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# The Legal Status of Decisions by Human Rights Treaty Bodies in National Law

Rosanne van Alebeek & André Nollkaemper\*

## 1. Introduction

The success of UN human rights treaty monitoring mechanisms depends largely on the influence that the findings of the relevant monitoring body exert on national legal orders.<sup>1</sup> While the practice of these bodies may influence the interpretation and development of treaties in the international legal order, the main rationale of human rights treaty monitoring mechanisms is that they effect the protection of human rights at the domestic level.

Assessment of the success of the UN treaty bodies in this respect varies. As far as norm enforcement is concerned, the opinion of commentators is generally not favourable. As regards the impact of the individual complaints procedure under the ICCPR, Mose and Opsahl wrote in 1981 that ‘[i]n principle it is revolutionary. In practice so far, it has had only limited, nearly negligible effects.’<sup>2</sup> Twelve years later McGoldrick stated that ‘compliance with the HRC’s views by States parties has been disappointing.’<sup>3</sup> A further nine years later, Heyns and

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<sup>1</sup> Cf. C. Heyns & F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002) at 1.

<sup>2</sup> E. Mose and T. Opsahl, ‘The Optional Protocol to the International Covenant on Civil and Political Rights’, *Santa Clara Law Review* 21 (1981) 271–331, at 329–331.

<sup>3</sup> D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) at 202. Cf. also H.J.

Viljoens noted that ‘international enforcement mechanisms used by the treaty bodies appear to have had a very limited demonstrable impact thus far’<sup>4</sup> and in that same year 2002 the Human Rights Committee (HRC) itself said that only roughly thirty per cent of the follow-up replies it receives display a willingness to implement its Views or to offer an appropriate remedy to the victim.<sup>5</sup> A 2010 study of the Open Society Justice Initiative concludes, on the basis of 2009 data of the HRC, that the compliance rate ‘hovers slightly above 12 percent, a low figure by any measure’ and that the implementation record appears to have actually deteriorated over time<sup>6</sup>.

On the other hand, the work of the treaty bodies has influenced the human rights narrative in many countries around the world. The 2004 report of the International Law Association’s (ILA) Committee on International Human Rights Law and Practice on the Impact of the

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Steiner, ‘Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee’, P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* XXXV (Cambridge University Press, 2000) 15–53, at 30 referring to ‘the historically spotty record of compliance’; Remarks by A. Bayefsky, *Proceedings of the 91<sup>st</sup> Annual Meeting Held in Anaheim*, ASIL 91 466–472, at 470: ‘a distressing level of noncompliance with the Committee’s views’. Cf. however J.Th. Möller and A. de Zayas, *United Nations Human Rights Committee Case Law 1977-2008, A Handbook* (Kehl am Rhein: Engel Verlag, 2009) at 7: noting that ‘the degree of State compliance with Human Rights Committee decisions is encouraging’.

<sup>4</sup> Heyns and Viljoen, *The Impact of the United Nations Human Rights Treaties*, *supra* note 1, at 6.

<sup>5</sup> UN GA, 57th Session. *Report of the Human Rights Committee*, 11 July 2002, UN Doc. A/57/19, vol. I, Supp (No. 40), para. 225. In 2009 the HRC estimated that the figure still amounts to roughly 30 per cent; UN GA, 64th session. *Report of the Human Rights Committee*, UN Doc. A/64/40 (Vol. I) Supp. No. 40, paras. 230-236.

<sup>6</sup> Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010) 119-120.

Findings of the United Nations Human Rights Treaty Bodies (ILA Report) concluded that treaty body output had become a relevant interpretative source for many national courts.<sup>7</sup>

In the context of this matter-of-fact account of the implementation of, or reference to, treaty body decisions, a question arises as to the legal status of decisions in national legal orders. The question of the status in national law should be distinguished from the question of bindingness of these decisions – that is a question of their *international* legal status. This contribution approaches the question of legal status from the perspective of national law and more in particular national courts. It is proposed that the extent to which national courts can give legal effect to treaty bodies' decisions largely reflects the legal status of these decisions in the national legal order.

Given our focus on the legal status from the perspective of domestic courts, we examine the question of the legal status of decisions of treaty bodies primarily by examining the reported case-law of national courts in which this question has arisen. This case-law was selected on the basis of the Annual Reports of the treaty bodies, the work of the ILA Commission, review of secondary literature citing such case law, and the cases reported in International Law in Domestic Courts (ILDC). We also used the reporter network of ILDC to get access to cases identified in any of these sources, that were not otherwise accessible. On the basis of this information, we have systematized the national (judicial) practice. We have not attempted to explain the situation in each and every state where the question of national legal status of

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<sup>7</sup> ILA, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (2004) (hereinafter Final Report). Cf. also ILA, Committee on International Human Rights Law and Practice, *Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals* (2002) (hereinafter Interim Report).

decisions of treaty bodies has arisen, but rather systematized them in patterns that allow for generalization.

We will examine the question as to the status of decisions of treaty bodies in national law from two distinct perspectives. The first perspective inquires into the legal status of decisions of treaty bodies in the context of the individual communication procedure within the national legal order of the state against which it is addressed. Section 2 will discuss whether and how Views of treaty bodies acquire legal effect at the national level. It will moreover assess this question from the perspective of international law and it will argue that, while states are not bound by Views, they do have an obligation to allow Views, and interim measures, to take legal effect within their national legal order. The second perspective is a broader one. Treaty bodies are the principal interpreters of the UN human rights treaties. They clarify the normative content of the often broadly phrased rights and obligations in these treaties, or, as Steiner puts it, they confront a treaty's 'ambiguities and indeterminacy, [resolve] conflicts among its principles and rights [and work] out meanings of its grand terms.'<sup>8</sup> Section 3 inquires into the role of treaty body decisions in the interpretation of treaty obligations by national courts, beyond the individual case with which the decision was concerned. Section 4 contains brief conclusions.

## **2. Implementation of Views through national courts**

This section addresses the implementation of Views in respondent states through national court proceedings. Recommended remedies will not always lend themselves to

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<sup>8</sup> Steiner, Individual Claims, *supra* note 3, at 39 (referring specifically to the Views of the HRC). See for interpretation by treaty bodies in general Schlütter, Interpretation Methods, this volume, section ###. Cf. also K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', *Vanderbilt Journal of Transnational Law* 42 (2009) 905–947.

implementation through the courts. But when a treaty body recommends the payment of compensation and the government refuses to comply, individuals may wish to ask for an independent review of the matter by the national courts. In case of the remedy of re-opening of proceedings, the involvement of the national courts in the implementation process may even be indispensable. The inquiry is divided in two parts. The first part gives an overview of the legal status of Views in the national legal orders of states to which they are addressed. After some general remarks concerning implementation (2.1.1.), we will discuss the two main ways by which decisions of treaty bodies can acquire domestic legal effect: special mechanisms facilitating implementation (2.1.2.); and enforcement of Views through national court proceedings (2.1.3.). We conclude with an overview of factors that may hinder or facilitate the granting of legal effect by national courts to decisions of treaty bodies. Implementation through national courts will prove problematic in view of, especially, rule of law requirements. Discussion of influence of the various sources of legitimacy, as these are examined in other chapters of the book of which this chapter is a part, is therefore relatively limited (2.1.4.).

The second part approaches the question of the legal status of Views from an international law perspective. What are the obligations of states under individual communication procedures? The part inquires into three types of obligations: obligations under Views (2.2.1.), obligations under interim measures (2.2.2.), and obligations to give legal effect at the national level to Views and interim measures (2.2.3.). We will conclude that states, while not obliged to implement Views, violate their obligations under individual complaints procedures when they do not ensure that their national courts can pay heed to the outcome of these procedures in possible subsequent domestic proceedings (2.2.4.) The practice identified in the first part of section 2 may be criticised from this international law perspective.

## 2.1 The legal status of Views in national legal orders

### 2.1.1 Overview of implementation patterns

There are currently five monitoring bodies that may consider individual complaints: the Human Rights Committee (HRC), the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), the Committee against Torture (CAT Committee), the Committee on the Elimination of all Forms of Racial Discrimination (CERD Committee) and the Committee on the Rights of Persons with Disabilities (CRPD Committee).<sup>9</sup> Two other bodies will be able to receive and consider individual complaints once the requisite number of states has accepted this competence: the Committee on Economic, Social and Cultural Rights (ICESCR Committee)<sup>10</sup> and the Committee on Migrant Workers (CMW Committee).<sup>11</sup>

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<sup>9</sup> The HRC may consider individual communications relating to state parties to the *First Optional Protocol to the ICCPR*, 999 UNTS 302, entered into force 23 March 1976 (113 states are party to this Protocol); The CEDAW Committee may consider individual communications relating to state parties to the *Optional Protocol to the CEDAW*, 2131 UNTS 83, entered into force 22 December 2000 (ninety-nine states are party to the Protocol). The CAT Committee may consider individual communications relating to state parties who have made the necessary declaration under article 22 of the CAT (sixty-four states have made this declaration); The CERD Committee may consider individual communications relating to state parties who have made the necessary declaration under article 14 of the CERD (fifty-three states have made this declaration); The CRPD Committee may consider individual communications relating to state parties to the *Optional Protocol to the CRPD*, Doc.A/61/611 (CPRD Convention), entered into force 3 May 2008 (fifty-eight states are party to this Protocol).

<sup>10</sup> Once the Optional Protocol to the ICESCR, 993 UNTS 3, enters into force, the ICESCR Committee may consider individual communications relating to state parties to this Protocol (this Protocol will enter into force after ten ratifications. At the moment this Optional Protocol has been signed by thirty-two states and ratified by three states).

Finally, Article 31 of the International Convention on the Protection of All Persons from Enforced Disappearance foresees the establishment of a Committee on Enforced Disappearances (CPED Committee) with a mandate to consider individual complaints once it enters into force.

Four of the five bodies under consideration have issued a total of approximately 600 decisions in which a violation of one of UN human rights treaties was found. The large majority of these decisions come from the HRC that has since 1977 issued 543 Views in which a violation was found<sup>12</sup>, the CAT issued 48,<sup>13</sup> the CEDAW 4,<sup>14</sup> and the CERD 10.<sup>15</sup> Contrary to

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<sup>11</sup> The CMW Convention contains a provision for allowing individual communications to be considered by the CMW Committee; these provisions will become operative when ten state parties have made the necessary declaration under article 77 (at the moment two states have made such a declaration; see: [www2.ohchr.org/english/bodies/cmw/](http://www2.ohchr.org/english/bodies/cmw/)).

<sup>12</sup> The HRC has since 1977 received 1888 communications concerning 83 state parties. The Committee has issued 681 Views, 543 of which found a violation of the ICCPR. 533 communications were declared inadmissible, 264 were discontinued or withdrawn and 410 have not yet been concluded. UN GA, 64th Session. *Report of the Human Rights Committee*, 1 January 2009, UN Doc A/64/40, vol. I, Supp. (No. 40), para. 99.

<sup>13</sup> The CAT Committee has since 1989 received 384 complaints concerning 29 state parties. It issued Views in 158 cases and found violations of the CAT in 48 of them. 59 communications were declared inadmissible, 95 were discontinued, 67 are pending for consideration and 4 were suspended, pending exhaustion of domestic remedies. UN GA, 64th Session. *Report of the Committee against Torture*, 28 September 2009, UN Doc. A/64/44, Supp. (No. 44), para. 79.

<sup>14</sup> The CEDAW has since 2000 issued ten Views, four of which found a violation of the CEDAW, and one found no (direct) violation. Five Communications were declared inadmissible. UN GA, 65th Session. *Report of the Committee on the Elimination of Discrimination against Women*, 1 January 2010, UN Doc. A/65/38, Supp. (No. 38)

<sup>15</sup> The CERD Committee has since 1982 received 45 communications concerning 10 state parties, see the ‘Statistical Survey of Individual Complaints Considered’ on the CERD website: [www2.ohchr.org/english/bodies/cerd/docs/CERDSURVEYArt14.xls](http://www2.ohchr.org/english/bodies/cerd/docs/CERDSURVEYArt14.xls) (last updated in July 2010). The Committee has issued 41 Views, 10 of which found a violation of the CERD. In 9 cases the

the general practice of the European Court of Human Rights,<sup>16</sup> the UN treaty bodies are not confined to declaratory findings of violation and compensation orders but may recommend specific remedies. Recommended remedies include the amendment or repeal of legislation, re-opening of national proceedings, release of prisoners, commutation of a sentence, an investigation to establish the facts, bringing perpetrators to justice, restitution of property, issuance of a passport and re-instatement of a person in civil service. The HRC also occasionally quantifies the amount of compensation that it considers appropriate.<sup>17</sup>

It is difficult, if not impossible, to comprehensively assess the level of compliance with Views of treaty bodies. The dialogue between state parties and treaty bodies in the context of follow-up proceedings offers some insight on this point. The HRC indicated in 2002 that roughly only thirty per cent of follow-up replies were satisfactory, whereas the more recent assessment by the Open Society Justice Initiative, relying on data of the Annual Reports, arrives at the conclusion that the compliance level is only just above 12 per cent.<sup>18</sup> However, even though the victim has a role in the follow-up dialogue, the information in the Annual Reports is inherently subjective and is not systematically verified. Moreover, it is difficult to trace the effect of Views of a treaty body on subsequent national proceedings or events. For

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Committee provided suggestions or recommendations even though no violation was found. 17 communications were declared inadmissible and 4 communications are still under consideration.

<sup>16</sup> See for the limited exceptions D.J. Harris *et al.*, *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 2<sup>nd</sup> ed. (Oxford University Press, 2009) at 862–863.

<sup>17</sup> E.g. HRC, *Laptsevich v. Belarus*, Communication No. 780/1997, 13 April 2000, UN Doc. CCPR/C/68, para. 10; HRC, *Aarela et al. v. Finland*, Communication No. 779/1997, 24 October 2001, UN Doc. CCPR/C/73/D/779/1990, para. 4.16.

<sup>18</sup> UN GA, Report of the Human Rights Committee, *supra* note 5; Open Society Justice Initiative, *supra* note 6.

instance, after *Gutierrez Vivanco v. Peru*<sup>19</sup> in which the HRC found a violation of articles 14 (1) and (3) (c) of the ICCPR and noted that the state party has the obligation to provide an effective remedy, including compensation, to Mr. José Luis Gutiérrez Vivanco, the state party informed the Committee that by resolution dated 24 December 1998, he was pardoned, and thus all warrants of arrest against him had been cancelled and all criminal records arising from this process had been deleted.<sup>20</sup> There is nothing on record indicating what was the role, if any, of the Views of the HRC, even though the outcome is on this point<sup>21</sup> in conformity with the remedy ordered by the HRC.

If the estimate of the HRC is not too far off, roughly seventy per cent of Views are not implemented. This begs a question as to the legal position of successful authors in national legal orders: can they ask the national courts to reconsider their case on the basis of the treaty body decisions when implementation of that decision is not forthcoming? Some states have introduced enabling legislation to ensure (a degree of) domestic legal effect (2.1.2). When the legal effect of Views is not regulated in national legislation it is up to the national courts to ascertain their legal status in the national legal order (2.1.3 and 2.1.4)

### *2.1.2. Enabling legislation*

A limited number of states have established special procedures or enabling legislation to empower, or oblige, state organs to grant effect to the decisions of treaty bodies on individual

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<sup>19</sup> HRC, *Gutierrez Vivanco v. Peru*, Communication No. 678/1996, 26 March 2002, UN Doc. CCPR/C/74/D/678/1996.

<sup>20</sup> UN GA, 57th Session. *Report of the Human Rights Committee*, 1 January 2002, UN Doc. A/57/40 vol. II Supp. (No. 40).

<sup>21</sup> See for the issue of compensation, HRC, *Gutierrez Vivanco v. Peru*, *supra* note 19, at para. 9.

complaints. Enabling legislation has obvious advantages from the policy perspective of effective implementation of Views. The HRC has drawn attention to the issue of enabling legislation, presumably on the basis of its potential impact on implementation.<sup>22</sup>

The existence of a legally regulated procedure does not necessarily mean that Views are given legal effect. The enabling legislation of the Czech Republic, for instance, has provided by law that the Minister of Justice will coordinate the implementation of HRC Views. It does not explicitly grant its courts any role in the enforcement of Views.<sup>23</sup> In still other cases, it has been reported that procedures have been put in place, but this does not seem to be regulated by law. In Tajikistan, a Governmental Commission reviews the consequences and need for implementation arising out of Views of the HRC.<sup>24</sup> The Republic of Korea informed the HRC

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<sup>22</sup> For instance HRC, General Comment No. 33, 5 November 2008, UN Doc. CCPR/C/GC/33, para. 20. See also M.G. Schmidt, 'Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond', A.F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (The Hague: Kluwer Law International, 2000) 233–249, at 243 (noting that states parties should be encouraged to enact enabling legislation pursuant to which decisions of UN treaty bodies are given legal force); Möller & De Zayas, *United Nations Human Rights Committee Case Law*, *supra* note 3, at 518–519.

<sup>23</sup> ILA, Final Report, *supra* note 7, footnote 32 (referring to Act No. 517/2002 Coll. of Laws on Some Measures in the System of Central State Organs). Notably the Czech Constitution provides that the Constitutional Court has to decide on the measures necessary to implement *binding* decisions of international courts if it cannot be implemented otherwise, see ILA, Final Report, *supra* note 7, para. 39 (referring to Constitution of the Czech Republic of 16 December 1992, as amended, Coll of Laws No. 1/1993, article 87(1)(i). Attempts to change this provision to include other international bodies, like the HRC, failed: e.g. Governmental Draft of the Amendment to the Act on the Constitutional Court, 2003, Parliamentary Doc. No. 284, [www.psp.cz/sqw/historie.sqw?O=4&T=284](http://www.psp.cz/sqw/historie.sqw?O=4&T=284)).

<sup>24</sup> See e.g. HRC, *Kurbanov v. Tajikistan*, Communication No. 1208/2003, 16 March 2003, UN Doc. CCPR/C/79/D/1096/2002.

in 2009 that a task force relating to the implementation of individual communications was set up, but there is no evidence that this has indeed happened.<sup>25</sup>

However, in some states enabling legislation may allow national courts to play a role (albeit limited). A prominent example is Colombia.<sup>26</sup> Law 288/96 provides a procedure for implementation of the HRC's Views (as well as decisions of the Inter-American Commission on Human Rights).<sup>27</sup> If the HRC has concluded that Colombia has acted in contravention of its obligations under the ICCPR and has ordered payment of compensation, a committee comprised of the Ministers of Interior; Foreign Affairs, Justice and Law; and National Defense 'shall render opinion favorable to compliance with the decision of the international human rights body in all cases that meet the factual and legal requirements provided in the Constitution and the applicable international treaties' (Committee of Ministers). For the purpose of rendering that opinion, the Committee of Ministers shall consider, among other elements, 'the evidence gathered and the rulings issued in the domestic judicial and administrative disciplinary proceedings, and in the proceedings before the relevant international body.'<sup>28</sup>

When the Committee of Ministers considers that the requirements of the preceding paragraph are not met, it shall communicate this to the government. The law suggests that the

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<sup>25</sup> UN GA, HRCouncil, 13<sup>th</sup> Session. *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, 22 December 2009, UN Doc. A/HRC/13/29, para. 42. No further information on the status of this procedure could be obtained.

<sup>26</sup> Information provided by R. Uruena, Centre of Excellence in Global Governance Research, University of Helsinki.

<sup>27</sup> El Congreso de Colombia, La Ley 288 de 1996, (julio 5) Diario Oficial No. 42.826, de 9 de Julio de 1996, [www.secretariassenado.gov.co/senado/basedoc/ley/1996/ley\\_0288\\_1996.html](http://www.secretariassenado.gov.co/senado/basedoc/ley/1996/ley_0288_1996.html) (in Spanish).

<sup>28</sup> La Ley 288 de 1996, *ibid.* at article 2, para. 1.

government then should file a complaint or appeal against the decision before the competent international body, if available. If the treaty does not provide for an appeal, or if the time frame to file it has expired, the Committee shall issue an opinion favorable to compliance with the international body's decision.<sup>29</sup>

If the Committee of Ministers has adopted a favourable opinion, Law 288/1996 foresees a settlement procedure in order to determine the amount of damages. This settlement must be approved in a summary proceeding by a single Justice of the Administrative Court. The judge will approve the settlement unless this is detrimental to the patrimonial interest of the state or is null and void.<sup>30</sup>

If the settlement is rejected, a new agreement is to be drafted or, alternatively, the interested parties may go before the administrative tribunal with jurisdiction over the matter to file a motion for the calculation of injuries. This latter option is also available if no agreement is reached by the parties.<sup>31</sup>

The significance of this enabling legislation can be illustrated by a comparison of a case that preceded the adoption of the law and a case that postdates it. In *Bautista de Arellana v. Colombia*,<sup>32</sup> the HRC found violations of articles 6 and 7 of the ICCPR and ordered the remedy of compensation to the family. At that time, Law 288/96 had not been passed and national courts played no role in the enforcement of the Views. The plaintiffs initiated a

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<sup>29</sup> La Ley 288 de 1996, *supra* note 27, at article 2, para. 2.

<sup>30</sup> La Ley 288 de 1996, *supra* note 27, at article 7.

<sup>31</sup> La Ley 288 de 1996, *supra* note 27, at article 11.

<sup>32</sup> HRC, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, 27 October 1995, UN Doc. CCPR/C/55/D/199, para. 10.

variety of procedures relating to these facts, but in none of them was the HRC decision relevant. This can be contrasted with the follow-up of *Arhuaco v. Colombia*, in which the HRC found Colombia responsible for the disappearance and death of Luis Napoleón Torres Crespo, Ángel María Torres Arroyo and Antonio Hugues Chaparro Torres.<sup>33</sup> Moreover, it found a violation of the prohibition of torture and arbitrary detention in the acts against José Vicente and Amado Villafañe.<sup>34</sup> The Committee of Ministers applied the standards established by Law 288/96 concluded that the Villafañe brothers' case did fulfill the requirements therein established, and gave an opinion favorable to compliance in that case.<sup>35</sup> In the case of the Villafañe brothers, no settlement could be reached, and the case has been submitted to the courts in conformity with article 11 of Law 288/96.

In the event of a non-favorable view of the Committee of Ministers, the case of the individual may still proceed to the administrative courts that will entertain the claim without prejudice,<sup>36</sup> as will be illustrated in section 2.1.2. below.

In Slovakia, legislation ensuring the domestic legal effect of Views was enacted in 2000.<sup>37</sup> The legislation obliged the government to submit a case in which the HRC found against

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<sup>33</sup> HRC, *Arhuaco v. Colombia*, Communication No. 612/1995, 14 March 1996, UN Doc. CCPR/C/56/D/612/1995, para. 5.2.

<sup>34</sup> *Ibid.*

<sup>35</sup> In Resolution 02 of 1997 it gave a non – favorable opinion in the cases of Luis Napoleón Torres Crespo, Angel María Torres Arroyo y Antonio Hughes Chaparro Torres.

<sup>36</sup> Heyns and Viljoen, *The Impact of the United Nations Human Rights Treaties*, *supra* note 1, at 188 (fn 103).

<sup>37</sup> See ILA, Final Report, *supra* note 7, at para. 40 (referring to the Amendment to Act No. 38/1993 Coll. on the Constitutional Court of the Slovak Republic, Act No. 226/2000 Coll. para. 75).

Slovakia to the Constitutional Court. Just two years later, the legislation was repealed again,<sup>38</sup> because, as the ILA Report states, the procedure ‘was viewed as possibly leading to a breach of the principle of *res judicata*.’<sup>39</sup>

Some states have enacted legislation to ensure implementation of the remedy of re-opening criminal proceedings after a treaty body finding of a covenant violation. While most states that do provide for revision in relation to a finding by international institutions appear to limit this possibility to binding decisions of international courts,<sup>40</sup> some states have explicitly allowed for revision after a non-binding finding of a treaty body as well.

In Norway,<sup>41</sup> a case may be reopened when an international court or the UN Human Rights Committee<sup>42</sup> has found in a case against Norway that; (1) the decision conflicts with a rule of international law that is binding on Norway and it must be assumed that a new hearing should lead to a different decision; (2) or the procedure on which the decision is based conflicts with

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<sup>38</sup> *Ibid*, (referring to the Amendment to Act No 38/1993 Coll of Laws, Act No 124/2002 Coll., entered into force on 20 March 2002).

<sup>39</sup> ILA, *ibid*.

<sup>40</sup> Cf. The Netherlands, article 457.3 Code of Criminal Procedure (Wetboek van Strafvordering) is limited to judgments of the ECtHR primarily because these judgments are binding while for example Views of the HRC are not: TK 2000–2001, 27 726, nr. 3 11, MvT 11–12; Cf. also the information on the Czech Republic, *supra* note 23. See also H Keller and A Stone Sweet, *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008) 704-705 (stating that ‘it is now commonplace for States to allow the reopening of national criminal proceedings after a non-favourable judgment from Strasbourg’).

<sup>41</sup> Information provided by R. Nordeide.

<sup>42</sup> The law is restricted to 'international courts' and the 'UN Human Rights Committee'. It transpires from the *travaux* that suggestions to include also other UN bodies, such as the CAT Committee and the CERD Committee were rejected because of lack of experience with these bodies. Views by such other international bodies may lead to re-opening under the conditions set out in Section 392. These conditions are, however, much stricter.

a rule of international law that is binding on Norway if there is reason to assume that the procedural error may have influenced the substance of the decision, and a reopening of the case is necessary in order to remedy the harm that the error has caused.<sup>43</sup>

The Polish<sup>44</sup> code of criminal procedure stipulates that proceedings ‘shall be re-opened for the benefit of the accused if such a need results from a ruling of an international organ which operates on the basis of an international treaty ratified by the Republic of Poland.’<sup>45</sup> The reference to ‘ruling of an international organ’ appears to cover the Views of all treaty bodies.<sup>46</sup> So far there has been no case re-opened in Poland after Views were issued by a treaty body; the handful of examples of re-opening on the basis of this provision all concerned judgments of the ECtHR.

In Hungary,<sup>47</sup> paragraph 416 of the Code of Criminal Procedure provides that one of the possible reasons for initiating a review at the Supreme Court is that ‘a human rights body established by an international treaty confirmed that the way the procedure was conducted or

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<sup>43</sup> Section 391(2) of the Norwegian Criminal Procedure Act of 22 May 1981 No. 25. The provisions on re-opening of criminal proceedings in the Criminal Procedure Act were amended in 2001 (by law of 15 June 2001 No. 63) to, *inter alia*, include HRC Views in individual cases. The amendments entered into force 1 January 2004. Positions taken by the HRC in periodic reviews are not covered by Section 391(2), as can be inferred from the words in ‘cases’ against Norway.

<sup>44</sup> Information provided by M. Balcerzak and M. Górski.

<sup>45</sup> Article 540, para. 3 of the 1997 Code of Criminal Procedure, Journal of Laws (Dziennik Ustaw) 1997, no. 89, pos. 555, as amended. Alternative translation of para. 3: ‘The proceedings shall be resumed where it is to the benefit of the accused, where such need results from the decision of international body acting on grounds of international agreement ratified by the Republic of Poland.’

<sup>46</sup> One of the commentaries (by J. Grajewski) expressly refers to the HRC: ‘Podstawą do wznowienia postępowania w trybie art. 540 § 3 może być też orzeczenie Komitetu Praw Człowieka ONZ’ (‘the basis of the resumption under Article 540, para. 3 may also be the decision of the UN Human Rights Committee’).

<sup>47</sup> Information provided by Z. Deen-Racsmany, E. Kirs and S. Sándor.

the judgment of the court violated a provision of the international treaty promulgated by an act, provided that the Republic of Hungary accepted the authority of the international human rights body.’<sup>48</sup> In contrast to the situation in Norway, this procedure would appear to be open in respect of all human rights bodies. However, all reported decisions have related to judgments of the ECtHR.

### *2.1.3. Implementation through national court proceedings*

In the absence of specific legislation, individuals who seek to enforce a decision of a human rights treaty body may be forced to attempt to fit their case in generally available national remedies and procedures. The possibilities to do so successfully differ widely between states.

Several cases have been reported from which it can be concluded that, also in the absence of enabling legislation or outside the scope of such legislation where it did exist, courts may be able to implement decisions of treaty bodies. In such cases, national law does allow such decisions to take legal effect domestically.

Reading the Follow-up Progress Report of the Human Rights Committee on Individual Communications of 2009, it indeed becomes clear that the role attributed to national courts in the implementation of Views, also when no enabling legislation has been adopted, is not

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<sup>48</sup> Act XIX of 1998, adopted on March 10, 1998. An exception from this possibility is if the decision of the human rights body related to the unreasonable length of the procedure; Article 416(3)(1) Hungarian Code of Criminal Procedure. Decisions of human rights bodies are not mentioned in the relevant provisions on the procedure of review (articles 270–275) of the Code of Civil Procedure (Act III of 1952).

insignificant.<sup>49</sup> Of the nine countries under consideration in that report, seven refer to their national courts in their follow-up reply. In four cases the follow-up reply seems to indicate that national courts are able to give effect to decisions of treaty bodies.

A few examples may illustrate the possibilities that exist under national law. In Finland,<sup>50</sup> a finding by the HRC is not considered as legally binding. Nonetheless, it appears that a finding of the HRC that the state acted in contravention of its obligations under the ICCPR can be accepted as a basis of liability. In *Vuolanne v. Finland*<sup>51</sup> and *Torres v. Finland*<sup>52</sup> the Committee was of the view that article 9(4) of the ICCPR was violated because the authors were unable to challenge their detention before a court. Both authors sought compensation from the state through the Finnish courts.<sup>53</sup> Vuolanne instigated a civil claim that was rejected by the court of first instance but accepted by the Helsinki Court of Appeal. Torres took a different route, instigating a procedure for administrative disputes, and was eventually granted compensation by the Supreme Administrative Court.<sup>54</sup> The decision of the Court of Appeal in *Vuolanne* was quashed by the Supreme Court in an appeal brought by the state because the claim should have been brought in the administrative courts instead. On the basis of this

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<sup>49</sup> HRC, Follow-up Progress Report of the Human Rights Committee on Individual Communications (299), 17 February 2009, UN Doc. CCPR/C/95/4.

<sup>50</sup> Information provided by M. Brummer.

<sup>51</sup> HRC, *Antti Vuolanne v. Finland*, Communication No. 265/1987, 2 May 1989, UN Doc. CCPR/C/35/D/265/1987.

<sup>52</sup> HRC, *R.A.V.N. et al. [names deleted] v. Argentina*, Communication No. 291/1988, 5 April 1990, UN Doc. CCPR/C/38/D/291/1988.

<sup>53</sup> It is to be added that the ICCPR has been implemented in Finland by Law 107/1976.

<sup>54</sup> HRC, *Torres v. Finland*, Communication No. 291/1988, 2 April 1990, UN Doc. CCPR/C/38/D/291/1988.

jurisprudence it is now established that, under Finnish law, a finding of a violation of the ICCPR in a HRC decision may create an obligation for the state to pay compensation.<sup>55</sup>

The follow-up reply to *Kalamiotis v. Greece*<sup>56</sup> suggests that the situation in Greece is somewhat comparable. The HRC found that there had been a case of torture, or cruel, inhuman or degrading treatment and punishment. It ordered Greece to provide an effective remedy and appropriate reparation. In its follow-up reply Greece informed the HRC that the author may institute an action for compensation under article 105 of the Introductory Law to the Civil Code (ILCC) for damages suffered due to his ill-treatment. According to article 105, '[t]he State shall be liable for compensation for illegal acts or omissions of organs of the State in the exercise of the public power entrusted to them, unless such acts or omissions violated a provision of general interest'. This suggests that the only question to be considered by the courts with respect to such a claim would be the amount of compensation to be paid. Apparently, the court would not revisit the question as to whether there was a violation of the ICCPR in the first place. This statement may be supported by the fact that the Special Supreme Court and the Supreme Administrative Court of Greece have held that the state is strictly liable under article 105 of the ILCC for adopting laws that result in violations of the Constitution or treaties (which under article 28(1) of the Greek Constitution outrank ordinary laws).<sup>57</sup> It may be argued that the victim of an ICCPR violation, as determined by the HRC, may bring a claim against the state under article 105 of the ILCC for failure to comply with that decision, since Views are an authoritative determination of such a violation and as such

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<sup>55</sup> Cf. also Heyns and Viljoen, *The Impact of the United Nations Human Rights Treaties*, *supra* note 1, at 288.

<sup>56</sup> HRC, *Kalamiotis v. Greece*, Communication No. 1486/2006, 5 August 2008, UN Doc. CCPR/C/93/D/1486/2006.

<sup>57</sup> Greece, Special Supreme Court, Case Nos AED 13/2006; AED 17/2006; StE 909/2007.

lead to this provision's application. Whether this indeed means that an individual can bring a successful claim for compensation is somewhat uncertain, however. No case law could be found that has affirmed this possibility.

A peculiar example of implementation through domestic courts is provided by the national proceedings following the decision of the CAT Committee in *Ristić v. Yugoslavia*.<sup>58</sup> The CAT Committee had found a violation of articles 12 and 13 of the CAT due to a failure to investigate allegations of torture and severe police brutality. As a remedy it ordered specific performance – effective investigation and publication of the decision – and no damages. When investigation was still not forthcoming, the author launched a case in the civil courts. The Supreme Court endorsed the CAT Committee's decision, but since civil courts cannot order investigation or publication, it decided to 'substitute the international remedy of specific performance with the national remedy of reparation'.<sup>59</sup> Interestingly, the Court relied on the remedial structures found in articles 12, 14 and 22 of the CAT to establish jurisdiction over the matter.

In *M.G. v. Germany*,<sup>60</sup> the HRC found a violation by Germany of article 17 in conjunction with article 14 of the ICCPR and ordered a remedy that included compensation. In 2009 Germany informed the Special Rapporteur on Follow-Up Procedures that the author had not filed a claim for compensation with the federal government, suggesting that in principle such a claim may be possible. Indeed, it seems that generally, a claim for compensation could be

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<sup>58</sup> CAT Committee, *Radivoje Ristic v. Yugoslavia*, Communication No. 113/1998, 11 May 2001, UN Doc. CAT/C/26/D/113 1998.

<sup>59</sup> Discussed in S. Djajic, 'Victims and Promise of Remedies: International Law Fairytale Gone Bad', *San Diego International Law Journal* 9 (2008) 329–366, at 354–355.

<sup>60</sup> HRC, *M.G. v. Germany*, Communication No. 1482/2006, 2 September 2008, UN Doc. CCPR/C/93/D/1482/2006, paras. 11–12.

adjudged by the German courts based on § 839 of the Civil Code (BGB) in conjunction with article 34 of the Basic Law. These rules provide for liability of the state for wrongful decisions of civil servants (which includes judges). However, § 839, paragraph 2 of the BGB has an exception for wrongful decisions of the judiciary, and it would depend on the case at hand whether the wrongful act was committed by the courts or other branches of government.<sup>61</sup>

In some of the above situations, for instance Finland, the ability of courts to give effect to Views of the HRC seems to depend in large part on the fact that the underlying obligations that were determined to be violated were part of national (constitutional) law. The courts that adjudicate possible violations of such national provisions can in that process attach a certain weight to decisions of human rights bodies.

This appears also to be the situation in Colombia. Outside the settlement proceedings provided for in Law 288/96,<sup>62</sup> several victims have petitioned the Constitutional Court to have their fundamental rights under constitutional law protected. That procedure does not seem to be excluded by the existence of enabling legislation provided in Law 288/96. In *Jimenez Vaca v. Colombia*,<sup>63</sup> the HRC found a violation of the right to security of the person not deprived of their liberty and recommended a remedy including payment of compensation. The Committee of Ministers set up by Law 288/96 delivered a non-favorable opinion. The applicants then turned to the courts. The Court of Appeals<sup>64</sup> noted that Colombia had

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<sup>61</sup> Information provided by H. Aust.

<sup>62</sup> See section 2.1.2. *supra*.

<sup>63</sup> HRC, *Luis Asdrúbal Jiménez Vaca v. Colombia*, Communication No. 859/1999, 25 March 2002, UN Doc. CCPR/C/74/D/859/1999, paras. 8–9.

<sup>64</sup> Colombia, Supreme Court of Justice, Appeal Decision of 26 January 2004.

requested ‘reconsideration’ before the HRC, as provided for in Law 288/96, and that the claim was consequently denied on the basis that no final decision had been taken by the HRC, and thus no violation of rights existed, as no duty existed yet on behalf of the Colombian state. The case was then brought to the Constitutional Court. In its decision on revision,<sup>65</sup> the Constitutional Court gave importance to neither the non-favorable opinion of the Committee of Ministers nor the ‘reconsideration’ submission. It treaded carefully, and stopped short of expressing an opinion on whether HRC Views are binding. Rather, it argued that the Views ‘call to attention situations in which not only human rights as protected by the international instrument are endangered, but also constitutional fundamental rights guaranteed by our Constitution’.<sup>66</sup> The Court put forward a three-part standard: (a) HRC Views need to be ‘observed and executed’ in good faith by the state; (b) the Constitutional Court lacks jurisdiction to either verify or order compliance with HRC Views; and (c) yet, the Court does have jurisdiction to adjudicate on the ‘underlying facts’ that motivated the HRC’s Views – that is, on whether the author’s fundamental rights under Colombian law were indeed affected. The Court then applied the last part of this test and found that no violation occurred. The claim was therefore denied.

As to remedies that require revision of judgments or retrial, in principle existing legislation may be applicable. After *Polay Campos v. Peru*,<sup>67</sup> in respect of the HRC’s findings that Mr. Polay Compas be retried in compliance with the requirements of fair trial, Peru informed the

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<sup>65</sup> Colombia, Constitutional Court, Revision Decision of 12 March 2003 (T-335/05).

<sup>66</sup> *Ibid.* at 3.3.

<sup>67</sup> HRC, *Polay Campos v. Peru*, Communication No. 577/1994, 6 November 1997, UN Doc. CCPR/C/61/D/577/1994.

HRC that a sentence could be reviewed by the extraordinary appeal measure of revision foreseen in article 361 of the Code of Criminal Procedure.<sup>68</sup>

However, such legislation generally does not consider decisions of treaty bodies as new facts and, without enabling legislation, such decisions are unlikely to result in a decision to revise judgments.<sup>69</sup> The following section evidences that it is not uncommon for national courts to feel unable to accord legal effect to decisions of treaty bodies.

#### *2.1.4. Obstacles*

In this section we will examine the possible reasons for the (lack of) implementation of Views through national court proceedings.

##### *2.1.4.1. International legal status of Views*

A review of the follow-up procedure suggests that the general perception of states that Views do not impose legal obligations on them has a substantial impact on decisions not to implement a particular decision. In the course of the follow-up dialogue with the treaty bodies states regularly dispute the findings of the body. In some cases a refusal to implement a decision is expressly justified by the fact that the Views in question are not legally binding on the state in question. In its follow-up reply to *Gridin v. Russian Federation*, Russia for example argued ‘that it is well established that the Committee is not a court and that its views are recommendatory. Such views are highly authoritative for the State party’s authorities, and

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<sup>68</sup> UN GA, 53th Session. *Report of the Human Rights Committee*, 15 September 1998, UN Doc. A/53/40 vol. I, Supp. (No. 40), para. 498. No information available as to whether this was used.

<sup>69</sup> See further section 2.1.4.1. *infra*.

they are taken very seriously; thus the State party conducted a second review of this case. However, the State party's conclusions in this matter remain the same.<sup>70</sup> Even states that have proved generally respectful of the work of treaty bodies do at times insist on their discretion to either implement or reject the outcome of individual communication procedures. The Netherlands, for example, when ratifying the First Optional Protocol to the ICCPR expressed its expectation that all parties to a communication procedure would follow the decision of the HRC.<sup>71</sup> This does not mean, however, that the Netherlands necessarily accepts the authority of the HRC to determine its legal obligations. After the HRC found in *van Alphen v. The Netherlands* that Mr. van Alphen had been subjected to arbitrary detention in violation of article 9 of the ICCPR<sup>72</sup>, the Netherlands responded that it did not share the HRC's Views but that it would make an *ex gratia* payment to the author 'out of respect for the Committee.'<sup>73</sup> This attitude is necessarily based on the assumption that Views of the HRC are themselves not legally binding for the state concerned, and that the state retains the right to review and if necessary deviate from the HRC's findings.

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<sup>70</sup> HRC, *Gridin v. Russian Federation*, Communication No. 770/1997, 20 July 2000, UN Doc. CCPR/C/69/D/770/1997, see for Russia's follow-up reply UN GA, 60th Session. *Report of the Human Rights Committee*, 3 October 2005, UN Doc. A/60/40 vol. II, Supp. (No. 40), 521–522. In the follow-up to CAT Committee, *Bachan Singh Sogi*, Communication No. 297/2006, 16 November 2007, UN Doc. CAT/C/39/D/297/2006, in which the CAT Committee requested Canada to make reparation for the breach of article 3 of the CAT, Canada informed the CAT Committee that it was not in a position to implement the Committee's Views as it did not consider the Committee's Views to be legally binding and was of the view that it had fulfilled all of its international obligations. It also disputed the findings on the merits: UN GA, Report of the Committee against Torture, *supra* note 13, at 149-153.

<sup>71</sup> Official Papers of the Parliament of the Netherlands, TK 1975-1976, 13 932 (R 1037), no. 3, at 39.

<sup>72</sup> HRC, *Van Alphen v. The Netherlands*, Communication No. 305/1988, 23 July 1990, UN Doc. CCPR/C/39/D/305/1988.

<sup>73</sup> UN GA, 46th Session. *Report of the Human Rights Committee*, 10 October 1991, UN Doc. A/46/40 vol. II, Supp. (No. 40).

While compliance is much better as far as interim measures are concerned,<sup>74</sup> states equally do not regard these measures as binding. Austria, for example, justified its defiance of the HRC interim measure in *Weiss v. Austria* arguing that there is no obligation to provide for direct effect of interim measures within the national legal order. It also underlined that an interim request is not binding and cannot override contrary international legal obligations under an extradition treaty for example.<sup>75</sup>

In brief, states see Views and interim measures as recommendations that do not impose legal obligations on them. At best, they acknowledge that their acceptance of the individual communication procedure entails an obligation to review their position, or, as Iceland recently put it to the HRC, ‘to address the conclusions of the Committee’.<sup>76</sup>

In the context of the question of state compliance with Views, some authors have downplayed the relevance the non-bindingness of Views. Steiner observed that ‘[t]he problem stems less

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<sup>74</sup> Cf. in regard to the HRC interim measures: Möller & De Zayas, United Nations Human Rights Committee Case Law, *supra* note 3, at 24: ‘States parties have honoured the rule 92(86) requests in the overwhelming majority of cases.’.

<sup>75</sup> HRC, *Weiss v. Austria*, Communication No. 1086/2002, 24 May 2002, UN Doc. CCPR/C/77/D/1086/2002, paras. 5.2–5.3; also see the follow-up to HRC, *Ahani v. Canada*, Communication No. 1051/2002, 15 June 2004, UN Doc. CCPR/C/80/D/1051/2002: UN GA, Report of the Human Rights Committee, *supra* note 70, at 499; the Australian Joint Standing Committee on Treaties in its Report on the Optional Protocol to the Disabilities Convention also qualified the interim measures of the CRPD as non-binding, available at [www.aph.gov.au/house/committee/jsct/3december2008/report/chapter2.pdf](http://www.aph.gov.au/house/committee/jsct/3december2008/report/chapter2.pdf), at para. 2.9 (last accessed 27 January 2011).

<sup>76</sup> Letter from the Government of Iceland Concerning the Views adopted by the Human Rights Committee on 24 October 2007 Concerning Communication No. 1306/2004, available at <http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/9306>, para. II (last accessed 27 January 2011).

from uncertainty over the formal effect of the views than from unyielding attitudes of the recalcitrant states, the gross and systematic violators.’<sup>77</sup>

Leaving aside the impact of this factor on decisions of (non-)compliance by states, the (perception of the) international legal status of decisions clearly influences the implementation of Views through national court proceedings.<sup>78</sup>

In a substantial number of cases courts expressly explained or justified their decision not to grant effect to a particular decision by considering that such decisions were not legally binding. For example, after the HRC in *Jong-Kyu Sohn v. Republic of Korea*<sup>79</sup> held that the author was entitled to compensation for violation of his right to freedom of expression, the lawsuit to enforce those Views in the national court system was unsuccessful. The Supreme Court ‘found that the State had no obligation to provide compensation to the author, under the State Compensation Act, with regard to the lawsuit which he had filed against the government based on the Committee’s Views, as the Views are not legally binding and there is no

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<sup>77</sup> Steiner, Individual Claims, *supra* note 3, at 30. Cf. also M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2<sup>nd</sup> ed. (Kehl am Rhein: Engel Verlag, 2005) at 894. Cf. differently Schmidt, Follow-Up Mechanisms, *supra* note 22, at 233: ‘One, if not, *the*, major lacuna of UN individual complaints procedures in the field of human rights remains the absence of binding and thus legally enforceable decisions.’ Note that the lack of binding nature does not necessarily imply the lack of legal enforceability. Cf. in this sense also M. wa Mutua, ‘Looking Past the Human Rights Committee: An Argument for De-marginalizing Enforcement’, *Buffalo Human Rights Law Review* 4 (1998) 211-260.

<sup>78</sup> While in Section 2.2 we explain that arguably Views and interim measures may in fact give rise to certain legal obligations, national courts generally do not proceed from that position.

<sup>79</sup> HRC, *Jong-Kyu Sohn v. Republic of Korea*, Communication No. 518/1992, 19 July 1995, UN Doc. CCPR/C/54/D/518/1992, para. 12.

evidence that public officials inflicted damage on the author intentionally or negligently in the course of the investigation or trial.’<sup>80</sup>

The Irish case *Kavanagh* provides another example. In 2001 the Human Rights Committee found a violation of article 26 of the ICCPR because Ireland failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds.<sup>81</sup> With the Views of the HRC in his hands Mr. Kavanagh sought to have his case re-opened at the national level. The case eventually came before the Supreme Court, which dismissed the appeal holding that ‘[t]he notion that the ‘views’ of a Committee even of admittedly distinguished experts on international human rights experts (*sic*), though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is patently unacceptable.’<sup>82</sup>

The problem that results from the decisions not being binding (or this perception) is not just that courts (or other organs) do not consider themselves legally obliged to give effect to such decisions, but also that often they will consider themselves unable to give such effect. As long as Views cannot be seen as generating rights for individuals, or obligations for states, national courts face the problem that, even if in principle they may be willing to give effect to decisions of treaty bodies, such decisions may conflict with binding national law and binding

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<sup>80</sup> UN GA, 62<sup>nd</sup> Session. *Report of the Human Rights Committee*, 1 January 2007, UN Doc. A/62/40 (vol II), Supp. (No. 40).

<sup>81</sup> HRC, *Mr. Joseph Kavanagh v. Ireland*, Communication No. 819/1998, 4 April 2001, UN Doc. CCPR/C/76/D/1114/2002/Rev.1.

<sup>82</sup> Ireland, Supreme Court, *Kavanagh v. Governor of Mountjoy Prison*, 1 March 2002, [2002] IESC 13 (2002), ILDC 488 (IE 2002), 132 *ILR* 380, judgment delivered by Fennelly J.

national court decisions.<sup>83</sup> While the *Kavanagh* court only hinted at this problem, other courts have been more explicit. Thus, when the HRC issued a request for the suspension of extradition of the author in *Weiss v. Austria*, the Austrian Minister of Justice ordered the Vienna Public Prosecutor's Office to file a request for suspension of extradition with the Vienna Regional Criminal Court. The Court refused. It held that interim measures of the HRC 'may neither invalidate judicial orders nor restrict the jurisdiction of an independent domestic court.'<sup>84</sup>

In Austria's report to the HRC in 1988, Austria stated that it regarded 'the Committee's views on communications from individuals, as in the *Pauger* case, as non-binding opinions, and did not think its obligations under the Covenant extended to acting in accordance with those views. It did believe that such views should be taken duly into account. However, the legal problem in the *Pauger* case had been considered by the Constitutional Court, which had held in a judgment deemed to be binding, that there had been no violation of the principle of equal treatment before the law. Mr. Pauger had not accepted that judgment and had submitted a Communication to the HRC, which had taken a decision exactly opposite to that of the

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<sup>83</sup> This only may be different when national implementation mechanisms allow for domestic effect, irrespective of their international legal nature (as discussed above); see also A. de Zayas, 'Petitioning the United Nations', *Proceedings of the 95<sup>th</sup> Annual Meeting of the ASIL* (Washington: ASIL, 2001) 82–87, at 86 (noting that '[t]he main obstacle to implementation is not the unwillingness of state parties to cooperate but the lack of a mechanism in domestic law to receive and implement decisions emanating from a foreign entity').

<sup>84</sup> See HRC, *Weiss v. Austria*, *supra* note 75, at para. 5.2. In addition, the state noted in para. 5.3 that non-binding interim measures 'cannot override a contrary obligation of international law, that is, an obligation under the extradition treaty'. The juxtaposition of the non-binding interim measure with the binding treaty obligation does not convince: there is possibly a clash of two binding treaty obligations and the extradition treaty does not pose an obstacle to the attaching of weight to the findings of the HRC in the interim measure.

Constitutional Court. In that conflict, the binding judgment of the Constitutional Court had priority for Austria'.<sup>85</sup>

Also the often criticised judgment of the Supreme Court of Sri Lanka in *Singarasa* illustrates this problem. The HRC had found a violation of article 14 of the ICCPR in connection with the extraction of a statement under duress, unfair trial, and undue delay, and ordered an effective and appropriate remedy, including release or retrial and compensation.<sup>86</sup> The Supreme Court found that the Constitution of Sri Lanka and the prevailing legal regime did not provide for release, retrial or the payment of compensation to a convicted person, after his or her conviction had been affirmed by the highest appellate court, the Supreme Court. To take such steps would be contrary to the Constitution and be tantamount to interference with the independence of the judiciary.

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<sup>85</sup> HRC, Summary Record of the 1719th Meeting: Austria, 4 November 1998, UN Doc. CCPR/C/SR.1719, para. 22, discussing HRC, *Dietmar Pauer v. Austria*, Communication No. 716/1996, 30 April 1999, UN Doc. CCPR/C/65/D/716/1996.

<sup>86</sup> HRC, *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, 23 August 2004, UN Doc. CCPR/C/81/D/1033/2001; see Sri Lanka, Supreme Court, *Special Case: Supreme Court on Nallaratnam Singarasa*, 15 September 2006; S.C. SpL(LA) No. 182/99, C.A. Appeal No. 208/95, H.C. Colombo 6825/94, ILDC 518 (LK 2006) (noting that 'The resulting position is that the Petitioner cannot seek to "vindicate and enforce" his rights through the Human Rights Committee at Geneva, which is not reposed with judicial power under our Constitution. A fortiori it is submitted that this Court being "the highest and final Superior Court of record in the Republic" in terms of Article 118 of the Constitution cannot set aside or vary its order as pleaded by the Petitioner on the basis of the findings of the Human Rights Committee in Geneva which is not reposed with any judicial power under or in terms of the Constitution.'))

Similarly, after *Joseph v. Sri Lanka*,<sup>87</sup> Sri Lanka submitted that it must respect and act in accordance with the Constitution of the Republic and within the framework of its domestic legal system. It is not in a position to act contrary to any decision given by any court in Sri Lanka. The Supreme Court is the highest court in Sri Lanka and its determination is final and binding both on the government of Sri Lanka, and its Parliament. Therefore, there is no remedy that could be afforded by the government to the authors.

The follow-up to *Shin v. Korea*<sup>88</sup> provides another example. The HRC had found in this case that the authors' conviction for subversive art and the order of destruction of the subversive painting violated article 19(2) of the ICCPR and recommended compensation and return of the painting in its original condition. In its follow-up reply Korea held that it could not implement the Views because of legal impediments. It could not compensate the author since he had been held guilty through criminal proceedings and the painting could not be returned because it had been lawfully confiscated through a ruling of the Supreme Court.<sup>89</sup>

As a result of the local remedies rule cases that are considered by a treaty body will generally have been litigated domestically to the highest court. The problematic co-existence of a binding decision of the highest national court that contradicts the non-binding international decision is therefore the rule rather than exception.

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<sup>87</sup> Also HRC, *Joseph v. Sri Lanka*, Communication No. 1249/2004, 21 October 2005, UN Doc. CCPR/C/85/D/1249/2004.

<sup>88</sup> HRC, *Shin v. Korea*, Communication No. 926/2000, 16 March 2004, UN Doc. CCPR/C/80/D/926/2000.

<sup>89</sup> See follow-up reply by Korea in UN GA, Report of the Human Rights Committee, *supra* note 70, at 505–506.

The problem of collision between decisions of treaty bodies and national law presents itself very clearly in cases where a treaty body expressly or impliedly requests a revision or setting aside of a judgment of a national court. In the first place, compliance with these Views may be problematic in light of the separation of powers doctrine. Decisions of treaty bodies generally are addressed to the state as such. Yet internally, questions of revision will generally be left to the courts and, certainly in view of the non-binding nature of Views, there will be little that the government can do about them. In *Quispe Roque v. Peru*,<sup>90</sup> the HRC recommended the state party to furnish the author with an effective remedy and appropriate compensation. It also noted that, in the light of the long period that he had already spent in prison and the nature of the acts of which he was accused, ‘the State party should consider the possibility of terminating his deprivation of liberty, pending the outcome of the current proceedings against him’. Peru informed the Committee that a new trial was under way (in accordance with its obligation to provide an effective remedy), but also noted that it is for the judiciary to determine whether the complainant can be released pending the adoption of a new decision.<sup>91</sup>

In turn, the judiciary may find it difficult if not impossible to implement the recommended remedy in the absence of national legislation allowing Views to take legal effect domestically. Obviously, courts cannot be expected to overrule binding national court judgments on the basis of non-binding international decisions. It may be noted that this problem to some extent also exists when decisions of international courts (for instance the ECtHR or the IACtHR) are binding. Without enabling legislation, courts also in such cases may not be able to set aside

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<sup>90</sup> HRC, *Quispe Roque v. Peru*, Communication No. 1125/2002, 17 November 2005, UN Doc. CCPR/C/85/D/1125/2002, para. 9.

<sup>91</sup> UN GA, 61st Session. *Report of the Human Rights Committee*, 2006, UN Doc. A/61/40 vol. II, Supp. (No. 40), 719.

final judgments.<sup>92</sup> However, in that latter case there would be a collision of legal rules, and either outcome may be defended in terms of the rule of law. In case of non-binding decisions, the rule of law clearly could only allow to leave the national judgment intact. In these situations, there is a clear tension between, on the one hand, the argument that states should give full effect to their international obligations as interpreted or formulated by treaty bodies, and on the other hand, the requirements of the rule of law, a value, moreover, protected by international law itself.

As a result, individuals that according to the HRC were entitled to a retrial are often left empty-handed within their national legal order. Though in many states revision is possible when new facts are available, a decision of the HRC is generally not treated as such. The authors in *Haraldsson and Sveinsson v. Iceland*<sup>93</sup> informed the Human Rights Committee that they had unsuccessfully applied before the Supreme Court of Iceland for a re-opening of their case. The authors based their request on a provision allowing re-opening of a case if new material has appeared which might have had a material impact on the outcome of the case.<sup>94</sup> The authors argued that the Supreme Court may have failed to take account of international law and the generally accepted principle that Icelandic law shall be interpreted in accordance with international law when deciding the case. In its decision of 8 May 2008, the Supreme Court of Iceland rejected these arguments, stating that: ‘Law No. 19/1991 does not have a provision allowing the re-opening of a case decided by the Supreme Court following a decision of the Human Rights Committee of United Nations about a violation of the ICCPR.

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<sup>92</sup> See generally T. Barkhuysen, M. Van Emmerink and P.H. Van Kempen (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague: Martinus Nijhoff Publishers, 1999).

<sup>93</sup> HRC, *Haraldsson and Sveinsson v. Iceland*, Communication No. 1306/2004, 14 December 2007, UN Doc. CCPR/C/91/D/1306/2004.

<sup>94</sup> *Ibid.*

Even though the Human Rights Committee has now determined that the Icelandic government has violated its international obligations under Article 26 of the Covenant, the sentenced individuals had in their application for a re-opening provided no new information which might have had a material impact on the outcome of the case if placed before the Court before it handed down its judgment.<sup>95</sup>

Similarly, the Supreme Court of Belarus refused to reopen proceedings after the HRC issued its Views in *Svetik v. Belarus*.<sup>96</sup> The application of the author was held not to reveal any new grounds for the annulment of previous court decisions, ‘notwithstanding ... the examination of his case by the Human Rights Committee’.

Also one of the authors of *Michael and Brian Hill v. Spain* encountered difficulties when he tried to give effect to the Views of the HRC in the national courts.<sup>97</sup> The HRC had found a violation of the ICCPR and held that pursuant to article 2(3)(a) of the ICCPR, the authors were entitled to an effective remedy, including compensation. Brian Hill brought his case back before the Spanish courts, asking the Court to declare his conviction a nullity and to grant him a new trial. The Supreme Court held that, under the applicable law of criminal

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<sup>95</sup> The view of the Iceland Supreme Court is interesting, in particular as it has in many other cases taken due account of international law when interpreting the human right provisions of the Constitution; see e.g. *Public Prosecutor v. Kristjánsson and ors*, Appeal Judgment, Case No. 12/2000; H (2000) 1534; ILDC 67 (IS 2000), where the same fisheries management system as in *Haraldsson and Sveinsson v. Iceland*, *supra* note 93, was challenged as a violation of the Constitution, the Supreme Court cited the United Nations Convention on the Law of the Sea, not incorporated into Icelandic law, to restrict individuals' rights protected by the Constitution.

<sup>96</sup> HRC, *Svetik v. Belarus*, Communication No. 927/2000, 25 August 2004, UN Doc. CCPR/C/81/D/927/2000 and follow-up reply by Belarus in, UN GA, Report of the Human Rights Committee, *supra* note 70, at 498–499.

<sup>97</sup> HRC, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, 2 April 1997, UN Doc. CCPR/C/59/D/526/1993.

procedure, a court did not have the power to revise a verdict in a criminal case unless new evidence was submitted demonstrating that the person previously convicted was innocent. A decision of the Human Rights Committee or a judgment of the European Court of Human Rights did not constitute new facts that would permit a reopening of the criminal proceedings against Hill.<sup>98</sup>

#### 2.1.4.2 Dualism

Even if Views of the HRC would have been accepted as legally binding as a matter of international law, they may not have any domestic legal effect if the domestic legal order would not incorporate the ICCPR or the First Optional Protocol. In the Irish case of *Kavanagh v. Governor of Mountjoy Prison*<sup>99</sup> the refusal to take the findings of the HRC into account seems to be at least partly based on the fact that the ICCPR was not incorporated into Irish law. The Supreme Court noted: ‘The terms of the Covenant have not been enacted into Irish law. They cannot prevail over the provisions of the Offences against the State Act, 1939 or of a conviction by a court established under its provisions. For the reasons already stated, the views of the Committee cannot be invoked to invalidate that conviction without contravening the ... Constitution.’

In *Bradshaw v. Barbados* the HRC had issued an interim request to stay execution during the communication procedure. When Mr. Bradshaw relied on this measure before the Barbados Court of Appeal, the Court noted that in the absence of implementing legislation, the procedural provisions under the First Optional Protocol were not part of the law of Barbados.

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<sup>98</sup> See follow-up reply by Spain in, UN GA, Report of the Human Rights Committee, *supra* note 70, at 526–527.

<sup>99</sup> Ireland, Supreme Court, *Kavanagh v. Governor of Mountjoy*, *supra* note 82.

The request of the HRC was ‘on the state of the law, ... not a matter with respect to which this court can adjudicate’.<sup>100</sup>

The *Ahani* case<sup>101</sup> is perhaps the best-known example in this regard. Mr. Ahani was to be deported from Canada to Iran because he constituted a threat to national security. He started a procedure with the HRC, which asked Canada not to deport him before the communication was decided. When it became clear that Canada was unwilling to comply, Mr. Ahani sought to have his deportation stayed through a court order. The Canadian courts proved unsympathetic to the plight of Mr. Ahani, as well as to the interim measure request he relied on. The Ontario Court of Appeal observed that ‘neither the Committee’s views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law.’<sup>102</sup> ‘To give effect to Ahani’s position’, the Court continued, ‘would convert a non-binding request, in a Protocol which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result.’<sup>103</sup>

In such cases, the rule of law problem is magnified; there is a clear tension between, on the one hand, the argument that states should give full effect to their international obligations as interpreted or formulated by treaty bodies, and on the other hand, the requirement that courts

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<sup>100</sup> HRC, *Bradshaw v. Barbados*, Communication No. 489/1992, 19 July 1994, UN Doc. CCPR/C/51/D/489/1992, para. 2.9.

<sup>101</sup> See HRC, *Ahani v. Canada*, *supra* note 75.

<sup>102</sup> Canada, Ontario Court of Appeal, *Ahani v. Canada (Attorney General)*, 17 January 2002, 58 O.R. (3d) 107, para. 32.

<sup>103</sup> *Ibid.* at para. 33.

abide by the rule of law domestically, which disables them to grant full effect to such obligations.

#### 2.1.4.3 The Legitimacy of the Treaty Bodies and their Output

The level of compliance by states with the outcome of complaints procedures is often linked to factors related to the supervisory body, the procedure, and the decision. Byrnes identifies the following relevant factors:

whether the state considers that the procedure has been fair and has involved the impartial and full consideration of the relevant evidence and law; whether the decision of the body is persuasively reasoned; whether the decision gives a clear indication of the nature of the violation and the steps that need to be taken to remedy it; ... ; the government's and public's perception of the status, role, competence and legitimacy of the body and its decisions; [and] the existence of a mechanism to monitor compliance[.]<sup>104</sup>

These factors are in literature at times linked to the concept of legitimacy – a concept that is central to the book of which this chapter is a part.<sup>105</sup> Mechlem for example finds that ‘the methodological weaknesses and lack of coherence and analytical rigor’ ‘compromises’ the

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<sup>104</sup> A. Byrnes, ‘An Effective Complaints Procedure in the Context of International Human Rights Law’, A.F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (The Hague: Kluwer Law International, 2000) 139–162, at 151.

<sup>105</sup> See generally on legitimacy: R. Wolfrum *et al.* (eds.), *Legitimacy in International Law* (New York: Springer Publishers, 2008) and D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, *AJIL* 93 (1999) 596–624.

legitimacy of the treaty bodies.<sup>106</sup> Statements such as this are not so much concerned with legitimacy in terms of actual acceptance of authority (sometimes also referred to as popular legitimacy), but with so-called normative legitimacy, that is whether and on what grounds authority ‘is well founded – whether it is justified in some objective sense’.<sup>107</sup>

One prominent basis of legitimacy is the consent of states to international obligations — consent indeed remains the prime source of legitimacy in international law.<sup>108</sup> However, in the case of decisions of treaty bodies, this is precisely the basis of legitimacy that is absent.

In theory, legitimacy can be found in other factors. The normative basis of justification may for example in part be found in the properties of rules or rule-making institutions that Franck distinguished in explaining the pull towards compliance: determinacy, symbolic validation, coherence and adherence.<sup>109</sup> However, these other factors appear to be of relatively limited relevance as far as implementation of Views through national proceedings is concerned. While it may be true as a general proposition that rules or decisions may be legitimate, and on that basis may be effective, also when they are not binding, the leeway for national courts to give effect to legitimate decisions generally will be curtailed by national law. Indeed, the empirical material that is available contains little information to suggest that any of these factors has played a systemic role in explaining non-implementation of decisions of treaty bodies through national court proceedings. The relevance of the perceived authority of treaty bodies and their output *is* clear in the context of the question of the interpretative value of

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<sup>106</sup> Mechlem, Treaty Bodies, *supra* note 8, at 905,

<sup>107</sup> See Bodansky, The Legitimacy of International Governance, *supra* note 105, at 601.

<sup>108</sup> See Bodansky, The Legitimacy of International Governance, *supra* note 105, at 601.

<sup>109</sup> T.M. Franck, *The Power of Legitimacy* (Oxford University Press, 1990) at 16.

output and will for that reason be further discussed. Insert footnote: See *infra* section 3.1.2. and renumber footnotes accordingly.

## 2.2 Assessment in terms of international law

The prevailing interpretation of the ICCPR and its First Optional Protocol, as well as the other UN human rights treaties, is that Views adopted under these instruments are not legally binding.<sup>110</sup> Treaty bodies do, however, insist that Views on the merits are not mere ‘recommendations’. This section discusses three types of obligations: obligations resulting from Views (2.2.1.), obligations resulting from interim measures (2.2.1.), and an obligation to allow for domestic legal effect (2.2.1.). This discussion forms the framework for an analysis of the state practice set out in section 2.1 in terms of international law (2.2.4.).

### 2.2.1. Obligations under Views

Article 5 paragraph 4 of the Optional Protocol to the ICCPR provides that the Human Rights Committee concludes a procedure concerning an individual communication with the adoption of ‘Views’.<sup>111</sup> This terminology was chosen to indicate that the decisions are ‘advisory rather

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<sup>110</sup> C. Tomuschat, *Human Rights. Between Idealism and Realism*, 2<sup>nd</sup> ed. (Oxford University Press, 2006) at 220; McGoldrick, *The Human Rights Committee*, *supra* note 3, at 151; A. Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Leiden: Martinus Nijhoff Publishers, 1999) at 117, and F. Pocar, ‘Legal Value of the Human Rights Committee’s Views’, *Canadian Human Rights Yearbook* (1991-1992) at 119–123.

<sup>111</sup> See Ulfstein, *Individual Complaints*, this volume, section ###.

than obligatory in character.’<sup>112</sup> Identical wording can be found in the CAT, the CMD and the CPED, while the Optional Protocols to the CEDAW and the ICESCR speak of ‘Views, together with recommendations’, the Optional Protocol to the CPRD of ‘findings, comments and recommendations’, and the CERD of ‘suggestions and recommendations’.

The intention of the drafters that can be inferred from this language has not stopped the treaty bodies from increasingly couching their findings in the individual communication procedure in terms of rights and obligations. In a more or less standard formula, the Human Rights Committee considers as follows: ‘By becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views.’<sup>113</sup> While the Committee does not say with so many words that states are bound by its Views, the reference to the obligation to provide a remedy under article 2 of the ICCPR can be understood as an implicit recognition of the bindingness of Views. As Davidson put it: ‘To

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<sup>112</sup> T. Buergenthal, ‘The UN Human Rights Committee’, *Max Planck Yearbook of United Nations Law* 5 (2001) 341–398, at 397; Cf. also M. Scheinin, ‘The Work of the Human Rights Committee under the International Covenant on Civil and Political Rights and its Optional Protocol’, R. Hanski and M. Scheinin (eds.), *Leading Cases of the Human Rights Committee* (Turku: Åbo Akademi University, 2003) at 23.

<sup>113</sup> HRC, General Comment No. 33, *supra* note 22, at para. 14.

suggest that there is an obligation to provide a remedy under the ICCPR which is independent of any legally binding determination of a breach is extremely troublesome, to say the least.’<sup>114</sup>

Also the criticism that the HRC directs at states refusing to implement Views points in this direction. When Australia disagreed with the HRC Views in *A. v Australia*<sup>115</sup>, for example, the HRC held in its Concluding Observations for Australia that ‘[re]jecting the Committee's interpretation of the Covenant when it does not correspond with the interpretation presented by the State party in its submissions to the Committee undermines the State party's recognition of the Committee's competence under the Optional Protocol to consider communications.’<sup>116</sup>

In academic writing, this assertive stance of the HRC is often applauded and endorsed. Nowak writes that the ‘the reference to art. 2(3) of the Covenant makes it clear that these are not mere recommendations but that States parties to the Covenant have a legal obligation to provide every victim of a violation of the Covenant with an effective remedy and reparation.’<sup>117</sup> Hanski and Scheinin write that Views are not mere recommendations and that states cannot ‘simply replace the Committee’s position with its own interpretation as to whether there has been a violation of the Covenant or not.’ They further claim that a state that wants to question the correctness of Views ‘should at least resort to some other procedure

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<sup>114</sup> S. Davidson, ‘Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee’, G. Huscroft and P. Rishworth (eds.), *Litigating Rights* (Oxford: Hart Publishing, 2002) 305–321, at 311.

<sup>115</sup> HRC, *A. v. Australia*, Communication No. 560/1993, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993.

<sup>116</sup> See Concluding Observations on Australia in UN GA, 55th Session. *Report of the Human Rights Committee*, 10 October 2000, UN Doc. A/55/40 (vol. I), Supp. (No. 40), para. 520.

<sup>117</sup> M. Nowak, UN Covenant on Civil and Political Rights, *supra* note 77, at 893.

before an international court or independent expert body.’ If this is not done, Views should be ‘treated as the authoritative interpretation of the Covenant under international law’.<sup>118</sup> Elsewhere, Scheinin put it differently. He wrote: ‘The absence of specific provisions on the legally binding nature of the findings by the pertinent expert body in other human rights treaties does not mean that such findings are merely ‘recommendations’. The treaty obligations themselves are, naturally, legally binding, and the international expert body established by the treaty is the most authoritative interpreter of the treaty in question. Therefore, a finding of a violation by a UN human rights treaty body may be understood as an indication of the State party being under a legal obligation to remedy the situation.’<sup>119</sup> Möller and de Zayas write that ‘the Views of the Committee are weighty, and it is hardly conceivable that a sovereign State, acting at its own free will, would first recognize the competence of the Committee to determine whether a breach of the Covenant has occurred and thereafter feel entirely free to ignore its findings and conclusions. Thus, in spite of the fact that the views of the Committee are not formally binding in law, the opinion is gaining in strength that a State party is under an obligation, in accordance with article 2, paragraph 3(a), of the Covenant, to provide the victim of a violation established by the Committee with an effective remedy.’<sup>120</sup>

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<sup>118</sup> Scheinin, Work of the Human Rights Committee, *supra* note 112.

<sup>119</sup> M. Scheinin, ‘International Mechanisms and Procedures for Implementation’, R. Hanski and S. Markku (eds.) *An Introduction to the International Protection of Human Rights: A Textbook*, 2<sup>nd</sup> ed. (Turku: Åbo Akademi University, 1999) at 444.

<sup>120</sup> Möller & De Zayas, United Nations Human Rights Committee Case Law, *supra* note 3, at 8. Some authors define the obligations of states in less cautious terms. In E. Rieter, *Preventing Irreparable Harm, Provisional Measures in International Human Rights Adjudication* (Antwerp: Intersentia, 2010) at 886 we read for example; ‘The obligation of good faith compliance with this procedure implies that the State is internationally bound to respect the contents of the Views. State parties have the legal obligation to implement these Views and to redress the violations found by the Committee.’

Such attempts to transform Views into legally binding obligations are problematic and run directly against the intention of states as manifested in the text, as well as against the dominant position in state practice.<sup>121</sup>

Views nonetheless can have legal significance.<sup>122</sup> There is merit in the argument that it is incompatible with acceptance of the HRC's competence to determine whether a breach of the ICCPR has occurred, if a state would 'thereafter feel entirely free to ignore its findings and conclusions.'<sup>123</sup> This does not mean that the state is obliged to comply,<sup>124</sup> but it does mean that an obligation to give the contents of Views serious consideration is implied in the structure of the provisions on the competence of treaty bodies. It is to be recalled that, under international law, the question whether or not a state has acted wrongfully and is due to provide reparation is not contingent on a binding determination of a breach of an international obligation, but arises out of the wrongful act itself.<sup>125</sup> The determination of whether or not this breach has happened is largely left to auto-interpretation of the states concerned. It would seem that the granting of competence to a treaty body to make determinations on questions of

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<sup>121</sup> See text to notes to section 2.1.4.1. *supra*.

<sup>122</sup> A. Boulesbaa, *The UN Convention on Torture*, *supra* note 110, at 285; E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge University Press, 1991) at 7.

<sup>123</sup> Möller and de Zayas, *United Nations Human Rights Committee Case Law*, *supra* note 3, at 8.

<sup>124</sup> Möller and de Zayas, *United Nations Human Rights Committee Case Law*, *supra* note 3, at 8 (as the authors conclude on the basis of this consideration, cf. fn. 171).

<sup>125</sup> B. Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury', Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden and Boston: Martinus Nijhoff Publishers, 2005) 93–116, at 101. Compare the discussion of principles of reparation by J. Crawford, UN GA, 52nd Session. *Third Report on State Responsibility*, 15 March 2000, UN Doc. A/CN.4/507, 26 (stating that 'the general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State, even if the form which reparation should take in the circumstances may be contingent.')

breach and reparation, even though non-binding, necessarily limits the pre-existing room for auto-interpretation. In any case, when treaty bodies fulfill tests of impartiality and objectivity,<sup>126</sup> their expertise generally can create ‘a presumption in favour of substantive correctness’ of Views of such bodies. If states disagree with the Views expressed in a certain case, it must present good arguments in counter-argument.<sup>127</sup>

This more modest interpretation of the nature and extent of obligations under Views corresponds largely with that found in HRC General Comment No. 33. Views, we read in the General Comment, ‘represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument’<sup>128</sup>, and ‘[t]he character of the Views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedure under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations’.<sup>129</sup> The more assertive stance of the HRC is limited to the statement that ‘States parties must use whatever means lie within their power in order to give effect to the Views issued by the Committee’.<sup>130</sup>

The position that states are required to give Views serious consideration was also taken by Iceland in a recent letter to the HRC in response to the Views adopted in *Erlingur Sveinn*

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<sup>126</sup> McGoldrick, The Human Rights Committee, *supra* note 3, at 152.

<sup>127</sup> Tomuschat, Human Rights. Between Idealism and Realism, *supra* note 110, at 220.

<sup>128</sup> See HRC, General Comment No. 33, *supra* note 22, para. 13.

<sup>129</sup> See HRC, General Comment No. 33, *supra* note 22, para. 15.

<sup>130</sup> See HRC, General Comment No. 33, *supra* note 22, para. 20.

*Haraldsson and Örn Snævar Sveinsson v Iceland*.<sup>131</sup> It wrote that, because of its ratification of the First Optional Protocol, '[t]he State of Iceland is ... required by international law to address the conclusions of the Committee.'<sup>132</sup> In a comparable vein, Austria once let the HRC know that its Views 'should be taken duly into account'.<sup>133</sup> In a 2008 decision the Norwegian Supreme Court held that interim measures requests of the CAT Committee are not binding. It did point out though that the position of Norway is that 'such request shall be given considerable weight and that they as a starting point will be complied with insofar as possible.'<sup>134</sup> Also the practice of states that allow revision of judgments after determination by the HRC of an ICCPR violation suggest that those states recognise the need to give due consideration to Views.

This test provides a perspective that allows one to review the arguments of states parties for justifying their non-compliance. Blanket refusals to implement particular Views, without considering them or attaching any weight to them, sit uneasily with the obligations flowing from or implied by the conventions and protocols.

### 2.2.2. *Obligations under Interim Measures*

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<sup>131</sup> See HRC, *Haraldsson and Sveinsson v. Iceland*, *supra* note 93.

<sup>132</sup> See Letter from the Government of Iceland Concerning the Views adopted by the Human Rights Committee on 24 October 2007, *supra* note 76.

<sup>133</sup> See HRC, Summary Record of the 1719th Meeting: Austria, *supra* note 85, para. 22.

<sup>134</sup> Norway, Supreme Court, *A v. The Norwegian Immigration Appeals Board*, 16 April 2008, Case No. HR-2008-681-A, ILDC 1326 (NW 2008), paras. 52 and 58; The decision CAT Committee, *Nadeem Ahmad Dar v. Norway*, Communication No. 249/2004, 16 May 2007, UN Doc. CAT/C/38/D/2004.

All treaty bodies currently empowered to consider individual communications have the possibility to take interim measures. As far as the CEDAW and the CRPD are concerned, this possibility is included in their Optional Protocols establishing the competence of these bodies to receive and consider communications.<sup>135</sup> The HRC, the CAT Committee and the CEDAW Committee have provided for this possibility in their rules of procedure. The provisions are phrased in more or less similar wording. Rule 92 of the HRC Rules of Procedure provides: ‘The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation.’<sup>136</sup> The CERD Rules of Procedure speak of ‘views on the desirability ... of taking interim measures’, while the CAT Rules of Procedure, and the Optional Protocols to the CEDAW and the CRPD refer to ‘requests’ made to the state ‘for its urgent consideration’.

As with Views, the terminology does not indicate an obligation of states to comply with the measures. In addition, where the competence is included in rules of procedure, it cannot even be said that states have recognised this competence.

Nevertheless, the trend of an increasing assertiveness of treaty bodies and move towards the use of a more imperative vocabulary is particularly clear when interim measures are

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<sup>135</sup> *Optional Protocol to the CEDAW, Optional Protocol to the CRPD, supra* note 9.

<sup>136</sup> Previously rule 86; see HRC, Rules of Procedure of the Human Rights Committee, 22 September 2005, UN Doc. CCPR/C/3/Rev.8. Cf. also rule 94.3 of the CERD Committee, Rules of Procedure of the Committee on the Elimination of Racial Discrimination, 1 January 1989, UN Doc. CERD/C/35/Rev.3 and rule 108 of the CAT Committee, Rules of Procedure, 9 August 2002, UN Doc. CAT/C/3/Rev.4.

concerned.<sup>137</sup> In 1991 Canada extradited Mr. Kindler to the United States in defiance of the interim measure request of the HRC not to do so. The HRC did not waste words on the incident in its Views on the merits and expressed ‘its regret that the State party did not accede to the Special Rapporteur’s request’.<sup>138</sup> In its 1994 Views in *Bradshaw v. Barbados* the HRC identified a legal obligation of states parties to ensure that interim measures have legal effect in domestic law. While the phrasing of this obligation seemed to hint at bindingness of the measure itself, the context of the case makes clear that the HRC was primarily concerned with the fact that courts in Barbados could not attribute any legal relevance to HRC interim measures because the ICCPR and the First Optional Protocol were not part of domestic law.

In *Piandiong et al. v. the Philippines*, the HRC changed its course.<sup>139</sup> According to it, the execution of authors during the communication procedure breaches the obligations under the First Optional Protocol. This is all the more so when this is done in defiance of an interim measure request. According to the HRC: ‘interim measures pursuant to rule 86 of the Committee’s rules adopted in conformity with article 39 of the Covenant, are essential to the Committee’s role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country,

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<sup>137</sup> Cf. for this development Rieter, Preventing Irreparable Harm, *supra* note 120, at 898–905; J. Harrington, ‘Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Interim Measures of Protection’, *McGill Law Journal* 48 (2003) 55–88.

<sup>138</sup> HRC, *Kindler v. Canada*, Communication No. 470/1991, 30 July 1993, UN Doc. CCPR/C/48/D/470/1991, paras. 17 and 18. Also, McGoldrick wrote in 1994 that interim measures are ‘non-binding as a matter of law and depend totally on the cooperation and good faith of the State party concerned’, McGoldrick, The Human Rights Committee, *supra* note 3, at 128. Cf. however HRC, Summary Record of the 1352<sup>nd</sup> meeting: Trinidad and Tobago, 31 July 1996, UN Doc. CCPR/C/SR.1352 (discussing at a preliminary stage HRC, *Ashby v. Trinidad and Tobago*, Communication No. 580/1994, 21 March 2002, UN Doc. CCPR/C/74/D/580/1994).

<sup>139</sup> HRC, *Piandiong et al. v. the Philippines*, Communication No. 869/1999, 19 October 2000, UN Doc. CCPR/C/70/D/869/1999.

undermines the protection of Covenant rights through the Optional Protocol.<sup>140</sup> This position has since then been consolidated in Views,<sup>141</sup> Concluding Observations<sup>142</sup> and in General Comments Nos. 31 and 33<sup>143</sup>. In General Comment No. 33 the HRC specified that '[f]ailure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.'<sup>144</sup>

Also the CAT Committee now insists on an obligation of states to comply with its interim measures. In *Brada v. France* it held that 'the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying and giving full effect to the procedure of individual complaint

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<sup>140</sup> *Ibid.* at para. 5.4. The relevant paragraphs of this View were incorporated in the UN GA, 56th Session. *Report of the Human Rights Committee*, 1 January 2001, UN Doc. A/56/40 (vol. I), Supp. (No. 40), paras. 128–130.

<sup>141</sup> E.g. HRC, *Mansaraj v. Sierra Leone*, Communication Nos. 839, 840, 841/1998, 16 July 2001, UN Doc. CCPR/C/72/D/839/1998; HRC, *Asbhy v. Trinidad and Tobago*, *supra* note 138 at 58; See HRC, *Shukurova v. Tajikistan*, Communication No. 1044/2002, 26 April 2006, UN Doc. CCPR/C/86/D/1044/2002; HRC, *Uteeva v. Uzbekistan*, Communication No. 1150/2003, 13 November 2007, UN Doc. CCPR/C/91/D/1150/2003.

<sup>142</sup> See HRC, Concluding Observations: Canada, 20 April 2006, UN Doc. CCPR/C/CAN/CO/5, para. 7: 'The Committee notes with concern the State party's reluctance to consider that it is under an obligation to implement the Committee's requests for interim measures of protection. The Committee recalls that, in acceding to the Optional Protocol, the State party recognised the Committee's competence to receive and examine complaints from individuals under the State party's jurisdiction. Disregard of the Committee's requests for interim measures is inconsistent with the State party's obligations under the Covenant and the Optional Protocol.' See also HRC, Concluding Observations: Tajikistan, 18 July 2005, UN Doc. CCPR/CO/84/TJK, para. 8 and HRC, Concluding Observations: Uzbekistan, 26 April 2005, UN Doc. CCPR/CO/83/UZB, para. 6.

<sup>143</sup> HRC, General Comment No. 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, article 2 and HRC, General Comment No. 33, *supra* note 22, para. 19.

<sup>144</sup> General Comment No. 33, *supra* note 22, para. 19.

established thereunder. The state party's action in expelling the complainant in the face of the CAT Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.<sup>145</sup>

The reasoning of the HRC and CAT Committee has not yet resonated with states, nor with national courts.<sup>146</sup> The idea of an obligation to comply with interim measures in a procedure with a non-binding outcome, in the absence of language in the relevant international instrument to that effect, may not convince immediately. However, the position as advanced by the HRC and the CAT Committee is not altogether unconvincing.<sup>147</sup> Acceptance of the individual communication procedure entails recognition of the right of individual petition and hence the obligation of states to respect that right. Causing irreparable harm to the interests at stake in the procedure may be seen to violate this obligation. Failure to comply with interim

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<sup>145</sup> CAT Committee, *Brada v. France*, Communication No. 195/02, 24 May 2005, UN Doc. CAT/C/34/D/195/2002, para. 13.4 ; CAT Committee, *Agiza v. Sweden*, Communication No. 233/03, 24 May 2005, UN Doc. CAT/C/34/D/233/2003, para. 13.9 ; Cf. also CAT Committee, *T.P.S. v. Canada*, Communication No. 99/1997, UN Doc. CAT/C/24/D/99/1997, para. 15.6.

<sup>146</sup> Cf. section 2.2.1. *supra* for the position of states, and section 2.2.4. *infra* for the position of national courts.

<sup>147</sup> Cf. for support Rieter, Preventing Irreparable Harm, *supra* note 120, at 881–935; S. Joseph, K. Mitchell and L. Gyorki, *Seeking Remedies for Torture Victims, A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (Geneva: OMCT's State Compliance Programme, 2006) at 101–102; J. M. Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization', *Vanderbilt Journal of Transnational Law* 38 (2005) 1–49; G. Letsas, 'International Human Rights and the Binding Force of Interim Measures', *European Human Rights Law Review* 8 (2003) 527–538; Harrington, Punting Terrorists, *supra* note 137; S. Ghandhi, 'The Human Rights Committee and Interim Measure of Relief', *Canterbury Law Review* 13 (2007) 203–226.

measures constitutes a breach of a state's legal obligations under the First Optional Protocol, although not necessarily a violation of substantive provisions of the ICCPR.<sup>148</sup>

This line of reasoning was also relied on by the European Court of Human Rights in *Mamatkulov v. Turkey* in which the binding force of interim measures – a competence provided for in the Rules of Court – was established.<sup>149</sup> The fact that the ECtHR issues binding judgments while the treaty bodies issue at best authoritative recommendations does not warrant a distinction since the obligation of states to comply with the interim measures was held to inhere in the nature of the right to individual petition and the acceptance of that right by states – not in the binding nature of final judgments.<sup>150</sup>

Of course, in view of the general principle that states are free to choose the means by which to comply with a binding decision of an international court,<sup>151</sup> implementation of interim measures is not necessarily done through national court proceedings. However, it will be argued in the next section that, in the context of individual complaints mechanisms, states may be seen to have an obligation to allow Views and interim measures to take legal effect domestically so as to allow *all* state organs, courts included, to take these decisions into account when determining the legal position of a successful author in the national legal order.

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<sup>148</sup> G.J. Naldi, 'Interim Measures in the UN Human Rights Committee', *The International and Comparative Law Quarterly* 53:2 (2004) 445–454, at 448.

<sup>149</sup> *Mamatkulov and Askarov v. Turkey* (Appl. Nos. 46827/99; 46951/99), Judgment (Grand Chamber), 4 February 2005, ECHR 2005-I, para. 128.

<sup>150</sup> L.C. Caflisch, 'Provisional Measures in the International Protection of Human Rights: the Mamatkulov Case', P.M. Dupuy *et al.* (eds.), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (Kehl am Rhein: Engel Verlag, 2006) 493–515; C.J. Tams, 'Interim Orders by the European Court of Human Rights: Comments on Mamatkulov and Abdurasulovic v. Turkey', *Zeitschrift für ausländisches Recht und Völkerrecht* 63:3 (2003) 681–692.

<sup>151</sup> Cf. *Avena* Interpretation Judgment further discussed *infra* note 158.

### *2.2.3. Obligation to give legal effect to Views and Interim Measures*

To be distinguished from the question of legal effects flowing from an adoption of Views or interim measures as such, is the question whether states have any obligation to provide for legal effect of Views or interim measures within their national legal orders. We would suggest that such an obligation indeed can be construed, in the sense that states must enable their organs, including their courts, to consider the consequences of decisions of treaty bodies in their determination of the position of a successful author under national law.

Such an obligation follows logically from the effects of, on the one hand, Views, and, on the other hand, interim measures, as identified above. As to the former, if a state, as we have suggested, is indeed required to treat Views of treaty bodies as authoritative and to consider the contents of Views, it follows that domestically their organs must be able to do so as well. An *a priori* rule that would disallow state organs to provide effect would make it as a practical matter in many cases impossible to accord any consequence to Views. This holds in particular for the courts, since in many cases the plaintiff will have to make recourse to courts for the implementation of Views, to obtain reparation or another remedy. This argument is particularly forceful with respect to Views that in effect require revision or re-opening of cases, which *can* only been done through domestic legal effect, and states cannot be said to act in good faith if legal effect is not allowed.

In cases where the treaty body orders damages, such national proceedings may in any case be required to determine whether compensation is indeed due, taking into account the Views of the treaty body, and, if this is confirmed, to determine the level of damages. After *Gutierrez*

*Vivanco v. Peru*<sup>152</sup> in which the HRC found a violation of articles 14 (1) and (3) (c) of the ICCPR and noted that the state party has the obligation to provide an effective remedy, including compensation, to Mr. José Luis Gutiérrez Vivanco, the state party informed the HRC that the author had not filed a lawsuit against the state party claiming damages.<sup>153</sup> It would seem to not be in contravention of a state's obligations to make the award of compensation subject to the filing of a claim by the author in a national court; that then may or may not end with the same outcome as the Views. But obviously in such a case a procedure before the courts should be available.

As to interim measures, the acceptance of the right of individual petition implies an obligation not to cause irreparable harm to the interests of the plaintiff during the procedure and on that basis an obligation to comply with Interim Measures. Implementation of that obligation will in many cases only be possible if the relevant state organs, including the courts, are able to accord due weight to decisions on interim measures.

The requirement to allow for domestic effect in respect of Views ultimately flows from the obligation under article 2(2) of the ICCPR 'to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.' This principle is an application of the more general principle that a state which has contracted valid international obligations is bound to make such modifications 'as may be necessary to ensure the fulfillment of the obligations undertaken' in its legislation.<sup>154</sup> This extends to the obligations

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<sup>152</sup> See HRC, *Gutierrez Vivanco v. Peru*, *supra* note 19.

<sup>153</sup> See follow-up reply by Peru in HRC, Follow-up Progress Report on Individual Communications, 17 February 2009, UN Doc. CCPR/C/94/4, at 6.

<sup>154</sup> *Exchange of Greek and Turkish Populations* (Advisory Opinion) PCIJ Rep Series B No. 10; ICGJ 277 (PCIJ 1925), para. 51; see also *Greco-Bulgarian 'Communities'* (Advisory Opinion) PCIJ Series

of reparation inherent in article 2(3) which, as argued above, should be understood to imply the need to accord proper authority to Views of the treaty bodies. Full performance of the obligations under articles 2(2) and 2(3) then require a state to adopt such laws or other measures that may be necessary to allow its courts to give effect to the Views in question.

The requirement to allow for domestic effect is a procedural requirement that should enable the relevant organs to consider, and where found necessary, attribute due weight to the outcome of the individual complaints procedure. It clearly cannot convert Views that as a matter of international law are not binding into a binding entitlement under national law.<sup>155</sup>

The argument advanced echoes the reasoning of the HRC in *Bradshaw v. Barbados*. Faced with Barbados' defiance of an interim measure request to stay execution during the communication procedure, the HRC stated that states have an obligation to give legal effect to Views and interim measures within the national legal order. According to the Barbados court the ICCPR and the First Optional Protocol were not part of national law and an interim measure did not therefore have any legal relevance. In its Views on the merits the HRC held that ratification of the First Optional Protocol brought with it a legal obligation to make the

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B no 17; ICGJ 284 (PCIJ 1930), para. 84. See also in this context article 33 proposed by Special Rapporteur Fitzmaurice in his Fourth Report on the Law of Treaties, *Yearbook of the ILC II* (1959), UN Doc. A/CN.4/120, 49 (providing that 'where a treaty provides for rights, interests or benefits to be enjoyed by private parties, or where the treaty otherwise redounds to their advantage, it is the duty of the contracting States to place no obstacle in the way of enjoyment of these rights, interests, benefits or advantages by the individuals or juristic entities concerned, and to take all such steps as may be necessary to make them effective on the internal plane'); Special Rapporteur Waldock thought that this provision was superfluous as it was inherent in the principle *pacta sunt servanda*, *Yearbook of the ILC II* (1964), UN Doc. A/CN.4/167, para. 47.

<sup>155</sup> Cf. Canada, Ontario Court of Appeal, *Ahani v. Canada (Attorney General)*, note 102 *supra*, para. 33, for an example of disregard of the difference between the giving of legal effect (to interim measures) and the acceptance of their binding force.

provisions of the ICCPR effective and held that ‘[t]o this extent, it is an obligation for the State party to adopt appropriate measures to give legal effect to the Views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol.’<sup>156</sup>

While the HRC still regularly calls for states to accord Views domestic effect by urging them to enact national ‘enabling legislation’ to ensure their implementation,<sup>157</sup> the *Bradshaw*-type reasoning has not been repeated in any of its later Views.

At first blush the argument developed may be seen to sit uncomfortably with the principle recognised in the *Avena Interpretation* case.<sup>158</sup> The ICJ confirmed that that when a legal obligation is an obligation of result, states have the freedom to determine whether or not its courts should be able to apply such obligations directly. In paragraph 153 (9) of the *Avena* judgment the Court had found that:

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<sup>156</sup> HRC, *Bradshaw v. Barbados*, *supra* note 100, para. 5.3; Also see HRC, *Roberts v. Barbados*, Communication No. 504/1992, 29 July 1994, UN Doc. CCPR/C/51/D/504/1, para. 6.3.

<sup>157</sup> When for example Lithuania ratified the First Optional Protocol to the ICCPR the HRC stated that ‘[a] specific mechanism should be established to ensure that the Views expressed by the Committee on individual communications under the Optional Protocol to the Covenant are systematically implemented’. See HRC, Concluding Observations: Lithuania, 19 November 1997, UN Doc. CCPR/C/79/Add.87, para. 8.

<sup>158</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* ICJ Reports (2009).

the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals ....<sup>159</sup>

In *Medellin*, the US Supreme Court held that it could not give effect to this obligation and that it was for the legislature to take appropriate action.<sup>160</sup> In the *Request for Interpretation Judgment*, Mexico suggested that as a matter of international law, the US Supreme Court would have been required to give effect to paragraph 153(9) of the *Avena* Judgment, rather than defer to the legislature. The Court said in response:

The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law.<sup>161</sup>

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<sup>159</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Merits) ICJ Reports (2004) 12, para. 153(g).

<sup>160</sup> United States, Supreme Court, *Medellin v. Texas*, 5 August 2008, 552 US 491; ILDC 947 (US 2008), para. 32.

<sup>161</sup> See *Avena* Interpretation Judgment, *supra* note 158, para. 44.

This warrants the question whether states cannot fulfill their procedural obligation to give the contents of Views serious consideration and accord it proper weight, or their substantive obligation to comply with an interim measure, through means other than national court proceedings.

Two observations are called for. In the first place, the discretion allowed to the US in the *Avena Interpretation Judgment* should be nuanced. The result that had to be achieved (that is, review and reconsideration of convictions and sentences) necessarily involved some legal action at the domestic level. Given that review and reconsideration should involve judicial procedures,<sup>162</sup> it follows that the state had to provide for proper means to allow for domestic effect, whether directly through the courts or through the legislature (that then had to allow the courts to act). Translated to the context of individual communication procedures, the possibility that recommended remedies include remedies that by definition can *only* be implemented through national court proceedings is not incidental, as in the *Avena* case, but inherent in acceptance of the procedure. It can therefore be argued that there is no room for the ‘reasonable time’ given to the United States in the *Avena Interpretation Judgment*: acceptance of the individual communication procedure imposes an obligation on states to prepare their legal system for the recommended remedies to follow in the form of a generally available procedure for all future successful authors.

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<sup>162</sup> *Avena Interpretation Judgment*, *supra* note 158, at para. 140 (holding that ‘in cases where the breach of the individual rights of Mexican nationals under Article 36, para. 1(b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.’)

Secondly, we argue that, concerning remedies that do not necessarily involve national court proceedings, the obligation to give serious consideration to decisions of treaty bodies entails an obligation to *allow* Views and interim measures to take legal effect domestically, that is, to permit national courts to take these decisions into account when deciding on questions of law before them. The character of international human rights adjudication differs fundamentally from that of inter-state adjudication. The legal position of individuals as against the state, while increasingly regulated by international norms and to some extent ruled upon by international supervisory mechanisms, necessarily and logically inserts itself in the domestic legal context. Acceptance of the right to individual petition, without ensuring that Views or interim measures, may at least be taken into account by courts determining rights and obligations within that domestic legal context, would be contrary to the object and purpose of individual petition.

### **2.3 Concluding remarks**

On the basis of the available information, it can be concluded that only in relatively few states, courts are able to give legal effect to Views and interim measures of treaty bodies. This limited practice appears to result primarily from a combination of two related factors: the (perception of a) non-legally binding status of such decisions and the fact that implementation would collide with rules of national law, or require courts to exercise powers that they have not been given.

The latter factor appears particularly relevant. For giving effect to a decision of a human rights body that is not legally binding and that may conflict with a decision of the highest court seems incompatible with the principle of legal certainty (in particular when third parties

are involved) and more generally with the rule of law. This presents somewhat of a paradox. Not implementing a particular decision may seem to undermine the cause of human rights. A court that refuses to enforce Views because ‘[t]he notion that the ‘views’ of a Committee even of admittedly distinguished experts on international human rights experts, though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is patently unacceptable’,<sup>163</sup> may not attract much sympathy. However, when approached from a rule of law perspective, this state of affairs does not appear altogether unreasonable. As noted in the dissenting opinion of Lord Goff in *Thomas and Hilaire v. Baptiste*: ‘The widest possible adoption of humane standards is undoubtedly to be aspired to. But it is not properly to be achieved by subverting the constitutions of states nor by a clear misuse of legal concepts and terminology; indeed, the furthering of human rights depends upon confirming and upholding the rule of law’.<sup>164</sup>

In this respect, it rightly has been said that ‘[t]he main obstacle to implementation is not the unwillingness of state parties to cooperate but the lack of a mechanism in domestic law to receive and implement decisions emanating from a foreign entity.’<sup>165</sup> The implementation of certain remedies, like the re-opening of national proceedings, requires by definition a legal basis in national law.

In the absence of such enabling provisions, or powers under general international law, it is not surprising that other possible sources of legitimacy have played a marginal role – our review

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<sup>163</sup> Ireland, Supreme Court, *Kavanagh v. Governor of Mountjoy*, *supra* note 82.

<sup>164</sup> Trinidad and Tobago, Privy Council, *Thomas and Hilaire v. Baptiste and the Attorney General of Trinidad and Tobago*, 17 March 1999, [1999] 3 W.L.R. 249, at 270 (per Lord Goff), also cited with approval by majority in *Ahani* case, Court of Appeal, *supra* note 102, para. 56.

<sup>165</sup> de Zayas, *Petitioning the United Nations*, *supra* note 83, at 86.

of practice has identified very few cases where sources of legitimacy were able to compensate for the combination of a lack of bindingness and enabling legislation.

However, we also can conclude that the practice of states, and in particular the general absence of legislation that would empower the courts, may be influenced by a failure to recognise the legal context and legal status of decisions of treaty bodies in international law. While there is no dispute that Views are not legally binding, we have argued that they are authoritative determinations of breach and reparation, that states are obliged to give Views serious consideration, to provide good reasons for not following decisions, and in particular that they have to allow, under domestic law, the possibility to consider and wherever necessary to give effect to such decisions. Moreover, specifically as regard interim measures, we concluded that acceptance of the individual petition procedure entails an obligation to protect the interests at stake of the individual concerned, and that this may require giving effect to an interim measure. This conclusion provides a critical perspective for the assessment of practice, and it would seem that there is a significant gap between the requirements under international law and the practice of states and their courts.

### 3. Treaty interpretation

The legal status of treaty body decisions in national law can be approached from a second, broader perspective. While the previous section focused on the legal effect of Views in the national legal order of the state against which they were addressed, this section examines the role of decisions of treaty bodies in the interpretation of treaty obligations by national courts. It reviews to what extent national courts attach interpretative value, *res interpretata*, to treaty body output (3.1), and assesses this practice in light of international law rules on treaty interpretation (3.2).<sup>166</sup> Both theory and practice evidence the relevance of the perceived authority of treaty bodies and their output.

#### 3.1 Interpretative value attached to treaty body output by national courts

##### 3.1.1. National court practice

Just as states insist on discretion not to implement Views directed against them, they have at times been seen to insist on an interpretation of treaty provisions that deviates from the one advanced by a treaty body in Views, Concluding Observations or General Comments. For example, the US has resolutely rejected the interpretation of article 7 of the ICCPR as including the *non-refoulement* principle. In its Concluding Observations on the US in 2006, the HRC stated that '[t]he State party should review its position, in accordance with the Committee's general comments 20 (1992) on article 7 and 31 (2004) on the nature of the

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<sup>166</sup> In contrast to section 2, which focused on decisions of treaty bodies in individual communication proceedings, this section uses a broader category of output of treaty bodies, also including Concluding Observations and General Comments.

general legal obligation imposed on States parties.<sup>167</sup> In response, the US stated that ‘[t]he non-binding opinions offered by the Committee in General Comments 20 and 31 have no firm legal basis in the text of the treaty or the intention of its States Parties at the time they negotiated or became party to the instrument. Moreover ... the States Parties under article 40 of the Covenant did not give the Human Rights Committee authority to issue legally binding or authoritative interpretations of the Covenant. Accordingly, the United States does not consider General Comments 20 and 31 to reflect the “legal obligation” under the Covenant that is claimed by the Committee.’<sup>168</sup>

This position can equally be seen to be reflected in national court practice. When a national court declines to follow the interpretation of a treaty body, it generally does so by underlining the fact that the interpretations do not have binding force. At times, courts add to this that treaty bodies are not courts and do not have judicial authority.<sup>169</sup> For example, when a French conscientious objector to military service relied on the HRC Views in *Venier and Nicholas v. France*<sup>170</sup> to argue that the duration of civilian service should not exceed that of military service, the French *Conseil d’Etat* emphasised that the HRC was a non-judicial organ whose

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<sup>167</sup> HRC, Concluding Observations: USA, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 16.

<sup>168</sup> See HRC, Comments by the Government of the USA on the Concluding Observations of the HRC, 12 February 2008, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 8–9.

<sup>169</sup> New Zealand, Court of Appeal: *Wellington District Legal Services Committee v. Tangiora*, 8 July 1997, [1998] 1 NZLR 129, 137 (CA); Spain, Constitutional Court, Judgment of 3 April 2002, Case No. STC 70/2002 (Resumen por Manuel Jaén Vallejo) 7.

<sup>170</sup> HRC, *Venier and Nicolas v. France*, Communication Nos. 690/1996 and 691/1996, 1 August 2000, UN Doc. CCPR/C/69/D/690/1996, para. 10.2 (noting that there are no reasonable and objective reasons to treat conscientious objectors differently than military conscripts).

findings were not binding.<sup>171</sup> Some courts go even further by generally questioning the authority of the output before it.<sup>172</sup> A particularly vehement sneer regarding the CAT Committee can be found in *Jones v. Saudi Arabia* decided by the House of Lords in 2006.<sup>173</sup> In its Concluding Observations on Canada in 2005, the CAT Committee had noted with concern ‘[t]he absence of effective measures to provide civil compensation to victims of torture in all cases’ and recommended that ‘[t]he State party should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture’.<sup>174</sup> Lord Bingham of Cornhill noted in respect of this interpretation of article 14 of the CAT: ‘I would not wish to question the wisdom of this recommendation, and of course I share the Committee's concern that all victims of torture should be compensated. But the Committee is not an exclusively legal and not an adjudicative body; its power under article 19 is to make general comments; the Committee did not, in making this recommendation, advance any analysis or interpretation of article 14 of the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.’<sup>175</sup> Lord Hoffmann went further and declared that, ‘as an interpretation of article 14 or a statement of international law, I regard it as having no value.’<sup>176</sup>

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<sup>171</sup> France, Council of State, *Hauchemaille v. France*, 11 October 2001, ILDC 767 (FR 2001), para. 22.

<sup>172</sup> Japan, Tokyo District Court, Judgment of 15 March 2001, 1784 Hanrei Jiho 67, at 74 (noting that ‘the General Comment neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan’); also see ILA, Final Report, *supra* note 7, para. 87.

<sup>173</sup> UK, House of Lords, *Jones v. Saudi Arabia*, 14 June 2006, [2006] UKHL 26; (2007) 1 AC 270.

<sup>174</sup> CAT Committee, Conclusions and Recommendations: Canada, 7 July 2005, UN Doc. CAT/C/CR/34/CAN, paras. 4(g) and 5(f).

<sup>175</sup> See UK, House of Lords, *Jones v. Saudi Arabia*, *supra* note 173, para. 23.

<sup>176</sup> UK, House of Lords, *Jones v. Saudi Arabia*, *supra* note 173, para. 57.

However, treaty body output does not always fare this badly in national courts. The ILA Report concludes that ‘treaty body output has become a relevant interpretative source for many national courts in the interpretation of constitutional and statutory guarantees of human rights, as well as in interpreting provisions which form part of domestic law’.<sup>177</sup> National courts regularly refer to treaty body output in support of their decisions.<sup>178</sup> Depending on the national legal system, the output is relied on to interpret the UN human rights conventions, national law that incorporates these conventions, or national law provisions guaranteeing fundamental rights.

While the majority of references are to Views of the HRC,<sup>179</sup> references to other types of output and output of other bodies can also be found. In *Suresh v. Canada*, for example, the Canadian Supreme Court attached decisive weight to the interpretation of article 7 of the ICCPR in General Comment No. 20. According to the Court ‘[th]e clear import of the ICCPR, read together with the *General Comment 20*, is to foreclose a state from expelling a person to face torture elsewhere.’<sup>180</sup> Another example of reference to output other than Views and other than that of the HRC can be found in a case concerning Maya customary land rights in Belize. The Supreme Court of Belize attached great weight to the interpretation given by the CERD

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<sup>177</sup> See ILA, Final Report, *supra* note 7, para. 175.

<sup>178</sup> Cf. for an overview of many examples both the ILA Interim Report and the ILA Final Report, *supra* note 7.

<sup>179</sup> See ILA, Final Report, *supra* note 7, paras. 176–177; for more recent examples cf. Australia, High Court, *Vasiljkovic v. Australia and ors.*, 3 August 2006, (2006) HCA 40; 80 ALJR 1399; (2006) 228 ALR 447, ILDC 530 (AU 2006), paras. 162–163; Australia, High Court, *Nudd v. The Queen*, 9 March 2006, (2006) 225 ALR 161; (2006) 80 ALJR 614; (2006) 162 A Crim R 301, ILDC 527 (AU 2006), para. 93; The Netherlands, District Court of The Hague, *Prosecutor v. Joseph M.*, 23 March 2009, LJN BK0520, chapter 16, paras. 9 and 13.

<sup>180</sup> Canada, Supreme Court, *Suresh v. Canada*, 11 January 2002, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 67.

Committee to certain provisions of the CERD.<sup>181</sup> The Court referred to a letter sent by CERD to Belize's Permanent Representative to the UN<sup>182</sup> in which it had expressed its concern regarding Belize's dealings with Maya land. '[G]iven Belize's commitment under CERD', the Court reasoned, '[the state] should take this communication seriously and respond accordingly.'<sup>183</sup> It stated that the communication, together with General Recommendation XXIII on the Rights of Indigenous Peoples 'weighted heavily ... in interpreting the fundamental human rights provisions of the Constitution'.<sup>184</sup>

In other cases, the treaty body output is only one of the many international sources taken into account by the courts. For example, when the Israeli Supreme Court was asked to examine certain special orders allowing the detention of individuals for prolonged periods of time

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<sup>181</sup> Belize, Supreme Court, *Cal and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment & Coy and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment*, 18 October 2007, (2007) 135 ILR 77; Cf. also The Netherlands, District Court of The Hague, *Test Trial Fund Clara Wichmann and ors v. Netherlands*, 7 September 2005, NJ 2005/473; AB 2005/398; NJCM 2005/30(8), ILDC 221 (NL 2005); Switzerland, Federal Supreme Court (Bundesgerichtshof), *A and B v. Regierungsrat des Kantons Zürich*, 22 September 2000, partly published as BGE 126 I 242, ILDC 350 (CH 2000), para. 2(g) ('Diese Stellungnahmen sind zwar für die Auslegung und Rechtsentwicklung von Bedeutung, können aber keine direkte Verbindlichkeit beanspruchen', i.e. the recommendations of the ICESCR Committee are relevant for the interpretation and the legal development, but are not legally binding.)

<sup>182</sup> This letter was sent in the context of the 'Early warning and Urgent Action Procedures' adopted by the CERD Committee in 1993; Cf. for more information on this procedure: UN GA, 62nd Session. *Report of the Committee on the Elimination of Racial Discrimination*, 1 October 2007, UN Doc. A/62/18, Supp. (No. 18), Chapter III and Annexes.

<sup>183</sup> Belize, Supreme Court, *Aurelio Cal, et al. v. Attorney General of Belize*, Claim No. 171/2007, 3 April 2007, paras. 124–125.

<sup>184</sup> *Ibid.* at paras. 123–126.

without access to counsel or court, the Court referred to General Comment No. 8 of the HRC, as well as to judgments of the ECtHR.<sup>185</sup>

National courts do at times also attach importance to what a treaty body *has not* said. When a Dutch Court was asked to find that Dutch legislation, which allowed the retention of DNA-material of minors, violated *inter alia* the CRC, it considered it relevant to note that the CRC Committee had not reprimanded the Netherlands over this law in its recent Concluding Observations on the Netherlands.<sup>186</sup> In a similar vein, the Canadian Supreme Court noted that the HRC is of the view that corporal punishment in schools may engage article 7 of the ICCPR, but that it has not said that corporal punishment by parents could as well.<sup>187</sup>

The ILA Report did qualify its positive account. It admitted that, in the jurisprudence of courts in many countries, for example in Eastern Europe or Southern Africa, there is ‘little or no reference to the findings of the treaty bodies.’<sup>188</sup> Moreover, it conceded that many references to treaty body work concern ‘inconsequential references in passing’ and that ‘the number of cases in which a treaty body finding is a significant factor in influencing the

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<sup>185</sup> Israel, Supreme Court, *Marab and Others v. Israel Defence Force Commander in the West Bank and Another*, 5 February 2003, HCJ 3239/02 (2003) 133 ILR 332, 349, para. 27. It is doubtful whether the Court understood the nature of the treaty body output it referred to. It did not use the term ‘General Comment’ and indicated that it found the quote it relied on in N. Rodley, *The Treatment of Prisoners Under International Law*, 2<sup>nd</sup> ed. (Oxford University Press, 1999).

<sup>186</sup> The Netherlands, District Court of Maastricht, Judgment of 24 February 2009, LJN: BH4127, para. 4.4.

<sup>187</sup> Canada, Supreme Court, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney-General)*, 30 January 2004, (2004) 70 OR (3d) 95; ILDC 177 (CA 2004), para. 33.

<sup>188</sup> See ILA, Final Report, *supra* note 7, para. 28.

outcome of a decision is a small minority of the cases referred.’<sup>189</sup> Oftentimes the reference is part of ‘a lengthy listing of other international sources and comparative national case law’.<sup>190</sup>

Most of the references to treaty body output are indeed references in passing, only occasionally do courts care to explain the relevance or the authority of the output.<sup>191</sup> A US court referred to HRC General Comments and Views as ‘a major source for interpretation of the ICCPR’.<sup>192</sup> One Australian court held that HRC Views are ‘persuasive’,<sup>193</sup> while another considered it ‘appropriate for a court to have regard to the views of such a body’.<sup>194</sup> In *Residents of Bon Vista mansions v. Southern Metropolitan Local* a South African court noted that ‘general comments have an authoritative status under international law.’<sup>195</sup> Also New Zealand courts have regularly recognised the authority of HRC decisions. In *R v. Goodwin* the New Zealand Court of Appeal considered that ‘[w]hether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority.’<sup>196</sup> The Hong Kong

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<sup>189</sup> *Ibid.* at para. 179.

<sup>190</sup> See ILA, Interim Report, *supra* note 7, at para. 62.

<sup>191</sup> In addition to examples here, also see Belize, *Cal and Others v. Attorney-General*, *supra* note 181 and Canada, *Suresh v. Canada*, *supra* note 180.

<sup>192</sup> United States of America, United States District Court for the Eastern District of New York, *Maria v. McElroy*, 27 August 1999, 68 F Supp 2d 206, 232 (EDNY 1999) (noting that ‘the Human Rights Committee’s General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR’).

<sup>193</sup> Australia, Federal Court, *Minister for Foreign Affairs and Trade v. Magno*, 26 November 1992, (1992) 37 FCR 298, 112 ALR 528, 573.

<sup>194</sup> Australia, Federal Court, *Minister for Immigration v. Al Masri*, 15 April 2003, [2003] FCAFC 70, para. 148.

<sup>195</sup> South Africa, High Court Witwatersrand, *Residents of Bon Vista mansions v. Southern Metropolitan Local Council*, 2002 (6) BCLR 625 (W).

<sup>196</sup> New Zealand, Court of Appeal, *R v. Goodwin (No 2)* [1993] 2 NZLR 390; Cf. also New Zealand, Court of Appeal, *Nicholls v. Registrar of the Court of Appeal*, 4 May 1998, [1998] 2 NZLR 385, 405

Court of Appeal has observed that ‘the general comments and decisions of the Human Rights Committee ... are of the greatest assistance and should be given considerable weight’ while interpreting the national Bill of Rights.<sup>197</sup> The Dutch Administrative High Court similarly qualified the Views of the HRC as authoritative, and added that national courts could only deviate from these Views if justified by weighty reasons.<sup>198</sup>

In brief, as a consequence of the non-binding nature of these decisions, national courts seem to generally approach treaty body output in a pick-and-choose manner. If courts are convinced by the interpretation of state obligations found in treaty body output, they refer to its authoritative status. If not, its non-binding nature is emphasised.

The use of treaty body output seems however not to depend on the whims of national courts alone. The ILA Report identified, albeit in a very tentative manner, several factors that seem to contribute to the use of treaty body output. These included the fact that international law forms part of domestic law, direct incorporation of treaty provisions in a domestic statute or constitution, general awareness of the treaty bodies, and the availability of relevant treaty body findings in local languages.<sup>199</sup> In addition, the ILA Report listed a set of different factors that explain the extent to which the treaty body decisions that national courts refer to actually influence the decisions of national courts: the pertinence of the findings to the issue in the case, the detail and persuasiveness of the reasoning in the treaty body source, the particular norm that is being interpreted, the receptiveness of the court to the international source

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and 461 and New Zealand, Court of Appeal, *Quilter v. Attorney General*, 3 September 1997, [1998] 1 NZLR 523, 576-577 (Tipping J).

<sup>197</sup> Hong Kong, Court of Appeal, *R v. Sin Yau-ming*, 30 September 1991, (1991) 1 HKPLR 88, 107.

<sup>198</sup> The Netherlands, Central Appeals Tribunal, *Appellante v. de Raad van Bestuur van de Sociale Verzekeringsbank*, 21 July 2006, LJN: AY5560, para. 4.36.

<sup>199</sup> See ILA, Final Report, *supra* note 7, paras. 180–182.

material, the availability of other international or national material that deals with the issue in a more detailed manner, and the membership of a regional organisation in which there exists an organ which can deliver binding judgments.<sup>200</sup>

Despite the work of the ILA Committee, the knowledge and understanding of national (judicial) practice remains limited. The ILA Committee conceded that its conclusions were not based on a comprehensive study of the practice of all states.<sup>201</sup> It recognised ‘the limitations of its data collection and analysis and that any persuasive predictive analysis of the features of a State’s system or behaviour that may lead to greater use of treaty body output would require a much more systematic analysis of the available data.’<sup>202</sup> In this regard, the Committee encouraged the treaty bodies as well as the Office of the High Commissioner for Human Rights (OHCHR) and the Division for the Advancement of Women (DAW) to collect relevant data.<sup>203</sup>

Further study is indeed required to identify with more certainty the factors that favour or inhibit reliance on treaty body output by national courts. Not only because the ILA Report was not based on a comprehensive or systematic study of data, but also because within that limited scope the report does not convincingly establish the relevance of the identified factors. To come to solid and valuable conclusions on the status and use of this output in national legal orders, it would however not be sufficient to engage in a comprehensive study of all instances of state practice in which reference is made to the output of the treaty bodies; it would be necessary to also identify those instances where there was no reference to the

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<sup>200</sup> See ILA, Final Report, *supra* note 7, para. 179.

<sup>201</sup> See ILA, Final Report, *supra* note 7, paras. 175–176 and 180.

<sup>202</sup> See ILA, Final Report, *supra* note 7, para. 180.

<sup>203</sup> See ILA, Final Report, *supra* note 7, para. 183.

findings of treaty bodies while those findings *were* pertinent to the case at hand. This is an interesting and much called for research project, but not one we are able to undertake within the scope of this contribution.

For the purposes of this contribution, two points can be noted, however. First, while the dualist nature of a national legal order, or the fact that human rights treaties have not been incorporated in national law, will undoubtedly influence the extent to which treaty body output plays a role in national court proceedings, these factors do not constitute impediments to attaching interpretative value to the work of the treaty bodies. Second, when treaty body output finds its way to national courtrooms, the extent of the interpretative value attributed to it largely turns on the perceived authority of the treaty bodies and their work under international law.

### *3.1.2. The authority, or legitimacy, of the treaty bodies and their output*

Compliance by states with the outcome of complaints procedures has been linked to factors related to the supervisory body, the procedure, and the decision, which may be grouped under the concept of legitimacy. However these factors appear to play a marginal role in the specific context of judicial decisions.<sup>204</sup> They may be thought of as more relevant in explaining the interpretative weight of decisions of treaty bodies, since courts then are not similarly constrained by national law.

We use the term legitimacy here to refer to the justification of authority<sup>205</sup> – the concept thus encompasses factors that may provide such justification, and thereby may explain the effect of

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<sup>204</sup> See *supra* section 2.1.4.3.

<sup>205</sup> Bodansky, *The Legitimacy of International Governance*, *supra* note 105, at 601.

decisions of treaty bodies at the national level. Several factors affect the authority of treaty bodies and their output. They can be divided into the institutional aspects of the body's procedure, and the substance of the output. In view of the number of different treaty bodies, all with their own profile and own procedures, and in view of the different functions each of these bodies performs, this section offers, in conclusion, a birds-eye-view of the problematic issues – not a comprehensive overview.

One recurring theme in critical discussions of the authority of treaty bodies to interpret the legal instruments under their supervision is the (non-)legal character of the bodies and their procedures. Practice evidences that the extent to which national courts attribute authority to treaty body output is influenced by their assessment of these bodies' judicial character. Contrasting the treaty bodies with the universal periodic review to be carried out by the Human Rights Council, the chairpersons of the treaty bodies have referred to the treaty bodies as 'exclusively an independent legal mechanism'.<sup>206</sup> This characterisation may not convince everyone. While the members of the various treaty bodies are indeed formally independent and impartial,<sup>207</sup> some members hold a position in government which is hard to reconcile with the objective element of the impartiality requirement.<sup>208</sup> Moreover, a 'legal mechanism' is not

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<sup>206</sup> UN GA, 62nd Session. *Report of the Chairpersons of the Human Rights Treaty Bodies on Their Nineteenth Meeting - Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights*, 13 August 2007, Un Doc. A/52/224, para. 8.

<sup>207</sup> Steiner, Individual Claims, *supra* note 3, at 49.

<sup>208</sup> Objective impartiality: Cf. for criticism Mechlem, Treaty Bodies, *supra* note 8, at 915; Cf. also Bayefsky (ed.), *The UN Human Rights Treaty System*, *supra* note 22; However, now the requirement of expertise and independence is 'fulfilled' (see S. Joseph, J. Schulz and M. Castan, *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary*, 2<sup>nd</sup> ed. (Oxford University Press, 2004) at 17).

the same as a court, or a judicial institution.<sup>209</sup> Even the function of treaty bodies that resembles judicial activity closest – the individual complaints procedure – should be distinguished from the judicial function exercised by national and international courts. Members are not necessarily lawyers.<sup>210</sup> The inclusion of economists, political scientists or sociologists may be understandable in view of the diversity of functions exercised by the bodies and the wide-ranging issues that come before them,<sup>211</sup> but it does distinguish them from purely judicial institutions. It has even been argued that broad interdisciplinary membership ‘impede[s] the development of a common and sophisticated jurisprudence.’<sup>212</sup>

As the legal character of the various functions of treaty bodies differs, perception of the authority of Views, General Comments, and Concluding Observations will differ. It is, for example, hardly imaginable that the Law Lords deciding the *Jones* case would have dismissed

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<sup>209</sup> ECJ, *Grant v. South-West Trains Ltd.*, Case C-249/96, 17 February 1998, [1998] ECR I-621. Cf. on this also New Zealand, Privy Council, *Tangiora v. Wellington District Legal Services Committee*, 4 October 1999, [2000] 1 NZLR 17, at 21.

<sup>210</sup> Article 28.2 of the ICCPR; article 17.1 of the CAT, merely notes that ‘consideration’ will be given ‘to the usefulness of the participation of some persons having legal experience’ and article 26.1 of the CPED states that ‘[d]ue account shall be taken of the usefulness of the participation in the work of the Committee of persons having relevant legal experience’. Cf. Mechlem, Treaty Bodies, *supra* note 8, at 917–918 for an overview of members with legal background in the different treaty bodies.

<sup>211</sup> See for pleas for a broad interdisciplinary membership N. Ando, ‘The Future of Monitoring Bodies – Limitations and Possibilities of the Human Rights Committee’, *Canadian Human Rights Yearbook* (1992–1992) 169–175, at 172; C. Scott, ‘Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights’, P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* XXXV (Cambridge University Press, 2000) 403–437, at 418; A. Byrnes, ‘The “Other” Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women’, *Yale Journal of International Law* 14 (1989) 1–67, at 1 and 9; Mechlem, Treaty Bodies, *supra* note 8, at 918.

<sup>212</sup> A.F. Bayefsky, *Report on the UN Human Rights Treaties: Facing the Implementation Crisis*, ILA, ‘Report of the 67th Conference’, Helsinki (1996) 346.

Views of the HRC in the same disrespectful tone in which they dismissed Concluding Observations. In its comments on HRC General Comment No. 24 on reservations, the United Kingdom noted that '[t]here is a qualitative distinction between decisions judicially arrived at after full legal argument and determinations made without the benefit of a judicial process.'<sup>213</sup>

But also the procedure leading to the adoption of Views is regularly the subject of criticism. Commentators have for example argued that the consensus model negatively affects the authority of Views of the HRC. Already in 1991 McGoldrick observed that '[t]he necessity for consensus inevitably reduces clarity and precision'.<sup>214</sup> Davidson adds to that: '[t]he reliance upon written procedure alone further dilutes the authority of the HRC's proceedings, since they are unable to call, hear and cross examine witnesses.'<sup>215</sup> Limited resources are another concern which, in the words of Davidson, may lead to 'a less than rigorous review of the issues'.<sup>216</sup> In conclusion, Davidson argued that '[i]t is apparent that the HRC has neither the resources, the organisation, nor the procedures to allow it to undertake extended jurisprudential analysis similar to that of the European or Inter-American Court of Human Rights.'<sup>217</sup>

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<sup>213</sup> Observations by the United Kingdom under 'Observations of States Parties under Article 40, Paragraph 5, of the Covenant' in UN GA, 50th Session. *Report of the Human Rights Committee*, 4 February 1996, UN Doc. A/50/40, vol. I, Supp. (No. 40), 133, para. 12.

<sup>214</sup> McGoldrick, *The Human Rights Committee*, *supra* note 3, at 199. Cf. also Steiner, *Individual Claims*, *supra* note 3, at 43; Davidson, *Intention and Effect*, *supra* note 114, at 316.

<sup>215</sup> Davidson, *Ibid.*

<sup>216</sup> *Ibid.*; see on consequences of lack of sufficient resources also R. Bank, 'International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?', *EJIL* 8 (1997) 613–637, especially at 636.

<sup>217</sup> Davidson, *Intention and Effect*, *supra* note 114, at 317.

The substance of treaty body output is indeed regularly subject to critical reflection. As Mechlem notes, ‘commentators ... regularly criticize a lack of substantial arguments, coherence, and analytical rigor; the absence of a visible concept of interpretations; and the existence of contradictory remarks by different committee members, which are caused by the absence of a principled approach.’<sup>218</sup> An example is Steiner who writes that ‘[t]hroughout the [Human Rights] Committee’s life, views have been written in a form that could not be called user-friendly. Rather than highlight issues and argument, they too frequently frustrate the reader because of their rigid structure and excessive information, the disjunction between most of this information and the conclusions of the Committee, the terse statement of these conclusions, and the sheer lack of readability.’<sup>219</sup>

Finally, Simma has noted that ‘in some instances the Views or General Comments issued by the treaty bodies go too far and thereby diminish their own authority.’<sup>220</sup> In addition to the dynamic and progressive interpretation of substantive norms – Simma speaks of the CERD as expanding the obligations of states ‘beyond recognition’<sup>221</sup> – one may in this respect also think of the attempts of treaty bodies to formulate their Views in legally binding terms,<sup>222</sup> or the practice of some treaty bodies that cannot issue Views to ‘expressly speak of treaty violations without a clear mandate to that effect in the treaties themselves’.<sup>223</sup>

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<sup>218</sup> Mechlem, *Treaty Bodies*, *supra* note 8, at 908.

<sup>219</sup> Steiner, *Individual Claims*, *supra* note 3, at 42.

<sup>220</sup> B. Simma, ‘Commissions and Treaty Bodies of the UN System’, R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (New York: Springer, 2005) 581–586, at 583; Simma gives the example of HRC General Comment No. 24 on Reservations.

<sup>221</sup> *Ibid.* at 583.

<sup>222</sup> Cf. section 2.2.1. *supra*.

<sup>223</sup> Simma, *Commissions and Treaty Bodies*, *supra* note 220.

The degree to which such factors indeed have influence on the interpretative practice of national courts remains difficult to determine without a major empirical (comparative) research project involving interviews with relevant actors.

### **3.2 Assessment in terms of international law**

#### *3.2.1. International law on treaty interpretation*

The fact that the interpretation of human rights treaties by the treaty bodies is not binding on states is hardly controversial. General comments are not binding<sup>224</sup> and also the treaty interpretation found in Concluding Observations and Views does not bind states.<sup>225</sup> It should be noted that, in this respect, the status of decisions on individual communications does not differ fundamentally from binding international adjudication by, for example, the ECtHR or the ICJ for that matter. Judgments are only binding on the parties to a dispute and do not create norms of general application.<sup>226</sup> While national courts may be more likely to follow the interpretation of a body endowed with the power to issue binding judgments,<sup>227</sup> the question as to the legal status of treaty body output in the sense of interpretative value is as a matter of principle, comparable to the question of the ECtHR's and ICJ's judgments' relevance for treaty interpretation. National courts do not always seem to grasp this. The full court of the

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<sup>224</sup> See Keller and Grover, General Comments, this volume, section ####.

<sup>225</sup> See Kalin, Concluding Observations, this volume ####.. For Views see section 2.2.1. *supra*.

<sup>226</sup> Judgments are only binding on the parties: article 59 of the ICJ Statute; article 46 of the ECHR. See on the question of *res interpretata* of Judgments of the European Court of Human Rights the Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice", AS/Jur/Inf (2010) 04.

<sup>227</sup> For one, because it increases the likelihood that the individual will challenge the deviating interpretation before that international body.

Federal Court of Australia, for example, juxtaposing the ECtHR and the HRC stated that, '[w]hereas a determination by the European Court imposes an obligation upon each State party recognising the Court's jurisdiction to conform with that ruling, the HR Committee's report is not binding on an acceding state party'.<sup>228</sup>

It is at times argued that treaty body output, as far as it is acquiesced to by states, may constitute 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' in the sense of article 31(3)(b) Vienna Convention on the Law of Treaties (VCLT).<sup>229</sup> More often, commentators leave the precise legal qualification of the output in the middle, referring instead to its 'authoritative nature'. The relevance of this authority can however very well be framed in legal terms. As a Japanese High Court held in a 1994 decision, HRC General Comments and Views 'should be relied on as a supplementary means of interpretation of the ICCPR'.<sup>230</sup> The Court clearly alludes to article 32 of the VCLT, and in a similar vein the notion of 'subsidiary means for the determination of rules of law' in the sense of article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute) may play a role. A brief assessment of the question to what extent these three rules on interpretation have bearing on the interpretative value of treaty body output in national courts is called for.<sup>231</sup>

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<sup>228</sup> See Australia, *Minister for Foreign Affairs and Trade v. Magno*, *supra* note 193, at 573.

<sup>229</sup> See *infra* note 233.

<sup>230</sup> Japan, Osaka High Court, *Yun Chang-Yol v. The State of Japan and the Prefecture of Kyoto*, 28 October 1994, 38 Japanese Annual of International Law (1995) 118, 129–130.

<sup>231</sup> Clearly, these rules only become relevant when a national court chooses to have regard to treaty provisions in the first place. There is no obligation to have regard to treaties when interpreting national legislation that reflects or incorporates the rights and obligations under the UN Human Rights Treaties. Cf. on the application by national judges of the VCLT rules on interpretation R.K. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) at 18–19 and at 126–128.

### 3.2.2. *Subsequent practice in the application of the treaty*

According to article 31(3)(b) of the VCLT, ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [shall be taken into account]’ in the process of treaty interpretation. Two arguments regarding treaty body output have been made in this respect. In the first place, it is at times argued that the reaction of states to treaty body decisions – acquiescence, approval, rejection – may be seen to constitute the relevant subsequent practice.<sup>232</sup> In a more controversial argument, subsequent practice is framed in terms of the treaty body decision *itself* – at least in as far as states have not objected to it.<sup>233</sup> The ILA Report, for example, points to the special nature of human rights treaties – ‘with third-party beneficiaries and an independent monitoring mechanism’ – compared to traditional treaty forms and suggests that, for the interpretation of human rights treaties, the practice of the treaty bodies may therefore qualify as relevant subsequent practice under customary international law – if not under the VCLT.<sup>234</sup>

Article 31(3)(b) of the VCLT makes it obligatory to have regard to subsequent practice and should the qualification of treaty body output in these terms be correct, this would mean that the pick-and-choose manner in which national courts generally approach this output is not in accordance with international law. Two critical observations may however be seen to cast doubt on the relevance of the rule in this context. In the first place, the idea that treaty law must be interpreted in a manner that does justice to the distinctive characteristics of human

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<sup>232</sup> See ILA, Final Report, *supra* note 7, para. 21.

<sup>233</sup> See ILA, Final Report, *supra* note 7, para. 22; M. Herdegen, *Völkerrecht*, 8<sup>th</sup> ed. (München: Beck Juristischer Verlag, 2009) at 124; Mechlem, Treaty Bodies, *supra* note 8, at 920–921; see Schlütter, Interpretation Methods, this volume, section ####: she limits this argument to General Comments.

<sup>234</sup> See ILA, Final Report, *supra* note 7, para. 22 (the argument is however not made consistently: para. 23 *et seq.* discusses the notion again from the perspective of subsequent *state* practice).

rights treaties, and that therefore the notion subsequent practice should be interpreted as extending to the practice of treaty bodies, is attractive but controversial. It would to some extent circumvent the non-bindingness of treaty body decisions and therewith the express terms of the UN human rights treaties. The problem with the position that the reaction of states to treaty body decisions forms subsequent practice is not one of principle but one of practice. It is difficult to imagine a situation in which the interpretation advanced in a treaty body decision triggers state practice qualifying as ‘subsequent practice’. According to Special Rapporteur Waldock, ‘to amount to an “authentic interpretation”, the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally.’<sup>235</sup> Clearly, the absence of objection of states to treaty body output is not sufficient. A first requirement would be the presence of practice ‘in the application of the treaty’, meaning the adoption of practice by at least a number of states as a result of the acceptance of an interpretation of treaty obligations by a treaty body. The second requirement is that *all* the other state parties to the relevant treaty agree with the interpretation reflected in the said practice. According to Gardiner, this means that ‘there must be a sufficient nexus between the parties to the treaty and the practice, as distinct from actual participation of all parties in the practice concerned.’<sup>236</sup> In view of the fact that ‘practice’ in this field by definition develops on the domestic rather than the international level, and in view of the fact that the link between domestic practice and the interpretation of a treaty may not always be clearly publicised, it is very hard, if not impossible, to argue that inaction or silence of non-participating states should qualify as tacit assent.

### 3.2.3. *Subsidiary or supplementary means of interpretation*

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<sup>235</sup> See ILC, *Yearbook of the ILC* II (1966), UN Doc. A/CN.4/SER.A/1966/Add.1, 98–99, para. 18, and 221–222, para. 15.

<sup>236</sup> Cf. in this sense Gardiner, *Treaty Interpretation*, *supra* note 231, at 236.

Article 38(1)(d) of the ICJ Statute qualifies ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’ as ‘subsidiary means for the determination of the rules of law’.<sup>237</sup> Within the specific context of treaty interpretation, jurisprudence and academic literature may play a role as ‘supplementary means of interpretation’ in the sense of article 32 of the VCLT, in order to ‘confirm the meaning resulting from the application of article 31’ of the VCLT, or ‘to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure’. In practice, this leaves ample room for reference to expert opinion when interpreting treaty provisions.<sup>238</sup> It is in any case recognised that ‘[s]ubsequent practice which does not fall within [the] narrow definition of [article 31(3)(b)] may nonetheless constitute a supplementary means of interpretation within the meaning of article 32 of the Convention.’<sup>239</sup>

The two rules (article 38(1)(d) of the ICJ Statute and article 32 of the VCLT) differ fundamentally from the one in Article 31(3)(b) of the VCLT. Where the latter article imposes an obligation to take subsequent practice into account when interpreting a treaty, article 38(1)(d) of the ICJ Statute and article 32 of the VCLT merely open a possibility: whether or not recourse is had to these subsidiary or supplementary means of interpretation lies within the discretion of the interpreter.<sup>240</sup> As Villiger notes: ‘The extent to which [supplementary

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<sup>237</sup> Article 38(1)(d) of the ICJ Statute.

<sup>238</sup> M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009) at 447, noting that ‘it is difficult to imagine situations where the means of Article 32 may not be employed’; see for a different opinion I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> ed. (Manchester University Press, 1984) at 142: ‘recourse is permissible in carefully controlled circumstances’.

<sup>239</sup> Sinclair, *ibid.* at 138.

<sup>240</sup> Cf. also ILC, Yearbook, *supra* note 235, at 218, para. 4.

means] are able to [aid in the process of treaty interpretation] will depend on their cogency, in particular on their accessibility; their direct relevance for the treaty terms at issue, the consistency among the means found, the number of parties involved in the evolution of the particular means, and the reactions of other parties thereto.’<sup>241</sup>

### **3.3. Concluding remarks**

National court practice evidences that treaty body output increasingly finds its way into domestic courtrooms. Whether or not national courts follow the treaty bodies in their interpretation of the fundamental rights of individuals seems to depend to a large extent on the perceived authority of the body and the output. This practice to assess the interpretative value of treaty body output in terms of authority makes sense in light of the international law rules on treaty interpretation.

## **4. Conclusion**

The premise of this article was that the success of UN human rights treaty monitoring mechanisms depends largely on the influence that the findings of the relevant monitoring body exert on national legal orders. This contribution approached the question of influence from the perspective of the national judge: what is the legal status of treaty body decisions in proceedings before national courts?

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<sup>241</sup> See Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, *supra* note 238, at 446.

We first inquired into the legal status of Views and interim measures in follow-up proceedings within the national legal order of the state against which they were addressed and found that the practice of states and their courts in this respect varies. But our examination demonstrated that, only in very few states have courts been enabled to consider and give due effect to a decision of a treaty body in cases instigated by individuals in the national legal order to ensure implementation. In the absence of such provisions, the principle of the rule of law will generally oppose giving effect to decisions. The lack of practice may be due to a lack of appreciation of the legal nature of decisions of human rights bodies, both in regard to Views and in regard to interim measures. We concluded that there is a significant gap between the requirements under international law and the practice of states and their courts.

However, the level of implementation of Views in individual cases is not the best measure of success of the treaty bodies. In addition to the remedy for the wronged individual and the general measures that states take to ensure that similar violations will not occur in the future, Views, together with other treaty body output, influence national legal orders through the guidance they provide to states and to national courts as to the exact meaning of the broadly phrased rights and obligations in human rights treaties.<sup>242</sup> In view of the fact that the treaty bodies have only a very limited capacity to take on individual complaints,<sup>243</sup> the interpretative role of the treaty bodies, exercised through Views, Concluding Observations and General

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<sup>242</sup> See also Byrnes, *An Effective Complaints Procedure*, *supra* note 104, at 142; Steiner, *supra* note 3, at 36 et seq. adds to this ‘deterrence and behaviour modification’.

<sup>243</sup> Cf. Steiner, *Individual Claims*, *supra* note 3, at 33 (‘about thirty a year’); D. Kretzmer, ‘Commentary on Complaint Processes by Human Rights Committee and Torture Committee Members’, A.F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (The Hague: Kluwer Law International, 2000) at 163–166 (points to the weakness of the system as individual redress is concerned: ninety state parties, thirty Views per year).

Comments, may far exceed their role as dispensers of individual justice.<sup>244</sup> State practice evidences that national courts do increasingly attach interpretative value to treaty body output, although the authority of treaty bodies and their output to interpret state obligations under human rights treaties is not accepted unconditionally.

According to Gallagher, ‘the worth of the United Nations human rights treaty system can best be measured by reference to its ability to encourage and cultivate national implementation of, and compliance with human rights standards. ... It follows that the work of the treaty bodies themselves should be heavily weighted towards encouraging and facilitating the development of national systems and processes which support and defend protected rights.’<sup>245</sup> As far as the role of national courts in the protection of human rights in the national legal order is concerned, treaty bodies should consider three things. First, it seems that much could be gained from an increased awareness and knowledge of the treaty bodies and their work in general. A telling illustration of the lack of knowledge and understanding by courts of the nature of treaty bodies can be found in the recent reference of the Dutch Supreme Court to the Human Rights Commission, when it meant the HRC,<sup>246</sup> and the observation of a Dutch [Attorney General] in his conclusion before the Dutch Supreme Court that the HRC had recently been replaced by the Human Rights Council.<sup>247</sup> Second, a consolidated effort of treaty bodies to clarify the obligations of states under an individual communication procedure

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<sup>244</sup> In regard to Views only: Kretzmer, *ibid.* at 165.

<sup>245</sup> A. Gallagher, ‘Making Human Rights Treat Obligations a Reality: Working with New Actors and Partners’, P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring XXXV* (Cambridge University Press, 2000) 201–227, at 201.

<sup>246</sup> The Netherlands, Supreme Court, 18 April 1995, NJ 1995/611, para. 4.5

<sup>247</sup> The Netherlands, Supreme Court, *Barelds & Pasman B.V. v. BLG Hypotheekbank N.V.*, 8 June 2007, LJN: AY9933, NJ 2007/419, Conclusion of the Attorney General, para. 5.2.

is called for. While states are not obliged to implement Views, they should be made to realise that acceptance of the right to individual petition does impose an obligation to remove obstacles in their national legal order that stand in the way of giving domestic legal effect to Views and interim measures. Finally, the overview of factors influencing the perceived authority of treaty bodies and their output indicates that an increased impact on national legal orders can partially be achieved through a change of the practice of the treaty bodies themselves. In the absence of binding powers, treaty bodies need to ensure legitimacy through their membership, their procedures, the quality and clarity of (legal) reasoning in their decisions and respect for their mandate.