlights how the principle is not yet cemented as part of the customary rule on the prohibition of torture despite the tendency of scholars to refer to it as such.[61]

Australia's engagement with the CAT highlights the slow progress in the entrenchment of this aspect of the prohibition. In 2000, the CAT recommended that it consider 'providing a mechanism for independent review of ministerial

[59] e.g. *Othman* (n 43)
[60] HRC, General Comment 21, UN Doc. HRI\GEN\1\Rev.1, 33 (1994).
[61] See Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273, 282 et seq

decisions in respect of cases coming under article 3 of [UNCAT].'[62] Failure to comply with the obligation of non-*refoulement* was determined in a previous complaint against Australia before the CAT.[63] Following the determination of a breach of UNCAT Article 3 in that complaint, the responsible government minister allowed a subsequent protection visa application, which was also rejected and the applicant was expelled. Ultimately, following the fourth finding of a breach of non-*refoulement* within the treaty body complaints system, the Senate Select Committee on Ministerial Discretion recommended to the Australian government that a new system be put in place to record immigration cases and establish the compliance of the ministerial decisions with the UNCAT, UNCRC and the ICCPR, reflecting the recommendations made by the relevant treaty bodies.[64] Subsequent to the suggested changes to domestic procedures, Australia has been the subject of additional complaints on the issue of non-*refoulement* and has further indicated that it will take heed of the CAT's decisions in complaints where it determined a breach of Article 3.[65] How this dimension of the obligation will eventually be entrenched remains to be seen, though movement can be tracked across various State organs and ultimately each

[62] *Concluding Observations of the Committee against Torture: Australia,* 25th session, 13-24 November 2000, UN Doc. CAT A/56/44/2001 (2001)
[63] e.g. CAT, *Elmi v. Australia*, Communication No. 120/1998, UN Doc. CAT/C/22/D/120/1998 (1998)
[64] Senate (Australia) *Select Committee on Ministerial Discretion in Migration Matters*, Report (n 14) Recommendation 18, para 8.29
[65] CAT, Follow-up on *Dewage v. Australia*, Communication No. 387/2009, UN Doc. CAT/C/53/2 (11 December 2014), para 19 (stay of deportation to Sri Lanka or any other country that might return him to Sri Lanka on humanitarian grounds); Follow-up on *Ke Chun Rong v. Australia*, Communication No. 46/2010, UN Doc. CAT/C/53/2 (11 December 2014), para 21 (stay of deportation to China).

movement feeds into a developing State practice and Australia's understanding of the obligation of non-*refoulement*. As the progress continues, the discussions surrounding new policies and procedures will undoubtedly reflect the view of Australia in terms of non-*refoulement* therefore contributing to *opinio juris* in the evolution of the prohibition against torture.

Despite slow movement in Australia, the CAT has experienced some success in its complaints procedures in terms of pushing States to reconsider expulsion cases in order to enforce the right of non-*refoulement*, as observed in the follow-up procedures with Norway,[66] Sweden,[67] Kazakhstan,[68] Switzerland,[69] and other States.[70] In some cases, States have noted that the national law has changed to better reflect their international obligations.[71] In other cases, well-crafted opinions deliver interpretative value in subsequent cases. A Finnish case demonstrates the strength of conviction with which counsel for complainants

[66] CAT, Follow-up on *Eftekhary v. Norway*, Communication No. 312/2006, UN Doc. CAT/C/53/2 (11 December 2014), paras 8-9 (stay of deportation to Iran on humanitarian grounds)
[67] CAT, Follow-up on *Njamba and Balikosa v. Sweden*, Communication 322/2007, UN Doc. CAT/C/53/2 (11 December 2014), para 10 (stay of deportation to Democratic Republic of the Congo on humanitarian grounds)
[68] CAT, Follow-up on *Nasirov v. Kazakhszan*, Communication 475/2011, UN Doc. CAT/C/53/2 (11 December 2014), para 30 (stay of extradition to Uzbekistan).
[69] CAT, Follow-up on *K.N., F.W. and S.N. v. Switzerland*, Communication No. 481/2011, UN Doc. CAT/C/53/2 (11 December 2014), para 30 (stay of deportation to Iran)
[70] CAT, Follow-up on *E.K.W. v. Finland*, Communication No. 490/2012, UN Doc. CAT/C/56/2 (22 December 2015), 1 (removal to the Democratic Republic of the Congo)
[71] CAT, Follow-up on *Mopongo et al. v. Morocco*, Communication No. 321/2007, UN Doc. CAT/C/56/2 (22 December 2015), 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.'

place upon decisions of the treaty bodies. In the follow-up procedure on the case of *Mr X and Mr Z v. Finland* (non-return to Iran) it was found that Finland had complied with the CAT's suggested redress following the CAT's decision that the State breached the obligation of non-return, thereby negating the need for follow-up.[72] Finland complained that the CAT should remove the decision from its list due to the compliance. The complainant's counsel, however, argued that the decision should not be struck from the list because 'the Committee's decision is important in order to improve national jurisprudence and procedures in similar cases.'[73] It is this incremental improvement that aids in developing customary international law. While improvements do not follow the same pace across all States, the marked increase in 'chatter' surrounding treaty body jurisprudence cannot be ignored. Once the chatter cements into policy, *opinio juris* may be extracted to support this dimension of the prohibition.

Similarly, in *Thuraisamy v. Canada*, the HRC determined that the applicant's claim of torture in violation of ICCPR Article 7 if returned to Sri Lanka mandated reconsideration of his claim for asylum based on humanitarian and compassionate grounds.[74] In consideration of the Committee's views, Canada reconsidered the application and ultimately granted leave to remain.[75] This

[72] CAT, Follow-up on *Mr X and Mr Z v. Finland*, Communication No. 483/2011, UN Doc. CAT/C/53/2 (11 December 2014), para 38 (obligation to refrain from forcibly returning the complainants to Iran). Finland granted the complainant refugee status shortly after the decision.
[73] ibid, para 39
[74] HRC, *Thuraisamy v. Canada*, Communication No. 1912/2009, UN Doc. CCPR/C/106/D/1912/2009 (31 October 2012)
[75] HRC, Follow-up on *Thuraisamy v. Canada*, Communication No. 1912/2009, UN Doc. A/69/40 (Vol. I) (2014), 190

pattern is tangible across a range of States and suggests that the right of non-return is increasingly recognised. Even where the State and treaty body views diverge, the various intricacies of the protection are being explored in terms of how best to adhere to the protection.[76] Once a tipping point has been reached, it will be only a matter of time until this aspect of the prohibition against torture is viewed as customary international law and this will be due in many ways to the treaty bodies' elaboration of non-*refoulement*.

4.3 Rehabilitation for Victims of Torture

The obligation to provide medical treatment to victims of torture is a further dimension of the prohibition against torture that could gain traction as a customary rule of international law. Unlike the *prima facie* prohibition, this feature of the protection acknowledges the breach and requires that States deliver relief in the form of both physical and mental rehabilitation. While the text of ICCPR is silent on the issue, the right to medical treatment is protected by UNCAT Article 14. Failure to provide victims of torture with rehabilitative medical treatment is repeatedly recognised as a breach of the prohibition by the European Court of Human Rights.[77] Both the CAT and the HRC have confirmed

[76] CAT, Follow-up on *Khan v. Canada*, Communication No. 015/1994, UN Doc. CAT/C/56/2 (22 December 2015), 7-8

[77] *Kudla v. Poland* (Application No. 3021/96) ECtHR Judgment of 26 October 2000, at para 94; *McGlinchey v. the United Kingdom*, ECtHR Judgment of 29 April 2003, at paras 57-58; *Sarban v. Moldova*, ECtHR Judgment of 4 October 2005, at paras 83 & 89-91; *Hummatov v. Azerbaijan*, ECtHR Judgment of 29 November 2007, at para 121 (mental suffering)

that rehabilitation to the extent possible is a necessary part of the protection against torture.[78]

For torture victims with a multitude of physical and psychological symptoms, rehabilitation cannot easily be quantified, nor is there a one-size-fits-all approach to be applied. Whether the victim is incarcerated or living freely, there are many variables that will influence rehabilitation options. In the event that provision of healthcare is offered, either practically or by subsidisation, States vary considerably as to how they approach the issue. When torture is directly attributable to a State actor, such as a police officer or prison guard, the duty to ensure appropriate medical care often requires that victims, especially those who are incarcerated, balance their safety and their health, thus adding a further level of issues to consider.[79] Therefore, the way in which rehabilitation is provided is highly variable but as previously noted, it is for the State to determine how to comply with a customary norm, thus precise levels of rehabilitation need not be identified across State practice in order to support an expansion of this dimension of the prohibition.[80]

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[78] CAT, *Gerasimov v. Kazakhstan*, Communication No. 433/2010, CAT/C/48/D/433/2010 (24 May 2012); CAT, Follow-up on *Keremedchiev v. Bulgaria*, Communication No. 257/2004, UN Doc. CAT/C/56/2 (22 December 2015), 3; CAT, *Ntikarahera v. Burundi*, Communication 503/2012, UN Doc. CAT/C/52/D/503/2012 (12 June 2014), para 6.5; CAT, General Comment No. 3 Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3 (13 December 2012), paras. 11-14; HRC, General Comment No. 20 (30 September 1992), para 15

[79] CAT, Follow-up on *Aarross v. Morocco* (n 55), 4-6. This case repeatedly has 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.

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

The variables at stake extend to how the State ensures accessible treatment. Cameroon, for example, responded positively to a decision calling for compensation to facilitate rehabilitation of a victim of ill-treatment following the determination of a breach of the ICCPR. The complainant suffered severe physical symptoms of ill-treatment and was diagnosed with post-traumatic stress disorder.[81] Though Cameroon acknowledged the need to cover medical care for the victim and offered an amount substantially lower than that sought by the victim, the State noted that a specific amount was not required by the Committee.[82] The victim sought cover for private services while the State seems to have relied in part on its own public services. This speaks to the fluidity of the developing rule in that it is for States to determine how medical treatment is to be delivered, whether by compensation for private services or by State services. This also is contingent on the service provision available as it will not be the same among States. At this moment, provision of medical rehabilitation remains a demand of the treaty prohibition against torture as there is no bright line test for determining what amounts to adequate rehabilitation that equates to 'the extent possible' demanded by the CAT and the HRC. The coming years will reveal how States come to approach this developing dimension of the prohibition.

4.4 Corporal Punishment as a Form of Cruel, Inhuman or Degrading Treatment

[81] HRC, *Afuson Njaru v. Cameroon*, Communication No. 1353/2005, UN Doc. CCPR/C/89/D/1353/2005 (19 March 2007)
[82] HRC, Follow-up on *Afuson Njaru v. Cameroon*, Communication No. 1353/2005, UN Doc. A/69/40 (Vol. I) (2014), 188

A slightly different angle on the prohibition includes actions that do not amount to torture but do breach human rights in the form of actions amounting to cruel, inhuman or degrading treatment. UNCAT Article 16 prohibits other acts of cruel, inhuman or degrading treatment while lesser forms of prohibited treatment are also included in ICCPR Article 7 and UNCRC Article 37. Of the further dimensions of the prohibition against torture introduced above, the ban on corporal punishment of children is steadily gaining the requisite support to evidence a documented evolution in the prohibition as a rule of customary international law.

It is commonly recognized that the judiciary generally cannot impose corporal punishment on adults or children and the number of states with laws permitting corporal punishment for certain crimes are few.[83] The expansion of the protection outside the judicial or penal system to include a prohibition against corporal punishment against children as a form of cruel, inhuman or degrading treatment gained great momentum in the early 2000s. Both the HRC and the CAT had previously issued opinions citing that corporal punishment violated the prohibition.[84] When the opinions were further reinforced by the Committee on the Rights of the Child (CRC), which oversees the UNCRC, the international interpretation of the treaty prohibition and its extension to corporal punishment was sealed. The CRC issued General Comment No. 8 on the

[83] See generally Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press 2011), chapter 10 'Corporal Punishment'

[84] HRC, General Comment No. 20 (n 41), para 5; CAT, Report of the Committee, UN Doc. A/50/44 (1995), para 169

right of children to be free from corporal punishment in 2006.[85] The comment noted that over 100 States had banned corporal punishment in schools and penal systems and many had also forbidden it in the home, which was the agreed interpretation of the prohibition in this context.[86]

While the prohibition of corporal punishment in schools and detention facilities is widely enforced, a complete ban in the home is less congealed across States outwith Europe. For example, between consideration of the first and second periodic reports of South Africa on compliance with the UNCRC, the State adopted a law prohibiting corporal punishment of children in detention and alternative care settings though it is still permits the practice in the home.[87] Notably, the HRC also addressed the issue of corporal punishment in South Africa in its 2016 concluding observations calling for an absolute prohibition.[88] The dialogue with South Africa suggests that the State's views on corporal punishment in schools was shaped by the treaty bodies and both *opinio juris* and State practice can be derived from its adoption of new laws and the enforcement of the law in line with the rule outlined by the treaty bodies.

Referring to the HRC in 2004, among other foreign judicial systems, the Canadian Supreme Court noted that the corporal punishment in schools

[85] UN Doc. CRC/C/GC/8 (2 March 2007)
[86] ibid paras 4 et seq. provide general background information of the CRC and its role in the promotion of this prohibition as well as some statistics.
[87] Concluding observations on the second periodic report of South Africa, UN Doc. CRC/C/ZAF/CO/2 (27 October 2016), para 35, welcoming the adoption of the South African Children's Act of 2005.
[88] HRC, Concluding observations on the initial report of South Africa, UN Doc. CCPR/C/ZAF/CO/1 (14 April 2016), paras 24-25

triggered a breach of the prohibition against cruel, inhuman or degrading treatment found in ICCPR Article 7.[89] The Court recognised that both international law and other national jurisdictions had acknowledged that corporal punishment as a form of corrective force was prohibited in schools.[90] The examination by the Court in identifying common practice across other jurisdictions and international mechanisms was not unlike that undertaken by the ICJ in its determination of customary international law. These examples provide support for the idea that treaty bodies can influence the development of customary international law from the earliest stages, even if only nominally or in conjunction with other actors. Ultimately, conduct in connection with treaties, including responses to treaty body jurisprudence, contribute to the identification of customary international law, as outlined by ILC draft conclusion 6(2).

The CRC continues to raise the issue of banning corporal punishment in the home and repealing laws that permit 'reasonable chastisement' during its bilateral dialogues with States parties.[91] Picking up issues raised by the CRC, NHRIs are actively promoting State compliance with a full ban and continue to note that even where there are limited bans there has been a failure to promote

[89] *Canadian Foundation for Children, Youth and the Law v. Canada*, 2004 SCC 4, [2004] 1 SCR 76, 30 January 2004, para 33
[90] ibid para 34.
[91] e.g. CRC, Concluding observation on the fifth periodic report of the United Kingdom, UN Doc. CRC/C/GBR/CO/5 (12 July 2016), para. 41; Concluding observations on the first periodic report of South Africa, UN Doc. CRC/C/15/Add.122 (2000), para 28; Concluding observations on the second periodic report of South Africa (n 88) paras 33, 35, and esp. 36.

alternative forms of discipline in line with the suggestions of the CRC.[92] Thus whether directly through a dialogue with the State or through promotion of its jurisprudence by an NHRI or civil society, treaty bodies are impacting the way in which human rights rules are expanding rules of customary international law.

5 Concluding Remarks

The overarching aim of this paper was to deliver an account of the way in which the engagement between States and treaty bodies plays a clear, but often overlooked, role in shaping customary international law. Engagement with the treaty bodies varies wildly among States. This chapter has presented a mere glimpse of the influence of the treaty bodies on the development of customary international law through the incidental behaviour of States in response to treaty body jurisprudence. While it is clear that the core prohibition against torture is undoubtedly recognised in customary international law, the analysis demonstrates that further dimensions of the prohibition reflecting treaty body interpretations are on the horizon.

[92] e.g. Scottish Human Rights Commission, 'Submission to the UN Committee on the Rights of the Child' April 2016, 7-8 <www.scottishhumanrights.com/international/international-treaty-monitoring/the-convention-on-the-rights-of-the-child-crc/> accessed 20 December 2017