The Honourable Shigeru Oda Commemorative Lecture 2016

Development of International Human Rights Law: On the Occasion of the Fiftieth Anniversary of the Adoption of the International Covenants on Human Rights

Whose International Law Is It? Some Reflections on the Contributions of Non-State Actors to the Development and Implementation of International Human Rights Law

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Abstract

This paper takes as its subject the contributions of selected types of non-State actors to the development and implementation of international human rights law. It takes as its starting-point the classical typology of the entities which have formal law-making and law-interpreting powers under international law (namely States and to a lesser extent international organisations), as recently clearly depicted in the work of the International Law Commission on identification of customary international law and subsequent practice in relation to the interpretation of treaties. It then proceeds beyond this world into the everyday world of human rights law and practice, where the presence and impact of non-State actors has been extensive and in some cases profound. The paper also explores some of the intersections between the actions of non-State actors and the formal law-making process, referring to instances in which these have stimulated acts of formal legal significance. To explore these issues the paper examines three examples: (a) academic/NGO contributions of normative instruments or interpretations of them in the form of formal statements or compilations; (b) the interpretive output of the UN human rights treaty bodies (focusing on the Committee on the Elimination of Discrimination against Women), and (c) international peoples' tribunals.

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Introduction

It is a great honour to be invited to deliver the second in the series of The Honorable Shigeru Oda Commemorative lectures and I would like to thank the Japanese Society of International Law and its current President, Professor Iwasawa, for the privilege and the opportunity to address you today.

I have never had the pleasure of meeting Judge Oda, who is one of the towering figures of Japanese international law and who was a presence of considerable significance on the International Court of Justice for a period of almost three decades. My first acquaintance with the name and work of this eminent jurist came when I was a law student being exposed for the first time to the field of public international law and the law of the sea. I was fortunate enough to have the opportunity to compete in the Jessup International Law Moot Court Competition while a law student at the Australian National University. A central component of the problem set for the competition that year was a dispute over the rules applicable to the delimitation of maritime zones between two fictional adjacent countries in a region which bore a striking resemblance to the Gulf of Guinea in West Africa.

Our enthusiastic research into the subject took us inevitably to the works of Shigeru Oda, whether individually authored works or collections of scholarly work and primary materials on the law of the sea which he had edited or compiled. At that time Judge Oda had been a member of the International Court of Justice for only a few years, so it was his scholarly work rather than his judicial contributions that we drew on. Since that time of course, up until 2003, Judge Oda was a prominent member of the ICJ, frequently writing separately or in dissent. It would be presumptuous of me to offer a general assessment of his corpus of judicial writings – others more informed and eminent than I have done this.[1] But my earlier impressions of the incisiveness of Judge Oda's analysis and the fidelity of his argumentation to his understanding of the proper role of the judge in international adjudication compared

[1] See, among other publications, Edward McWhinney ed., *Judge Shigeru Oda and the Progressive Development of International Law: Opinions (declarations, Separate Opinions, dissents) on the International Court of Justice, 1976-1992* (1993); Edward McWhinney and Mariko Kawano eds., *Judge Shigeru Oda and the Path to Judicial Wisdom: Opinions (declarations, Separate Opinions, dissents) on the International Court of Justice, 1993-2003* (2006); Rudiger Wolfrum, Edward McWhinney and Nisuke Ando eds., *Liber Amicorum Judge Shigeru Oda* (2002).

with the role of States, have been confirmed by a number of his judgments dealing with human rights matters that I revisited as part of my research for this lecture.

Of the many tributes that have been offered to Judge Oda, that by Professor Michael Reisman is particularly striking:

> As a judge he is a study in independence. His resolution is legendary. At the ICJ, he has produced an unmatched number of dissents and separate opinions, some differing only slightly from the majority. In none of them was he joined by another member of the Court. Yet the dissents do not reveal a 'wrecker', a person who is at all 'anti-institutional', as some dissents, unfortunately, sometimes do. Indeed, in reading through the corpus of Judge Oda's work, one is struck by the number of cases, especially in the latter part of his career, in which Judge Oda expresses serious doubts about the core issue of the majority conception of the law or the facts as narrated in the opinion and yet supports the majority. Judge Oda is also known for his distinctive ex cathedra style: the extraordinarily detailed and systematic exposition of every step in the logical process, as if the writer-craftsman were unwilling to allow himself to make a leap or to take anything for granted. It is a demand for the most explicit rationality and an extraordinary concern and respect for the political and legal commitments actually made and discoverable.[2]

Judge Oda is, of course, one of a large community of Japanese international lawyers who have made, and continue to make, major contributions to the discipline of international law in theory and practice, whether as leading scholars, as members of international courts and tribunals, and as members of international expert bodies such as the International Law Commission and the UN human rights treaty bodies, to name but a few areas.

One of the particularly gratifying developments over recent decades has been the collaboration between Japanese and Australasian international lawyers, in particular between the Japanese Society of International Law and the Australian and New Zealand Society of International Law, both on a bilateral basis but also multilaterally through undertakings such as the Four Societies Conference. Our two societies have been joined by the American Society of International Law and Canadian Council of International Law in this successful enterprise, now twenty years old, to support opportunities for early career scholars to develop their international networks.

Finally, it would be remiss of me to not mention the opportunities that Australian lawyers have had to learn from and work with our Japanese colleagues within the framework of bodies such as the International Law Association and the Asian Society of International Law. It was as a member of the ILA Human Rights Committee that I had the opportunity to work with Professor Iwasawa, currently a member and former chair of the UN Human Rights Committee established under the International Covenant on Civil and Political Rights. I have also been fortunate to have the chance to work with Japanese members of the Committee on the Elimination of Discrimination against Women, most recently the current Chairperson of that committee, Ms Yoko Hayashi, as well as in the past with members of the Japanese

[2] Michael Reisman, "A Tribute to an International Treasure," *Leiden Journal of International Law,* Vol. 16 (2009), p. 57, at p. 61.

Association of International Women's Rights in relation to an important early commentary on the CEDAW Convention.[3]

I. Law-makers, law interpreters and law consumers in international law

Let me now turn to the substantive topic of this lecture – which draws on some of that collaborative work -- and offer some reflections on the contribution of non-State actors to the development of international human rights law.

My topic poses the question 'Whose International Law is it?' with reference to international human rights law and in particular the role of non-State actors in that field. This question is my starting-point for exploring some familiar and perhaps less familiar perspectives on international human rights law. The question is not a rhetorical one, and admits of different answers that may simultaneously be accurate yet apparently inconsistent with each other. Your answer to the question 'Whose International Law is it?' may have implications for the determination of who are legitimate participants in the process of international law-making, the interpretation of international law, and its implementation. And what constitutes international 'law' and why and when it matters that something is 'law'.

Recognising – or perhaps more accurately reminding -- ourselves that there may be different ways of answering this question forces us to engage with the complexity of the international legal system and how international human rights law develops and becomes relevant to the lives of people whose interests it purports to guarantee and preserve against arbitrary exercises of power and which promises a decent existence and more for all.

In engaging with these questions, this paper takes as its starting-point the classical typology of the entities which have formal law-making and law-interpreting powers under international law (namely States and to a lesser extent international organisations). It then proceeds beyond this world into the everyday world of human rights law and practice, where the presence and impact of non-State actors has been extensive and in some cases profound. The paper also explores some of the intersections between the actions of non-State actors and the formal law-making process, referring to instances in which these have stimulated acts of formal legal significance. To explore these issues the paper examines three examples: (a) academic/NGO contributions of normative instruments or interpretations of them in the form of formal statements or compilations; (b) the interpretive output of the UN human rights treaty bodies (focusing on the Committee on the Elimination of Discrimination against Women), and (c) international peoples' tribunals.

1. The International Law Commission and the identification of customary international law

The impetus for my focus on this topic came from reading some of the recent output of the International Law Commission, in particular its work on the topics of the identification of customary international law and on subsequent agreements and subsequent practice in relation to the interpretation of treaties. In each case the world of international law that appears through the conceptual lens used by the Commission is a classical Westphalian one, populated by States who are the primary legitimate and most significant law-makers and law-

[3] Japanese Association of International Women's Rights, *Commentary on the Convention on the Elimination of All Forms of Discrimination Against Women* (1995).

interpreters, though there is a nod to the status of and formal role played by international governmental organisations.

Other actors appear in the shadows as of limited conceptual or formal relevance to these fundamental activities of making and interpreting law – as law-takers rather than law-makers.[4] With only a few, anomalous exceptions, the actions of these non-State and non-IGO bodies may be of sociological or political interest but are largely seen as having no firm place in the core law-making and law-interpreting activities of international law, other than through occasional fortuitous intersections with that process by stimulating a State response that is or may become a formal source of law. This is a very different world from that which human rights advocates inhabit and which many scholars study. That other world is populated by a diverse range of actors who initiate, lobby for and apply human rights norms, and who are often indispensable participants in the process of international law-making, interpretation and implementation but who have no or little formal status and role in those processes.

The Commission's recent work on the identification of customary international law engages with issues that have been and continue to be fundamental to the conceptual underpinnings of the modern international legal system, though possibly of less practical importance in terms of international norms and regulation than they once were.[5] The topic is one on which States unsurprisingly have strong views which involve a commitment to preserving much of their privileged position. Even so, the Commission's approach seems conservative, with its insistence on a clear analytical separation of the State practice requirement (*consuetudo*) and the subjective requirement of *opinio iuris*, a distinction which has dogged both the theory and practice of demonstrating the existence of customary international law rules and the evidence required to establish each of these elements.

The Commission's account understandably enough gives pride of place to the practice of States, and also accepts that international organisations have a role to play and have indeed played a role in contributing to the development of customary international law in different ways.[6] Beyond that, there seems little formal role for other players.[7] As the Commission's Special Rapporteur on the theme, Sir Michael Wood, commented in his second report:

[4] Math Noortmann and Cedric Ryngaert eds., *Non-State Actor Dynamics in International Law – From Law-takers to Law-makers* (2010).

[5] See Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, "When structures become shackles: stagnation and dynamics in International lawmaking," *European Journal of International Law*, Vol. 25, No. 3 (2014), p. 733; Anne-Marie Slaughter, *A New World Order* (2004).

[6] International Law Commission, "Conclusion 4: Requirement of practice", *Report of the International Law Commission*, sixty-eighth session, (2 May-10 June and 4 July-12 August 2016), advance version (18 August 2016) [*ILC 2016 Report*], U.N. Doc. A/71/10, 94 (2016) ("In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law").

[7] "Conclusion 4 (3)", *id.,* p. 94 (2016) ("Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice [of States and international organizations]").

> States remain the primary subjects of international law and . . . it is primarily their practice that contributes to the formation, and expression, of rules of customary international law.[8]

While the Special Rapporteur and the Commission accepted that the acts of public international organizations may also contribute to the formation of customary international law under certain circumstances,[9] they reject suggestions that the use of the term 'practice' rather than 'State practice' in Article 38(1)(b) of the Statute of the International Court of Justice allows the possibility that the practices of entities other than States and possibly intergovernmental organisations might contribute directly to the formation of customary international law.[10]

> The better view, however, is that, while individuals and non-governmental organizations can indeed 'play important roles in the promotion of international law and in its observance' (for example, by encouraging State practice by bringing international law claims in national courts or by being relevant when assessing such practice), their actions are not 'practice' for purposes of the formation or evidencing of customary international law.[11]

The frequently cited, but by no means only, example of such influence is the International Committee of the Red Cross (ICRC). Despite its special status recognised in the Geneva Conventions and its influence on the attitude and practice of States and non-State actors in the field of international humanitarian law, the ICRC's acts do not constitute State practice, though they may indirectly contribute to the body of State practice insofar as they generate responses from governments.[12] The ICRC's *Customary International Humanitarian Law Study* and the responses to it illustrate both the formal limitations of the ICRC's role as well as its role in stimulating State practice by way of response to its cataloguing of customary international humanitarian law rules.[13]

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[8] International Law Commission, *Third report on identification of customary international law by Michael Wood, Special Rapporteur*, sixty-seventh session**,** Geneva, 4 May-5 June and 6 July-7 August 2015, U.N. Doc. A/CN.4/682, para. 70 (2015).

[9] "Conclusion 4 (2)", *ILC 2016 Report*, *supra* note 6, p. 94 ("In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law").

[10] See the sources cited in International Law Commission, *Second report on identification of customary international law by Michael Wood, Special Rapporteur* [*Wood Second Report*], sixty-sixth session, Geneva, 5 May-6 June and 7 July-8 August 2014, U.N. Doc. A/CN.4/672, p. 32 n. 136 (2014) and Dwight Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States" Roles?" in Andrew Byrnes, Mika Hayashi and Christopher Michaelsen eds., *International Law in the New Age of Globalization* (2013), p. 267, pp. 275-282.

[11] *Wood Second Report*, *supra* note 10, pp. 32-33, para. 45 (footnotes omitted).

[12] International Law Commission, *Fourth report on identification of customary international law by Michael Wood, Special Rapporteur* [*Wood Fourth Report*], sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016, U.N. Doc. A/CN.4/695, pp. 7-8, para. 21 (2016). See also International Law Commission, "Commentary on Conclusion 4", *ILC 2016 Report*, *supra* note 6, pp. 107-108, paras. 9-10.

[13] Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict," *International Review of the Red Cross*, Vol. 87 (2005), p. 175, at pp. 179-180; John B. Bellinger, III and William J. Haynes II, "A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law," *International Review of the Red Cross,* Vol. 89 (2007), p. 443, at p. 445; Jean-

2. The International Law Commission and subsequent practice as regards the interpretation of treaties

The position is very similar in the work of the ILC on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The traditional position sees the States parties to a treaty as being the authoritative and ultimate arbiters of its meaning, unless they have chosen to delegate that function in some circumstances to a court of tribunal that is empowered to adopt binding interpretations of the treaty in particular cases. The situation is slightly complicated in the case of international organisations; it is now generally accepted that the competent organ of an international organisation may play a role in developing authoritative interpretations of its constituent instrument. But the classical view is as put by James Crawford in the context of a discussion of Article 31(3) of the Vienna Convention of the Law of Treaties:

> [I]t is too often forgotten that the parties to a treaty, that is, the states which are bound by it at the relevant time, own the treaty. It is their treaty. It is not anyone else's treaty. In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them. So, for example, when the North American Free Trade Agreement (NAFTA) provides for interpretation of its provisions by a Commission of the states parties, this is regarded as somehow an infringement on the inherent rights of the investors under the NAFTA. That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question their application of reason as they see fit.[14]

But the world of treaties is not populated only by States parties, as the passage from Crawford indicates – treaties create rights and expectations, and sometimes obligations, for persons other than States or intergovernmental organisations. Treaties establish not only tribunals with binding adjudicatory power but also bodies with a range of other powers and functions in relation to the supervision and implementation of treaties. In the present context the United Nations human rights treaty bodies are prime examples of bodies which are formally established by States and which are tasked with the interpretation and application of their constituent treaties, albeit without the power formally to bind through their actions. And beyond the category of bodies formally established by States, there are many other actors which deploy treaties in their work, interpreting them and applying them in everyday contexts outside the realm of formal public international law adjudication. These might include public bodies outside of executive governments (such as national human rights institutions), hybrid bodies, private international dispute resolution regimes, as well as non-governmental organisations.

Marie Henckaerts, "Customary International Humanitarian Law: a response to US comments," *International Review of the Red Cross*, Vol. 89 (2007), p. 473, at pp. 478-480; Elizabeth Wilmshurst and Susan Breau eds., *Perspectives on the ICRC study on customary international humanitarian law* (2007).

[14] James Crawford, "A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties" in Georg Nolte ed., *Treaties and Subsequent Practice* (2013), p. 29, at p. 31 (footnote omitted). See also Marcelo G Kohen, "Keeping Subsequent Agreements and Practice in Their Rights Limits" in Nolte, *ibid.,* p. 34, at pp. 41-42.

The legal significance and effect of such interpretive acts and their intersection with the formal theories of treaty interpretation is of both theoretical and practical interest, in particular because arguments have been put forward suggesting that the interpretive acts of at least some of these bodies (the formally established ones) may be of legal significance, and go beyond just having the potential to persuade in practice.

This issue has been explored by the ILC and its Special Rapporteur, Georg Nolte, as part of its examination of on the subject of treaties and subsequent practice. The focus has been on Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which provides that in the interpretation of a treaty--

> 3. There shall be taken into account, together with the context:
> …
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation …

Some have suggested, perhaps a little optimistically, that the absence of a reference to 'State' practice in Article 31(3)(b) opens the door to the possibility that the practice of bodies other than States parties may be directly taken into account under this provision. However, the logic of the provision – which is directed to ascertain evidence of what the States parties have agreed on – militates against such a conclusion.[15] As Nolte comments:

> An important question relates to the actors who may perform relevant subsequent practice. Article 31 (3) (b) of the Vienna Convention does not explicitly require that it must be the practice of the parties to the treaty themselves, but the provision seems to imply this requirement. It is certainly the parties themselves, acting through their organs, who are competent to engage in interpretative treaty practice and to apply or to comment upon a treaty.[16]

This position is reflected in the Commission's *Draft Conclusions* on the issue:

> **Conclusion 5**
> **Attribution of subsequent practice**
>
> 1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
>
> 2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.[17]

[15] The requirement that the subsequent practice take place "in the application of the treaty" has also been relied on to support this conclusion. International Law Commission, "Commentary on Draft Conclusion 4", *ILC 2016 Report*, *supra* note 6, p. 160, para. 18.

[16] International Law Commission, *First report on subsequent agreements and subsequent practice in relation to treaty interpretation, by Georg Nolte, Special Rapporteur* [*Nolte First Report*], U.N. Doc. A/CN.4/660, para. 117.

[17] Provisionally adopted in *Report of the International Law Commission*, sixty-fifth session (6 May–7 June and 8 July–9 August 2013)[*ILC 2013 Report*], U.N. Doc. A/68/10, Ch IV (2013), finally adopted *ILC 2016 Report*, *supra* note 6, p. 138.

However, that is not the end of the matter; indeed, it is where the issue begins to get more interesting from the perspective of the human rights advocate or practitioner.[18] Nolte notes that despite the fact that Article 31(3)(b) requires *State* practice, 'it is also not excluded that private (natural and legal) persons "apply" a treaty in certain cases. Such non-State practice, however, needs to be attributable to a particular State party in [45] order to be relevant for the purpose of establishing an authentic element of interpretation.'[19] Further, while it is noted that the practice of non-State actors 'should not … be confounded with the practice by the parties to the treaties themselves', the practice of States parties 'can be reflected in, or be initiated by the pronouncements or conduct of other actors, such as international organizations or non-State actors.'[20]

In this context there is a wide variety of actors whose actions might stimulate acts by States parties which could be viewed as subsequent State practice. These include non-governmental organisations, international organisations and, of particular relevance to my discussion, human rights treaty bodies. As the Commission notes, this 'other conduct' that can generate relevant State practice could include 'a pronouncement by a treaty monitoring body or a dispute settlement body in relation to the interpretation of the treaty concerned'.[21]

3. The formal position and the world of international human rights practice

The picture of the world of international law-making and application that emerges from the ILC reports and discussions is thus very traditional – and perhaps unsurprisingly appears to reflect the positions of many States in that regard. The Commission's account is a boundary-patrolling exercise, reaffirming a classical conception of who makes international law and how it is made and preserving, in formal terms at least, the near monopoly of States on international law making and their predominant role in its interpretation. And it may well be that there is not a great deal of room for the Commission to adopt a radically different approach, given the constraints within which it works.

The issue of the distance between formal accounts of the making, interpretation and application of international law general (and international human rights in particular) and the complex reality of lawmaking and interpretation as it actually happens -- with the critical involvement of many different types of participants other than States or intergovernmental organisations -- is no new topic for international law and international relations scholars.[22] Nonetheless, the past decade or so has seen a surge of interest in and writing about the issue by international lawyers, possibly reflecting the ever-increasing numbers of non-State actors

[18] Of course, the actions of a non-State actor that can be attributed to a State may constitute relevant State practice. International Law Commission, "Commentary on Draft Conclusion 5", *ILC 2016 Report*, *supra* note 6, p. 170, para. 11.
[19] *Nolte First Report*, *supra* note 16, pp. 44-45, para. 117.
[20] *Id.,* p. 51, para. 135.
[21] "Commentary on Draft Conclusion 5", *ILC 2016 Report*, *supra* note 6, p. 170, para. 12 (earlier, *ILC 2013 Report*, *supra* note 17, pp. 44-45).
[22] See generally Robert McCorquodale, "An Inclusive International Legal System," *Leiden Journal of International Law* Vol. 17 (2004), p. 477, pp. 492-497 (role of NGOs in the international legal system including human rights).

participating in different processes and fora of international or transnational regulation including traditional diplomatic processes but going far beyond that.[23]

Globalisation and the relative ease of organising across national boundaries, even compared to thirty years ago, and the rapid expansion of a worldwide academic and NGO community that has a high level of international human rights literacy, has led to increased demands for the adoption of new standards addressing new problems (or the more effective implementation of old ones) and a greater role in the elaboration and implementation of human rights norms.[24] The increase in the number of international adjudicatory tribunals or quasi-judicial bodies and the related expansion of access by non-State actors to international complaint procedures has meant many more opportunities for civil society groups to have input into the processes of interpretation and application of human rights law than was once the case.

In many cases these bodies, whether judicial, quasi-judicial or non-judicial, have been energetic in seeking to develop international human rights law through their activities. Within the UN system alone the last three decades have seen an extraordinary volume of interpretive material produced by expert bodies. In the case of the UN human rights treaty bodies, this has taken the form of General comments and General recommendations, case law, reports on inquiries, concluding observations on State reports, and other formal statements.[25] Notwithstanding the formal position that such interpretations are not binding interpretations of treaty obligations, in many cases, by default but also as a result of positive endorsement, they have become interpretations of human rights obligations accepted in practice, and are widely used by advocates, scholars, courts and governments. Whether due to inevitable mission creep or the aspirations of the individuals who are appointed or elected to bodies such as the UN human rights treaty bodies or special procedures mandates, the ever-expanding body of interpretive material is a fundamental feature of the way in which human

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[23] See, *e.g.*, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006); Math Noortmann, August Reinisch and Cedric Ryngaert eds., *Non-State Actors in International Law* (2015).

[24] For a recent example, see Philip Lynch and Ben Schokman, "Taking Human Rights from the Grassroots to Geneva … and Back : Strengthening the Relationship between UN Treaty Bodies and NGOs" in M. Cherif Bassiouni and William A. Schabas eds., *New Challenges for the UN Human Rights Machinery – What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (2011), p.173, at p. 190 ('it is desirable and appropriate that NGOs be more closely engaged in the development of General Comments…. NGOS should be consulted and [provide] input on both the provisions or issues which should be elaborated in General Comments, and the development of the content of the General Comments themselves').

[25] The body of interpretive material is not confined to the treaty bodies. For example the UN Human Rights Council's Working Group on Arbitrary Detention has developed a large body of Opinions in individual cases, as well as formulating general observations on legal issues relating to arbitrary detention, and most recently a detailed exegesis of the law and practice relating to a person's right to challenge deprivation of liberty before a court (the last developed in response to a request by the Human Rights Council. See Opinions adopted by the Working Group on Arbitrary Detention", *available at* <http://www.ohchr.org/EN/Issues/Detention/Pages/OpinionsadoptedbytheWGAD.aspx>; Working Group on Arbitrary Detention, *Compilation of Deliberations*, *available at* <http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>; and Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, U.N. Doc. WGAD/CRP.1/2015, *available at* <http://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/March2015/WGAD.CRP.1.2015.pdf> (full text with footnotes).

rights law is 'done' in practice, though one might question whether we have reached the stage whether there is now an unworkable amount of such material that has been produced.

Another dimension of international human rights law – as indeed of international law generally – that the above reflects is the significant addition to the repertoire of international regulation of processes and forms of standard-setting that have moved away from the formal classical diplomatic methods of international regulation by formal treaty. 'Informal international law making', as it has been termed by one influential body of scholars involves forms of international or transnational regulatory activity that diverge from traditional international law making methods and outputs.[26] It involves different actors (State officials but not necessarily foreign ministries); private actors; hybrid public-private bodies); different processes (informal networks, hybrid fora) and different outputs (greater use of formally non-binding but nonetheless prescriptive forms of regulatory instrument, for example guidelines, standards, MOUs).[27]

This trend is driven by various factors, including the desire on the part of States for means of regulation that allow for greater speed and flexibility in addressing issues, but it also comes with concerns about transparency and accountability.[28] There is considerable evidence of activity of this sort in the field of human rights, though the use of informal methods is not always driven by States (for which the avoidance of formal obligation, rather a search for than more effective protection, may sometimes be the motivation for resort to informal standards and implementation). In many cases 'informal law making' may be utilized by non-State actors with the goal of setting in motion a parallel informal approach that may ultimately feed into formal processes or simply be an effective informal tool for advocacy and action on its own.[29]

Much has been written in response to the reality of the world of diverse and heterogeneous actors involved in practice in the making and implementation of international (human rights) law. Some of that writing has engaged with the issue of whether the fact of participation in law-making should be reflected by according enhanced legal status or legal personality to these participants, particularly as many of them might be viewed as having some legal status as a result of the procedural and substantive rights or obligations that international law affords or imposes on them. Such proposals have been met with both conceptual, real-political and other objections.

4. Non-State actors and my choice of subjects

Referring to the category of 'non-State actors' is, as Philip Alston has observed, rather like describing a rabbit, a mouse or a kangaroo as 'not a cat'.[30] While it tells you something about those other animals, it is of limited utility. The category of 'non-State actors' embraces a

[26] See the works by Pauwelyn, Wessel, and Wouters cited *supra* note 5.
[27] Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Question" in Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters eds., *Informal International Lawmaking* (2012), p. 13, at pp. 16-22.
[28] *Ibid.,* pp. 22-31.
[29] I use the term "informal" in a broader sense than Pauwleyn et al, who are primarily concerned with the exercise of public power, albeit that taking place in contexts which may also involve the participation of private actors in law-making and decision-making: *id* at 21.
[30] Philip Alston, "The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Philip Alston ed., *Non-State Actors and Human Rights* (2005), p. 3.

wide range of actors, including everything from intergovernmental organisations established by States to transnational corporations, non-State armed groups, and nongovernmental organisations pursing advocacy goals.[31]

The three types of non-State actor and actions that I have selected to discuss in this paper are only part of the non-State actor universe. They are: (a) academic contributions of normative instruments or interpretations of them in the form of formal statements or compilations; (b) the UN human rights treaty bodies, and (c) international peoples' tribunals. Each of these groups and their activities have different characteristics, though they share the feature that they are 'not a State', and have no formal law-making authority or power to adopt binding interpretations of international human rights law. Through each of these I want to explore two aspects – the intersection of the law-making aspirations and law-interpretive activities of these actors with the formal international legal system, and their contributions informally in the shadowland of the non-formal participant.

II. Academic-NGO contributions through the formulation of normative instruments and interpretive guidelines

International human rights lawyers will be familiar with a number of occasions on which self-appointed groups of academic experts, sometimes joining with non-governmental organisations and other experts and advocates, have drawn up a normative or interpretive document that seeks to provide clarification of the obligations of States under existing international human rights law.[32] Such documents have been intended to influence the interpretation and application of human rights law at the international level, but are also intended to put into the hands of advocates a tool that they can use in their advocacy efforts before domestic courts and tribunals and in lobbying executive governments and national legislatures. The undertakings sometimes go beyond an exegesis of established law and their

[31] Math Noortmann, "Presentation" in Jean d'Aspremont ed., *Participants in the International Legal System: Multiple perspectives on non-state actors in international law* (2011), pp. xxxviii; International Law Association Committee on Non-State Actors, *Draft Final Report on Non-State Actors and International Law*, International Law Association Annual Conference, Johannesburg, 2016, paras. 17-38, *available at* <http://www.ila-hq.org/download.cfm/docid/2B7FD370-5D20-41BD-994C08779F5F2582>

[32] See generally Theo van Boven, "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite for Democracy," *California Western International Law Journal* Vol. 20 (1990), p. 207, pp. 219-220. Typical is the statement in relation to the *Johannesburg Principles*: "The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community": "The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*," *Human Rights Quarterly*, Vol. 20 (1998), p. 1. The phenomenon is not confined to the field of international human rights law – see, *e.g.*, the work of the CISG Advisory Council, s self-appointed group of experts which "aims at promoting a uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG). It is a private initiative in the sense that its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues" relating to the CISG. "Welcome to the CISG Advisory Council (CISG-AC)", *available at* <www.cisgac.com>. The primary purpose of the CISG-AC is "to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative." *Ibid.* See generally Joshua D Karton and Lorraine de Germiny, "Has the CISG Advisory Council Come of Age," *Berkeley Journal of International Law*, Vol. 27 (2009), p. 448.

avowed purpose in some cases is to stimulate the adoption of expansive interpretations of existing law and the development of new law. In some cases these documents have been formally brought to the attention of the UN political human rights bodies by a supportive government[33] and sometimes even endorsed. Their frequent invocation by international and national bodies (including courts, national human rights institutions, and legislatures, among others) takes them beyond a 'merely academic' commentary or simply NGO advocacy.

Well-known examples of these documents include the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* 1984,[34] the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* 1986,[35] the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* 1995, [36] the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* 1996,[37] the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* 2011,[38] the *Montréal Principles on Women's Economic, Social and Cultural*

[33] See, *e.g.*, *Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General*, U.N. Doc. E/CN.4.1985/4 (1985) (circulating the *Siracusa Principles*) and *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights*, U.N. Doc. E/CN.4/1987/17, Annex (circulating the *Limburg Principles*).

[34] U.N. Doc. E/CN.4/1985/4, Annex (1985). See also "The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*," *Human Rights Quarterly*, Vol. 7 (1985), pp. 3-14. They were adopted in May 1984 by a group of experts convened International Commission of Jurists, the International Association of Penal Law, American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences.

[35] "The *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*," *Human Rights Quarterly*, Vol. 9 (1987), pp. 122-135, circulated at the request of the Netherlands government as U.N. Doc. E/CN.4/1987/17, Annex (formulated by a group of experts convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht) and the Urban Morgan Institute for Human Rights, University of Cincinnati).

[36] "The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*," *Human Rights Quarterly* Vol. 20 (1988), pp. 1-11 (adopted "by a group of experts convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with Centre for Applied Legal Studies of the University of the Witwatersrand"). These were included as an annex to the Report to the report of the Special rapporteur on freedom of expression of UN Human Rights Commission in 1996: *Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45*, U.N. Doc. E/CN/4/1996/39, annex.

[37] Victor Dankwa, Cees Flinterman and Scott Leckie, "Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 705.

[38] Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman, "Commentary to the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*," *Human Rights Quarterly*, Vol. 34 (2012), p. 1084 (group of experts convened by the University of Maastricht and the International Commission of Jurists). See also Fons Coomans, 'Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", Maastricht Faculty of Law Working Paper, 26 April 2013, *available at* <http://ssrn.com/abstract=2256836>; and Fons Coomans, "Die Verortung der Maastrichter Prinzipien zu den extraterritorialen Staatenpflichten im Bereich der wirtschaftlichen, sozialen und kulturellen Rechte," *Zeitschrift für Menschenrechte* 2012 (2), p. 27.

Rights 2002,[39] and the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* 2006.[40] There are many other such contributions in the field of human rights law and international humanitarian law[41] – the International Law Association has contributed in this way for decades across a range of areas of international law.[42]

The aspirations of those who engage in these exercises are well-captured by one of the principal drafters of the 2011 *Maastricht Principles*, Fons Coomans:

> The purpose of the new set of Maastricht Principles is firstly to provide for a normative framework for extraterritorial human rights obligations in the area of economic, social and cultural rights. Secondly, to promote their application by UN Treaty bodies and judicial bodies, but also to promote awareness about the nature and scope of extraterritorial human rights obligations among governments and international organizations. The Principles may also serve as a tool for civil society organizations and NGOs to hold States accountable for their extraterritorial conduct which may affect economic, social and cultural rights of people in other countries. In short, the Principles are aimed at clearly defining the normative framework and filling in the accountability gap. This means that the normative framework laid down in the Principles is not new, but rather a restatement and explanation of existing human rights law. … The style of the Principles is based upon the Articles on the Responsibility of States for Internationally Wrongful Acts drafted by the International Law Commission. This means that the language used is dry and direct.[43]

The use of the *Principles* in advocacy is contemplated, indeed encouraged.[44] Yet this is no soap-box advocacy: the legitimacy and authority of the document is sought to be grounded in an appeal to expertise: 'among the participants who adopted and endorsed the Principles were

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[39] "Montréal Principles on Women's Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 26 (2004), p. 760 (formulated by experts and advocates in the field of women's human rights at a meeting convened by the Women's Economic Equality Project (WEEP), the Women's Working Group of the International Network on Economic Social and Cultural Rights (ESCR-Net), and the Centre for Equality Rights in Accommodation (CERA)). See Gwen Brodsky, "Montreal Principles on Women's Economic, Social and Cultural Rights," *Canadian Journal of Women and the Law*, Vol. 16 (2004), p. 400.

[40] *Available at* <www.yogyakartaprinciples.org>. See generally Michael O"Flaherty and John Fisher, 'sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," *Human Rights Law Review*, Vol. 8 (2008), p. 207; Ryan Richard Thoreson, "Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name," *Journal of Human Rights*, Vol. 8 (2009), p. 323 and David Brown, "Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles," *Michigan Journal of International Law*, Vol. 31 (2010), p. 821.

[41] See, *e.g.*, Theodor Meron and Allan Rosas, "Declaration of Minimum Humanitarian Standards," *American Journal of International Law*, Vol. 85 (1991), pp. 375-381 (an expert meeting convened by the Åbo Akademi University Institute for Human Rights in Turku/Åbo (Finland): *id.*, p. 376).

[42] See, *e.g.*, International Law Association, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency," *American Journal of International Law*, Vol. 79 (1985), p. 1072.

[43] Fons Coomans, "Situating the Maastricht Principles," *supra* note 38, p. 5.

[44] "Human rights monitoring bodies, governments and NGOs should get familiar with the text and apply the Principles in practice as part of a human rights impact assessment, or as a normative framework for evaluating States" extraterritorial conduct." *Ibid.,* p. 21.

key human rights scholars and experts. This gives authority to the document.'[45] The expertise of the draft -- and in some cases an understanding of the experiences of the groups whose rights are sought to be better protected -- are the two main bases on which these documents are sought to be legitimated, along with representations that they embody existing international legal obligations binding on States.[46]

These types of documents are sometimes compendious summaries or articulations of existing standards or, in some cases, interpretations that have progressive elements. It is also clear they have no formal status as such, even when circulated in UN political organs at the request of a member State. However, the issue of greater interest is what practical effect they have (and what legal effect that might indirectly produce if States react to them). The originators and supporters of these documents hope that their work will spread and assert that it has had meaningful impact and influence.[47] Some of these documents have become well-known (most prominently in the academic and advocacy communities) and extensive use has been made of them. They have sometimes been endorsed by individual States or groups of States and by independent human rights mechanisms, deployed in advocacy and referred to by international and national courts, and included in official training materials,[48] as well as entering the human rights discourse through the practice of bodies such as national human rights institutions, law reform commissions, and parliamentary bodies.

Some sense of the impact of these documents can be gained from a brief review of references to the earliest and latest of the documents referred to above, the *Siracusa Principles* and the *Yogyakarta Principles.* The *Siracusa Principles* have been referred to in argument by and the decisions of courts in many jurisdictions, for example, the United Kingdom,[49] Australia,[50] New Zealand,[51] Fiji,[52] Hong Kong,[53] South Africa,[54] and Ukraine,[55] among others. They have

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[45] *Ibid*.
[46] Thoreson, *supra* note 40, p. 327.
[47] "These interpretive documents have had an impact on the work of Treaty Bodies, Special Rapporteurs, human rights NGOs and academic discourse." Fons Coomans, "Situating the Maastricht Principles," *supra* note 38, p. 5.
[48] See, eg, United Nations, *Economic, Social and Cultural Rights: A Handbook for National Institutions* (United Nations, 2005) (Limburg and Maastricht Principles described as "authoritative statement", *ibid.,* p.7), and both documents referred to extensively along with other material from formally established bodies including the Committee on Economic, Social and Cultural Rights.
[49] *A and others v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [19], [21], [36] (Lord Bingham) (UK House of Lords).
[50] *XYZ v. Victoria Police (General)* [2010] VCAT 255, [432]-[435] (Victorian Civil and Administrative Tribunal).
[51] *Quilter v. Attorney-General* [1997] NZCA 207; [1998] 1 NZLR 523 (New Zealand Court of Appeal).
[52] *Railumu v. Commander, Republic of Fiji Military Forces* [2002] FJHC 1; HBM0081J.2002S (High Court of Fiji).
[53] See, *e.g.*, *HKSAR v. Ng Kung Siu* [1999] HKCFA 10, (1999) 2 HKCFAR 442, [52] (Hong Kong Court of Final Appeal); *Leung Kwok Hung v. HKSAR* [2005] HKCFA 40, (2005) 8 HKCFAR 229, [32], [71]-[72] (Hong Kong Court of Final Appeal).
[54] See, *e.g.*, *Coetzee v. Government of the Republic of South Africa, Matiso and Others v. Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7, 1995 (4) SA 631, [59] (Constitutional Court of South Africa).
[55] See, *e.g.* the reference among other formal sources of law in the *Decision of the Constitutional Court of Ukraine in the Matter of the Constitutional Petition of Seventy People's Deputies of Ukraine Regarding the Conformity to the Constitution of Ukraine (Constitutionality) of the Provisions of*

been drawn on by international policy-making bodies,[56] by national law reform bodies,[57] parliamentary human rights bodies, [58] national human rights institutions and non-governmental organisations. While some of the references have been inconsequential, others have been more substantial and the *Siracusa Principles* have in some instances been taken into account as useful guidance for interpreting international human rights instruments and national guarantees.

In the decade or so since their adoption, the *Yogyakarta Principles* have been an important focus of advocacy for these seeking to advance human rights issues related to sexual orientation and gender identity. These have been disseminated broadly,[59] have been cited or relied on in court decisions,[60] endorsed in UNHCR guidelines[61] and have also been taken up by national human rights institutions,[62] one prominent example of the last use being the work of the Asia Pacific Forum of National Human Rights Institutions in this area.[63] Writing just

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Articles 10.1, 11.2.3, 11.5, 11.6, 15, 17.1.1, 24, and Section VI.3 of the "Concluding Provisions" of the Law of Ukraine "On Political Parties in Ukraine" (Case of the Creation of Political Parties) (2009) 44(3) *Statutes and Decisions* 58, 66, para. 5.3.

[56] See, *e.g.*, Council of Europe Venice Commission, *Opinion on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners adopted by the Venice Commission at its 66th Plenary Session* (17-18 March 2006) - CDL-AD(2006)009 (17 March 2006); *Opinion on the Protection of Human Rights in Emergency Situations adopted by the Venice Commission at its 66th Plenary Session* (Venice, 17-18 March 2006) - CDL-AD(2006)015 (4 April 2006).

[57] See, *e.g.*, Law Commission of India, *Trial by Media: Free Speech Vs. Fair Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)* (Report No. 200) (2006); and Australian Law Reform Commission, *Traditional Rights and Freedoms, Encroachments by Commonwealth Laws, Final Report*, ALRC Report 129 (December 2015) (draws throughout on the *Siracusa Principles* in its analysis).

[58] See, the work of the Australian Parliamentary Joint Committee on Human Rights, for example in its *Nineteenth Report of the 44th Parliament,* 23 March 2015, p. 24 n. 21 (reference to *Siracusa Principles* in relation to meaning of "*ordre public*").

[59] See "Welcome to Yogyakarta Principles in Action", *available at* <http://ypinaction.org/> (purpose of the project is "to track and evaluate the use of the Yogyakarta Principles"); Thoreson, *supra* note 40, pp. 331-335; Paula L Ettelbrick and Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development, A Study of November 2007 – June 2010, Final Report*, 10 September 2010, *available at* <http://ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf>.

[60] *Naz Foundation v. Government of NCT of Delhi*, WP(C) No. 7455/2001, 2 July 2009, 160 *Delhi Law Times* 277 (Delhi High Court); *Suresh Kumar Koushal & Anr v. Naz Foundation* [2013] INSC 1096 (Supreme Court of India)(11 December 2013); *National Legal Services Authority (NALSA) v. Union of India & Ors*, Writ Petition (Civil) No. 400 of 2012, 15 April 2014; *Hämäläinen v. Finland*, European Court of Human Rights, Grand Chamber, judgment of 16 July 2014, joint dissenting opinion of Judges Sajó, Keller and Lemmens, [16]; *A (Advocate General's Opinion)* [2014] EUECJ C-148/13_O, [2015] 1 WLR 2141; *JK, R (on the application of) v. The Secretary of State for the Home Department & Anor* [2015] EWHC 990 (Admin) [2015] 2 FCR 131, [72]-[74].

[61] United Nations High Commission for Refugees, *Guidelines on International Protection No 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/09, [7] (23 October 2012).

[62] "National human rights bodies, *available at* <http://ypinaction.org/content/national_human_rights_bodies_doc>.

[63] Eric Fish, "Conclusions of the Workshop on the Role of National Human Rights Institutions in the Promotion and Implementation of the Yogyakarta Principles," *Asia Pacific Journal on Human Rights*

two years after their adoption, referring to many examples of changes in discourse and policy, Thoreson maintained:

> Within a matter of two years, the Principles are widely cited by state and nonstate actors alike, despite the fact that they were formulated privately by a cadre of experts and not by any official or quasi-representative body. Still, they are not only rhetorically invoked as evidence of a normative shift in geopolitics but have been used concretely by elites to formulate policy for localities and nation-states.[64]

While one must be careful not to exaggerate the impact of these documents, it does appear that the aspirations of their authors that they influence advocacy and interpretation by both official bodies and non-State actors have been at least partly realised. A sceptic might ask whether they have done more than provide a convenient summary and *aide-memoire* of well-known binding standards, but their utility as a tool whatever their formal status is clear.

III. Human rights treaty bodies and the status and impact of their output

1. General

I turn now from the case of bodies that are institutionally independent of formal State systems (academics and NGOs) to bodies established within a State-based framework which are meant to be independent of States and which do not possess formal law-making power or the power to issue binding interpretations of treaty obligations. My specific example is the United Nations human rights treaty bodies, the ten bodies established by or pursuant to the principal human rights treaties of the United Nations.

These bodies perform a range of functions under their constituent treaties, including the review of States parties' reports, consideration of individual complaints, the conduct of inquiries into serious or systemic violations of human rights and the (unutilised) possibility of considering inter-State complaints. The exact mix depends upon the particular treaty and the applicable optional protocols, and in each case depends on the consent of the State concerned to the particular procedure. Most of the committees also adopt General comments or General recommendations, which are detailed statements setting out the relevant committee's understanding of the provisions of its treaty.

The legal status of the interpretations adopted by the human rights treaty bodies in their general comments, individual cases and concluding observations has been the subject of much attention by scholars, human rights advocates, governments and courts.[65] These

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and the Law, Vol. 10 (2009), p. 114; Asia Pacific Forum of National Human Rights Institutions, *ACJ Report: Human Rights, Sexual Orientation and Gender Identity* (2010), *available at* <http://www.asiapacificforum.net/media/resource_file/ACJ_Report_Human_Rights_Sexual_Orientation_and_Gender_Identity.doc.pdf>, extracts in *Asia Pacific Journal on Human Rights and the Law*, Vol. 11 (2010), p. 52.

[64] Thoreson, *supra* note 40, p. 327. Michael O'Flaherty also argues that the widespread dissemination of the Principles has had an impact in a range of contexts: Michael O'Flaherty, "The Yogyakarta Principles at Ten," *Nordic Journal of Human Rights* Vol. 33 (2015), p. 280.

[65] See in relation to courts, International Law Association Committee on International Human Rights Law and Practice, *Final report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals*, *Report of the Seventy-first Conference*, *Berlin* (2004), pp. 621-688; International Law Association Committee on International Human Rights Law and Practice,

interpretations and applications of the various treaties are widely viewed as, in general, well-informed, even 'authoritative' (in the sense of speaking with authority on the basis of expertise and experience). However, States parties are under no legal obligation to comply with such views, though they are probably subject to a legal obligation to give due consideration to these recommendations in good faith and also, arguably, to give reasoned responses when they reject them (at least in the case of recommendations directed to a particular State party). Much of the academic commentary, including that authored by some members and former members of such bodies,[66] puts the status of some treaty body output slightly higher.[67] But it is generally agreed that they are not in themselves legally binding, even if the interpretation of the treaty they propound is in fact a correct interpretation of the instrument as construed in accordance with the ordinary rules of treaty interpretation.

That of course does not address the practical impact of these treaty body outputs. The jurisprudence of the UN human rights treaty bodies, especially their general comments and recommendations, but also their decisions in individual cases, have become extremely important in practice. They are to be found in "the academic commentaries, the submissions of advocates in courts and of those seeking to change policy or laws, the analysis of human rights commissions and other public bodies and of civil society organisations, and the judgments of international and national courts."[68] Just as importantly, executive governments themselves have frequently accorded this output a certain level of authority and relevance. They invoke such output in their submissions to international bodies, and in their submissions in domestic contexts, often arguing the merits of a case within the framework elaborated by these non-binding interpretations. Thus, these interpretations "become part of the legal discourse and of the cognitive and rhetorical framework within which arguments about the human rights are conducted. Such pronouncements matter, deliberatively, politically and legally, even if they are not formally binding."[69]

But they can also matter legally and produce legal effects if they give rise to State practice that is relevant to the interpretation of the treaty under Article 31(3) (b) of the VLCT. I wish to explore this aspect of their potential impact in the context of the debate currently underway

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Interim report on the impact of the United Nations treaty bodies on the work of national courts and tribunals, in International Law Association, *Report of the Seventieth Conference*, New Delhi (2002), pp. 507-555.

[66] See, *e.g.*, Ivan Shearer, "The Australian Bill of Rights Debate: The International Law Dimension", *Proceedings of the Twenty-first Conference of The Samuel Griffith Society*, Adelaide, 2009, pp. ix-x, *available at* <http://samuelgriffith.org.au/docs/vol21/vol21dinner.pdf> (noting at p. x: "The [UN Human Rights] Committee thus adopts a nuanced conclusion as to the status of its views, falling just short of stating them to be binding, but by stating them to be "authoritative" it gives to those views a status far higher than that of mere recommendations for consideration by the respondent State party.")

[67] See, *e.g.*, Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), pp. 777-778. For an overview of the issues and literature, see Geir Ulfstein, "Individual complaints" in Helen Keller and Geir Ulfstein eds., *UN human rights treaty bodies: law and legitimacy* (2012), p. 73, pp. 92-100; Rosanne van Alebeek and André Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law" in *ibid.,* p. 356, pp. 372-379; Paula Gerber, Joanna Kyriakakis and Katie O"Byrne, "General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What is its Standing, Meaning and Effect?," *Melbourne Journal of International Law*, Vol. 14 (2013), p. 1 at pp. 4-11.

[68] Andrew Byrnes, "The Meanings of International Law: Government Monopoly, Expert Precinct or Peoples' Law?," *Australian Yearbook of International Law*, Vol. 32 (2014), p. 11, at p. 23.

[69] *Ibid.*

about whether it is desirable for the United Nations to adopt a new human rights treaty focusing explicitly and systematically on gender-based violence against women.

2. The CEDAW Convention and violence against women – a "normative gap"?

At present there is no UN human rights treaty that explicitly and comprehensively addresses the topic of violence against women. The overarching Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) does not contain the phrase "violence against women". However, since the early days of the Convention its monitoring body, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), has taken the view that gender-based violence against women constitutes a form of "discrimination against women" as defined in Article 1 of the Convention.[70] States parties undertake to take steps to eliminate discrimination against women by both public and private actors; accordingly, they are bound to take such steps to eliminate public and private violence The Committee has set out this understanding in its well-known *General recommendation 19* (1992),[71] which has been an extremely influential statement. The Committee has also included the topic of violence in its reporting guidelines, has questioned States parties on their record in this area, and addresses the issue in its concluding observations on every State party report. Furthermore, many of the individual communications under the Optional Protocol to the CEDAW Convention have concerned complaints of gender-based violence and the Committee has found against the State party concerned in a number of them; the issue has also been addressed in a number of the Committee's inquiries under the Optional Protocol and in other formal statements it has made.[72]

It is this practice of the Committee that forms the backdrop to the discussion about whether a new specific convention should be adopted in order to address the widespread and persistent violence against women in many forms in all parts of the world. One of the central arguments advanced to support the call for a new convention is that, as a result of the lack of a specific reference to violence against women in the CEDAW Convention and other UN human rights treaties, there is a "normative gap" in international law, and that closing that gap would be a significant contribution to advancing the struggle to eliminate violence against women.

A leading proponent of a new convention has been the former Special Rapporteur on violence against women, Professor Rashida Manjoo of South Africa. In her June 2015 report to the UN Human Rights Council, she urged the development of a new UN binding instrument on violence against women, with its own dedicated monitoring body.[73] Such a convention should

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[70] See the discussions in Christine Chinkin, "Violence against Women" in Marsha Freeman, Christine Chinkin and Beate Rudolf eds., *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (2012), pp. 443-474; Angelika Kartush, "Bekämpfung von Gewalt gegen Frauen, Allgemein" in Erika Schläppi, Silvia Ulrich, and Judith Wyttenbach eds., *CEDAW: Kommentar zum Übereinkommen der Vereinten Nationen zur Beseitigung jeder Form von Diskriminierung der Frau* (2015), pp. 1275-1305; and Bonita Meyersfeld, *Domestic Violence and International Law* (2010).

[71] CEDAW, *General recommendation 19* (1992), *available at* <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

[72] Meyersfeld, *supra* note 70, pp. 42-58.

[73] *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Human Rights Council, 29th session, U.N. Doc. A/HRC/29/27, para. 64 (2015) [*SRVAW 2015 report*]. The current Special Rapporteur, Ms Dubravka Šimonović, has also raised the issue in her call for input from stakeholders, asking for submissions on, among other matters, whether they

be a treaty that articulates violence against women "as a human rights violation in and of itself",[74] and one that "comprehensively address[es] all forms of violence against women and clearly stat[es] the obligations of States to act with due diligence to eliminate violence against women",[75] such a convention should have "its own dedicated monitoring body."[76] Interest in a new UN convention has also been stimulated by developments at the regional level, most recently by the Council of Europe Convention on the subject.[77]

An important plank of the argument advanced by Professor Manjoo and other advocates for new convention is the claim that there is a "normative gap" in international law. She notes that the term "violence against women" does not appear anywhere in the text of the CEDAW Convention and maintains that there thus is no explicit obligation on States parties to take steps to eliminate it. She recognizes that there have been many instruments and policy or programmatic documents adopted at the United Nations level in relation to violence against women (such as the UN Declaration on the Elimination of Violence against Women) and that these provide guidance to States parties on the measures they should adopt to address violence against women. She also acknowledges the work that the CEDAW Committee has done in elaborating General recommendations on the subject (in particular its *General recommendation 19*), in raising the matter in the reporting procedure with States parties, and in its decisions under the Optional Protocol to the Convention. However, she argues that these interpretations by the Committee are not in themselves legally binding and have not given rise to legally binding obligations:

> The current norms and standards within the United Nations system emanate from soft law developments and are of persuasive value, but are not legally binding. The normative gap under international human rights law raises crucial questions about the State responsibility to act with due diligence and the responsibility of the State as the ultimate duty bearer to protect women and girls from violence, its causes and consequences.[78]
>
> There are many 'soft law' documents that address the issue, including the Vienna Declaration and Programme of Action, the Declaration on the Elimination of Violence against Women, the Beijing Declaration and Platform for Action, and general

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consider that "there is a need for a separate legally binding treaty on violence against women with its separate monitoring body": *available at* <ohchr.org/EN/Issues/Women/SRWomen/Pages/InternationalLegalFramework.aspx?>. See also Statement by Ms Dubravka Šimonović, Special Rapporteur on violence against women, its causes and consequences at the 70th session of the General Assembly, 12 October 2015, *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16631&LangID=E>.

[74] *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Human Rights Council, 26th session, U.N. Doc. A/HRC/26/38, para. 68 (2014) [*SRVAW 2014 report*].

[75] *Ibid.*

[76] *SRVAW 2015 report*, *supra* note 73, para. 64.

[77] Council of Europe, Convention on preventing and combating violence against women and domestic violence 2011 (the Istanbul Convention), *Council of Europe Treaty Series*, No 210. Earlier conventions in the Americas and Africa are the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (the Convention of Belém do Pará), *OAS Treaty Series* A-61, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (the Maputo Protocol), *available at* <http://www.achpr.org/instruments/women-protocol/>.

[78] *SRVAW 2015 report*, *supra* note 73, para. 63.

comments and recommendations of treaty bodies***. However, although soft laws may be influential in developing norms, their non-binding nature effectively means that States cannot be held responsible for violations.***[79]

Professor Manjoo also argues that 'none of the soft law developments on violence against women has moved into the realm of customary international law as yet.'[80]

There is much to be said for seriously considering whether the struggle to eliminate violence against women might be strengthened by a new UN treaty on the subject. A case based on the existence of a "normative gap" has rhetorical power and makes strategic sense, inasmuch as it seeks to pre-empt resistance by governments which might otherwise argue that binding norms on the subject exist in abundance and that what is really needed is more effective implementation.

However, the assertion of the existence of a 'normative gap' bears further examination. My argument is that the assertion of the existence of a "normative gap" is probably incorrect as a matter of international treaty law, and that pressing for a new treaty on the ground that there is such a gap is potentially counter-productive.[81]

3. Interpreting the CEDAW Convention – the relevance of CEDAW's practice

The question of whether there is a normative gap must be answered in the first instance by approaching the interpretation of the CEDAW Convention by applying the accepted principles of treaty interpretation. Under the CEDAW Convention, States parties assume wide-ranging obligations across all fields of social life. Those obligations are, broadly speaking, to eliminate all forms of discrimination against women in those areas and to ensure that women enjoy human rights and fundamental freedoms generally and in a number of specific areas, on the basis of equality with men. In addition, article 5 of the Convention requires States parties to take all appropriate measures to modify social and cultural patterns of behaviour in order to eliminate prejudices, customary and other practices which are based on the idea of the superiority of either sex or on stereotyped roles for men and women.

The Convention requires States parties to ensure that *State actions* do not involve discrimination and that public officials do not engage in discriminatory acts. Equally importantly, the Convention explicitly obliges States parties to take all appropriate measures to eliminate discrimination by *private persons* ("any person, organization or enterprise", Article 2(e)), to modify existing laws, regulations, customs and practices which constitute discrimination (Article 2(f)), and to ensure that there is effective legal protection of women against any act of discrimination. It thus has explicit application to both public and private actors.

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[79] *SRVAW 2014 report*, *supra* note 74, para. 68 (emphasis added).
[80] *Ibid.*
[81] I confine my discussion to the question of whether obligations exist under the CEDAW Convention. Similar obligations exist under other UN human rights treaties, in particular but not exclusive the ICCPR and the Convention against Torture. Professor Manjoo may have been too quick to dismiss the possibility that there is a customary international law norm relating to the prevention and punishment of violence against women. While the existence of a customary international law rule can be difficult to prove, this may be one case where there is an general obligation, even if there is not agreement as to every detail.

To cut a long analysis short, the critical issue is whether gender-based violence against women can be viewed as falling within the term "discrimination against women" as defined in the Convention (or whether its elimination is part of eliminating stereotyped notions about the sexes under article 5). It seems to me, as it has to many others (including States parties to the Convention), that this is so – in part because of the reasoning set out by CEDAW in its pronouncements on the issue, which reflect a broader understanding of the nature and origins of violence against women. In effect, the interpretation of the Convention set out by CEDAW in its *General recommendations*, particularly *General recommendation 19*, can be seen as an appropriate interpretation of the Convention reached by a conventional process of treaty interpretation.[82]

Thus, the obligation of State organs and officials to refrain from violence against women and to take steps to investigate and punish and provide remedies for such violence clearly follows from the conclusion that such violence falls within Article 1. Equally, the obligation of the State in relation to private actors – the obligation of "due diligence" --- is set out in Article 2 of the Convention and operates across all the provisions of the Convention. This due diligence obligation applies to violence against women committed by private actors. Its detailed content has been articulated by CEDAW in a range of documents, in particular its *General recommendations*, and in its decision in cases under the Optional Protocol to the Convention (though that is not to say that some further elaboration would not be useful).

It is thus clear in the light of the ordinary process of treaty interpretation the claim that there are no binding treaty obligations in relation to violence against women under the CEDAW Convention is not persuasive. However, the practice of States parties to the Convention throws further light on this question and provides a useful illustration of the role that treaty bodies can play in generating State party practice relevant for the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

As already mentioned, the Committee has consistently taken the view that public and private violence against women is covered by the Convention and first articulated this position in a detailed analysis in 1992 in the *General recommendation 19* (and has reiterated in subsequent General recommendations). We know that the Committee's interpretations of the Convention in General recommendations or even in its Optional Protocol decisions in individual cases against States parties are not formally binding. However, as already noted, the responses of States parties to the pronouncements of a treaty body may constitute relevant State practice for the purposes of Article 31(3)(b).[83] The practice must be of *all* of the States parties and it must establish the *agreement* of those parties[84] or a 'common understanding' (including

[82] See Chinkin, *supra* note 70*,* and Schläppi, Ulrich, and Wyttenbach, *supra* note 70

[83] See *First report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur*, International Law Commission, sixty-fifth session, para. 135, U.N. Doc. A/CN.4/660 (2013).

[84] See, *e.g.*, World Trade Organisation Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, p. 97, at p. 106. Villiger comments that

> it requires active practice of some parties to the treaty. The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must establish the agreement of the parties regarding its interpretation. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection.

acquiescence).[85] This criterion is not an easy hurdle to overcome. Thus the questions here are how have States parties to the Convention – of which there were 189 as of August 31, 2016[86] -- responded to the stance adopted by the Committee and what is the legal significance of their response for the interpretation of the treaty.

A definitive answer to this question would require a comprehensive examination of State responses to CEDAW's pronouncements in their reports, their responses to lists of issues and concluding observations, and the positions they take in individual communications and inquiries and in response to the outcomes of those procedures, and statements made in other contexts about the Convention.

However, if one examines State party practice under the Convention from 2010 to 2015,[87] there appears to be support across the body of States parties for CEDAW's interpretation of the Convention as regards violence and in particular broad support for *General recommendation 19*. States have indicated their acceptance of the Convention's coverage of violence generally and of *General recommendation 19* in a number of ways, both explicit and tacit.[88] For example, in the 109 State party reports submitted under the Convention between January 2010 and March 2015, there were explicit endorsements of *General recommendation 19* by 29 States parties. There were also eleven general endorsements of CEDAW's *General recommendations*. *All* States parties reported on violence against women in their periodic reports.

Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 431 (referred to with approval by Lords Kerr and Dyson, and Lady Hale in *Assange v The Swedish Prosecution Authority (Rev 1)* [2012] UKSC 22, [2012] 2 AC 471).

[85] International Law Commission, "Draft conclusion 8: Forms and value of subsequent practice under article 31 (3) (b)", *Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Texts and titles of draft conclusions 6 to 10 provisionally adopted by the Drafting Committee on 27 and 28 May and on 2 and 3 June 2014*, International Law Commission, sixty-sixth session, U.N. Doc. A/CN.4/L.833 (2014)[*ILC Daft Conclusions 6-10*]. This was based on the analysis in the *Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur*, International Law Commission, 66th session, U.N. Doc. A/CN.4/671 (2014) [*Nolte second report*].

[86] United Nations, *Multilateral Treaties Deposited with the Secretary-General*, *available at* <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en>.

[87] This summary is based on primary research carried out by Erin O"Connor Jardine, student associate of the Australian Human Rights Centre, Faculty of Law, University of New South Wales, Sydney, Australia. It was prepared for a workshop organised by IWRAW Asia Pacific in May 2015 to explore the issues arising from suggestions that a new convention on violence against women be adopted. The data is available at <http://www.ahrcentre.org/topics/violence-against-women-and-international-human-rights-law>.

[88] See "Draft conclusion 9", *ILC Draft Conclusions 6-10*, *supra* note 85 (based on the analysis in *Nolte Second report*, *supra* note 85):

> **Agreement of the parties regarding the interpretation of a treaty**
>
> 1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.
>
> 2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Further acceptance by States parties, whether by conduct or explicit endorsement, can also be seen in a number of individual communications considered under the Optional Protocol to CEDAW. Of the forty cases concluded in the period under review, 24 cases involved complaints in relation to violence against women. In twenty of those cases States parties recognised or explicitly endorsed *General recommendation 19*, even in cases in which they argued that there had been no failure by them to carry out the relevant obligations. No State dissented from the general gist of *General recommendation 19*; the only aspect of substantive interpretive disagreement was over the applicability to refoulement decisions of the Convention's obligations in relation to violence.[89]

There appears to have been no objection to the substance of *General recommendation 19* in any of the materials studied for the 2010-2015 period, whether in the reporting, communications or other procedures. (This probably reflects the longer-term position as well, pre-2010.) Accordingly, there is a strong argument that the subsequent practice of States parties shows that they have endorsed the interpretation of the Committee adopted in its *General recommendation 19* and related practice.

This combination of explicit and implicit acceptance and endorsement of the interpretation offered by the CEDAW Committee, especially in *General recommendation 19* but also as elaborated in later General recommendations and practice, can be characterised as practice under the treaty and can reasonably be viewed as practice of the parties establishing their agreement as to the meaning of the treaty in this respect, at least in broad terms. This is not a case in which States parties have remained silent in the face of expansive or contestable Committee interpretations.[90]

This instance may be contrasted with a number of cases in which States parties (and sometimes non-States parties) have made clear their disagreement with the interpretation by a treaty body of its powers or of a particular provision of the treaty. The best-known of these cases involved the reaction by a number of States parties to the Human Rights Committee's General comment on reservations to the International Covenant on Civil and Political Rights.[91] There have been other, more recent cases, involving objections by the United States

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[89] See Committee on the Elimination of Discrimination against Women, *M.E.N. v. Denmark*, Communication No 35/2011, July 26, 2013, U.N. Doc. CEDAW/C/55/D/35/2011, para. 4.9 (2013). The Committee held the communication inadmissible, but nonetheless went on to affirm that the Convention barred States parties from returning women to other countries in certain circumstances (para. 8.4).

[90] See Bruno Simma, "Miscellaneous Thoughts on Subsequent Agreements and Practice", in Nolte, *supra* note 14, p. 46, at pp. 47-48:

> … could we say that a lack of opposition by states parties to the International Covenant on Civil and Political Rights to a view of the Human Rights Committee considering the interpretation and application of the Covenant could lead to some sort of acquiescence vis-à- vis that view and, in that sense, would constitute state practice, consisting of not doing anything? Could a state be bound by just keeping quiet vis- à- vis more or less daring interpretations of the law by these treaty bodies?

See also the discussion of the relevance of silence in International Law Commission, *Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Georg Nolte, Special Rapporteur*, U.N. Doc. A/CN.4/671, paras. 58-70 (2014).

[91] General comment 24 (52), *Report of the Human Rights Committee*, UN GAOR, 50th sess, Supp No 40, U.N. Doc. A/50/40, Vol. I, annex V (2004). The United States, the United Kingdom (id at annex

in 2008 to aspects of the draft general comment formulated by the Human Rights Committee on the obligations of States parties to the First Optional Protocol to the ICCPR[92] and to the content of *General comment No 2*[93] adopted by the Committee against Torture on the implementation of the general obligations in the Torture Convention.[94] So far as I am aware, there has been no such exception taken to the approach of the CEDAW Committee set out in *General recommendation 19* and followed in its practice since that time. Explicit endorsement and actions consistent with the acceptance of that interpretation in the reporting and communications procedures have been the rule.

In sum, there are clear binding obligations under the CEDAW Convention relating to violence against women, and it is hard to maintain that there is "normative gap", though there might be some discussion over detail. That does not of itself determine the question of whether there should be a new convention on violence against women. – there may well be other good reasons for pushing ahead with such a proposal – achieving greater clarity and precision of obligations, developing new constituencies, and devising new implementation structures and processes, for example. Such a campaign should, though, take into account the current obligations under the Convention and work reinforce and supplement them, not undermine them. The positing of a "normative gap" in order to strengthen the case for a treaty is potentially counter-productive. That is because the arguments that have been put forward to support the claim that there is a "normative gap" give a misleading account of the current state of international law on the subject, have the potential to diminish or undermine the advances in international law made over the past 25 years, and distort the nature of the inquiry that we should be undertaking in deciding whether to support the development of a new convention and the form it might take. Fundamental to that analysis is a recognition of the legal effects that the actions of treaty bodies may have when they generate State practice under the relevant treaty.

IV. Peoples' tribunals and international human rights law[95]

VI) and France (*Report of the Human Rights Committee*, UN GAOR, 51st sess, Supp No 40, U.N. Doc. A/51/40, Vol. I, annex VI (2005)) took strong exception to certain aspects of the Committee's General comment.

[92] Human Rights Committee, General comment No 33 (2008), *Report of the Human Rights Committee*, UN GAOR, 64th sess, Supp No 40, U.N. Doc. A/64/40, Vol. I, annex V (2009). See Comments of the United States of America on the Human Rights Committee's "Draft General Comment 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant Civil and Political Rights" 17 October 2008, http://www.state.gov/documents/organization/138851.pdf; Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 22 December 2008, http://www.state.gov/documents/organization/138852.pdf. Extracts from both appear in *Digest of United States Practice in International Law 2008*, http://www.state.gov/documents/organization/138513.pdf, 252-261 and 261-266.

[93] Committee against Torture, *General comment No 2* (2008), *Report of the Committee against Torture*, UN GAOR 63rd sess, Supp No 44, U.N. Doc. A/63/44, annex VI (2008).

[94] Observations by the United States of America on Committee Against Torture General Comment No. 2: Implementation of Article 2 by States Parties, 3 November 2008, *Digest of United States Practice in International Law 2008*, 269, 271, *available at* <http://www.state.gov/documents/organization/138853.pdf> .

[95] This section draws in part on material in Andrew Byrnes and Gabrielle Simm, "International Peoples' tribunals: their nature, practice and significance" in Andrew Byrnes and Gabrielle Simm eds., *Peoples' Tribunals and international law* (unpublished manuscript, 2016). See also Gabrielle Simm

The final example of contributions by non-State actors to the development and implementation of international human rights law that Iwish to discuss is the phenomenon of peoples' tribunals. The organisation of peoples' tribunals to which international law and international human rights standards are central normative frameworks has been a popular form of engagement by civil society organisations when redress within State-sponsored systems of human rights protection is not available, inadequate or non-functioning.[96] While they come in many varieties, a peoples' tribunal may be broadly described as:

> a civil society initiative establishing a forum for a body of eminent persons and/or experts to consider allegations of violations of specific standards of international law (and possibly also other bodies of law such as national law, indigenous law, or "peoples' law") in the light of documentary and other forms of evidence presented to them in formal proceedings. The tribunal presents a reasoned set of findings based on its evaluation of that material. The process is thus a formal deliberative one, characterised by the public presentation of material, and the delivery of reasoned conclusions by the adjudicative or evaluating body, whose members are sometimes termed "judges", at other times "jurors".[97]

Peoples' tribunals generally arise from a social movement or national or transnational advocacy campaign; they are generally instigated by the group whose rights have been affected or who are closely associated with such people. They respond to an absence of national or international fora available to provide acknowledgement of wrongs and reparation for them. That absence may be the result of a lack of relevant law, a wrong that does not fit neatly into established categories of law, or a case where those aggrieved are shut out of the existing system.

Modern peoples' tribunals frequently trace their origins and justification to the model of the First Russell Tribunal held in the late 1960s to inquire into alleged US and allied violations of international law and international humanitarian law during the Vietnam war.[98] Since that time there have been dozens, possibly hundreds, of such tribunals held.[99] They have dealt with historical wrongs such as the Armenian genocide,[100] the Japanese military's system of wartime sexual slavery,[101] and the suppression of the communist uprising in Indonesia in

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and Andrew Byrnes, "International Peoples' Tribunals in Asia: political theatre, juridical farce or meaningful intervention?," *Asian Journal of International Law*, Vol. 4 (2014), p. 103, and Andrew Byrnes and Gabrielle Simm, "Peoples' tribunals, international law and the use of force," *University of New South Wales Law Journal*, Vol 36 (2013), p. 711.

[96] Louis Joinet, "Les tribunaux d"opinion: Bilan et perspective" in Guiliano Amato et al eds., *Marxismo, democrazia e diritto dei popoli: Scritti in onore di Lelio Basso* (1979), p. 821.

[97] *Ibid.,* Chapter 1.

[98] See generally Arthur Jay Klinghoffer and Judith Apter Klinghoffer, *International Citizens" Tribunals: Mobilising Public Opinion to Advance Human Rights* (2002).

[99] For a list see Arthur Blaser, "How to Advance Human Rights without Really Trying: An Analysis of Nongovernmental Tribunals," *Human Rights Quarterly* Vol. 14 (1992), p. 339, at pp. 366-370. There have been at least as many tribunals held since Blaser wrote.

[100] Gabrielle Simm, "The Paris Peoples' Tribunal and the Istanbul Trials: Archives of the Armenian genocide," *Leiden Journal of International Law*, Vol. 29 (2016), 245.

[101] The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, *Judgement on the Common Indictment and the Application for Restitution and Reparation* (2001). See Ustinia Dolgopol, "The Judgement of the Tokyo Women's Tribunal," *Alternative Law Journal*, Vol. 28 (2003), p. 242.

1967.[102] They have also regularly addressed more contemporary issues. Tribunals held in recent decades include an international people's tribunal into alleged crimes against the Filipino people,[103] a number of tribunals engaging with historical and current Israel-Palestine issues,[104] issues relating to the 2003 Iraq war,[105] on the Canadian mining industry in Latin America,[106] international tribunals for nature,[107] on water and environmental rights in Latin America,[108] peoples' tribunals on a minimum wage for garment workers in Asia,[109] violations of labour rights,[110] violations of women's rights,[111] the situation of human rights in Mexico and Central America,[112] the role of transnational corporations and international organisations in the commission of human rights violations,[113] the human rights impacts of the global trade

[102] International People's Tribunal 1965, *available at* <http://1965tribunal.org/>. See Lena Bjurström, "Indonésie: juger l"histoire", *Politis*, No. 1398, 19 November 2015, pp. 21-22, <www.politis.fr/Indonesie-juger-l-histoire,33057.html>.

[103] The International People's Tribunal (IPT) on Crimes against the Filipino People by Pres. Benigno S. Aquino III and the US Government represented by Pres. Barack Obama, Washington, DC, 16-18 July 2015, *available at* http://internationalpeoplestribunal.org/

[104] Russell Tribunal on Palestine (2010-2014), *available at* <http://www.russelltribunalonpalestine.com/en/>; Kuala Lumpur War Crimes Tribunal Hearing on Palestine (2012-2014), *available at* criminalisewar.org/media-centre/documents/. See Frank Barat and Daniel Machover, " The Russell Tribunal on Palestine" in Chantal Meloni and Gianni Tognoni eds., *Is there a court for Gaza?: a test bench for international justice* (2012), p. 527 and for a critical view of the RToP, see NGO Monitor, "Russell Tribunal on Palestine", October 3, 2012, *available at* <http://www.ngo-monitor.org/article/russell_tribunal_on_palestine>.

[105] See Mürge Gürsöy Sökmen ed., *World Tribunal on Iraq: Making the Case against War* (2008); Kuala Lumpur War Crimes Tribunal, "Chief Prosecutor of the Kuala Lumpur War Crimes Commission v George W Bush and Anthony L Blair", Judgment, November 22, 2011, *available at* <http://criminalisewar.org/media-centre/documents/extempore-judgment-of-the-kl-war-crimes-tribunal/>

[106] Permanent Peoples' Tribunal (PPT) on the Canadian mining industry in Latin America, *available at* <http://www.tppcanada.org/a-propos-du-tpp/session-canada/>.

[107] International Rights of Nature Tribunal, *available at* <therightsofnature.org/rights-of-nature-tribunal/>

[108] Tribunal Latinoamericano del Agua (Latin American Water Tribunal), "Ciudad de Guatemala, 2015", *available at* http://tragua.com/audiencias/ciudad-de-guatemala-2015/ (7 cases throughout Latin America).

[109] National People's Tribunals on Living Wage for Garment Workers in Asia, See Matthew Burnett-Stuart, "Transnational Advocacy Networks as Counter Hegemonic Actors: The Asia Floor Wage Alliance and the Living Wage People's Tribunals", *available at* <https://www.academia.edu/7276015/The_Asia_Floor_Wage_Alliance_and_the_Living_Wage_Peoples_Tribunals>.

[110] Tribunal Internacional de Libertad Sindical (International Tribunal on Trade Union Freedoms), *available at* <http://www.tribunaldelibertadsindical.blogspot.no/>.

[111] "Courts of Women: An Introduction", *available at* <www.eltaller.in/Courts of Women.htm>.

[112] Tribunal Hearings on the Human Rights Crisis in Mexico and Central America International Tribunal of Conscience of Peoples in Movement, *available at* <http://internationaltribunalofconscience.org/>.

[113] Permanent Peoples' Tribunal, *The European Union and Transnational Corporations in Latin America: Policies, Instruments and Actors Complicit in Violations of the Peoples' Rights, Deliberating Session, Madrid, 14-17 May 2010: The Judgement* (2010); Permanent Peoples' Tribunal, Session on Agrochemical Transnational Corporations, Bangalore, 3-6 December 2011, Verdict.

regime[114] and of international financial institutions, and an international people's tribunal into the impact of fracking on the enjoyment of human rights and on the environment.[115]

In many cases a tribunal will form part of a broader campaign – it may be a one-off or there may be a number of tribunals organised around a situation or theme. There are also a number of institutions which have been repeat players in this area, offering a institutional and consistent theoretical framework over a period of years while addressing different issues or situations over time. The most prominent institution in this regard is the Permanent Peoples' Tribunal (PPT) based in Rome.[116] The PPT was established by the Italian leftist senator, Lelio Basso and has held over 40 hearings since it commenced its work in 1979.[117] It represents in its founding documents and orientation the two strands of legal authority that have been drawn on at different times by international peoples' tribunals – the positive law of nations, and the law of peoples, a body of law that claims its validity as grounded in the sovereignty of peoples that exists outside and independently of the Westphalian system. The latter is represented in particular by the Universal Declaration of the Rights of Peoples adopted in Algiers in 1976 by the International League for the Rights and Liberation of Peoples.[118]

For the most part international peoples' tribunals have devoted a great deal of attention to what might be seen as the conventional application of international legal standards to those States, international organsiations or other entities that are the subject of their inquiries. Some tribunals place a major emphsais on the centrality of the law to their proceedings, while others place equal or greater emphasis on broader social, political or economic contexts. To this extent they can be seen as 'law-takers' or 'law-consumers', but in asserting the right of civil society to interpret international law and to establish informal proceedings in which they

[114] Global People's Tribunal on WTO and Free Trade Agreements (2013), *available at* <https://www.popularresistance.org/global-peoples-tribunal-on-wto-free-trade-agreements/>

[115] The tribunal process was launched in 2015, with final hearings to take place in 2017: *available at* <http://www.truth-out.org/news/item/33066-permanent-peoples-tribunal-highlights-fracking-s-threat-to-human-rights>.

[116] See generally Gianni Tognoni, "La storia del Tribunale Permanente dei Popoli"["The history of the Permanent Peoples' Tribunal"] in Linda Bimbi and Gianni Tognoni eds., *Speranze e inquietudini di ieri e di oggi. I trent"anni della Dichiarazione Universal* (2008) [*Hopes and Fears of Yesterday and Today: Thirty Years of the Universal Declaration*], pp. 95-105, *available at* <http://www.internazionaleleliobasso.it/wp-content/uploads/2011/05/TPPGianniTognoni.pdf>. ; Gianni Tognoni, "Alle radici del Progetto TPP in Permanent Peoples' Tribunal" ["On the origins of the project of the Permanemt Peoples' Tribunal" in *Tribunale Permanente dei Popoli: Le Sentenze 1979-1998* (1998) [*The Permanent Peoples' Tribunal: Verdicts 1979-1998*], pp. i-xi; Edmond Jouve,"Du tribunal de Nuremberg au Tribunal permanent des peuples," *Politique étrangère*, Vol. 46 (1981), p. 669; Luís Moita, "Opinion Tribunals and the Permanent People's Tribunal", JANUS.NET e-journal of International Relations, Vol. 6, No 1, May-October 2015, 30, *available at* <observare.ual.pt/janus.net/en_vol6_n1_art3>. The Latin American Water Tribunal (*Tribunal Latinoamericano del Agua*) is another important example of a repeat player.

[117] *Available at* <http://tribunalepermanentedeipopoli.fondazionebasso.it/category/sessioni-e-sentenze-it/>.

[118] *Universal Declaration of the Rights of the Peoples*, Algiers (adopted 4 July 1976) *available at* http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm. See See François Rigaux, "The Algiers Declaration of the Rights of Peoples' in Antonio Cassese ed., *UN Law, Fundamental Rights: Two Topics in International Law* (1979), p. 211; Richard Falk, "The Algiers Declaration of the Rights of Peoples and the Struggle for Human Rights", in Cassese, *ibid.,* p. 225.

seek to hold alleged perpetrators to account, there is an assertion of a role that goes beyond that of a largely passive recipient of legal norms.

Peoples' tribunals have also attempted to adopt progressive interpretations of existing law. One example is the scope of the international crime of genocide, whose international criminal formulation in the Genocide Convention of 1948 and more recently in identical terms in the Statute of the International Criminal Court is more limited than many of those involved in its drafting and subsequent advocates would have liked. In particular the definition is limited insofar as it does not include intentional efforts to eliminate sections of the population defined by their political views or a broader notion of cultural genocide.[119] The PPT has made efforts to promote a broad reading of the concept of genocide[120] though claims of genocide have not always been upheld by PPT panels.[121]

Some peoples' tribunals see their role as involving more than just the application of existing law but also as extending to its critique and advocacy for change. They seek to develop international law in a progressive direction in areas they consider that it reflects oppressive political or economic power relations.[122] The international law and its institutions that are seen as underpinning unequal power relations as part of the of neo-liberal international economic order have been regular targets of critique in peoples' tribunals. This has included criticism and calls for reform of international law to address its limitations in relation to the role of transnational corporations in the violation of human rights. The international legal regime protecting intellectual property and its implementation through national legal systems has also been a subject of concern.[123] In these areas the work of peoples' tribunals forms part of and feeds into wider calls for reform.

Of course, peoples' tribunals are regularly attacked for their lack of a legitimate mandate – by which critics mean a State-based mandate. This is a criticism peoples' tribunals necessarily accept, yet they assert that there other equally valid bases for legitimacy,[124] especially where the State concerned or the international community has failed to carry out the task of ensuring justice for victims of human rights violations. Equally, peoples' tribunals are criticised for their lack of power to issue verdicts that are legally binding in a formal sense and for their lack of impact in changing the behaviour of those whose actions they put on trial. Such criticisms have echoes in the literature relating to the UN human rights treat bodies and other international mechanisms.

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[119] William Schabas, "The Law and Genocide" in Donald Bloxham and Dirk A Moses eds., *Oxford Handbook of Genocide Studies* (2010), p. 123, at pp. 120-131.

[120] Simona Fraudatario and Gianni Tognoni, "La definición jurídica y substancial del genocidio a la prueba del encuentro entre el Tribunal Permanente de los Pueblos y las víctimas" ["The juridical and substantive definition of genocide tested in the engagement between the Permanent Peoples' Tribunal and victims", paper presented at the Conferencia Bianual de La International Association of Genocide Scholars, Buenos Aires, *available at* <www.genocidescholars.org/sites/default/files/document%09[current-page%3A1]/documents/IAGS 2011 Simona Fraudatario.pdf>.

[121] *Ibid.* (referring to PPT hearings on the Brazilian Amazon (1990)).

[122] In this context an understanding of the historical origins of present day international law has been important. See, *e.g.*, the *Permanent Peoples' Tribunal on The Conquest of America and International Law, Padua-Venice, 5-9 October 1992,* verdict, para. 1.3.

[123] Trade Related Intellectual Property Rights (TRIPS) agreement of the WTO.

[124] See Craig Borowiak, "The World Tribunal on Iraq: Citizens" Tribunals and the Struggle for Accountability," *New Political Science*, Vol. 30 (2008), p. 161, at p. 181 (identifying four aspects of the legitimacy of bodes of this sort: "authorization, rationale, credibility, and recognition")

While peoples' tribunal verdicts and recommendations may have no formal status or enforcement powers, sometimes they do have an impact. As Kampmark comments, their potential to affect public opinion in some cases 'can be gathered form the sheer hostility of critics who would rather dismiss them, but find significant threat in their potency in affecting public opinion.'[125] But to focus only on that narrow notion of their role and importance is to neglect the other important roles that they can play, and in which they supplement or make up for the failures of formal institutions.

While the judgment and 'verdicts' of peoples' tribunals are not binding legal pronouncements, the contributions made by peoples' tribunals are of various types. They can act as a means of publicising information in order to support an advocacy campaign, oras a 'corrective mechanism through which public intellectuals mobilize world public opinion against powerful countries shielded from sanctions under international law.'[126] Formal findings of accountability may have a symbolic and political impact[127] and a catalysing effect on advocacy networks. They can also serve as important collections of primary and secondary material that may be useful for formal procedures of inquiry. Equally importantly, they can serve as a solemn recognition of the sufferings of victims and survivors, and also memorialise 'historical' wrongs.

As Gabrielle Simm and I have written elsewhere:

> Rather than simply being ignored or dismissed, international peoples' tribunals may be understood not as a form of political activism and advocacy that lacks legitimacy from a legal perspective, but as institutions that engage seriously with international legal norms. The world of international law has expanded far beyond the society of nation-states and international organizations to include a range of other actors who contribute to and draw on international law. The study of these institutions provides a window into the significance of international law for civil society, raises questions about the source of legitimacy of international law norms and ''ownership'' of them, and highlights some of the gaps in and failings of the present international legal system.[128]

Conclusion

In this discussion I started from the fundamental question 'Whose international (human rights) law is it?' and the related questions of who are the law-makers and who are the authoritative interpreters of human right slaw. Anyone trained in the classical tenets of a Westphalian view of the international community, even updated to twenty-first century would, like the International Law Commission, have a ready answer to this question: international law is made by States, interpreted by States and implemented (or not) by States. Other actors play important informal roles in stimulating, interpreting and helping to implement human rights law, but unless there is a formal delegation of power by States, their acts do not in general have independent juridical authority.

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[125] Binoy Kampmark, "Citizens' war crimes" tribunals," *Social Alternatives*, Vol. 33, No. 2 (2014), p. 5, at p. 9.
[126] Klinghoffer and Klinghoffer, *supra* note 98, p. 5.
[127] Richard Falk, "Civil Society Perspectives on Humanitarian Intervention," *Journal of Civil Society,* Vol. 4, No. 1 (2008), p. 3, at pp. 11-12.
[128] Simm and Byrnes, *supra* note 95, p. 104.

Of course the real world is more complicated than this, as the ILC itself has recognised. The practical contribution of non-State actors to the development of formal international human rights law has been immense, even if these contributions have in most cases had to be mediated through their adoption by States in order to enter into the normative universe of modern international law. But we also need to continue to recognise the ways in which the interpretive and implementation activities of non-State actors can have important practical impacts on human rights practice and thinking.

The three examples I have explored show different dimensions of the contributions that non-State actors can make, how these can intersect with the formal law-making and interpretive processes, but also the importance of their independent impact outside formal structures while deploying international law. While States may still enjoy a dominant role in the development and interpretation of international human rights law, much international law-making, interpretation and implementation is the result of partnerships of different sorts, in which non-State actors are indispensable participants.

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