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Cooperation Between Human Rights Bodies and Domestic Courts

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A. Introduction

1 Cooperation between human rights bodies and domestic courts is a discursive engagement between the non-judicial bodies at the international level and the judiciary at the domestic level. The study of this cooperation illustrates the extent to which the interpretation of human rights treaties by human rights bodies may be accepted at the domestic level. The study also reveals variance among domestic courts in terms of their readiness to engage with human rights bodies. Ultimately, the topic of the present entry forms part of the interactive processes involving domestic and international bodies, through which international human rights law evolves through their discursive or dialogic engagement. The subject of the present entry is relevant, not only to the understanding of international human rights law, but also to the analysis of constitutional law, administrative law, and comparative law. After providing a definition of the topic (sec B below), the present entry discusses cooperation on the part of both human rights bodies (sec C) and domestic courts (secs D–F).

B. Definition

2 For the purpose of the present entry, cooperation is understood as an engagement between human rights bodies and domestic courts through their respective reasoning. International human rights bodies and domestic courts do not formally act together, although members of human rights bodies can informally exchange dialogues with some domestic judges. Cooperation in this entry is thus channelled through the documents adopted by the bodies and the courts respectively, without institutionalized coordination between them.

3 Human rights bodies, for the purpose of the present entry, are meant to encompass international organs, however designated, that are competent to hear individual or inter-State complaints but are not authorized to adopt binding decisions (→ *Quasi-Judicial Body*; → *Human Rights, Activities of International Organizations*). Among others, this entry pays particular attention to the committees that monitor the implementation of human rights conventions sponsored by the → *United Nations (UN)*. There are ten such committees (→ *Human Rights, Treaty Bodies*), including, for instance, the → *Human Rights Committee* ('HRC') and the → *Committee on the Elimination of Discrimination Against Women (CEDAW)* (or 'CEDAW Committee'). In this entry, these human rights monitoring committees are collectively referred to as 'UN treaty bodies'.

4 Also included in the category of human rights bodies are the working groups established by an international organization with a competence to receive and consider individual cases, such as the → *Working Group on Arbitrary Detention* within the Human Rights Council (→ *Special Procedures: Human Rights Council*). Human rights bodies also include regional human rights commissions, such as the → *Inter-American Commission on Human Rights (IACommHR)* and the → *African Commission on Human and Peoples' Rights (ACommHPR)*. For the sake of this entry, human rights bodies do not include regional human rights courts having the competence to adopt binding decisions, such as the → *European Court of Human Rights (ECtHR)*, the → *Inter-American Court of Human Rights (IACtHR)*, and the → *African Court on Human and Peoples' Rights (ACtHPR)*. Among various human rights bodies, the present entry focuses primarily on UN treaty bodies which, unlike the regional commissions, do not have associated human rights courts.

5 Domestic courts are defined and regulated primarily by each State's domestic law. Their functions, composition, and relationships with other branches of the government vary according to each State or region's legal frameworks and traditions, which would also lead to the courts' varied interactions with human rights bodies.

C. Human Rights Bodies' Discursive Engagement

1. United Nations Treaty Bodies' Engagement

6 Human rights bodies may consult, and explicitly refer to, the jurisprudence of domestic courts or judicial proceedings in the course of assisting the implementation of respective human rights treaties. With regard to UN treaty bodies' explicit reference to the practices of domestic courts, the modes of engagement vary according to the types of documents.

7 Within General Comments and General Recommendations (→ *General Comments/Recommendations*) it is rare that UN treaty bodies refer to any specific domestic court decisions. While various committees frequently cite the jurisprudence of regional human rights courts, UN treaty bodies generally refrain from making explicit reference to specific national judgments. This avoidance is presumably to preserve the tenet that General Comments and Recommendations are addressed and relevant to all States Parties.

8 In State-specific concluding observations, by contrast, UN treaty bodies occasionally praise, critique, and take note of the party's domestic court decisions or court proceedings. To provide one concrete example, in the Concluding Observations addressed to Germany in 2018, the → *Committee on Economic, Social and Cultural Rights (CESCR)* ('CESCR' or 'CESCR Committee') welcomed the decision of the country's Federal Constitutional Court of 10 October 2017 concerning the third gender (CESCR, 2018, para 24; BVerfG, Order of the First Senate, 2017). In the same Concluding Observations, the CESCR Committee also recommended the State Party to revise its basic social benefits in the light of the earlier judgment of the Federal Constitutional Court of 23 July 2014 (CESCR, 2018, para 47; BVerfG, Order of the First Senate 2014). In general, UN treaty bodies refer to judicial decisions based upon the information originally submitted by States Parties themselves in their periodic reports (see Report of the Secretary-General, 'Compilation of Guidelines on the Form and Content of Reports', 2009) and by non-governmental organizations ('NGOs') in their additional submissions.

9 In addition, it must be recognized that the views, or decisions, or suggestions and recommendations, concerning individual communications (see → *Human Rights, Individual Communications/Complaints*) serve as occasions through which UN treaty bodies engage in the analysis of domestic court decisions and related proceedings, especially in the context of discussing the right to fair trial. To illustrate, the CEDAW Committee, in its views on several individual communications, criticized relevant domestic court decisions and proceedings where stereotyping affected women's rights to a fair trial and the judicial interpretation of gender-based violence (eg *Vertido v Philippines*, 2010, para 8.4; *VK v Bulgaria*, 2011, para 9.11). Furthermore, in General Recommendation No 33, the CEDAW Committee reiterated its perspectives on stereotyping and gender bias in the justice system (CEDAW, 'General Recommendation No 33', 2015, paras 26–29). As illustrated by the example, the process of examining individual communications allows UN treaty bodies to develop their perspectives on domestic courts' practices. Such a case-specific engagement helps shape the bodies' general positions on how treaty provisions ought to be implemented by States Parties.

2. Other Human Rights Bodies

10 In a similar vein, other human rights bodies engage with domestic court decisions and proceedings in the course of assessing a particular State's human rights situations. For instance, the opinions of the Working Group on Arbitrary Detention may explain and discuss domestic court decisions relevant to a particular communication. Likewise, the ACommHPR necessarily engages with the analysis of domestic courts' proceedings and decisions in assessing the complaints on the right to fair trial and the principle of judicial independence. Furthermore, human rights bodies may conduct general analysis of national case-law outside the context of particular incidents of human rights violations. For instance, the IACommHR conducted analysis of judicial decisions of the Member States of the → *Organization of American States (OAS)* relating to gender equality and women's rights (IACommHR, 2011).

D. Legal Bases for Judicial Engagement

11 With regard to domestic courts' engagement with human rights bodies, it would be necessary to consider whether there is a legal basis for judges to engage with the formally non-binding documents of human rights bodies. As will be discussed below, both international law (sec D.1 below) and domestic legal frameworks (sec D.2) play a part in facilitating, and even requiring, domestic courts to engage with human rights bodies.

1. Legal Bases for Cooperation under International Law

(a) Legal Status of the Documents in Form and in Substance

12 At the international level, the documents of human rights bodies analysed in this entry may not, in themselves, oblige States and their courts to implement the findings of the international bodies. UN treaty bodies' views on individual communications, general comments, and recommendations, and State-specific observations are generally regarded as non-binding under international law. Likewise, the opinions adopted by the UN's Working Group on Arbitrary Detention have no formal binding legal force at the international level (Tochilovsky, 2018, para 38). The exception in this regard is certain → *Interim (Provisional) Measures of Protection* adopted by human rights bodies, which have been claimed as binding on States Parties (Naldi, 2004, 447–50; HRC, 'General Comment No 33', 2009, para 19; Grossman, 2011, para 20; *Gutiérrez Soler v Colombia*, 2005; → *Provisional Measures: Human Rights Bodies*). Whether or not States Parties regard interim measures as binding requires a separate consideration, however. For example, in response to the → *Committee on the Rights of Persons with Disabilities (CRPD)*'s interim measure of 3 May 2019 against France concerning the treatment of Vincent Lambert, the French government did not regard CRPD measures legally binding; the decisions by the Court of Appeal of Paris and subsequently by the Cour de Cassation did not clarify the binding nature of CRPD interim measures in general (Cour de cassation, 2019; Véron and Baudel, 2020).

13 The non-binding status of the documents in general does not dictate the legal status of norms expressed in the documents of human rights bodies. Namely, the interpretation of rules articulated in the documents may reflect, in substance, established treaty interpretation that States Parties are obliged to implement. For instance, States Parties to the → *International Covenant on Civil and Political Rights (1966)* may be obliged to take into account General Comments, insofar as they 'reflect subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' under Article 31 (3) (b) → *Vienna Convention on the Law of Treaties (1969)* ('VCLT') (see → *Interpretation in International Law*). According to the → *International Law Commission (ILC)* Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, a 'pronouncement of an expert treaty body may give rise to,

or refer to, a subsequent agreement or subsequent practice by parties' (Conclusion 13.3) (Report of the ILC, 2018, 16).

14 At the same time, it is not a straight-forward task to ascertain whether a treaty body's pronouncement reflects subsequent practice by States Parties. The ILC's aforementioned Draft Conclusions adopted in 2018 do not provide a set of indicators with which to determine, for instance, whether a particular pronouncement by the → *United Nations Committee Against Torture (CAT)* refers to established treaty interpretation based upon subsequent practice by States Parties. In this sense, the content-based obligation effectively leaves ample discretion for States, and indirectly their courts, to determine whether and to what extent the findings of human rights bodies should be given effect at the domestic level.

(b) Obligation to Give Consideration

15 Apart from the content-based obligation, domestic courts' engagement may be accelerated by the existence of a separate obligation to give consideration to the documents of human rights bodies. With respect to UN treaty bodies, such an obligation is based, not on the substance of the pronouncement of human rights bodies, but on States Parties' obligation to cooperate with a committee when it comes to the adoption of views concerning individual communications. Such an obligation to cooperate is explicitly provided in a few human rights treaties. For example, Article 7 (4) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW-OP') obliges a State Party to 'give due consideration to the views of the Committee' and to submit, within six months, a written response regarding actions taken in the light of the CEDAW Committee's Views and recommendations. The same provision is included in the optional protocols concerning the views of the CESCR Committee and the → *Committee on the Rights of the Child (CRC)* ('CRC' or 'CRC Committee'), respectively (Art 9 (2) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008; Art 11 (1) Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, 2011).

16 In the absence of the explicit provision within human rights treaties, the obligation to cooperate with UN treaty bodies can be further derived from States' general obligation to perform a treaty in → *good faith (bona fide)*, according to Article 26 VCLT. The meaning of such a general obligation no doubt depends on contexts (Kolb, 2017, 166–69). In the context of UN treaty bodies, the HRC's General Comment No 33 referred to such an obligation to perform a treaty in good faith as a legal basis for a State Party's 'duty to cooperate with the Committee' (HRC, 2009, para 15). Such a duty to cooperate does not require States Parties to comply with the pronouncement of UN treaty bodies. At the same time, the frequent non-compliance and lack of engagement with the decisions on individual communications may amount to a State Party's bad faith towards its treaty commitment (Joseph, 2019, para 9; Tomuschat, 2019, para 14; Kadelbach, 2019, 70–71). In the same vein, the → *Venice Commission* observed that 'member states are under the obligation to take the HRC's final views into consideration in good faith' (European Commission for Democracy, 2014, para 78). In sum, it is plausible to argue that a State Party, and indirectly its domestic courts, are obliged to give consideration to a UN treaty body's views addressed to the State Party.

17 A question remains as to whether the obligation to consider is applicable to other documents adopted by UN treaty bodies. The ILC suggested that an obligation to consider was not limited to a State Party's responses to individual communications. According to the ILC's commentary to the 2018 Draft Conclusions on Subsequent Agreements and Subsequent Practice, States Parties may have an obligation to consider and react to a UN treaty body if its pronouncement is 'specifically addressed to them' (ILC, 2018, 113, para 19). It remains to be seen, however, whether such an obligation is applicable to all the

State-specific concluding observations or limited to specific types of the pronouncement of UN treaty bodies.

18 With regard to the Working Group on Arbitrary Detention, the duty to cooperate may not be treated the same as the duty to cooperate with UN treaty bodies whose authority is based upon some of the explicit provisions of a human rights treaty. The Working Group was established by a resolution of the → *United Nations Commission on Human Rights/United Nations Human Rights Council*, as opposed to a treaty itself.

(c) Authorization to Consider

19 Finally, it must also be noted that the documents of human rights bodies can be part of 'supplementary means of interpretation' under Article 32 VCLT. In this sense, regardless of the existence of an obligation to consider, States, and indirectly their courts, are authorized under international law to engage with human rights bodies in the course of interpreting relevant human rights treaties, which may eventually be used to construe comparable constitutional or statutory provisions concerning individuals' rights.

20 In summary, on top of some specific provisions of human rights treaties, Articles 26 and 31–32 VCLT can serve as an international legal basis for authorizing, or even obliging, States Parties, and indirectly their domestic courts, to engage with the documents of human rights bodies.

2. Legal Bases for Cooperation under Domestic Law

21 On top of international law, each State's domestic law may further provide a legal basis for domestic courts' engagement with the documents of human rights bodies. Domestic courts can consult and rely on the documents of human rights bodies in the course of interpreting a relevant human rights treaty, which may ultimately inform the courts' interpretation of relevant domestic law.

22 In States with monist traditions, Articles 26 and 31–32 VCLT discussed above may have domestic validity and can serve as a legal basis at the domestic level for the courts to engage with human rights bodies. Even in States with dualist traditions, or in monist States which have not ratified the VCLT, Articles 26 and 31–32 VCLT may still constitute a legal basis for domestic courts, given that these provisions are considered as reflecting customary international law (Dörr and Schmalenbach, 2018, 475, 561).

23 In addition, domestic law per se can provide a separate legal basis for courts to rely on the documents of human rights bodies as part of judicial reasoning. For example, under Section 32 (2) Charter of Human Rights and Responsibilities Act 2006 for the State of Victoria in Australia ('Victorian Charter'), courts are authorized to refer to international law and foreign judgments in construing a human right. Section 32 (2) Victorian Charter has been interpreted as a basis, not only to permit, but also to facilitate, a court's resort to foreign and international sources of human rights law, including the HRC's General Comments (*Kracke v Mental Health Review Board*, 2009, paras 201–2). While Section 32 (2) Victorian Charter does not mention human rights bodies, the explanatory memorandum concerning Section 32 (2) Victorian Charter explicitly allows a court to examine the 'decisions' of 'United Nations treaty monitoring bodies including the Human Rights Committee' in interpreting a statutory human right (Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill, 2006, 23). Likewise, the Queensland Human Rights Act 2019 in Australia authorizes courts to consider the decisions of UN treaty bodies in

interpreting a human right (sec 48 (3) Human Rights Act 2019; Explanatory Notes, Human Rights Bill 2018, 31).

24 Apart from interpretive reference to the documents of human rights bodies in the course of construing a human right, domestic courts may be able to take part in case-specific responses to the decisions of human rights bodies concerning individual communications. In limited cases, domestic courts may be allowed to reopen a case in response to the decisions of UN treaty bodies concerning individual communications (International Law Association, Committee on International Human Rights Law and Practice, 2004, paras 29–43; van Alebeek and Nollkaemper, 2012, 360–82). For instance, in Norway, according to the Act of 15 June 1 No 63 amending the Criminal Procedure and the Civil Procedure Acts, the country allowed the reopening of a case in response to the HRC's findings against Norway (HRC, 'Fifth Periodic Report, Norway', 2004, para 157). At the same time, it remains rare for States to have such an institutional mechanism to allow the reopening of judicial proceedings in response to the decisions of human rights bodies. In general, the doctrine of → *res judicata* is an obstacle for a domestic court to take follow-up steps to the decisions of human rights bodies concerning individual petitions. Domestic courts' engagement with human rights bodies thus takes place predominantly outside case-specific responses to the decisions concerning individual petitions.

E. Practices of Engagement by Domestic Courts

25 In practice, the extent to which domestic courts consult and discuss the perspectives of human rights bodies significantly varies depending on the courts, judges, and circumstances of cases. With such diversity in mind, this section provides some specific examples for domestic courts' engagement.

1. Domestic Courts' Case-Specific Responses to the Decisions of Human Rights Bodies on Individual Communications

26 In general, domestic courts only have a limited role in case-specific responses to the decisions adopted by human rights bodies concerning individuals' communications and petitions. Namely, in the absence of specific domestic legislation that enables judges to reopen a case following the international decisions, domestic courts may find themselves unable to give effect to the decisions of human rights bodies that found a violation of a State Party's obligations under human rights treaties. The non-binding legal status of the decisions and the principle of *res iudicata* are some of the common obstacles.

27 For instance, in *Perterer v Land Salzburg and Austria*, Perterer initiated a State liability claim to seek compensation after the HRC found a violation of the ICCPR (*Perterer v Austria*, 2004). Perterer's claim was rejected, however, by the Austrian Supreme Court of Justice, on the basis of the lack of legal binding domestic effect (*Perterer v Land Salzburg and Austria,* 2008, paras 9–10). In a similar vein, in *Kavanagh v Governor of Mountjoy Prison*, instituted in response to the HRC's views in *Kavanagh v Ireland (No 1)*, the Irish Supreme Court referred to the lack of binding effect of the Committee's views (*Kavanagh v Governor of Mountjoy Prison*, 2002, 404; *Kavanagh v Ireland (No 1)*, 2001). Likewise, in *Wilson v Ermita*, the Supreme Court of the Philippines dismissed the judicial relevance of the views in which the HRC found violations of the ICCPR (*Albert Wilson v Philippines*, 2003; *Wilson v Ermita and ors,* 2016, paras 34–35).

28 In view of the structural limitation of domestic courts in case-specific responses to the decisions of human rights bodies, the Spanish Supreme Court's Judgment No 1263/2018 in *María de los Ángeles González Carreño v Ministry of Justice* occupies a rather exceptional place (Kanetake, 2019). In this case, the appellant instituted a series of administrative and judicial proceedings in order to request the Spanish government to give effect to the views

of the CEDAW Committee which, in its views of 16 July 2014, found a violation of the State's obligations under the Convention on the Elimination of All Forms of Discrimination against Women and made a series of recommendations (*Angela González Carreño v Spain*, 2014, paras 9.7–9.9, 10–11). In response to the appellant's request to comply with the Committee's views, the Spanish Supreme Court, in its significant judgment of 17 July 2018, accorded a 'binding/obligatory' character to the views of the CEDAW Committee (*María de los Ángeles González Carreño v Ministry of Justice*, 2018, 12).

29 The Spanish Supreme Court's reasoning was based on both domestic and international law. Under the Spanish Constitution, according to the Supreme Court, international obligations relating to the execution of the decisions of the CEDAW Committee not only form part of the internal legal order, but also enjoy a hierarchical position over ordinary domestic law (*María de los Ángeles González Carreño v Ministry of Justice*, 2018, 12). On this basis, the Supreme Court regarded the Convention and the views of the CEDAW Committee as a 'decisive element' in providing the possible infringement of fundamental rights (*María de los Ángeles González Carreño*, 2018, 12). Importantly, the Supreme Court rejected the relevance of the principle of *res iudicata*, inasmuch as the Court was asked to assess the State's responsibility on a different ground (*María de los Ángeles González Carreño*, 2018, 13).

30 At the same time, the Spanish Supreme Court has built its reasoning also on the basis of international law. According to the Supreme Court, the obligatory character of the views of the CEDAW Committee is derived from Article 24 of the Convention, under which States Parties 'undertake to adopt all necessary measures' to achieve the 'full realization' of the Conventional rights (*María de los Ángeles González Carreño*, 2018, 12). Consideration was also given to the State Party's obligations to consider, and provide a follow-up response to, the views of the CEDAW Committee (*María de los Ángeles González Carreño*, 2018, 12; *Angela González Carreño v Spain*, 2014, para 12). As illustrated by this Spanish case, the existence of the obstacles, such as the principle of *res iudicata*, that limit the courts' case-specific engagement is not necessarily self-evident and depends on the judicial interpretation of relevant domestic and international law.

2. Domestic Courts' Interpretive Engagement with Human Rights Bodies

(a) Domestic Courts' Engagement with United Nations Treaty Bodies

31 Outside case-specific follow-up of the decisions of human rights bodies, there are ample examples of domestic courts' explicit interpretive reference to the documents of UN treaty bodies (see International Law Association, Committee on International Human Rights Law and Practice, 2004; van Alebeek and Nollkaemper, 2012; Alston and Crawford, 2000). Judges refer to the decisions on individual communications, State-specific reports, and general comments and recommendations in the course of construing human rights treaty provisions or domestic constitutional or statutory provisions.

32 To provide a few examples, among many others, the HRC's General Comment No 7 informed the constitutional interpretation by the High Court Division of the Bangladesh Supreme Court in *Bangladesh Legal Aid v Bangladesh* concerning extrajudicial punishment (2010, para 45; HRC, 2009). The HRC's General Comments Nos 8, 16, 20, and 23 were referred to by the Victorian Civil and Administrative Tribunal in the case of *Kracke v Mental Health Review Board* in order to interpret ICCPR provisions and, ultimately, the provisions of the Victorian Charter of Human Rights and Responsibilities Act (*Kracke v Mental Health Review Board*, 2009; HRC, 1982; HRC, 1988; HRC, 1992; HRC, 1994). There are also many examples for judicial interpretive engagement with the HRC's General Comment No 18 concerning non-discrimination (eg *Ts'epe v Independent Electoral Commission,* 2005, para

18; HRC, 1989). General Comment No 20 on the prohibition of torture invited engagement on the part of the Canadian Supreme Court in *Suresh v Canada*, which further relied upon the CAT, in construing the Canadian Charter (*Suresh*, 2002; HRC, 1992).

33 With regard to the CESCR Committee, for instance, General Comment No 3 was mentioned by the Constitutional Court of Peru in *Cuzco Bar Association v Congress of the Republic* as part of 'soft law' in order to interpret the principle of progressivity applicable to the realization of economic and social rights (*Cuzco Bar Association*, 2005; CESCR, 1990). General Comment No 13 on the right to education was consulted by the German Federal Constitutional Court in 2013 in the case concerning the constitutionality of general tuition fees at universities (BVerfG, Order of the First Senate of 8 May 2013; CESCR, 1999).

34 Examples are abundant with regard to courts' engagement with some other human rights bodies as well. By way of illustration, the CEDAW Committee's General Recommendation No 23 on non-discrimination in political and public life was consulted by the District Court of the Hague in *Test Trial Fund Clara Wichmann v Netherlands* on a political party's exclusion of women from public office (2005, paras 3.18–3.22; CEDAW, 1997). Another case in point is *Kav Laoved v Interior Ministry*, in which the Israeli Supreme Court cited the CEDAW Committee's General Recommendations Nos 21 and 26, as well as General Recommendation No 30 of the Committee on the Elimination of Racial Discrimination ('CERD'), in the process of interpreting the constitutional protection for female migrant workers (2011, paras H3–H4; CEDAW, 1994; CEDAW, 2008, CERD, 2004). The CERD's General Recommendation No 23 on the rights of indigenous peoples was given importance in *Cal v Attorney-General* by the Belize Supreme Court (2007, paras 123, 126; CERD, 1997). The Belize Supreme Court also urged the government to seriously consider, and respond to, the CERD's letter of 9 March 2007 to the State Party concerning the land claims of the Maya people (*Cal*, 2007, paras 124–25; Chairman of the CERD, 2007).

35 State-specific recommendations also inform judicial interpretation of underlying treaties or comparable constitutional or statutory provisions. To illustrate, the Japanese Supreme Court referred to a series of recommendations addressed to Japan by the HRC and the CRC Committee as part of the Court's reasoning to find the unconstitutionality of a provision of the Japanese Civil Code (Japanese Supreme Court, Judgment of 4 September 2013). The judgment of September 2013 was the first time that the Japanese highest court explicitly engaged with UN treaty bodies. In a similar vein, Concluding Observations of the HRC, its Views, and the report of the CRC Committee were taken into account by the Argentine Supreme Court, in the *FAL* case on the scope of legal abortion (*FAL*, 2012; HRC, 'Concluding Observations: Argentina', 2010; HRC, 'Concluding Observations: Peru', 2000; HRC, 'Concluding Observations: The Gambia', 2004; CRC 'Concluding Observations: Argentina', 2010).

36 Finally, it must be noted that domestic courts, even if they explicitly engage with human rights bodies, do not always favour their treaty interpretation. Judges may use their reasoning to show their disagreement with the international viewpoints. A noteworthy example of contestation is *Kazemi (Estate) v Iran* before the Canadian Supreme Court. The case concerned the applicability of State immunity in civil proceedings by the victim of torture committed abroad. According to the CAT, granting jurisdictional immunity in cases involving torture or ill-treatment is 'in direct conflict' with the obligation of providing redress to victims under Article 14 Convention against Torture ('CAT') ('General Comment No 3', 2012, para 42). In *Kazemi*, the majority of the Canadian Supreme Court disagreed with the CAT's position, observing that its position should be given less weight than the pronouncements of judicial authorities (*Kazemi*, 2014, paras 147–48). Other UN treaty bodies also met judicial contestation. For example, the German Federal Constitutional Court effectively disagreed with the Concluding Observations, General Comment No 1, and

Guidelines adopted by the CRPD, in finding that coercive treatment in cases of mental and physical illnesses was compatible with the Convention on the Rights of Persons with Disabilities (BVerfG, Order of the First Senate of 26 July 2016, para 91; CRPD, 'Concluding Observations', 2015, paras 25–26; CRPD, 'General Comment No 1', 2014, para 26; CRPD, 'Guidelines', 2015, paras 11–12). Despite disagreement, the German court observed that the CRPD's opinions should be dealt with 'in an argumentative way and in good faith' (BVerfG, Order of the First Senate of 26 July 2016, para 90).

(b) Domestic Courts' Engagement with Other Human Rights Bodies

37 While the present entry primarily focuses on judicial engagement with UN treaty bodies, domestic courts engage with other human rights bodies in the course of providing judicial reasoning.

38 The findings of the IACommHR have been referred to by domestic courts, together with the jurisprudence of the IACtHR. To illustrate, the Supreme Court of Argentina in *Asociación Derechos Civiles v Estado Nacional – PAMI* invoked the report of the IACommHR, together with the jurisprudence of the IACtHR, in supporting the broad interpretation of the right of access to information (*Asociación Derechos Civiles*, 2012, para 8.1). In *Casal v General Attorney*, the Argentine Supreme Court found that the decisions of the IACommHR should be considered in construing the right to a full review of a criminal conviction (*Casal*, 2005, paras 32–33).

39 In the similar vein, the ACommHPR's findings have been consulted by domestic courts. To provide some examples, the Supreme Court of Gambia in *Sabally v Inspector General of Police* referred to one of the ACommHPR's decisions on communications in the course of assessing the constitutionality of retroactive deprivation of vested rights (*Sabally*, 2001, paras 11–13). The Constitutional Court of Zimbabwe, in interpreting what constitutes inhuman or degrading treatment, mentioned a series of decisions on communications by the African Commission and found them persuasive (*Kachingwe and ors v Minister of Home Affairs and Commissioner of Police*, 2005, paras 66–69). In *Asare v Ga West District Assembly and Attorney General*, the High Court of Justice in Ghana also considered a decision of the ACommHPR, in interpreting the African Charter on Human Rights and Peoples' Rights, which was used ultimately to construe the constitutional right to life (*Asare*, 2008, paras 26–27). In *EG v Non-Governmental Organisations Co-ordination Board and Attorney General*, the High Court of Kenya referred to the ACommHPR's decision and its resolution, as well as the jurisprudence of the ACtHPR, as part of a wide range of domestic, regional, and international legal instruments and decisions concerning the right to freedom of association (*EG*, 2015, paras 82, 87).

F. Some Explanations for Varied Engagement

40 Variance in domestic courts' engagement is due to each jurisdiction's legal, political, and sociological factors that affect judges' authority and willingness to engage with human rights bodies.

1. Legal Effect of Underlying Human Rights Treaties

41 One of those factors is the domestic legal effect of underlying human rights treaties that are interpreted by relevant human rights bodies (see → *Human Rights, Domestic Implementation*). In States with dualist traditions, the treaties may lack domestic validity due to the lack of domestic incorporating legislation. In States with monist traditions, treaty provisions may not be directly applicable before the courts. The lack of domestic validity and applicability of underlying treaties necessarily limits the chances that judges consult the documents of human rights bodies. Notably, the United States ('US') declared that most of the treaty provisions were not self-executing in ratifying the ICCPR, the Convention

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention on the Elimination of All Forms of Racial Discrimination (see → *Treaties, Direct Applicability*; Sloss, 1999). The non-self-executing declarations by the State's political branch significantly limits judges' engagement with these treaties and the documents of relevant treaty bodies (eg *US v Duarte-Acero*, 2002). Judges also play a dual role in interpreting the scope of the direct applicability of treaty provisions and deciding the degree of engagement with human rights bodies (eg *A and B v Government of the Canton of Zurich,* 2000).

42 At the same time, the formal domestic legal status of underlying human rights treaties does not necessarily dictate judges' engagement with human rights bodies. Their documents, together with related human rights provisions, can inform the judicial interpretation of comparable constitutional and statutory provisions (eg *Bangladesh Legal Aid*, 2010). For instance, in the United Kingdom, there are many examples of judges' engagement with the HRC's documents, despite the fact that the ICCPR is not expressly incorporated into domestic law (eg *A and others v Secretary of State for the Home Department (No 1)*, 2004).

2. The Power of the Domestic Judiciary in Connection to Political Branches

43 In accounting for domestic courts' engagement, and lack thereof, with human rights bodies, it is also necessary to consider the separation of powers and the judiciary's breadth of discretion in connection to the political branches of the government. This is against the assumption that domestic courts' reliance on human rights bodies gives rise to a dual democratic challenge. Namely, neither domestic judges, nor international expert bodies, are elected by the members of a specific national or local community which would ultimately bear the consequences of domestic judicial decisions. Should democracy be understood, rather procedurally, as elections and equitable representation, judges may refrain from giving effect to the formally non-binding documents of human rights bodies without intermediary approval by the legislative or executive bodies.

44 At the same time, such a dual challenge can be understood and responded to in many different ways. Domestic courts can participate in the development of international law and remedy the latter's democratic deficit by actively and substantially engaging with human rights bodies' treaty interpretation. Domestic courts' role in critically reflecting on international law has been discussed in connection to their engagement with the jurisprudence of human rights courts (eg Benvenisti and Downs 2009; Kunz, 2019). Judges' substantive engagement with the decisions and recommendations of human rights bodies should also be understood as domestic courts' function as the agent for both the implementation and critical revision of international human rights law.

45 Furthermore, domestic courts' loyalty to the political branches of the government does not automatically mean that judges should refrain from referring to the documents of human rights bodies that have yet to receive specific political endorsement. The government, through its political branches, committed itself to its international obligations under human rights treaties, including the competence of human rights bodies to assist States' implementation of respective treaties. Such a commitment can be interpreted in a variety of manners both to restrict or facilitate domestic courts' engagement. In finding the CEDAW's views binding, the Spanish Supreme Court, in Judgment No 1263/2018, referred

also to the fact that the State Party expressly recognized the competence of the CEDAW Committee under Article 1 CEDAW-OP (*María de los Ángeles González Carreño,* 2018, 12).

3. Social Awareness of Human Rights Bodies

46 Finally, much more relevant factors may be sociological in nature. As the → *International Law Association (ILA)*'s Committee on International Human Rights Law and Practice rightly observed, wider public awareness of the reporting procedures at UN treaty bodies encourages the use of the international documents by litigants and judges in augmenting their arguments (International Law Association, 2004, para 182). In this regard, the availability of the documents of human rights in local languages can facilitate the litigants and judges' accessibility and familiarity with the documents (International Law Association, 2004, para 182). More importantly, the education and training of judges in each jurisdiction can play a role in the degree and quality of judges' engagement with human rights bodies. Cooperation between domestic courts and human rights bodies can be facilitated by integrating international human rights law into the education of law schools, bar exams, and subsequent professional training programs.

G. Conclusion

47 Various human rights bodies have put forward their views on the interpretation of relevant human rights treaties through comments, reports, views, and recommendations. States Parties' engagement, which determines these documents' practical relevance, is conditioned by each jurisdiction's legal, political, and social factors. While States Parties may be legally obliged, or at least encouraged, to consider the output of human rights bodies, such an obligation or expectation is flexible enough to allow varied amenability to human rights bodies on the part of domestic courts. Judges may endorse, take note of, discuss, contest, or ignore the treaty interpretation formulated by human rights bodies.

48 As noted at the beginning of the present entry, discursive engagement between human rights bodies and domestic courts contributes to the broader processes through which international human rights law evolves over time. Such processes include judicial and non-judicial bodies at the domestic and international levels. In this sense, the analysis of this entry should be understood together with the practice of, and literature about, judicial dialogue in the field of human rights. Domestic courts refer to the decisions of human rights courts or other national courts, even without being obliged to do so, in interpreting human rights norms. The present entry's focus further tests domestic courts' openness to engage, not only with other judicial bodies, but also with the instruments of non-judicial bodies at the international level.

49 The quality of cooperation between human rights bodies and domestic courts matters not only for each jurisdiction's human rights practices. The cooperation also affects the degree of normative harmonization across States Parties and the development of international human rights law. In this regard, human rights bodies and domestic courts should not be viewed as passive recipients of another's word. Instead, these international and domestic guardians should be regarded as partners whose deliberative engagement aims at achieving an overarching common objective of safeguarding the protection of human rights.

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