# 9 Soft Law

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## I. Introduction

Article 38(1) of the Statute of the International Court of Justice (ICJ) provides us with a handy catalogue of the recognized sources of international law, namely, conventions, custom, and the general principles of law.[1] Despite the general reliance on the catalogue, questions persist as to whether and to what extent these three sources of international law exhaust the international standards which states consider that they ought to follow.[2] The 'soft' law concept is part of the broad movement since the 1970s—of which this chapter is part—in international legal scholarship to give recognition to international normative standards which do not fall under the recognized sources of international law.[3]

By compiling a selected number of domestic court decisions primarily from the Oxford Reports on International Law in Domestic Courts (ILDC), this chapter aims to provide a glimpse of how domestic courts give recognition, through their judicial reasoning, to soft law.[4] Within the context of the ILDC reports, soft law is understood broadly to embrace a range of standards which states consider that they ought to abide by and which may not yet fall under the three sources of international law. This chapter does not cover a domestic court's reference to foreign law and judgments.

Soft law is typically expressed and developed by way of international instruments adopted by treaty-monitoring bodies and international organizations. Whether or not a normative prescription contained in, for instance, a UN General Assembly resolution, reflects, in substance, the accepted interpretation of treaties or established customary international law is by no means straightforward, owing to the flexibility of treaty interpretation and uncertainties in identifying state practice and *opinio juris* to constitute customary international law. Added also are the absence of centralized authorities to define the existence and scope of international legal rules, as well as the uneasy status of treaty-monitoring bodies and international organizations in the development of supposedly state-centric international law. In this sense, the manner in which domestic judges engage with soft-law instruments would be one indicator to measure the normativity of such international instruments.

This chapter categorizes the selected ILDC case reports primarily according to the *kind of instruments* invoked by domestic courts. As shown by section II of this chapter, the opinions of (p. 312) treaty-monitoring bodies, including those for human rights treaties, have informed judges to construe pertinent treaty provisions. One of the visible examples is judicial reference to General Comments issued by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights for the interpretation of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), respectively (as illustrated by *RM and Cradle*). Interestingly, General Comments may instruct domestic courts even if their states are not a party to relevant human rights treaties (*Jaftha v Schoeman*). Recourse is also made to documents prepared by the Office of the United Nations High Commissioner for Refugees (UNHCR) (*Adan*). While the UNHCR is not formally a treaty body for the Refugee Convention, it regularly undertakes refugee status determination according to the Refugee Convention and contributes to the development of its interpretation.

The documents adopted by treaty-monitoring bodies by no means exhaust judicial engagement with soft-law instruments. As illustrated in section III, judges consult documents prepared by a 'conference of parties' (*ADS*). Section IV demonstrates that national courts also refer to the instruments of international organizations, including the UN General Assembly's resolutions (*People's Union for Civil Liberties*). One of the frequently cited resolutions is the Universal Declaration of Human Rights, although its

provisions have arguably gained the status of customary international law. As section V suggests, major declarations adopted by inter-governmental forums have also been present in the judicial reasoning, such as the 1990 Bergen Ministerial Declaration on Sustainable Development in order to give meaning to the precautionary principle (*Spraytech*) and the 1972 Stockholm Declaration to interpret the concept of sustainable development (*Fuel Retailers Association*).

Needless to say, these international instruments serve a variety of *purposes* in the reasoning of domestic courts. In the first place, some instruments are invoked for an *evidentiary* purpose. General Assembly resolutions have been invoked as evidence to prove the existence of customary international law (*Filartiga*). Secondly, a more common usage is the *interpretive guide* for customary international law (*Spraytech*), or more frequently, for international treaties, which, especially in the countries with dualist traditions, would be ultimately used to construe domestic law (*RM and Cradle; Adan; ADS*). Finally, soft-law instruments have even been used as *general guidance* that shapes the direction of judicial interpretation. For instance, they have been invoked in order to stress the importance of access to water (*Matsipane Mosetlhanyane*) or to identify an evolving concept of international law and highlight the role of courts in environmental protection (*Fuel Retailers*).

The overview of the selected ILDC cases leads us to the question of *justification*, namely, on what basis domestic courts invoke soft-law instruments in their judicial reasoning. Domestic courts' reference to the instrument can be justified on the basis of formal binding force if declarations or recommendations have been incorporated into domestic law (eg, *Nabori* in section V) or have already been established as customary international law (eg, *Filartiga* in section IV). In such cases, domestic courts find little difficulty in justifying why they can invite UN General Assembly resolutions or other instruments to judicial reasoning. If international instruments are not formally binding, domestic courts' discretionary reference to them may be justified on the basis that the instruments are *persuasive*, or so-called 'persuasive authority' (*Adan*, per Lord Steyn, in Section II). Persuasive authority is contrasted with 'binding authority'. The latter has independent binding force and its authoritativeness stems from its pedigree, as opposed to its merit or substance.[5]

The arena of persuasive authority may appear to be an unregulated sphere, leaving judges wide discretion to pick and choose instruments which support conclusions they have reached (p. 313) elsewhere. The uncertainty of variables that determine the persuasiveness of an instrument indeed paves the way for domestic courts' purposeful interpretation that support judges' preferred conclusions. Nevertheless, the space of soft-law instruments is not totally without order. From the Oxford Reports on the ILDC cases, it is possible to identify some of the major indicators sustaining the persuasiveness of soft-law instruments.

First, the *systematic association with formal instruments* is one of the factors that determine the persuasiveness of non-treaty instruments. For the purpose of interpreting a particular treaty, the instruments of treaty monitoring bodies and a conference of parties (ie, Sections II-III) are generally more persuasive than those of other bodies (ie, Sections IV-V) owing to the former's institutional linkage to the treaty in question. Secondly, the *nature of the body* and the *procedure according to which instruments are adopted* may also accord persuasiveness on non-treaty instruments. The judicial nature of a body (or of the procedure according to which a particular instrument is adopted) confers persuasiveness on international instruments (as illustrated by *Mansouri-Rad* in section II). Finally, the wider public acceptance, or at least acceptance within the relevant interpretive communities, would render an instrument persuasive before domestic courts (eg, *KwaZulu-Natal v P* in section IV). These indicators by no means exhaust often context-dependent considerations that determine the level of domestic courts' interactions with soft-law instruments. After all, the use of soft-law instruments depends on the discretion of domestic

judges, whose level of engagement both augments and diminishes the normativity of international instruments at the international level.

## II. Instruments of Treaty-Monitoring Bodies

### RM v Attorney General, JK (on the application of RM) v Attorney General, Application brought by way of original summons to high court, Civil Case 1351, ILDC 699 (KE 2006), 1st December 2006, Kenya; Nairobi; High Court

The question the Kenyan High Court encountered in *RM and Cradle* was the compatibility of the Kenyan domestic law, which bestowed parental responsibility for children born out of wedlock only on the mother, with the Kenyan constitution and international covenants. RM, the applicant, was born out of wedlock to a mother and father who were cohabiting before the child's birth, on 16 September 2000, until 3 January 2001. The father disappeared or avoided the mother completely in April 2001, not providing any parental responsibility including support for the child's upkeep. It was argued on behalf of RM that the relevant law, section 24(3) of the Children Act No 8 of 2001 (Kenya), did not place any parental responsibility on a father who was, as in this case, not married to the child's mother.

RM argued that this differentiation, by placing RM and similarly situating children at a disadvantage compared to children born within wedlock, amounted to discrimination contrary to the constitution and international treaties, including the Convention on the Rights of the Child (1989), the African Charter on the Rights and Welfare of the Child (1999), and the Convention on the Elimination of Discrimination Against Women (1979). In upholding the compatibility of the domestic law with the Constitution and the international covenants, the Kenyan High Court invoked a UN General Assembly resolution and the General Comments of the Human Rights Committee.

The following are the excerpts of the relevant parts of the decision. Paragraph numbers have been added to this decision by OUP for the purpose of the ILDC report.

> **Position as Per International Instruments—States Permitted to take into Account Special Circumstances**
>
> [ … ]
>
> **75** It is strikingly clear that Article 2 of the Universal Declaration prohibits distinction of any kind. The obvious interpretation is that no differences at all can be legally (p. 314) accepted. However the situation on the ground does not support such a restrictive interpretation of the Declaration in that the monitoring bodies have not supported any such interpretation and in some of the constitutions of the member states including that of Kenya do not support the position as stated in Article 2. The Member States have claimed and have been allowed "*a margin of appreciation*" because differences in real life are inevitable and they are not necessarily negative. Indeed, international jurisprudence and supporting case law demonstrates that not all distinctions between persons and groups of persons can be regarded as discrimination in the strict sense or true sense of the term. Thus General Comment No. 18 in the United Nations Compilation of General Comments, p 134 para 1 lays what appears to be a peremptory international norm (jus cogens) in these words:
>
> "non-discrimination, together with equality before the law and equal protection of the law without any discrimination constitute a basic and general principle relating to the protection of human rights."

**76** The second principle which is now generally accepted and which does not support a restrictive interpretation is that *distinctions made between people are justified provided that they are, in general terms reasonable and imposed for an objective and legitimate purpose*.

**77** To amplify on this we wish to borrow again from the Human Rights Committee General Comments (supra) at page 135 para 7 in its definition of "discrimination."

"that the term discrimination as used in the Covenant (International Covenant on Civil and Political Rights) should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms"

**78** The Human Rights Committee has commented that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance. Taking the ICCPR as an example Article 6(5) prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women. The other obvious example is affirmative action which is aimed at diminishing or eliminating conditions likely to perpetuate inequality or discrimination in fact. Such a corrective action constitutes or is termed legitimate differentiation under the ICCPR.

**79** It is therefore an accepted international principle of law that differentiation based on *reasonable* and *objective criteria* does not amount to prohibited discrimination. A state which complies with this criteria would not be faulted in practice or in its formulation of a supporting law provided this criteria is adhered to. To explain the position further the universality of the 1948 Declaration of Human Rights is based on a common heritage of humankind which is the oneness of the human family and the essential dignity of the individual. It is from these two universally shared traits from which the notion of equality finds its stem or base.

[ … ]

**85** Thus we find that since the aim of the section is to provide for parental responsibility locating it initially in the mother and providing for a shared responsibility taking into account all possible relationships that spring from the birth the section has handled the situation with a reasonable proportionality between the difference of the one set of children (generally born within and those born out of wedlock since (p. 315) the aim is to provide for parental responsibility in both situations as far as it is practically possible in the later situation. We find that the balance struck by the challenged section cannot be said to be unreasonable or unjust. The difference between the two sets of situations cannot in our view be said not to have an objective *and reasonable justification*.

The General Comments and Recommendations are part of the instruments adopted by human rights treaty-monitoring bodies whose interpretation may guide domestic courts' decisions. Among the monitoring bodies, the Human Rights Committee's General Comments are the most visible ones in the jurisprudence of domestic courts. In this case, the Kenyan High Court consulted the Human Rights Committee's General Comment No 18 (1989)[6] on non-discrimination as interpretive guide as part of international human rights instruments.[7] The Kenyan High Court observed that such restrictive understanding that no

distinctions are acceptable is neither supported by member states' practice, nor by the 'monitoring bodies'.[8]

General Comments and Recommendations are formally non-binding instruments adopted by the Human Rights Committee and other monitoring bodies established for UN human rights treaties.[9] General Comments are issued with a view to assisting states parties in preparing their reports, as well as their treaty implementation in general.[10] General Comments are issued as part of the monitoring task to consider and evaluate reports submitted by states parties, and have been regarded 'authoritative' or 'persuasive' by some national courts. For instance, the South African High Court in the *Residents of Bon Vista Mansions v Southern Metropolitan Local* case (2002)[11] referred to General Comment No 12 on the ICESCR for the construction of the international and constitutional right to access to water, and observed that 'General Comments have authoritative status under international law'.[12]

The amenability to General Comments differs, however, according to states or even within one state. For instance, the Tokyo District Court in Japan, in its 15 March 2001 Judgment, regarded the General Comments of the Human Rights Committee as neither authoritative nor legally binding.[13] The differences in terms of the judicial amenability to the documents of monitoring bodies can be ascribed to a number of variables, including: the degree of judges' discretion, the awareness of parties to international human rights documents, and the presence of human rights non-government organizations (NGOs) who are capable of making use of international human rights instruments in their *amici curiae* submissions.

**Jaftha and van Rooyen v Schoeman and ors, Appeal decision, CCT74/03, [2004] ZACC 25, ILDC 1846 (ZA 2004), 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC), 8th October 2004, South Africa; Constitutional Court [CC]**

Jaftha and Van Rooyen were both unemployed and had few assets. Having been unable to pay their outstanding debt, their homes were sold in a sale of execution. In *Jaftha and van Rooyen v (p. 316) Schoeman and ors* in South Africa, they launched proceedings and sought to set aside the sales in execution. Jaftha and Van Rooyen challenged the constitutional validity of sections 66(1)(a) and 67 of the Magistrates' Courts Act 32 of 1944, which permit the sale in execution of peoples' homes on the basis that they have not paid their debts, and thereby enable the removal of their security of tenure. Jaftha and Van Rooyen argued that these sections of the 1944 Act violate the right to have access to adequate housing, protected in section 26 of the South African constitution. They claimed that both the state and private parties have a duty not to interfere unjustifiably with any person's existing access to adequate housing.

The Cape High Court did not uphold the argument of unconstitutionality.[14] Regarding the content of the right to adequate housing, the High Court was of the view that the right of access to housing does not encompass an entitlement to the ownership of housing. While the High Court acknowledged that the execution process brings the ownership to an end, it held that this does not violate section 26 of the South African constitution because that section does not contain a right to ownership.

The decision of the High Court was appealed in the South African Constitutional Court. The Constitutional Court found the incompatibility of the domestic legislation with the constitutional protection of access to adequate housing. In so holding, the South African Constitutional Court invoked the General Comments of the Committee on Economic, Social and Cultural Rights.

The following are the excerpts of the relevant parts of the decision. Footnotes listed at the end of the extracts are provided in the original document. The texts in square brackets are added by the present author.

*The right to adequate housing in international law*

**23** Although the concept of adequate housing was briefly discussed in *Government of the Republic of South Africa and Others v Grootboom and Others*[28] this Court has yet to consider it in any detail. This subject has however been dealt with by the United Nations Committee on Economic, Social and Cultural Rights (the Committee) in the context of the International Covenant on Economic, Social and Cultural Rights, 1966 (the Covenant).[29] In terms of section 39(1)(b) of the Constitution, this Court must consider international law when interpreting the Bill of Rights.[30] Therefore, guidance may be sought from international instruments that have considered the meaning of adequate housing.

**24** Article 11(1) of the Covenant reads as follows:

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate food, clothing and housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." (Emphasis added.)

In its General Comment 4, the Committee, giving content to article 11(1) of the Covenant, emphasised the need not to give the right to housing a restrictive interpretation and to see it as "the right to live somewhere in security, peace and dignity".[31] The position of the Committee reflects the view adopted by this Court in *Grootboom*, that the right to dignity is inherently linked with socio-economic rights.[32] It is important, for the purposes of this case, to point to the Committee's recognition that "the concept of adequacy is particularly significant in relation to the right to housing".[33] While acknowledging that adequacy "is determined in part by social, economic, cultural, climatic, ecological and other factors", it has identified (p. 317) "certain aspects of the right that must be taken into account for this purpose in any particular context."[34] Of relevance is the focus on security of tenure. The Committee points out that security of tenure takes many forms, not just ownership, but that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[35]

*Security of tenure in our historical context*

**25** The international law concept of adequate housing and its central theme of security of tenure reinforce the notion of adequate housing in section 26 as understood in the light of our particular history of forced removals and racist evictions in South Africa.

[ … ]

**52** I have held that section 66(1)(a) of [the Magistrates' Courts Act 32 of 1944] is overbroad and constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure. I have held further that section 66(1)(a) is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution [ … ].

**28** Id [*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)] at paras 35-7.

**29** South Africa signed the Covenant on 3 October 1994. It has yet to ratify the Covenant.

**30** Section 39(1) of the Constitution reads as follows:

"When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law."

**31** *The Right to Adequate Housing (Art.11(1)) UNCESCR General Comment 4* (1991) 13 December 1991 E/1992/23 at para 7.

**32** See above n 27 [*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 83].

**33** Above n 31 at para 8.

**34** Id.

**35** Id.

In this case, the South African Constitutional Court sought guidance, not only from Article 11(1) of the ICESCR itself, but also from General Comment No 4 in interpreting the constitutional protection.[15] In South Africa, it is constitutionally required for the court to consider international law when interpreting the Bill of Rights. Noteworthy, however, in this case is that the Constitutional Court consulted the treaty which South Africa had signed but had yet to ratify (fn 29) and the above-mentioned General Comment No 4 adopted by the Committee on Economic, Social and Cultural Rights.

This case is illustrative of the difficulty of identifying the precise 'weight' that courts may give to a soft-law instrument in their judicial reasoning. The extent to which soft-law instruments guide the reasoning of domestic courts varies depending on cases. Some international (p. 318) instruments may substantively change the meaning of specific rules or the overall direction of judgment, while others may be treated as confirmatory.

In this case, the South African Constitutional Court situated the concept of adequate housing under international law as something to 'reinforce' the domestic counterpart[16] and made no further reference to international law in the following paragraphs. It is therefore questionable whether the ICESCR and associated General Comment No 4 have substantively guided the interpretation of constitutional provisions by the South African Court. At least within the court's formal narrative, the General Comments had a confirmatory value.

**Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane v The Attorney General (Court of Appeal Civil Appeal No CACLB-074-10; High Court Civil Case No MAHLB-000393-09) (Botswana, Court of Appeal, 27 January 2011) (not in ILDC)**

The applicants, Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane, were residents of the Central Kalahari Game Reserve (CKGR) in Botswana. They belonged to the 'Basarwa' communities, which used to live on a nomadic basis but over the years formed permanent settlements inside the CKGR whilst continuing with their traditional way of life as hunter-gatherers.

In 2002, the government decided to ‘relocate’ the Basarwa communities to settlements outside the CKGR. In order to induce the relocation, a pump engine and water tank, which had been installed for the purpose of using a borehole, were dismantled and removed. As a result of this measure, the Basarwa communities encountered a shortage of water. The government also refused to issue special game licences.

Some residents of the Basarwa communities, including Matsipane Mosetlhanyane, instituted proceedings in 2002 against the government.[17] In 2006, the High Court in *Sesana* rendered a decision against the government, holding that the residents were forcibly or wrongful deprived of the lawful possession of the land without their consent, and that the government’s refusal to issue special game licences was unlawful and unconstitutional.

What the High Court in *Sesana* did not uphold, however, was the government’s obligation to restore the provision of basic and essential services to the Basarwa communities. The government thus continued to refuse to the provision of essential services and did not grant the permission for the abstraction of water. Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane then instituted a new proceeding against the government, claiming their right to abstract and use water. In 2010, the High Court of Botswana held against these two applicants; while it accepted their right to abstract water under section 6 of the Water Act, it held that the abstraction of water may not be done without a permission accordance with section 9 of the Act. The applicants then appealed to the Court of Appeal which decided, in January 2011, in their favour. In reaching the conclusion, the court referred to formally non-binding human rights instruments.

> **8** Quite significantly, the first appellant’s account of the human suffering at Mothomelo [in the CKGR] due to lack of water is uncontested. Very often the appellants and other members of the various communities in the reserve do not have enough water to meet their needs. They depend on melons which are either scarce or sometimes non-existent. As a result, life becomes “extremely difficult.” They spend a great deal of their time in the bush “looking for any root or other edible matter from which we can extract even a few drops of water.” The absence of water frequently makes them “weak and vulnerable to sickness.” Some of them suffer from “constipation, headaches or bouts of dizziness.” Often they do not sleep well. Young children “cry a great deal.” Often they do not have water to cook or (p. 319) to clean themselves. An official report describes them as “very dirty, due to lack of adequate water for drinking and other domestic use.” In these circumstances the appellants are “anxious to have use of the borehole, which has now been lying idle for several years.” They point to the fact that the borehole is of no use to anyone else but that it is vital to their well-being.
>
> [ … ]
>
> **19** It remains then to deal briefly with the appellants’ point relating to s 7 (1) of the Constitution … Section 7 (1) reads as follows:-
>
> **“7. (1)** *No person shall be subjected to torture or to inhuman or degrading punishment or other treatment*.”
>
> [ … ] in my view, the right is absolute and unqualified. Unlike the other rights contained in s3 of the Constitution it is not subject to any limitations “designed to ensure that the enjoyment of the said rights and freedoms of others does not prejudice the rights and freedoms of others or the public interest.” I should add that I approach the matter on the basis of the fundamental principle that whether a person has been subjected to inhuman or degrading treatment involves a value judgment. It is appropriate to stress that in the exercise of a value judgment, the

Court is entitled to have regard to international consensus on the importance of access to water. Reference to two important documents will suffice:-

(1) On 20 January 2003, the United Nations Committee on Economic, Social and Cultural Rights submitted a report on what it termed Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social and Cultural Rights. In its introduction it stated the following:-

> "*1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights…*"

In paragraph 16 (d) of its report the Committee said the following:-

> "*16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:*
>
> *(d) Indigenous people's access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water*".

(2) On July 2010, the United Nations General Assembly recognised the right to safe and clean drinking water as a fundamental human right that is essential for the full enjoyment of life and all human rights. Accordingly, the UN General Assembly called upon States:-

> "*(b) To ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders*."

**20** It was submitted on the appellants' behalf that the Government's refusal to allow them permission to use, at their own expense, the Mothomelo borehole, or any other borehole in the CKGR for that matter, for domestic purposes amounts to degrading treatment contrary to s 7 of the Constitution [ … ]

[ … ](p. 320)

**22** [ … ] As was crisply pointed out to respondent's counsel during argument, the Government seems to be saying to the appellants:- "you can live in your settlement in the CKGR as long as you don't abstract water other than from plants." Surely that cannot be right. Doing the best I can in the exercise of a value judgment in these circumstances I am driven to conclude, therefore, that the factors set out in paragraph [8] above amount to degrading treatment of the appellants. Indeed, I

> accept that there is a constitutional requirement based on international consensus [ … ] for Government to refrain from inflicting degrading treatment.

In this case, the Court of Appeal of the Republic of Botswana supported the claims of the applicants primarily based upon the construction of sections 6 and 9 of the Water Act. According to the Court of Appeal, section 6 of the Act does not provide for a right to water as such, but provides a lawful owner or occupier of any land with a right to sink a borehole on such land for domestic purposes without a water right (paras 13–18, not part of the excerpts above).

At the same time, the Court of Appeal touched on the claim submitted by the residents concerning the violation of the right not to be subjected to torture or to inhuman or degrading treatment (as provided in section 7(1) of the Botswana Constitution). In interpreting the constitutional right, the Court of Appeal has drawn on the two documents which are not formally biding in themselves:[18] General Comment No 15 (2002) adopted by the Committee on Economic and Social and Cultural Rights[19] and the resolution of the Human Rights Council.[20]

This case is illustrative of a variety of purposes for which domestic courts may utilize soft-law instruments. In this case, while the above-mentioned General Comment and the resolution were employed in the context of interpreting the constitutional right, the court employed them not necessarily as specific interpretive guides to the constitutional right, but rather to determine the overall normative direction of the judicial reasoning. Having noted that the determination of inhumane or degrading treatment should involve a value judgment, the Court of Appeal observed that '*in the exercise of a value judgment*, the Court is entitled to have regard to *international consensus on the importance of access to water*'.[21] It was for the purpose of highlighting the importance of access to water that the court referred to the General Comment and the Resolution of the Human Rights Council.

**Mansouri-Rad v Department of Labour, Appeal decision, Refugee Appeal No 74665/03, [2005] NZAR 60, ILDC 217 (NZ 2004), 7th July 2004, New Zealand**

The appellant in *Mansouri-Rad v Department of Labour* was a 25-year-old citizen of Iran. He arrived in New Zealand on 15 March 2003 and sought refugee status. His application was declined by the Refugee Status Branch of the New Zealand Immigration Service. Mansouri-Rad then appealed to the Refugee Status Appeals Authority.

(p. 321) The refugee status was to be determined in accordance with Article 1A of the Convention relating to the Status of Refugees (1954).[22] The principal basis for Mansouri-Rad's claim was that he was a homosexual. He argued that in Iran his relationships were conducted furtively and he was always in fear of being reported and arrested. He had attempted suicide on past occasions because of his deep unhappiness at being unable to live a normal life. He said that if he returned to Iran he could not continue to hide his sexual orientation because, for him, homosexuality was not a matter only of sex but of having loving relationships of the kind enjoyed by men and women.

Having considered the meaning of 'being persecuted' under Article 1A of the Refugee Convention, the New Zealand Refugee Status Appeals Authority upheld the refugee status of Mansouri-Rad in its decision of 7 July 2004. In the course of its reasoning, the Appeals Authority referred to the role of a human rights treaty-monitoring bodies and the UN-based human rights body.

The texts in square brackets found in the following excerpts are original.

> **Identifying core human rights**

**62** Recognising that "being persecuted" may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection, the question which arises is how one identifies "basic human rights".

[ … ]

**73** The Authority's decisions have … recognised that in addition to employing the international human rights instruments referred to, it is only appropriate that regard be had to the interpretation of those instruments by the "treaty bodies" set up under the instruments, particularly the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of all Forms of Discrimination Against Women, the Committee on the Elimination of Racial Discrimination and of the Committee on the Rights of the Child. The Authority recognises that the binding effect and jurisprudential quality of the decisions of these bodies may be a matter of controversy (see *Refugee Appeal No. 72558/01* (19 November 2002)). Contrast the views expressed by Elizabeth Evatt, a member of the Human Rights Committee, in "The Impact of International Human Rights on Domestic Law" in Huscroft & Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) at 281, 295, 302 with the views expressed in two other papers published in the same text, namely Paul Rishworth, "The Rule of International Law?" *op cit* 267, 274-279 and Scott Davidson, "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" *op cit* 305-321. This is not a controversy we need enter here. The decisions of the Human Rights Committee can be at least of persuasive authority: *R v Goodwin (No. 2)* [1993] 2 NZLR 390, 393 (CA) and *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 206 ALR 130 (HCA) at [148] (Kirby J). See further *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129, 134-136, 144 (CA) and *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, 20-22; [2000] 1 WLR 240, 244-246 (PC). Contrast *Briggs v Baptiste* [2000] 2 AC 40, 53 (PC) where, in the context of the Inter-American system the point made was that while it is to be expected that national courts will give great weight to the jurisprudence of the Inter-American Court, "they would be abdicating their duty if they were to adopt an interpretation of the [American] Convention [on Human (p. 322) Rights, 1969] which they considered to be untenable". For observations as to the binding effect of decisions of the Committee against Torture, see *Ahani v Canada (Attorney General)* (2002) 208 DLR (4th) 66 at paras 34-40 (Ont. CA).

**74** On occasion it might also be appropriate to draw on the jurisprudence of the European Court of Human Rights as well as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights under the American Declaration of the Rights and Duties of Man, 1948 and the American Convention on Human Rights 1969. However, as the European and inter-American systems differ in many ways from each other and from that provided for in the international human rights instruments referred to, caution must be exercised in applying the jurisprudence of these regional organisations outside their proper context. See for example David Harris, "Regional Protection of Human Rights: The Inter-American Achievement" in Harris & Livingstone, "The Inter-American System of Human Rights (Clarendon Press, Oxford, 1998) 1-29 and *Refugee Appeal No. 72558/01* (19 November 2002) at [115]-[119].

**75** There are three further cautions. First, in the context of Article 1A(2) of the Refugee Convention, the identification of basic human rights is directed to a single, limited end, namely the illumination of the meaning of the phrase "being persecuted". There is no other purpose. The function of refugee law is palliative. It does not hold states responsible for human rights abuses. The refugee decision-

maker does not usurp the jurisdiction of the Human Rights Committee under Article 40 of the International Covenant on Civil and Political Rights (the reporting process) or under Article 41 (the interstate complaints procedure). Nor is it the role of the refugee decision-maker to express "views" as if refugee adjudication were an individual complaint under the First Optional Protocol. The determination of refugee status is no more than an assessment whether, in the event of the refugee claimant returning to the country of origin, there is a real chance of that person "being persecuted" for a Convention reason.

**76** Second, it is important to remember why only a highly select group of human rights treaties are to be the point of reference. Not only is there a danger of over-inclusion, new "rights" can be claimed with little thought, debate or agreement: Philip Alston, "Conjuring up new human rights: A proposal for quality control" (1984) Am. J. Int'l L 613. Not everything that may serve to improve the well-being of individuals can or should be accepted as a human right.

**77** Third, the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population. As Professor Hathaway explains at op cit 103-104:

As a holistic reading of the refugee definition demonstrates, the drafters were not concerned to respond to certain forms of harm *per se*, but were rather motivated to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection. The existence of past or anticipated suffering alone, therefore, does not make one a refugee, unless the state has failed in relation to some duty to defend its citizenry against the particular form of harm anticipated.

**78** It is almost unnecessary to add that we do not see the UN Human Rights Commission as an appropriate point of reference, lying as it does outside the treaty framework earlier described. In addition, the 52-state Commission is highly politicised, as witness the circumstances in which Cuba and China were successful in having the United States lose its seat in 2001. One commentator referred to the observable spectacle of countries (p. 323) accused of violating human rights being among the most ardent seekers of seats on the Commission in order to be better placed to defend themselves from criticism for violating human rights (see Colum Lynch, "United States loses seat on UN rights body", *Guardian Weekly*, May 10, 2001 p 32) while another commentator concluded that foxes were guarding the chicken coop ("Chickens and foxes", *Economist*, April 21, 2001 p 42). Among the Commission's new members in 2001 were Algeria, Congo, Kenya, Libya, Saudi Arabia, Syria and Vietnam. They were later joined by Pakistan, Sudan and Togo ("Shameful all round", *Economist*, May 12, 2001 p 14). On 23 April 2004 the Commission failed to condemn the crimes against humanity, war crimes and other violations of international humanitarian law committed by the Sudanese government in the western province of Darfur: Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan* (May 2004). There is nothing in the assessment of the Human Rights Commission by Tomuschat in *Human Rights: Between Idealism and Realism* (Oxford, 2003) at 115-127 which persuades us that the work of the Commission is relevant to refugee determination.

> **79** Human rights law is by no means a flawless system. It has many gaps and limitations. But as pointed out by Professor Hillary Charlesworth in "The Challenges of Human Rights Law for Religious Traditions", Janis & Evans (eds), *Religion and International Law* (Martinus Nijhoff, 1999) at 401, 410-411, for all these constraints, it does offer a vocabulary and structure in which claims by marginalised groups can be formulated. It allows dialogue on difficult issues of human existence. Human rights law allows continually changing, negotiated understandings of that which it is most essential to protect in order to defend and to enhance our common humanity. The standards are not perfect: they are simply the best that have been identified and agreed upon thus far.

The New Zealand Refugee Status Appeals Authority recognized the applicant's refugee status on the basis that he had a well-founded fear of being persecuted for reason of his homosexuality. The Appeals Authority defined the notion of 'being persecuted' under the Refugee Convention as the sustained or systemic violations of basic human rights demonstrative of a failure of state protection. In interpreting the terms 'being persecuted' in such a manner, the Appeals Authority not only invoked major human rights treaties but also found it appropriate to consider the interpretation of these treaties by their 'treaty bodies', such as that of the Human Rights Committee.[23]

This case is noteworthy, not because of the Appeals Authority's amenability to the monitoring bodies' instruments, but because of a few remarks the authority made as to *why* it could consult such instruments. The Appeals Authority, while recognizing the controversy over the binding effect of the decisions of human rights treaty monitoring bodies, went on to observe that '[t]he decisions of the Human Rights Committee can be at least of *persuasive authority*'.[24] The Appeals Authority then contrasted the decisions of the human rights treaty monitoring bodies with those of the UN Human Rights Commission (now the UN Human Rights Council) established by the General Assembly. The non-judicial nature of the UN Human Rights Commission, which operates outside the framework of the human rights treaties, seemed to negate the persuasiveness of its decisions before domestic court proceedings. According to the Appeals Authority, 'the 52-state Commission is *highly politicised*, as witness the circumstances in which Cuba and China were successful in having the United States lose its seat in 2001'.[25]

(p. 324) These observations suggest that the persuasiveness of formally non-binding instruments before domestic courts should vary according in part to the existence of systematic association with a specific treaty framework and to the non-political nature of the bodies which adopt international instruments.

**R, ex parte Adan v Secretary of State for the Home Department, Appeal decision, [2000] UKHL 67, [2001] 2 AC 477, [2001] 2 WLR 143, [2001] 1 All ER 593, [2001] Imm AR 253, [2000] All ER (D) 2357, ILDC 229 (UK 2000), 19th December 2000, United Kingdom**

In *R v Secretary of State for the Home Department, ex parte Adan; R v Secretary of State for the Home Department, ex parte Aitseguer*, Adan, a Somali citizen, and Aitseguer, an Algerian citizen, were asylum-seekers. They both feared persecution by non-state agents. Adan arrived in the United Kingdom (UK) via Germany. She claimed asylum on the basis of the fear of persecution owing to her membership of a minority clan which had been persecuted by the majority clan. Aitseguer arrived in the UK via France. He claimed to be at risk of persecution from a political faction in Algeria and maintained that the Algerian authorities were unable to protect him.

German and French authorities had interpreted Article 1A(2) of the Refugee Convention as applicable only to events of persecution by the state. This interpretation is contrasted with the position of the UK, which includes persecution by non-state actors. Despite these interpretative differences, the secretary of state issued certificates under Article 2(2)(c) of the Asylum Act allowing the return of the asylum-seekers to Germany and France, respectively. Adan and Aitseguer challenged those certificates. The Court of Appeal held that the secretary of state had to be satisfied that the practice in the third country complied with the one true and international meaning of the Refugee Convention, ie that Article 1A(2) applied to situations where persecution was committed by non-state actors.

The secretary of state appealed to the House of Lords, claiming that interpretation of Article 2(2)(c) of the Asylum Act should refer to the Refugee Convention 'as legitimately interpreted by the country concerned'. The decision of the Court of Appeal that Article 1A(2) of the Refugee Convention had only one true and international meaning was also challenged.

The following are the excerpts of the relevant parts of the decision. Paragraph numbers have been added to this decision by OUP for the purpose of the ILDC report.

**LORD SLYNN OF HADLEY.**

[ … ]

**17** That persecution may be by bodies other than the state, for the purposes of the Geneva Convention, was accepted in *Adan*'s case. Nothing has been said in the present case which suggests that that might be wrong and in my view it was plainly correct. If art 33 of the Geneva Convention had intended his obligation to be limited to cases where a state carried out or tolerated the persecution, art 33 would have said so. The Secretary of State must apply that interpretation to the application of s 2(2)(c) of the Act as he must to his own obligation under art 33 of the Geneva Convention.

[ … ]

**LORD STEYN**.

[ … ]

**54** [ … ] First, it is accepted that the United Kingdom view is shared by the majority of states. It also appears to be gaining ground. Secondly, the *UN Handbook on Procedures and Criteria for Determining Refugee Status* (1979) published by the United Nations High Commission for Refugees (UNHCR), states in para 65:

'Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards (p. 325) established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, *or if the authorities refuse, or prove unable, to offer effective protection.*' (My emphasis.)

**55** Under arts 35 and 36 of the Geneva Convention, and under art II of the protocol, the UNHCR plays a critical role in the application of the Geneva Convention: compare the Statute of the Office of the United Nations High Commissioner for Refugees (UN GA Resolution 428(V) (1950), Doc A/1775) (para 8). Contracting states are obliged to co-operate with the UNHCR. It is not surprising therefore that the *UNHCR Handbook*, although not binding on states, has high

persuasive authority, and is much relied on by domestic courts and tribunals (see Aust, *Modern Treaty Law and Practice* (2000) p 191).

**56** The relevant autonomous meaning of art 1A(2) of the Geneva Convention is therefore as explained in *Adan*'s case. Like the Court of Appeal I would hold that there is no material distinction between a country where there is no government (like Somalia) and a country when the government is unable to afford the necessary protection to citizens (such as Algeria). Both are covered by art 1A(2).

[ … ]

**LORD HUTTON**.

[ … ]

**72** The essence of the reasoning of the Court of Appeal ([1999] 4 All ER 774 at 794-795, [1999] 3 WLR 1274 at 1295-1296), is:

' … the issue we must decide is whether or not, as a matter of law, the scope of art 1A(2) extends to persons who fear persecution by non-state agents in circumstances where the state is not complicit in the persecution, whether because it is unwilling or unable (including instances where no effective state authority exists) to afford protection. We entertain no doubt but that such persons, whose case is established on the facts, are entitled to the convention's protection. This seems to us to follow naturally from the words of art 1A(2): "… is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"; and this involves no technical or over-legalistic reading of the provision. This interpretation is supported by the approach taken in para 65 of the UNHCR Handbook. We have described the Handbook's genesis, to which we attach some importance. While the Handbook is not by any means itself a source of law, many signatory states have accepted the guidance which on their behalf the UNHCR was asked to provide, and in those circumstances it constitutes, in our judgment, good evidence of what has come to be international practice within art 31(3)(b) of the Vienna Convention.'

[ … ]

**74–75** Mr Pannick QC, on behalf of the Secretary of State … placed reliance on para 5.2 of the joint position of 4 March 1996 (OJ 1996 L63 p 2) of the member states on the harmonised application of the definition of the term 'refugee' in art 1 of the Geneva Convention:

> **'Persecution by third parties**
>
> Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the (p. 326) authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The person concerned may be eligible in any event for appropriate forms of protection under national law.'

**76** He submitted that the wording of the statement shows that it was accepted that the Geneva Convention did not give protection to asylum seekers unless there was complicity by the state in the persecution which they feared.

**77** My Lords, I consider that Mr Pannick's second submission relating to comity is of limited weight as the purpose of an English court in determining applications such as the present ones is not to pass judgment on the validity of a decision of a French or German court but to decide if the English Secretary of State has acted lawfully in deciding to remove a claimant for asylum from England.

**78** The preamble to the joint position states: 'Having established that the Handbook of the United Nations High Commissioner for Refugees (UNHCR) is a valuable aid to Member States in determining refugee status'; and I think that the weight of Mr Pannick's fourth submission is reduced by the observations in the *UNHCR Handbook*. Paragraph 65 states:

> 'Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.'

**79** And para 98 states:

> 'Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.' (My emphasis.)

In the absence of international adjudicative bodies which systematically interpret treaties, the primary interpretation by each member state can effectively be a definite one and the interpretive differences between states remain unresolved. This holds true in many international treaties, including the Refugee Convention. In this case, while Germany and France restricted 'persecution' to that by a state, the House of Lords confirmed that the UK interpreted persecution broadly to encompass cases in which a person is persecuted from non-state actors and in which a state does not exist or is unable to afford the necessary protection to its citizens. In interpreting the Refugee Convention, Lord Steyn and Lord Hutton referred to the UNHCR Handbook,[26] which does not seem to restrict persecution to that by a state.

(p. 327) Lord Steyn referred to the nature of the UNHCR Handbook as a 'high persuasive authority'.[27] The body's systematic association with formal international law in terms of law-application seems to be one of the variables that determine persuasiveness. The UNHCR is systematically associated with the Refugee Convention, which acknowledges its critical role, and under which member states are obligated to cooperate with the body.

The UNHCR's Handbook, together with the UNHCR's revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (1999),[28] has been referred to by domestic courts to interpret the Refugee Convention and its implementing legislation. The extensive reliance on the UNHCR's Handbook and the Guidelines can be seen, for instance, in the case of *Sarmadi* before the Cyprus Supreme Court in order to interpret the Refugee Convention implemented by national legislation.[29] The Israeli Supreme Court in *Anonymous (Ivory Coast) v Minister of Interior and Head of Administration of Border Crossings, Population and Immigration* also relied on the UNHCR Handbook in interpreting the requirement of persecution under the Refugee Convention, and thereby held that the persecution could arise from the events that occur after an asylum-seeker left the country of origin.[30]

While judges engaged with UNHCR documents, they sometimes made sure to note that the courts are not strictly bound by the positions of the Handbook and Guidelines. For instance, in *Novikov and Chabanyuk v Cyprus*,[31] the Cyprus Supreme Court noted that the UNHCR Handbook containing the best practices is 'soft law' that urges voluntary compliance and is not enforceable law. At the same time, the Cyprus court still regarded the UNHCR Handbook as an international instrument that the competent organs should take into account when examining asylum requests.

## III. Instruments of a Conference of Parties

**ADS (bvba) and ors v Belgium, Constitutional appeals judgment regarding annulment of the Act of 22 December 2009 concerning a general regulation of smoke-free closed spaces accessible to the public, Case no 37/2011, ILDC 1726 (BE 2011), 15th March 2011, Belgium; Constitutional Court**

A Belgian Act of 22 December 2009 on the regulation of smoke-free closed spaces accessible to the public and the protection of employees against tobacco smoke, published in *Moniteur belge* 29 December 2009 (Belgium), prohibited smoking in public places, but made an exception for closed pubs that did not form part of a sports facility (Article 4 of the 2009 Act).

The complainants in *ADS ao, Flemish League Against Cancer and Leo Leys v the Government* argued that the exception contained in the Act was not relevant or proportionate in light of the (p. 328) aim pursued, discriminated between comparable situations, and violated the right to health, as laid down in Article 23 of the Belgian Constitution and in the Framework Convention on Tobacco Control (2003),[32] which was ratified by Belgium on 1 November 2005, as well as the right to privacy, as laid down in Article 8 of the European Convention on Human Rights.

In its judgment of 15 March 2011, the Belgian Constitutional Court annulled the provisions of the Belgian Act of 22 December 2009, which provided for the exceptions to a smoking ban in public places.

> **[B.6.1.]** Regarding exposure to tobacco smoke, as argued by the claimants in case number 4859, it is necessary that the right to health protection referred to in article 23, paragraph 3, section 2, of the Constitution be read in conjunction with the "Framework Convention on Tobacco Control" adopted by the World Health Organisation in Geneva on 21 May 2003, which came into effect on 27 February 2005 and was ratified by the Kingdom of Belgium on 1 November 2005.
>
> Article 8 of the convention states:

> **“1.** The Parties recognise that scientific evidence has shown that exposure to tobacco smoke leads to death, disease and incapacity for work.
>
> **2.** Under existing national legal powers, as determined by national legislation, each party adopts appropriate statutory, executive, administrative and/or other measures, implements those measures and promotes them in other areas of its legal powers. These targeted measures must provide for protection against exposure to tobacco smoke in working areas within buildings, in public transport, in public buildings and, as appropriate, in other public places”.

Article 18 of the convention states:

> “The Parties agree to fulfil their obligations under this Convention in the area of tobacco cultivation and processing in their respective jurisdictions, taking into account protection of the environment and of public health with reference to the environment”.

**[B.6.2.]** In accordance with the Guidelines for Implementation of the Convention, article 8 specified the following obligations:

> “Article 8 requires the approval of targeted measures for protecting the population against exposure to tobacco smoke 1) in work places within buildings, 2) in public buildings, 3) in public transport and 4) ‘as appropriate’ in ‘other public places’.
>
> That article prescribes the obligation of providing complete protection by ensuring that each covered public space, each covered work area, all public transport systems and possibly other (uncovered or partially covered) public spaces are free from exposure to secondary tobacco smoke. Exemption on the basis of health and legal arguments are not justified. If exemptions must be considered on the basis of other arguments, then these must be minimal. Moreover, if a Party cannot achieve immediate universal cover, article 8 contains an obligation to remove any exemption as quickly as possible and to make protection complete. Each Party must endeavour to achieve complete protection within five years as from the date on which the Party brings the WHO Framework Convention into effect.
>
> There is no safe level of exposure to secondary smoke and, as recognised by the Conference of Parties in decision FCTC/COP1(15), technical solutions, such as (p. 329) ventilation, air-conditioning and the use of smoking area, do not provide protection against tobacco smoke.
>
> Protection applies to all covered or enclosed work areas, which includes motor vehicles used as work places (e.g. taxis, ambulances and supply vehicles).
>
> The Convention contains protective measures not only for indoor public spaces, but also, where necessary, in other (i.e. uncovered or partially covered) public spaces. In identifying these uncovered and partially covered public spaces for which legislation is required, the Parties must take into account the available data on possible health risks in different situations, and must provide for maximum targeted protection against exposure to tobacco smoke when the factual data show that there is a risk”.

[ … ]

**[B.6.3.]** The provisions must also be read in conjunction with the Recommendations of the European Union Council dated 30 November 2009 regarding smokefree spaces, in which the Council recommends that Member States:

> "1. Ensure effective protection against exposure to tobacco smoke in enclosed work places, enclosed public spaces, public transport systems and, where applicable, also in other public spaces where applicable, as determined in article 8 of the WHO Framework Convention on Tobacco Control and on the basis of the other related guidelines for protection against exposure to tobacco smoke that were approved by the second Conference of the Parties to the framework convention, within five years of the convention coming into effect for the Member State in question, or within a maximum of three years following approval of this recommendation;
>
> **2.** Develop and/or upgrade strategies and measures for preventing the exposure of children and young people to secondary tobacco smoke;
>
> **3.** To support a 'smokefree' policy with supplementary measures [ … ]".

**[B.7.]** Consequently hotel and restaurant customers and employees must in the same way be protected against the harmful effects of passive smoking, even if exposure to carcinogenic substances is only minimal. The distinction made in article 2, point 9, and in article 4 § 1, of the contested Act is not at variance with that obligation, since the distinction in question has the consequence that certain hotel and restaurant customers and employees are still exposed to the health risks associated with the use of tobacco products.

[ … ]

[B.9.] The argument in case no. 4859 and arguments one to four in case number 4905 are valid. Article 2, point 9, and article 4, § 1, of the contested law must therefore be declared null and void.

In this case, the Belgian Constitutional Court, in annulling the domestic law which allowed smoking in certain public places, interpreted the constitutional right to health in the light of not only Articles 8 and 18 of the Framework Convention on Tobacco Control but also the following guidelines and instruments: the Guidelines for Implementation of the Framework Convention on Tobacco Control (adopted by the Conference of the Parties of the Tobacco Agreement in 2007),[33] the decision FCTC/COP1(15) of the Conference of the Parties[34] (para B.6.2), and the (p. 330) Recommendation of the Council of the European Union of 30 November 2009 on smoke-free environments (para B.6.3).[35]

This case is noteworthy precisely because the Guidelines informed the Belgian court's constitutional interpretation to uphold a total ban on smoking in public places, despite the fact that the Convention itself does not categorically mandate universal protection.[36] When domestic courts employ international instruments, they can often be used merely to confirm the meaning of domestic law provisions developed already within the national legal practices. Nevertheless, the Belgian Constitutional Court attached more than a confirmatory value to the Guidelines and the conference of the parties' decision. In this

case, the formally non-binding international instruments appear to have given substantive meaning to the content of the constitutional right.

This case illustrates the impact of soft-law instruments, not on the interpretation of relevant treaty provisions, but on the development of constitutional provisions and possibly other domestic law. In other words, the interpretation of domestic law consistent with international law, known as the principle of consistent interpretation, serves not only to find the international affirmation of a particular reading of domestic law, but also to inject new meanings into domestic law.

## IV. Instruments of International Organizations

### Filártiga and Filártiga and United States (intervening) v Peña-Irala, Appeal Judgment, Docket No 79-6090, Case No 191, 630 F 2d 876 (2d Cir 1980), ILDC 681 (US 1980), 30th June 1980, United States; Court of Appeals (2nd Circuit) [2d Cir]

In *Filartiga v Pena-Irala*, two Paraguayan nationals, Dolly and Joel Filartiga, filed suit in the Eastern District of New York against another Paraguayan national, Americo Norberto Pena-Irala, for the wrongful death by torture of Joelito Filartiga, their brother and son, respectively. The events surrounding the death all took place in Paraguay. The Filartigas alleged that, on 29 March 1976, Pena (the Inspector General of Police in Asuncion at the time) had kidnapped, tortured, and killed Joelito in response to Joel Filartiga's political activities in opposing the government of President Alfredo Stroessner.

The Filartigas first asserted customary international law violations as federal questions, citing the Charter of the United Nations,[37] the Universal Declaration of Human Rights,[38] the Declaration on the Protection of All Persons from Being Subjected to Torture,[39] the American Declaration of the Rights and Duties of Man,[40] and other international instruments evincing a customary norm prohibiting torture. Second, they based their claims on the Alien Tort Statute, 28 USC 1350 (United States) which provided federal district courts with original jurisdiction of any civil action brought by aliens for a tort committed in violation of the law of nations or a treaty of the US.

(p. 331) Paragraph numbers in the following excerpts have been added to this decision by OUP for the purpose of the ILDC report.

> **12** Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. § 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Since appellants do not contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.
>
> [ … ]
>
> **14** *The Paquete Habana*, 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900), reaffirmed that where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; [ … ].

**15** Habana is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." Id. at 694, 20 S. Ct. at 297; accord, id. at 686, 20 S. Ct. at 297. Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 1 L. Ed. 568 (1796) (distinguishing between "ancient" and "modern" law of nations).

**16** The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law [ … ]

**17** [ … ] there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody.

**18** The United Nations Charter (a treaty of the United States, see 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. It provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations … the United Nations shall promote … universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion. Id. Art. 55. And further:
>
> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. Id. Art. 56.

**19** While this broad mandate has been held not to be wholly self-executing, *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), this observation alone does not end our inquiry. For although there is no universal agreement (p. 332) as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, "no one shall be subjected to torture." The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law." G.A.Res. 2625 (XXV) (Oct. 24, 1970).

**20** Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975), which is set out in full in the margin. The Declaration expressly prohibits any state from permitting the dastardly and totally inhuman act of torture. Torture, in turn, is defined as "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as … intimidating him or other persons." The Declaration goes on to provide that "(w)here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the

victim shall be afforded redress and compensation, in accordance with national law." This Declaration, like the Declaration of Human Rights before it, was adopted without dissent by the General Assembly. Nayar, "Human Rights: The United Nations and United States Foreign Policy," 19 Harv.Int'l L.J. 813, 816 n.18 (1978).

**21** These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "(m)embers can no longer contend that they do not know what human rights they promised in the Charter to promote." Sohn, "A Short History of United Nations Documents on Human Rights," in The United Nations and Human Rights, 18th Report of the Commission (Commission to Study the Organization of Peace ed. 1968). Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of "binding treaty' against "non-binding pronouncement,' but is rather an authoritative statement of the international community." E. Schwelb, Human Rights and the International Community 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, supra. Indeed, several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law. Nayar, supra, at 816–17; Waldlock, "Human Rights in Contemporary International Law and the Significance of the European Convention," Int'l & Comp. L.Q., Supp. Publ. No. 11 at 15 (1965).

In this case, the US Court of Appeals provided civil remedies under the Alien Tort Statute to the victims of torture committed in Paraguay. In this case, the US Court of Appeal employed General Assembly resolutions, namely, the Universal Declaration of Human Rights (1948) and the Declaration on the Protection of All Persons from Being Subjected to Torture (1975), in order to prove customary international law on the prohibition of torture, as well as to interpret the content of the prohibition.

(p. 333) As illustrated by this case, General Assembly resolutions may be invoked by domestic courts to prove the existence of customary international law. In an earlier case of *Eichmann* in 1962, for instance, the Israel Supreme Court invoked General Assembly Resolution 95 (I),[41] which affirmed the Charter of the Nuremberg Tribunal, as evidence that the Nuremberg principles have formed part of the customary law of nations.[42] Also, the First Instance of Brussels in *Re Pinochet*[43] in 1998 referred to General Assembly Resolution 3074 (1973) regarding the detention, arrest, extradition and punishment of individuals guilty of war crimes and crimes against humanity[44] in order to prove the existence of a rule of customary international law that recognized permissive universal jurisdiction over crimes against humanity and authorized national authorities to pursue and prosecute persons suspected of such crimes in all circumstances.[45]

In order for General Assembly resolutions to provide evidence for the existence of customary law, their provisions must be grounded on state practice and *opinio juris*. This is also acknowledged in this case before the US Court of Appeals. While the court observed that 'a [UN] Declaration creates an expectation of adherence',[46] it seems that the court did not regard such expectation as sufficient to validate the invocation of the General Assembly resolution; the US Court of Appeals made sure to observe that '*insofar as the expectation is*

*gradually justified by State practice*, a declaration may by custom become recognized as laying down rules binding upon the States'.[47]

In the light of these requirements, a large part of General Assembly resolutions would not likely be recognized as the articulation of existing customary law. For instance, the evidential value of particular General Assembly resolutions was rejected by the US Court of Appeals in *Flores and ors v Southern Peru Copper Corporation*[48] in 2003, on the ground that the UN General Assembly resolutions invoked by the plaintiffs were not proper sources of customary law but were 'merely aspirational and were never intended to be binding on member States of the United Nations'.[49] While this case was not to leave out the evidentiary value of General Assembly resolutions in general,[50] it suggested that the resolutions in question had not attained the status of customary international law.

**Director of Public Prosecutions KwaZulu-Natal v P, Appeal to Supreme Court of Appeal, Case No 363/2005, [2005] ZASCA 127, ILDC 492 (ZA 2005), 1st December 2005, South Africa; Supreme Court of Appeal [SCA]**

In *Director of the Public Prosecutions KwaZulu-Natal v P*, the South African Supreme Court of Appeal decided on the question of whether the imprisonment of a child was permissible under the South African Constitution and pertinent international law. In September 2002, P, then (p. 334) 12 years old, approached two men, and asked them to assist her in killing her grandmother. The two men agreed and entered the house together with P where her grandmother was asleep under the influence of sleeping pills that P had earlier placed in her tea. One of the men strangled P's grandmother to death. P gave the men some household goods and jewellery.

The High Court found P guilty of murder but, considering her age, postponed the passing of sentence for thirty-six months on condition that she would comply with the conditions of a thirty-six-month correctional supervision in accordance with section 276(1)(h) of the Criminal Procedure Act 51, 1977. The conditions included provisions such as house arrest, schooling, therapy, supervised probation (at least four visits by a parole officer per week), and community service.

The state appealed against the High Court decision, claiming that the correctional service provision was too lenient, considering the seriousness of the offence. The Court of Appeal then considered the appropriateness of the sentence, including the imprisonment of the juvenile offender.

In the following excerpts the texts in square brackets are added by the present author.

> **The Issue on Appeal**
>
> **11** In my view the issue on appeal can therefore be narrowed down to whether the sentence imposed by the trial court was appropriate, given that court's duty to have regard to the seriousness of the offence and the interests of society as well as the true character of the accused. This issue must of course now be considered [ … ] with due regard to the sentencing regime foreshadowed in s 28 (1) (g) of the Constitution and international developments as reflected in, for instance, instruments issued under the aegis of the United Nations.
>
> [ … ]
>
> **The Constitution and the International Instruments**
>
> **14** With the advent of the Constitution the principles of sentencing [ … ] must, where a child offender is concerned, be adapted and applied to fit in with the sentencing regime enshrined in the Constitution, and in keeping with the international instruments which lay 'emphasis on *reintegration* of the child into

society’. The general principle governing the sentencing of juvenile offenders is set out in s 28 (1) (g) of the Constitution. The section reads:

‘Every child has the right —

**(g)** not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child’s age; …’

**15** Section 28 has its origins in the international instruments of the United Nations. Of relevance to this case is the United Nations Convention on the Rights of the Child (1989) which South Africa ratified on 16 June 1995 and thereby assumed an obligation under International Law to incorporate it into its domestic law. Various articles under the convention provide that juvenile offenders under the age of 18 years ‘should as far as possible be dealt with by the criminal justice system in a manner that takes into account their age and special needs.’ Also of relevance is article 40 (1) of the Convention which recognizes the right of the child offender ‘to be treated in a manner consistent with the promotion of a child’s sense of dignity and worth, which reinforces the child’s respect for human rights and fundamental (p. 335) freedom of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.’ Section 28 (1) (g) of our Constitution appears to be a replica of s 37(b) of the Convention which provides that children in conflict with the law must be arrested, detained or imprisoned ‘only as a matter of last resort and for the shortest appropriate period of time.’

**16** The Convention has to be considered in conjunction with other international instruments. Most of these instruments are referred to extensively in *Brandt* [*Brandt v S* [2005] 2 All SA 1 (SCA)]. Of particular relevance in this case, however, is the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (1985) (‘Beijing Rules’), in particular rule 5 (1). The rule recommends that a criminal justice system should ‘ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence’. The rule should, however, not be read in isolation because rule 17 (1) (a) provides that:

‘The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as the needs of society’

The commentary notes that it is difficult to formulate guidelines because of the unresolved conflicts of a philosophical nature including rehabilitation versus just deserts, assistance versus repression and punishment, merits of the case versus protection of society in general and general deterrence versus individual incapacitation.

**The South African Law Commission**

**17** In July 2000 the South African Law Commission Project Committee on Juvenile Justice (Project 106) released a Discussion Paper embodying a draft Child Justice Bill. On the sentencing of child offenders there is unqualified support for the principle that ‘detention should be a matter of last resort.’ It also recommended that ‘the sentence of imprisonment for children below a certain age (14) years be

excluded.’ Following the Beijing Rules, in particular rule 17 (1) (c) thereof the committee recommended that imprisonment should only be imposed upon children who have been convicted of serious and violent offences. These recommendations have not as yet been adopted by Parliament and can have but peripheral value at this stage.

**18** Having regard to s 28 (1) (g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is ‘not to be detained except, as a measure of last resort’ and if detention of a child is unavoidable, this should be ‘only for the shortest appropriate period of time’. This of course applies to a juvenile offender who is under the age of 18 years as provided for in s 28 (1) (g) of the Constitution. Furthermore if the juvenile concerned is a child as described, he or she should be kept separately from persons over the age of 18 years and the sentencing court will have to give directions to this effect, if it considers that the case before it warrants detention. This follows from s 28 (2) of the Constitution which provides that a child’s best interests are of paramount importance in every matter concerning the child.

**19** It must be remembered that the Constitution and the international instruments do not forbid incarceration of children in certain circumstances. All that it requires is that the ‘child be detained only for the shortest period of time’ and that the child be ‘kept separately from detained persons over the age of 18 years.’

(p. 336) In allowing the imprisonment of child offenders with some conditions, the South African Supreme Court of Appeal drew on the Convention on the Rights of the Child which constituted the basis of section 28 of the constitution.[51] It then moved on to observe that ‘the Convention has to be considered in conjunction with other international instruments’, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) (Beijing Rules) adopted by the General Assembly Resolution.[52]

If an international instrument is *not* systematically linked to a particular treaty, there is greater uncertainty as to why domestic courts can rely on particular instruments as interpretive guide for international or domestic law. The judges’ explanation appears necessary in order to justify judicial engagement with soft-law instruments. Yet domestic courts do not often provide an explanation as to why a particular non-treaty instrument would be of relevance to the judges’ reasoning. In this case, the Convention on the Rights of the Child was invoked, presumably because the constitutional provision was based on the convention.[53] However, the court did not take steps to explain why the Beijing Rules were of particular relevance in constructing the convention and the constitutional provision on the rights of the child in this case.

This case also suggests that the domestic courts may also refer to the domestic acceptance of non-treaty instruments when the courts employ such instruments as interpretive guide. In this case, the South African Supreme Court, in taking into account the provisions of the Beijing Rules, also referred to the limited domestic relevance of those provisions. While the court observed that the South African Law Commission’s recommendations followed the Beijing Rules, it noted that the value of the recommendations is peripheral, as they have not been adopted by the parliament.[54]

**People’s Union for Civil Liberties v India, Writ petition (civil), AIR 2005 SC 2419, ILDC 458 (IN 2005), 29th April 2005, India; Supreme Court**

In *People's Union for Civil Liberties v India*, an Indian human rights organization filed a writ petition under Article 32 of the Indian Constitution in order to challenge the appointment of an individual who used to be the Director of the Central Bureau of Investigation and the Vice President (Asia) of Interpol to the National Human Rights Commission (NHRC). In arguing that such appointment would jeopardize the status of the Commission to strengthen the protection of human rights, the People's Union for Civil Liberties invoked not only the provisions of the Protection of Human Rights Act 1993 and the Constitutional provisions, but also a General Assembly resolution.

In the following excerpts, paragraph numbers have been added to this decision by OUP. The texts in square brackets are added by the present author.

N. Santosh Hegde, J.

**1** In this writ petition filed under Article 32 of the Constitution, the petitioner is challenging a decision of the first respondent Union of India appointing Respondent 2 as a member of the National Human Rights Commission (the Commission). [ … ] The petitioner urges that such appointment would undermine the status and international recognition of the Commission as an institution for protection of human rights. [ … ] It is submitted that it is also violative of international covenants. For this purpose the petitioner has heavily relied on the (p. 337) principles laid down in the meeting of representatives of the national institutions in Paris wherein certain principles were evolved in regard to protection of human rights which principles came to be known as "Paris Principles". According to the petitioner, these principles were subsequently endorsed by the UN Commission of Human Rights and the UN General Assembly. The petitioner further contends that the UN Resolution dated 19-12-1993 concerning national institutions for protection of human rights, the compliance with the Paris Principles has become mandatory and since the Paris Principles prohibited the appointment of a civil servant like a police officer to such a Commission, such appointment of the second respondent would send wrong signals to the international community as well as to the United Nations. [ … ]

**6** Having heard learned counsel for the parties and on the basis of their pleadings and arguments recorded hereinabove, at the outset we must notice that neither the Paris Principles nor the UN Resolution [ … ] expressly or impliedly exclude the inclusion of a police officer in the Commission. [ … ] Section 3(2)(d) [of the Protection of Human Rights Act, 1993] which refers to two members to be appointed to the Commission reads thus: "3.(2)(d) two members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights."

**7** A plain reading of this section does not give any room for interpretation because the language is quite clear. [ … ]

**8** If we apply the said principle of law to the facts of the case, there being no exclusion in Section 3(2)(d) of the Act and the language being clear, we cannot by looking back into the Paris Principles or the UN Resolution interpret an exclusionary clause to keep police officers from being members of the Commission in spite of the Act not providing for the same. [ … ]

**16** In the ordinary course the above analysis itself would have been sufficient to dispose of this petition. However, since this matter has been referred to this Bench due to the divergence of views between Hon'ble Sabharwal and Dharmadhikari, JJ. it is in the fitness of things that we note their judgments also and particularly the

judgment of Hon’ble Sabharwal, J. as our conclusions are different from his conclusions.

**17** In arriving at his decision Hon’ble Sabharwal, J. has treated the Paris Principles and the UN General Assembly Resolution as covenants. Thereafter, he has applied the law applicable to international covenants and imported the obligations under the Paris Principles and the UN General Assembly Resolution as if they are binding as legal obligations on India even in the municipal context. While doing so he has relied upon the judgments of this Hon’ble Court in *Mackinnon Mackenzie & Co. Ltd.* v. *Audrey D’Costa; Sheela Barse* v. *Secy., Children’s Aid Society; People’s Union for Civil Liberties* v. *Union of India*; and *Vishaka* v. *State of Rajasthan*.

**18** Having noted the above we would with respect like to point out that neither the Paris Principles nor the subsequent UN General Assembly Resolution can be exalted to the status of a covenant in international law. Therefore merely because India is a party to these documents does not cast any binding legal obligation on it. Further, all the above cases which Hon’ble Sabharwal, J. has relied upon deal with the obligations of the Indian State pursuant to its being a party to a covenant/treaty or a convention and not merely a declaration in the international fora or a UN General Assembly Resolution.

**19** Apart from the above, the fact that the field in relation to the constitution of NHRC is covered by an Act of the Indian Parliament, it follows that neither the Paris (p. 338) Principles nor the UN General Assembly Resolution can override the express provisions of the Act. Therefore, we are not in agreement with the decision of Hon’ble Sabharwal, J. After considering the views expressed by Hon’ble Dharmadhikari, J. on this aspect of the case, we are in agreement with the same.

**20** For the reasons stated above this petition fails and is dismissed.

The Paris Principles invoked by the petitioner in this case were adopted in 1991 by the first International Workshop on National Institutions for the Promotion of Protection of Human Rights in Paris and subsequently endorsed by the UN General Assembly in 1993.[55] The Paris Principles have been seen as the ‘template’ to guide and assess the work of national human rights institutions (NHRIs).[56] In light of the recognition given by the Paris Principles, it is not surprising that the petition in this case relied upon them to augment their opposition to the appointment of a former police officer as a member of the National Human Rights Commission.

In this case, the Indian Supreme Court did not necessarily dismiss the relevance of the UN-backed Paris Principles. The court engaged with the content of the Paris Principles which do not deny the inclusion of a police officer in the commission.[57] At the same time, against the clear language of domestic law, the Supreme Court did not see any interpretive space to accommodate the Paris Principles and the relevant UN resolution.[58] In particular, these international instruments cannot be invoked against the express provisions of the Act of the Indian Parliament.[59] For the court, the fact that the earlier decision treated the Paris Principles and the UN resolution as legally binding overstepped the boundary.[60]

## V. Instruments Adopted by Inter-governmental Forums

### Nabori and ors v Attorney General and ors, High Court decision, Petition no 466 of 2006, ILDC 1337 (KE 2007), 11th December 2007, Kenya; Nairobi; High Court

In *Nabori and ors v Attorney General and ors*, the Kenyan High Court encountered the question whether Kenya’s lack of action against the continued destruction of the ecosystem

caused by the introduction of a weed constituted a contravention of internationally acknowledged principles on protection and conservation of the environment.

In 1983–1984, Kenya, following a recommendation of the UN Food and Agricultural Organization, introduced the plant (Prosopis Juliflora) in the Ngambo Location of Marigat Division, Baringo District, Kenya. This was a semi-arid area and prone to desertification. The plant spread very quickly over vast areas of land and, owing to its particular biological characteristics, it displaced both humans and livestock and caused great damage to the lake basin ecosystem.

In 2005, Charles Lekuyen Nabori and others, through the Community Museums of Kenya, filed a complaint with the Public Complaints Commission that was provided for by the Environmental Management and Coordination Act, No 8 of 1999 (Kenya) seeking, *inter alia*, a declaration that the continued decimation of natural biodiversity in the affected area was contrary to Kenya's (p. 339) obligations as a party to international conventions, in particular the Convention on Biological Diversity (1992).[61]

As part of their claims, they sought awards based on the Stockholm Declaration on the Human Environment 1973[62] and the Rio Declaration on Environment and Development 1992,[63] requesting the issuance of an environmental restoration order against the Attorney General and the other respondents to eradicate the weed and to plant indigenous and environmentally friendly trees and grasses in the affected areas.

In the excerpts, paragraph numbers have been added to this decision by OUP. The text in square brackets has been added by the present author.

> Judgment No. of Ang'awa J
>
> [ … ]
>
> **36** The arguments put forth by the petitioners is that Proposis Juliflora is in effect a noxious weed. It was introduced into the petitioners area of Marigat Division, Baringo District in 1982. The said plant takes 15 years to mature. The 15 – 20 years have come and the plant has wreaked havoc for the people who are basically pastolist, some fisher men and very few do substance farming. The plant has caused flooding and over growing of free areas.
>
> **37** This plant was introduced by the 1st and 2nd respondent [who are the Attorney-General of the Republic of Kenya and the Minister for Environment and Natural Resources of the Republic of Kenya] as a project which in effect is not denied. Realizing the effect of the said plant weed which has had a very negative to the environment and residence as a whole.
>
> [ … ]
>
> **40** The Government of Kenya has failed in its duty by failing to pay attention to the international instruments that Kenya ratified, being The Convention of Biological Diversity 116/92 [ … ].
>
> [ … ]
>
> **42** The petitioners further emphasizes that there are principles that leads the Government of Kenya to apply. The first is:-
>
> **i)** Public participation and development plans [ … ]
>
> **v)** The principles of sustained development and or inter generational and inter generational equity. This means that the present generation should ensure that in

excising right to beneficial rise of the environment it be so done for future generations.

**vi)** The polluter pay principle should apply. The Government should be held accountable and made to pay for this wrong.

**43** Indeed the three principle were elaborated in the case law of *Waweru v Republic* (2006) I KLR (E & L) 677 (Nyamu, Mohamed Emukulle JJ).

**44** The applicable international instruments relied on case:-

i) *Stockholm declaration of Human Environmental 1972*.

ii) *The Rio Declaration on Environment and Development 1992*.

(p. 340)
Kenya has since enacted the National Environmental Management Co-ordination Act that has domesticated the International Instrument to our National law.

[ … ]

**VI:** *Finding of the court on the Interpretation of the Constitution of Kenya*

**100** [ … ] ii) *Polluter must pay*.

The principle of polluter must pay is upheld whereby the government of Kenya is held accountable of its actions made twenty years earlier or more knowingly or not. There is a duty of care and accountability by the Government of Kenya to be taken. The government made a mistake in introducing a noxious plant. Though their intentions may have been good the results which has been negative must be remedied by the government of Kenya. [ … ]

In this case, the Kenyan High Court referred to the Stockholm Declaration on the Human Environment 1973[64] and the Rio Declaration on Environment and Development 1992[65] simply on the ground that Kenya has enacted the National Environmental Management Co-ordination Act 1999, that has domesticated these international instruments into the national law. This domestic adoption allowed the domestic court to hold the government's decision-making accountable according *inter alia* to the polluter pays principle with regard to the introduction of the plant, which damaged the regional environment.

As illustrated by this case, insofar as non-treaty instruments are formally or effectively incorporated into domestic legislation, national courts have no difficulties in invoking those instruments as they apply pertinent domestic law, as opposed to the non-treaty instruments themselves. The High Court disregarded the Attorney General and the other respondents' arguments against the application of provisions contained in the Stockholm and Rio declarations by finding that they were now part of domestic law.

In addition, the Kenyan High Court referred to the earlier case of *Waweru v Kenya*. In the *Waweru* case, the High Court of Kenya at Nairobi stated that the principles contained in the National Environmental Management Co-ordination Act (section 3) did constitute part of customary international law and that the courts ought to take cognizance of them in all the relevant situations.[66] Therefore, both domestic law and customary international law may serve as the justification for the reference to the Stockholm and Rio declarations by the Kenyan courts.

**114957 Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/Chemlawn v Town of Hudson, Federation of Canadian Municipalities (intervening) and ors (intervening), Judgment of the Supreme Court, Docket No**

**26937, 2001 SCC 40, [2001] 2 SCR 241, ILDC 185 (CA 2001), 28th June 2001, Canada; Supreme Court [SCC]**

In *Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/ Chemlawn v Hudson*, the Canadian Supreme Court was seised by the question of whether a by-law regulating the use of pesticides was validly enacted under the relevant statute. The Town of Hudson, Quebec, enacted By-law 270 (1991) to regulate the use of pesticides within the town. Landscaping and lawn-care companies (Spraytech and Chemlawn) operating within the town were served with summons by the town in November of 1992 to respond to charges of having used pesticides in violation of the by-law.

The companies pleaded not guilty and argued that By-law 270 was *ultra vires* in the town's power because it was a complete ban and was discriminatory. They further argued that it was (p. 341) inoperative because it was inconsistent with both federal and provincial legislation which regulated pesticides. The Town of Hudson responded that By-law 270 was validly enacted pursuant to its general power to make by-laws for the health and general welfare of its residents, pursuant to section 410(1) of the Cities and Towns Act (CTA). In its decision of 28 June 2001, the Canadian Supreme Court upheld the validity of the by-law enacted by the Town of Hudson.

Judge L'Heureux-Dubé –

[ … ]

**A. Did the Town Have the Statutory Authority to Enact By-law 270?**

[ … ]

**30** To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, at para. 70, observed that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". As stated in *Driedger on the Construction of Statutes, supra*, at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred.* [Emphasis added.]

**31** The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, *CEPA and the Precautionary Principle/Approach* (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the *Oceans Act*, S.C. 1996, c. 31, Preamble (para. 6); *Canadian Environmental Protection Act, 1999*,

S.C. 1999, c. 33, s. 2(1)(*a*); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(*h*) and 11(1).

**32** Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law* (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in *ibid*., at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 *J. Env. L.* 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" (*A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53, at para. 27). See also *Vellore Citizens Welfare Forum v. Union of India*, [1996] (p. 342) Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

[ … ]

**43** I have found that By-law 270 was validly enacted under s. 410(1) *C.T.A.* Moreover, the by-law does not render dual compliance with its dictates and either federal or provincial legislation impossible. For these reasons, I would dismiss the appeal with costs.

[ … ]

LeBel J.

[ … ]

**48** [ … ] Interesting as they may be, references to international sources have little relevance. They confirm the general importance placed in modern society and shared by most citizens of this country on the environment and the need to protect it. Nevertheless, no matter how laudable the purpose of the by-law may be, and although it may express the will of the members of the community to protect their local environment, the means to do it must be found somewhere in the law. The issues in this case remain strictly, first, whether the *C.T.A.* authorizes municipalities to regulate the use of pesticides within their territorial limits and, second, whether the particular regulation conforms with the general principles applicable to delegated legislation.

In this case before the Canadian Supreme Court, Judge L'Heureux-Dubé, for the majority, employed paragraph 7 of the Bergen Ministerial Declaration on Sustainable Development (1990)[67] to give meaning to the precautionary principle.[68] While Judge L'Heureux-Dubé did not make an unequivocal statement about the customary law status of the precautionary principle, she noted that a good argument can be made that the precautionary principle is a principle of customary international law.[69] The majority referred to international law on the basis that the legislation is presumed to respect the values and principles enshrined in international law[70] while Judge LeBel, for the minority, tried to confine the judicial reasoning to the construction of domestic law without reference to international sources.[71]

As noted previously (eg, *Jaftha* 2004 and *ADS* 2011), the actual weight that international instruments have in the reasoning of national courts varies according to cases. In this case, even if the consistent interpretation justifies the reference to international law, the precautionary principle, and the Bergen Ministerial Declaration to give meaning to it, appear to have had a confirmatory value, rather than substantively guiding the interpretation of the statute by the court.

**Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and ors, Appeal, Case No CCT 67/06, [2007] ZACC 13, 2007 (10) BCLR 1059, ILDC 783 (ZA 2007), 7th June 2007, South Africa; Constitutional Court [CC]**

In *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and ors*, the South African Constitutional Court decided the questions whether, under domestic law, there (p. 343) was an obligation on environmental authorities when making decisions about the construction of a filling to consider its social, economic, and environmental impact, and whether they had complied with the obligation.

Section 22(1) of the Environmental Conservation Act 73, 1989 (ECA) requires that approval be obtained from a competent authority before any activity identified as having the potential to have a substantial detrimental impact on the environment can be undertaken. The ECA empowers the Minister of Environmental Affairs and Tourism to determine activities which, in his or her opinion, could have such effects.

In 2000, a trust applied to the environmental authorities to construct a filling station on its property in accordance with the cited environmental provisions. The environmental authorities approved the application. The Fuel Retailers Association, however, objected to the planned construction and appealed against the decision of the environmental authorities. The Fuel Retailers Association argued that the environmental authorities failed to consider the socio-economic impacts of the proposed petrol station. In its decision of 7 June 2007, the South African Constitutional Court had decided in favour of the Fuel Retailers Association.

> **45** The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. [ … ] Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.
>
> **The concept of sustainable development in international law**
>
> **46** Sustainable development is an evolving concept of international law. Broadly speaking its evolution can be traced to the 1972 Stockholm Conference. That Conference stressed the relationship between development and the protection of the environment, in particular, the need "to ensure that development is compatible with the need to protect and improve [the] environment for the benefit of their population". The principles which were proclaimed at this conference provide a setting for the development of the concept of sustainable development. Since then the concept of sustainable development has received considerable endorsement by the international community. Indeed in 2002 people from over 180 countries

gathered in our country for the Johannesburg World Summit on Sustainable Development (WSSD) to reaffirm that sustainable development is a world priority.

**47** But it was the report of the World Commission on Environment and Development (the Brundtland Report) which “coined” the term “sustainable development”. The Brundtland Report defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. It described sustainable development as—

“[i]n essence … a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations”.

**48** This report argued for a merger of environmental and economic considerations in decision-making and urged the proposition that “the goals of economic and social development must be defined in terms of sustainability”. It called for a new approach to development—“a type of development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an (p. 344) adequate livelihood base and equitable access to resources.” The concept of sustainable development, according to the report, “provides a framework for the integration of environment[al] policies and development strategies”.

**49** The 1992 Rio Conference made the concept of sustainable development a central feature of its Declaration. The Rio Declaration is especially important because it reflects a real consensus in the international community on some core principles of environmental protection and sustainable development. It developed general principles on sustainable development and provided a framework for the development of the law of sustainable development.

**50** At the heart of the Rio Declaration are Principles 3 and 4. Principle 3 provides that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” Principle 4 provides that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” The idea that development and environmental protection must be reconciled is central to the concept of sustainable development. At the core of this Principle is the principle of integration of environmental protection and socio-economic development.

**51** Commentators on international law have understandably refrained from attempting to define the concept of sustainable development. Instead they have identified the evolving elements of the concept of sustainable development. These include the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner.

**52** The principle of integration of environmental protection and development reflects a—

"… commitment to integrate environmental considerations into economic and other development, and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations."

This is an important aspect of sustainable development because "its formal application requires the collection and dissemination of environmental information, and the conduct of environmental impact assessments." (Footnote omitted.) The practical significance of the integration of the environmental and developmental considerations is that environmental considerations will now increasingly be a feature of economic and development policy.

**53** The principle of integration of environmental protection and socio-economic development is therefore fundamental to the concept of sustainable development. Indeed economic development, social development and the protection of the environment are now considered pillars of sustainable development. As recognised in the WSSD, States have assumed—

" … a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels."(p. 345)

**54** The concept of sustainable development has received approval in a judgment of the International Court of Justice. This much appears from the judgment of the International Court of Justice in Gabčíkovo-Nagymaros Project (Hungary/Slovakia) where the Court held—

"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."

**55** The integration of economic development, social development and environmental protection implies the need to reconcile and accommodate these three pillars of sustainable development. Sustainable development provides a framework for reconciling socio-economic development and environmental protection. This role of the concept of sustainable development as a mediating principle in reconciling environmental and developmental considerations was recognised by Vice-President Weeramantry in a separate opinion in Gabčíkovo-Nagymaros, when he said—

"The Court must hold the balance even between the environmental considerations and the development considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development."

**56** It is in the light of these developments in the international law of environment and sustainable development that the concept of sustainable development must be construed and understood in our law.

[ … ]

**102** The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out. Indeed, the Johannesburg Principles adopted at the Global Judges Symposium underscore the role of the judiciary in the protection of the environment.

**103** On that occasion members of the judiciary across the globe made the following statement—

"We affirm our commitment to the pledge made by world leaders in the Millennium Declaration adopted by the United Nations General Assembly in September 2000 'to spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs' "(p. 346)

In addition, they affirmed—

" … that an independent Judiciary and judicial process is vital for the same implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and the enforcement of, international and national environmental law".

**104** One of these principles expresses—

"A full commitment to contributing towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process … "

Courts therefore have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so.

**Conclusion**

**105** The considerations set out above make it clear that the decision of the environmental authorities is flawed [ … ]. In all the circumstances, the decision by the environmental authorities to grant authorisation for the construction of the filling station under section 22(1) of ECA cannot stand and falls to be reviewed and set aside. [ … ].

In this case, the South African Constitutional Court invoked non-treaty documents in the following two contexts. First, the court invoked the declarations and report in order to identify an 'evolving concept' of international law.[72] The Constitutional Court's assessment started with the constitutional provision, which recognized the interrelationship between the protection of the environment and the need for social and economic development. According to the court, sustainable development and sustainable use and exploitation of natural resources were at the core of the protection of the environment.[73] The South African Constitutional Court then interpreted the concept of sustainable development in domestic law in the light of international law. Having noted that sustainable development was an 'evolving concept of international law', the court traced the evolution by making

reference to several informal international instruments such as the 1972 Stockholm Declaration,[74] the report of the 1987 World Commission on Environment and Development (the Brundtland Report),[75] and the 1992 Rio Declaration.[76]

Secondly, the South African Constitutional Court also referred to the Johannesburg Principles (2002) adopted at the Global Judges Symposium[77] in order to highlight the importance of the (p. 347) role of courts in the protection of environment.[78] The court observed that if the need arose to intervene in order to protect the environment, the courts should not hesitate to do so.[79]

This case is illustrative of the variance among domestic court decisions with respect to the purposes for which they invoke international law and (formally) non-binding international instruments. In this case, the reference to international instruments (through which the court identified the evolving concept and emphasized the role of courts) may seem to serve the overall 'direction' of the reasoning rather than a concrete interpretive guide to domestic law. In this respect, the purposes for which instruments are employed are akin to those of the above-mentioned *Mosetlhanyane* case (2011), in which the Court of Appeal of the Republic of Botswana made recourse to international instruments in order to stress the importance of access to water.

## VI. Conclusion

Domestic courts have the role of sustaining the effectiveness and development of international law, as the subject-matters of international law overlap with those of domestic law. Both international and national law prescribe standards concerning, for instance, human rights, crimes, trade, investment, public health, and environmental conservation. The subject-matter overlaps generate space for national courts to apply, not only domestic legislation which implements international law, but also international treaties and customary international law as a freestanding basis of judicial decisions or as an instrument to supplement the construction of domestic law. Such opportunities for interactions have spread into formally non-binding international instruments. As demonstrated by several cases compiled in this chapter, domestic courts employ a wide range of soft-law instruments despite the lack of formal binding force, presumably due to their persuasiveness. Judges use the documents adopted, for instance, by UN human rights treaty-monitoring bodies, the UNHCR, conference of parties, and the UN General Assembly.

This chapter and the Oxford ILDC reports focus on the cases in which domestic courts proactively employed soft-law instruments. It is reasonable to assume, however, the other side of the interface between national and international law. Domestic courts may also avoid the explicit reference to various soft-law instruments, even if the parties to a dispute have relied on them. Methodologically, it is difficult to trace whether judges have purposely avoided the reference to, for instance, the General Comments or UN General Assembly resolutions. Yet one has to bear in mind that domestic courts, from time to time, deliberately avoid, discount, and explicitly contest soft-law instruments.[80] The cases compiled in this chapter thus present one of multiple interfaces between the domestic and international legal orders.

Whether or not domestic courts' engagement, or lack thereof, with soft-law instruments is desirable depends on normative yardsticks with which to assess judicial engagement. One of the normative questions pertains to the separation of powers between the judiciary and the political branches of the government. The more faithful the judicial organs are to the separation of powers and to the legislative authority of political branches, the less amenable the courts are to soft-law instruments. By applying formally non-binding international instruments without being intermediated by political bodies, domestic courts may interfere with the authority of a legislative body endowed with democratic legitimacy. The extent to which judicial engagement disturbs the separation of powers varies depending on the weight that the instruments carry in judicial reasoning. The authority of

political organs may be encroached if domestic (p. 348) courts invoke soft-law instruments, not merely in a confirmatory sense, but also as substantive guide for the interpretation of relevant treaties or domestic law where the standards put forward in soft-law instruments do not fully reflect the established treaty interpretation or customary international law. The methodological challenge lies in the fact that it is often hard to distinguish, from explicit judicial reasoning, to what extent soft-law instruments actually influence the mind-set of judges.

The judicial engagement with soft-law instruments remains a largely unregulated undertaking. The extent to which the instruments permeate domestic courts is often left to litigants' willingness to invoke the instruments, the quality of litigants' arguments, and the awareness and willingness of judges to engage with instruments, despite the lack of formal bindingness. The crux, however, is that the influence of domestic courts' recourse to soft-law instruments is not limited to the outcome of specific court decisions. Judicial reference to soft-law instruments also helps, albeit remotely, to convert those instruments into part of formal international law. Domestic court decisions are after all part of state practices. Domestic judges thus necessarily play a critical dual role in determining the domestic *and* international relevance of soft-law instruments whose effectiveness ultimately relies on acceptance at the national legal order.

## Footnotes:

**1** Statute of the International Court of Justice (signed 26 June 1945, entered into force on 24 October 1945) 39 AJIL Supp 215 (1945), Articles 38(1)(a)-(c).

**2** For an overview, see, eg, J Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?' in J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 125.

**3** The term 'soft' law can be used in different ways. In this chapter, the dichotomy of 'soft' and 'hard' law is based on whether a standard qualifies as one of the three sources of international law. However, 'soft' law can also be used to denote treaty provisions which are merely hortatory and not imperative. See R Ida, 'Formation des normes internationales dans un monde en mutation: Critique de la notion de soft law' in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Pedone 1990) 333.

**4** For other cases not covered in this chapter see M Kanetake and A Nollkaemper, 'The Application of Informal International Instruments Before Domestic Courts' (2014) 46 *The George Washington International Law Review* 765. This chapter is in part based on this article.

**5** See C Flanders, 'Toward a Theory of Persuasive Authority' (2009) 62 *Oklahoma Law Review* 55, 62.

**6** Human Rights Committee, 'CCPR General Comment No 18: Non-Discrimination' (1989) UN Doc HRI/GEN/1/Rev.1.

**7** *RM v Attorney General, JK (on the application of RM) v Attorney General*, Application brought by way of original summons to high court, Civil Case 1351, ILDC 699 (KE 2006) (Kenya, Nairobi, High Court, 1 December 2006), paras 75–78.

**8** ibid, para 75.

**9** The general comments and recommendations of all human rights treaty bodies are compiled periodically: see, eg, Human Rights Instruments, Volume I, Compilation of General

Comments and General Recommendations Adopted by Human Rights Treaty Bodies (2008), UN Doc HRI/GEN/1/Rev.9 (Vol I).

**10** For the Human Rights Committee see, eg, UN Doc HRI/GEN/1/Rev.9 (Vol I) (2008) at 172–73.

**11** *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (South Africa, High Court Witwatersrand). Cited in: 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) paras 11, 99.

**12** *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, ibid, 629, para 17.

**13** Judgment of 15 March 2001, Tokyo District Court, 1784 *Hanrei Jiho* 67.

**14** *Jaftha v Schoeman and ors; Van Rooyen v Stoltz and ors* (10) BCLR 1149 (C) (2003).

**15** *Jaftha and van Rooyen v Schoeman and ors*, Appeal decision, CCT74/03, [2004] ZACC 25, ILDC 1846 (ZA 2004), 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) (South Africa, Constitutional Court [CC], 8 October 2004), para 24.

**16** ibid, para 25.

**17** *Sesana and Others v Attorney-General* [2006] (2) BLR 633 (HC).

**18** *Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane v Attorney General* (Court of Appeal Civil Appeal No CACLB-074-10; High Court Civil Case No MAHLB-000393-09) (Botswana, Court of Appeal, 27 January 2011) para 19.

**19** Committee on Economic, Social and Cultural Rights, 'General Comment No. 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (2003) UN Doc E/C. 12/2002/11. From the General Comment, the court quoted not only the phrase which stated that the human right to water is indispensable (para 1), but also the special protection for indigenous peoples (para 16(d)).

**20** UN Human Rights Council, 'Human Rights and Access to Safe Drinking Water and Sanitation' (2010) UN Doc A/HRC/RES/15/9. The Court of Appeal is referring to the document adopted by the 'UN General Assembly' in 'July 2010' (para 19). Yet it cites the phrase from the Resolution of the Human Rights Council adopted in September 2010. The Human Rights Council's Resolution called upon states '[t]o ensure [ … ] the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein' (para 8(b)).

**21** *Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane v Attorney General* (n 18) para 19 (emphasis added).

**22** Convention relating to the Status of Refugees (adopted 28 July1951, entered into force 22 April 1954) 189 UNTS 137.

**23** *Mansouri-Rad v Department of Labour*, Appeal decision, Refugee Appeal No 74665/03, [2005] NZAR 60, ILDC 217 (NZ 2004) (New Zealand, 7 July 2004), para 73.

**24** ibid, emphasis added.

**25** ibid, para 78 (emphasis added).

**26** UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (1979, and edited in January 1992) UN Doc HCR/1P/4/Eng/Rev.2.

**27** *R, ex parte Adan v Secretary of State for the Home Department*, Appeal decision, [2000] UKHL 67, [2001] 2 AC 477, [2001] 2 WLR 143, [2001] 1 All ER 593, [2001] Imm AR 253, [2000] All ER (D) 2357, ILDC 229 (UK 2000) (United Kingdom, House of Lords, 19 December 2000) para 55.

**28** UNHCR, 'UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (1999) http://www.unhcr.org/refworld/docid/3c2b3f844.html (last accessed 1 April 2017).

**29** *Article 146 of the Constitution, Re, Sarmadi v Cyprus, ex parte Refugee Review Authority, Decision on Judicial Review*, Case No 61/2006, ILDC 835 (CY 2007) (Cyprus, Supreme Court, 3 April 2007) H1–5; A Constantinides, Analysis, *Article 146 of the Constitution, Re, Sarmadi v Cyprus, ex parte Refugee Review Authority*, ILDC 835 (CY 2007) A2.

**30** *Anonymous (Ivory Coast) v Minister of Interior and Head of Administration of Border Crossings, Population and Immigration*, Administrative appeal to the Supreme Court, Admin A 4922/12, ILDC 2182 (IL 2013) (Israel, Supreme Court as Court of Appeal, 16 January 2013), H2; A Carmeli, Analysis, *Anonymous (Ivory Coast) v Minister of Interior and Head of Administration of Border Crossings, Population and Immigration*, ILDC 2182 (IL 2013) A1.

**31** *Novikov and Chabanyuk v Cyprus*, Case No 681/2008 (Supreme Court of Cyprus, 23 October 2009).

**32** WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166, World Health Assembly Resolution 56.1.

**33** Guidelines for Implementation of the Framework Convention on Tobacco Control, adopted by the Conference of the Parties of the Tobacco Agreement in 2007, Article 8.

**34** Elaboration of Guidelines for Implementation of the Convention (Decision FCTC/COP1(15)) (2007), Article 8: Protection from Exposure to Tobacco Smoke.

**35** Recommendations of the Council of the European Union, Council Recommendation of 30 November 2009 on smoke-free environments, OJ C296/4 (2009).

**36** See C Ryngaert, Analysis, *ADS ao, Flemish League Against Cancer and Leo Leys v the Government*, ILDC 1726 (BE 2011) A2-5.

**37** Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

**38** Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III), UN Doc A/810 at 71 (1948).

**39** Declaration on the Protection of All Persons from Being Subjected to Torture, UNGA Res 3452(XXX) (9 December 1975) UN Doc A/1034.

**40** American Declaration of the Rights and Duties of Man, OAS Resolution, AG/RES 1591 (XXVIII-O/98), Ninth International Conference of American States, (1992) Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17; (1949) 43 AJIL Supp 133, 1948.

**41** Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal (11 December 1946) UN Doc A/RES/95(I).

**42** *Attorney-General (Israel) v Adolf Eichmann* (1962) 36 ILR 277 (Supreme Court of Israel, Judgment of 29 May 1962).

**43** *Re Pinochet* (1998) 119 ILR 345 (Belgium, Court of First Instance of Brussels, Judgment of 6 November 1998).

**44** Principles of International Cooperation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, UNGA Res 3074 (XXVIII) (3 December 1973) UN Doc A/RES/3074. para 1 of the resolution proclaims that war crimes and crimes against humanity shall be subject to investigation 'wherever they are committed'.

**45** *Re Pinochet* (n 43) 357; cf *Pinochet* (1999) 119 ILR 360 (Luxembourg, Court of Appeal (Chambre du Conseil), 11 February 1999).

**46** *Filártiga and Filártiga and United States (intervening) v Peña-Irala*, Appeal judgment, Docket No 79-6090, Case No 191, 630 F 2d 876 (2d Cir 1980), ILDC 681 (US 1980) (United States, Court of Appeals (2nd Circuit) [2d Cir], 30 June 1980), para 21.

**47** ibid, emphasis added.

**48** *Flores and ors v Southern Peru Copper Corporation*, Appeal judgment, 414 F 3d 233 (2d Cir 2003) (2003) ILDC 303 (US 2003) (United States, United States Court of Appeals for the Second Circuit, 29 August 2003).

**49** ibid, para 71.

**50** ibid, para 76 (noting that the court's position is not inconsistent with *Filartiga*).

**51** *Director of Public Prosecutions KwaZulu-Natal v P*, Appeal to Supreme Court of Appeal, Case No 363/2005, [2005] ZASCA 127, ILDC 492 (ZA 2005) (South Africa, Supreme Court of Appeal [SCA], 1 December 2005), para 15.

**52** ibid, para 16; UNGA 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")' UNGA Res 40/33 (29 November 1985) UN Doc A/RES/40/33.

**53** ibid, para 15.

**54** ibid, para 17.

**55** UNGA, 'Principles Relating to the Status of National Institutions' UNGA Res 48/134 (20 December 1993) UN Doc A/RES/48/134, Annex.

**56** G de Beco and R Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge University Press 2014) 3.

**57** *People's Union for Civil Liberties v India*, Writ petition (civil), AIR 2005 SC 2419, ILDC 458 (IN 2005) (India, Supreme Court, 29 April 2005), para 6.

**58** ibid, para 8.

**59** ibid, para 19.

**60** ibid, paras 17–18.

**61** Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; 31 ILM 818.

**62** Stockholm Declaration on the Human Environment (adopted 15 December 1972) UN Doc A/Conf.48/14/Rev.1; 11 ILM 1416 (1972).

**63** Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26 (vol I); 31 ILM 874, 1992.

**64** Stockholm Declaration on the Human Environment (adopted 15 December 1972) UN Doc A/Conf.48/14/Rev.1; 11 ILM 1416 (1972).

**65** Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26 (vol I); 31 ILM 874, 1992.

**66** (2006) 1 KLR (E & L) 677; C Munyua, Analysis, *Nabori and ors v Attorney General and ors*, ILDC 1337 (KE 2007) A1.

**67** Bergen Ministerial Declaration on Sustainable Development in the ECE Region (adopted 16 May 1990) UN Doc A/CONF.151/PC/10, Annex.

**68** *114957 Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/Chemlawn v Town of Hudson, Federation of Canadian Municipalities (intervening) and ors (intervening)*, Judgment of the Supreme Court, Docket No 26937, 2001 SCC 40, [2001] 2 SCR 241, ILDC 185 (CA 2001) (Canada, Supreme Court [SCC], 28 June 2001), para 31.

**69** ibid, para 32.

**70** ibid, para 30.

**71** ibid, para 48.

**72** *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and ors*, Appeal, Case No CCT 67/06, [2007] ZACC 13, 2007 (10) BCLR 1059, ILDC 783 (ZA 2007) (South Africa, Constitutional Court [CC], 7 June 2007), para 46.

**73** ibid, para 45; D Tladi, Analysis, *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and ors*, ILDC 783 (ZA 2007) A1–2.

**74** Stockholm Declaration on the Human Environment (adopted 15 December 1972) UN Doc A/Conf.48/14/Rev.1; 11 ILM 1416 (1972).

**75** Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427, Annex.

**76** *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and ors* (n 72) paras 46–50; Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26 (vol I); 31 ILM 874, 1992.

**77** United Nations Environment Programme, 'The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa on 18–20 August 2002'.

**78** *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and ors* (n 72) paras 102–04.

**79** ibid, para 104.

**80** I have separately analysed domestic courts' resistance with regard to UN human rights treaties: see M Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2018) 67 *International and Comparative Law Quarterly* 201.