

## UN treaty body views: a distinct pathway to UN human rights treaty impact?

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### Introduction

Professor Christoph Heyns was a prolific scholar of the domestic impact of United Nations human rights treaties.<sup>1</sup> He rightly underlined that as human rights scholars we should study how UN human rights treaties impact the real lives of individuals and communities.<sup>2</sup> Professor Heyns, in particular, placed a strong emphasis on studying pathways for impact, underlining the significant roles that domestic institutions and domestic civil society, as well as domestic human rights culture, play in driving impact. In his seminal article, published in the *Human Rights Quarterly* in 2001 together with Frans Viljoen, and based on the study of the impact of UN human rights treaties in twenty countries across the globe up until 1999, the authors underlined the negligible role of UN human rights enforcement mechanisms themselves in ensuring impact. They reported that ‘international enforcement mechanisms used by the treaty bodies appear to have had a very limited demonstrable impact thus far.’<sup>3</sup> In their contribution, Heyns and Viljoen underlined that this lack of impact was partly attributable to the inefficiencies of international human rights enforcement mechanisms.<sup>4</sup> Moreover, they further cautioned that while improvements to international enforcement mechanisms may enable greater impact, what was needed was to find ways to ‘harness the treaty system to domestic forces’.<sup>5</sup> For Professor Heyns, methods to ensure the harnessing of UN human rights domestically also defined the road map for human rights practice at the intersection of domestic and international advocacy contexts. Effective advocacy for human rights treaties is not only about improving the

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1 CH Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (Kluwer Law 2002).

2 CH Heyns & F Viljoen ‘The impact of the United Nations human rights treaties on the domestic level’ (1998) 23 *Human Rights Quarterly* 483 at 484.

3 Heyns & Viljoen (n 2) 488.

4 As above.

5 As above.

efficiency and accessibility of UN human rights standards, but also on strengthening the domestic infrastructure for human rights, composed not only of state institutions, but also all the other organs of domestic society.

Departing from the central insights of Professor Heyns' work on the barriers and pathways to impact of enforcement mechanisms of UN human rights treaties, this chapter turns its attention to one specific aspect of the UN human rights enforcement architecture, the individual complaints mechanisms before the United Nations human rights treaties, as a distinct avenue for increasing the domestic impact of UN human rights treaties. The chapter acknowledges that the individual complaints mechanisms share the standard weaknesses of other international enforcement mechanisms of UN human rights treaties as identified by Heyns and Viljoen. It also, however, argues that individual petition mechanisms present distinct opportunities for impact.<sup>6</sup> The reasons for this are twofold. First, individual cases present a distinct opportunity for civil society, media and academia to engage with UN human rights treaties. To engage with an individual case is to engage with a relatable, specific human story. In turn, individual cases may be more capable of focusing the attention of domestic compliance constituents to questions concerning the effective implementation of UN human rights treaties than a more abstract engagement with them. In the words of Heyns and Viljoen, individual cases may, in particular, offer a new opportunity for state and non-state actors in 'disengaged countries'.<sup>7</sup> Second, the decisions of UN human rights treaties are uniquely positioned to offer a special opportunity for judicial impact. This is because individuals demand a certain set of specific individual remedies, which courts are best placed to provide. In such situations judicial impact can take place directly, through the domestic courts engaging with individual remedies required in a case. It can also take place indirectly, by considering the case law of the United Nations treaty bodies (UNTB) in other comparable cases. There is also a second opportunity for indirect impact. UNTB case law may also provide opportunities for impact on regional human rights courts and commissions or other international courts. The judicial dialogue between regional courts and commissions (or other international courts) through their use of UNTB case law in individual cases can therefore subsequently act as a conduit of domestic impact in domestic judicial settings, in countries where individuals

6 I employ the definition of specific opportunities in the social movement literature when discussing the UNTB petition system as offering distinct opportunities. See, J Berclaz & M Giugni 'Specifying the concept of political opportunity structures' in M Kousis & C Tilly (eds) *Economic and political contention in comparative perspective* (Routledge 2005) 15-32.

7 Heyns & Viljoen (n 2) 534.

have access to both UN human rights treaty bodies and regional human rights courts.

In what follows, the chapter first outlines the proliferation of the right to individual petition mechanisms before the UN human rights treaties. It shows that the generation of UN human rights case law through individual cases has become a central avenue for UN human rights treaty bodies to harness UN human rights treaties to domestic institutions across the globe. Second, the chapter turns to how the standard weaknesses of international human rights enforcement mechanisms are also reflected in the human rights decisions of UNTBs. As such, lack of dissemination, backlog, vague recommendations and overlaps, alongside the lack of legally binding status of individual decisions are common barriers to ensuring the impact of the case law of UN generated through individual decisions.<sup>8</sup> Third, the chapter turns to the unique opportunities created by UN human rights views, and their ability to empower civil society and the media alongside domestic and international judiciaries. The chapter concludes by calling for more comparative studies of the impact of UN views and the need for a more robust cataloguing of best practices for impact created by UN views.

## The proliferation of the right to individual petition before UN human rights treaty bodies

The individual complaints mechanisms of the United Nations have over the last two decades come to the foreground of the academic scholarship on the impact of UN human rights treaties as well as international litigation practices, in particular.<sup>9</sup> This is because alongside the older individual complaints mechanisms of the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention against Torture (CAT), which came into force in 1976, 1982 and 1987 respectively, the individual complaints mechanisms have significantly

- 8 Heyns & Viljoen (n 2) 488. Also see KF Principi 'Implementation of UN treaty body decisions: a brief insight for practitioners' (2020) 12 *Journal of Human Rights Practice* 185, on non-legally binding status of decisions as a 'common reason' for implementation failures.
- 9 See representatively, G Ulfstein 'Individual complaints' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (CUP 2012), SP Subedi *The effectiveness of the UN human rights system: reform and the judicialisation of human rights* (Routledge 2017); Principi (n 8), V Shikhelman 'Implementing decisions of international human rights institutions—evidence from the United Nations Human Rights Committee' (2019) 30 *European Journal of International Law* 753, AJ Ullmann and A Von Staden 'Challenges and pitfalls in research on compliance with the "views" of UN human rights treaty bodies: a reply to Vera Shikhelman' (2020) 31 *European Journal of International Law* 693, C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: what role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71.

expanded, and are now available for all UN human rights treaties with the exception of the Convention on the Rights of Migrant Workers. In the case of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) state parties have drafted and ratified optional protocols on individual complaints mechanisms well after the initial adoption of these treaties, in 2000, 2013, and 2014 respectively. The two new generation UN human rights treaties, the Convention on the Rights of Persons with Disabilities (CRPD) also has an optional protocol for individual complaints and states can opt in to the individual complaints mechanism under the Convention on Enforced Disappearances (CED) by making a declaration under Article 31 of CED.

What is more, the expansion of the right to individual petition before these UNTBs has received a significant number of opt-ins by state parties, also in the last two decades. The ICCPR, CEDAW and CRPD, in particular, now have a global reach with access to individuals from both the global north and the global south and deliver decisions with respect to states which are also under the jurisdiction of regional human rights courts and commissions in Europe, the Americas and Africa. In addition, some of these mechanisms have become the only quasi-judicial avenue for victims of human rights violations to seek redress. This is, to name a few, the case for countries across the globe such as Belarus<sup>10</sup> in Europe, Tajikistan,<sup>11</sup> Kazakhstan<sup>12</sup> and Turkmenistan,<sup>13</sup> Nepal and Sri Lanka<sup>14</sup> in Asia, and Saudi Arabia<sup>15</sup> in the Middle East.

The increase in the availability of individual complaints mechanisms, alongside the rise in state opt ins to such mechanisms, has led in turn to a proliferation of UN treaty body case law across all UN human rights committees in recent decades,<sup>16</sup> and what I and my co-authors have called the rise of UN human rights treaty bodies as 'soft courts'<sup>17</sup> in a

10 Belarus accepted the right to individual petition before the ICCPR and CEDAW in 1992 and 2004 respectively.

11 Tajikistan acceded to ICCPR and CEDAW individual complaints mechanisms in 1999 and 2014 respectively.

12 Kazakhstan acceded to CERD, CAT, CEDAW and ICCPR individual complaints mechanisms in 2001, 2008, 2008 and 2009 respectively.

13 Turkmenistan acceded to ICCPR, CEDAW and CRPD individual complaints mechanisms in 1997, 2009 and 2010 respectively.

14 Nepal acceded to ICCPR, CEDAW and CRPD individual complaints mechanisms in 1991, 2007, and 2010 respectively.

15 Saudi Arabia acceded to the CRPD individual complaints mechanism in 2008.

16 B Çalı & AS Galand 'Towards a common institutional trajectory? individual complaints before UN treaty bodies during their booming years' (2020) 24 *International Journal of Human Rights* 1-24.

17 B Çalı, C Costello & S Cunningham 'Hard protection through soft courts? non-refoulement before the United Nations treaty bodies' (2020) 21 *German Law Journal* 355.

comparative study of non-refoulement decisions delivered by UNTBs. This is because the quasi-judicial assessment of compliance with UN treaties in individual cases is now a central part of the work of the UNTBs, alongside the more standard mandates they have of reviewing state reports and of issuing concluding observations and general comments.<sup>18</sup>

Parallel to the rise of individual petition before UNTBs, scholarship on the impact of these views has also proliferated, following the seminal cross-country study by Heyns and Viljoen.<sup>19</sup> There are now more and more studies on the level of compliance of states with the views. The broad findings of this literature on the level of compliance with treaty body UN views show that the initial findings of Heyns and Viljoen on the low levels of compliance with the views have not significantly changed. Principi’s 2017 and 2020 research confirms this finding, reporting that a lack of implementation of decisions is more prevalent than their implementation.<sup>20</sup> Shikhelman’s 2019 research further shows that a lack of action to implement the views of the UNTBs is the most prevalent outcome.<sup>21</sup> This finding underlines that states’ initial support of UN human rights treaty mechanisms by opting in to them is not met by these states’ subsequent compliance with such views.

**Table 1: Proliferation of UNTB Individual Complaints Mechanisms**

UNTB	Entry into force of individual complaints mechanisms	Yearly average no. of communications registered (2018-2019)*	Yearly average no. of final decisions (2018-2019)*	Number of States’ acceptance (2021)
HRC	1976	329	131	116

18 The Second Biennial Report of the UN Secretary General on the Status of the Human Rights Treaty Body System of 6 August 2018, A/73/209, [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/73/309](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/309) (accessed 28 October 2021).

19 Earlier studies focussing on the compliance with HRC decisions also found compliance with HRC’s views by state parties ‘disappointing’. See D McGoldrick *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (Clarendon 1994) 202.

20 KF Principi ‘Implementation of decisions under UN treaty body complaint procedures: how do states comply?: a categorized study based on 268 cases of “satisfactory” implementation under the follow-up procedure, mainly regarding the UN Human Rights Committee’ (2017) 37 *Human Rights Law Journal*, Principi (n 9).

21 Shikhelman (n 9)

UNTB	Entry into force of individual complaints mechanisms	Yearly average no. of communications registered (2018-2019)*	Yearly average no. of final decisions (2018-2019)*	Number of States' acceptance (2021)
CERD	1982	5	3	59
CAT	1987	60	57	70
CEDAW	2000	15	20	113
CRPD	2008	16	8	95
CED	2010	1	1	21
CESCR	2013	80	15	24
CRC	2014	35	15	46

\* Data extracted from Report of the Secretary General, Status of the human rights treaty body system, A/74/643 Annexes, 10 January 2020 (available at [www.ohchr.org/EN/HRBodies/HRTD/Pages/3rdBiennialReportbySG.aspx](http://www.ohchr.org/EN/HRBodies/HRTD/Pages/3rdBiennialReportbySG.aspx)) and organised by Dr Aristi Volou.

## Standard weaknesses of UN human rights enforcement mechanisms

As originally developed by Heyns and Viljoen, the output of the UN human rights treaties face two types of weaknesses.

The first type of weakness stems from the inefficiencies of the UN human rights treaty bodies themselves. These inefficiencies concern the slow operation of UN human rights treaty bodies, the lack of resources and the backlog problems they face alongside the vagueness of the outputs they produce and the weaknesses in their follow up mechanisms.<sup>22</sup> The literature on the weaknesses of UN human rights views also confirm these findings.<sup>23</sup> UN human rights treaty bodies

22 Heyns & Viljoen (n 2) 488.

23 MC Bassiouni & WA Schabas (eds) *New challenges for the UN human Rights machinery: what future for the UN treaty body system and the Human Rights Council procedures?* (Intersentia 2011) Sandoval, Leach & Murray (n 9).

face a significant backlog to process individual complaints. Individual complaints that are processed are subjected to delayed publication. Their translation into all UN official languages takes considerable time and they are not translated to local languages by the United Nations country offices. Their dissemination via the United Nations takes place through the cumbersome United Nations websites. The views have also been criticised for their lack of detailed legal reasoning and the vagueness of their recommendations as to the necessary individual measures that need to be taken,<sup>24</sup> even though there is also evidence that the clarity of UN human rights committee views on what types of remedies are required to address violations has increased over time across a number of treaty bodies.<sup>25</sup> In addition, the UN has follow-up mechanisms to monitor the implementation of the views,<sup>26</sup> but these mechanisms are not adequately resourced.<sup>27</sup> The follow-up procedures established by the Committees to monitor the implementation of views primarily rely on responses by state parties and authors as opposed to other more resource-intensive mechanisms such as those found at the Inter-American Court of Human Rights, where compliance hearings take place<sup>28</sup> or at the Council of Europe by way of regular monitoring of compliance with direct written input from civil society organisations.<sup>29</sup>

Alongside these inefficiencies, the UN views also share with all UN human rights treaty outputs, the lack of express binding recognition.<sup>30</sup> This means that when a state authority declines to implement a view, they often argue that they are not 'breaking international law' per se.<sup>31</sup> There are, of course, counter-views on this, holding that views are legally binding because the treaty obligations to provide remedies is legally

24 Similar problems are also noted with respect to concluding observations, M Kanetake 'UN human rights treaty monitoring bodies before domestic courts' (2018) 67 *International and Comparative Law Quarterly* 201.

25 Çalı & Galand (n 16).

26 A von Staden 'Monitoring second-order compliance: the follow-up procedures of the UN human rights treaty bodies' (2018) 9 *Czech Yearbook of International Law* 329.

27 A Donald, D Long & AK Speck 'Identifying and assessing the implementation of human rights decisions' (2020) 12 *Journal of Human Rights Practice* 125.

28 Sandoval, Leach & Murray (n 9).

29 B Çalı & A Koch 'Foxes guarding the foxes? peer review of human rights judgments by the Committee of Ministers of the Council of Europe' (2014) 14(2) *Human Rights Law Review* 301-325. Also see, European Implementation Network, Domestic Advocacy for the Implementation of Judgments of the European Court of Human Rights: An EIN Guide (2020) [https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5ec397941541404e7e1900c1/1589876642856/EIN+Toolkit+on+Domestic+Advocacy\\_FINAL.pdf](https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5ec397941541404e7e1900c1/1589876642856/EIN+Toolkit+on+Domestic+Advocacy_FINAL.pdf) (accessed 4 October 2021).

30 R Van Alebeek and A Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' in H Keller & G Ulfstein (eds) *UN human rights treaty bodies: law and legitimacy* (CUP 2012), also see M Nowak *UN Covenant on Civil and Political Rights, CCPR commentary* (2005) and E Rieter *Preventing irreparable harm, provisional measures in international human rights adjudication* (2010).

31 Principi (n 8).



binding and Committees are the authoritative interpreters of these obligations.<sup>32</sup> The international law discussion on whether and on what basis UN views generate qualities of bindingness has knock on effects with regard to states' handling of the views. These range from refusals to implement and even contest views due to their lack of binding qualities, to making UN views binding as a matter of domestic law. In a recent case study of compliance with the CAT Committee's views by Canada, for example, Limon shows how the refusal to implement based on the non-legally binding status of UN views takes centre stage.<sup>33</sup> In *Masih Shakeel*, Limon shows that the Canadian government had expressly disagreed with the Committee's decision in its submission to the Human Rights Committee.<sup>34</sup> Following *Michael Lockrey v Australia* decision of the CRPD, Australian authorities contested that CRPD's interpretation that duty of reasonable accommodation required providing real-time steno-captioning in the courtroom and jury room.<sup>35</sup> However, as the views have become more prominent as a form of output of UN treaty bodies, there are now also counter-examples that treat views with binding or weighty persuasive authority. I will return to these in the following section.

The second type of standard weakness focusses on the lack of domestic will or capacity to implement UN views. This is also a standard weakness that UN views not only share with other outputs of UN treaty bodies such as concluding observations,<sup>36</sup> but also with the implementation of binding human rights judgments, emanated by regional human rights courts.<sup>37</sup> This means that whether states effectively

32 See, for example, M Scheinin 'International mechanisms and procedures for implementation' in R Hanski & S Markku (eds) *An introduction to the international protection of human rights: a textbook* (Abo Akademi 1999), Nowak (n 30), Rieter (n 30).

33 P Limon 'Taking rights seriously: Canada's disappointing human rights implementation record' in *Implementing Human Rights Decisions: Reflections, Successes, and New Directions* (2021), available at <http://www.bristol.ac.uk/law/hrlip/outputs/implementing-human-rights-decisions/> (accessed on 28 October 2021).

34 As above. Also see VA Schorm 'It takes a village to implement a judgment: creating a forum for multi-stakeholder involvement in the Czech Republic' (2020) 12 *Journal of Human Rights Practice* 193.

35 Response of Australia to the Views of the Committee on the Rights of Persons with Disabilities in Communications 11/2013 (*GB v Australia*) and 13/2013 (*ML v Australia*) [https://remedy.org.au/reports/Aust\\_response\\_to\\_Lockrey&Beasley\\_FinalViews.PDF](https://remedy.org.au/reports/Aust_response_to_Lockrey&Beasley_FinalViews.PDF) (accessed 28 October 2021).

36 C Creamer & B Simmons 'The proof is in the process: self-reporting under international human rights treaties' (2020) 114 *American Journal of International Law* 1.

37 D Hawkins & W Jacoby 'Partial compliance: a comparison of the European and Inter-American Courts for Human Rights' (2010) 6 *Journal of International Law and International Relations* 35, C Hillebrecht 'Implementing international human rights law at home: domestic politics and the European Court of Human Rights' (2012) 13 *Human Rights Review* 279; A Von Staden *Strategies of compliance with the European Court of Human Rights: rational choice within normative constraints* (University of Pennsylvania 2018); Ø Stiansen 'Delayed but not derailed: legislative compliance



comply or do not comply with UN treaty body views largely depends on variations in domestic factors.<sup>38</sup> These factors range from political and judicial capacity and will to implement the views, how ‘costly’ the views are perceived as being by domestic authorities to implement,<sup>39</sup> whether views concern politically sensitive issues, and whether there is a robust climate of domestic compliance, which includes domestic advocacy by civil society organisations, national human rights institutions, the media and other salient domestic constituents. Von Staden, for example, argues that the rule of law or democracy rate of a state effects the capacity of states to implement not only legally binding court judgments, but also decisions of UNTBs.<sup>40</sup> Previous research has shown that where there are limited political and legal opportunity structures to mobilise for human rights implementation, the implementation of human rights treaties, recommendations, views, and also human rights judgments generally face important uphill struggles domestically.<sup>41</sup> In addition, some human rights judgments and views are more costly than others: in particular, when what is necessary to implement human rights judgments and views requires major systemic changes – especially when there is little appetite to engage in such far-reaching domestic reforms or when it requires significant resources. Conversely, decisions that are less resource intensive attract higher compliance rates.<sup>42</sup>

### UN human rights views: Capacity to harness new domestic legal opportunity structures

Despite the fact that UN decisions in individual cases suffer from the standard weaknesses of UN human rights treaty body outputs as well as human rights judgments more generally, there is also evidence indicating that UN human rights views may be in a position to offer special opportunities for domestic impact compared to other forms of output. This is due to two unique features of UN human rights views in particular when compared to other types of UN treaty body outputs: the individualised and quasi-judicial nature of UN views.

with European Court of Human Rights judgments’ (2019) 23 *International Journal of Human Rights* 1221.

- 38 R Murray & C De Vos ‘Behind the state: domestic mechanisms and procedures for the implementation of human rights judgments and decisions’ (2020) 12 *Journal of Human Rights Practice* 22.
- 39 B Çalı & A Koch ‘Lessons learnt from the implementation of civil and political rights judgments’ in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick* (2017) 43. (2017) 47.
- 40 A Von Staden ‘Monitoring second-order compliance: the follow-up procedures of the UN human rights treaty bodies’ (2018) 9 *Czech Yearbook of International Law* 329
- 41 BA Simmons *Mobilising for human rights* (CUP 2009).
- 42 Principi (n 8).

First, UN views concern real individuals and the specific harms they suffer due to violations of UN human rights treaties. This connection to human stories opens up concrete domestic advocacy avenues for the authors of the applications and their legal representatives as well as for civil society, the media and legal academia. As such, views on individual cases offer concrete demonstrations for why a state falls short of its commitments to UN human rights treaties. Individual cases offer better opportunities for the media to advocate for human rights implementation, as they offer a human face to what a remote Geneva institution is able to offer to domestic and international audiences. For example, the case brought by Greta Thunberg and fifteen children before the UN Committee on the Rights of the Child<sup>43</sup> arguing that states' failure to adequately mitigate the climate crisis amounts to multiple violations of the Convention on the Rights of the Child has made international headlines,<sup>44</sup> bringing an unprecedented attention to the work of the Committee of the Rights of the Child that perhaps no public communications campaign by the UN could have achieved. Even though this case was ultimately declared inadmissible on non-exhaustion of domestic remedies grounds, its positive recognition of the climate crisis as a children's rights issue is expected to have ripple effects on how domestic and regional human rights courts will address climate related harms to children's rights.<sup>45</sup>

Second, UN views are quasi-judicial pronouncements. They make assessments as to whether states have violated the UN human rights treaties with respect to specific individuals, and in turn, they require states to remedy these violations, both with respect to the victims of human rights violations and guarantees of non-repetition of similar violations in the future. This unique feature makes the views easier to engage with from the perspective of domestic judicial and executive authorities as individuals who receive violation judgments from the UNTBs create feedback loops. Following a view finding violations of the UN human rights treaties, individuals turn back to domestic courts, executives and parliaments to seek domestic remedies and guarantees of non-repetition. An individual case, therefore, may become the basis

43 *Saachi et al v Argentina et al*, Communication 104/2019 (Argentina), Communication 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Turkey) (8 October 2021), UN Doc CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, CRC/C/88/D/108/2019.

44 'Greta Thunberg and children's group hit back at attempt to throw out climate case' *Guardian*, 5 May 2020, <https://www.theguardian.com/environment/2020/may/05/greta-thunberg-and-childrens-group-hit-back-at-attempt-to-throw-out-climate-case> (accessed 28 October 2021).

45 A O'Nolan 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Saachi v Argentina*' *EJIL Talk!* <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/>

for much broader systemic or institutional reform. These two aspects of UN views taken together show that views may be capable of mobilising a broad range of domestic compliance constituents for concrete domestic impact, especially when compared to other outputs of UN human rights treaty bodies.

***Views as pathways to mobilise domestic judges, parliaments and executive organs***

One important mechanism in this regard is domestic legal frameworks enabling domestic authorities to give domestic legal effect to UN human rights views. The existence of a robust domestic legal framework bypasses the problem of the non-binding nature of the views under international law by legalising the status and consequences of UN views in a state's domestic legal order. This in turn allows for domestic courts to be responsive to the individual and general remedies that are called for in the individual views, overcoming judicial rejectionism, as was manifested in the case of Canadian judges discussed above. There are examples of legal frameworks, which treat UNTBs similar to regional human rights courts and commissions as a matter of domestic law. One example is Colombia, where domestic law clearly instructs the domestic courts to provide compensation to individuals receiving decisions from 'international human rights bodies'.<sup>46</sup> In Sweden, the Swedish Aliens Act requires that a residence permit is given to any individual if an international complaints mechanism find that the deportation of that individual would violate Sweden's obligations under international law.<sup>47</sup> These examples, however, are not necessarily complete legal frameworks to give full effect to views, as the focus of the domestic law is on offering individualised remedies.

A second type of domestic mechanism is the legalisation of the status of the UN views domestically by way of the recognition of their binding effects by domestic courts. This has come about through the engagement of domestic judiciaries with UN views as a matter of international law, or domestic law or both. In Spain, the recognition of the binding nature of CEDAW views came at the apex of the judicial system, by the Supreme Court of Spain.<sup>48</sup> In Switzerland, the judiciaries response was different. CAT views that found violations of

46 Concluding Observations on the 7th period Report of Colombia (17 November 2016) UN Doc CCPR/C/Col/Co/7 para 6. The HRC, however, also criticises that this legal framework only allows to give effect to compensation for victims, and not a general framework to implement all remedies flowing from a decision.

47 Swedish Aliens Act Section 5 para 4 cited in SS Ford, 'Nordic Migration Cases before the UN Treaty Bodies: Pathways of International Accountability' (2021) *I Courts Working paper Series 267*.

48 Judgment No. 1263/2018 of July 17, 2018, ROJ: STS 2747/2018, ECLI: ES:TS:2018:2747 (Tribunal Supremo [Sup. Ct.], Sala de lo Contencioso-Administrativo [Contentious-Administrative Chamber]) (Spain)

the non-refoulement obligations under the CAT have been treated as 'new evidence' by Swiss Administrative Courts, allowing for a review of cases following decisions by the CAT Committee.<sup>49</sup> There are now also emerging examples as to how the domestic judicial recognition of UN views in one country may have comparative law value in other contexts. This seems to be the case in Kyrgyzstan.<sup>50</sup> Lawyers advocating for the implementation of specific UN views in Kyrgyzstan, for example, submitted an *amici curiae* brief to domestic courts, offering reasons underpinning the obligation to implement the decisions of the UN HRC citing, among others, the Supreme Court of Spain's case law on the binding nature of a decision issued by the CEDAW Committee.<sup>51</sup> In addition, human rights lawyers in Kyrgyzstan were able to secure an amendment in the Kyrgyz Criminal Procedure Code, allowing a sentence or a judicial decision to be revoked in the light of a Human Rights Committee view.<sup>52</sup>

These examples show that the standard weakness of the 'non-binding objection' to the implementation of UN views can be overcome by directing the focus of advocacy to the creation of domestic legal frameworks and enabling domestic judicial attitudes. In countries, where a legal framework to implement UNTB decisions are lacking, compliance and impact risk being erratic and subject to whether the domestic authorities agree with the substance of the views themselves. Indeed, creation of enabling legal frameworks has also been the pathway for effective domestic implementation and impact, also in the case of internationally legally binding judgments of regional human rights courts. There is significant evidence that the internationally legally binding status of human rights judgments (as opposed to UN human rights views) has not by itself led to smooth domestic implementation.<sup>53</sup> Regional human rights courts have been keen to increase the buy-in

49 KF Princip 'Implementation of decisions under treaty body complaints procedures – do states comply? how do they do it?' (2017) <https://hr.un.org/sites/hr.un.org/files/editors/u4492/Implementation%20of%20decisions%20under%20treaty%20body%20complaints%20procedures%20-%20Do%20states%20comply%20-%202015%20Sabbatical%20-%20Kate%20Fox.pdf> (accessed 28 October 2021).

50 M Lisitsyna & A Miller 'Litigating Torture in Central Asia: Lessons Learned from Kyrgyzstan and Kazakhstan' (2021) in 'Implementing Human Rights Decisions: Reflections, Successes, and New Directions', available at <http://www.bristol.ac.uk/law/hrlip/outputs/implementing-human-rights-decisions/> (accessed 28 October 2021).

51 As above.

52 Concluding Observations on the 7th period Report of Colombia (n 44) 442. Art 4(3) of Kyrgyz Criminal Procedure Code states: 'a sentence or a judicial decision may be revoked and the procedure may be resumed in cases ordered by a recognized international body based on the international treaties to which the Kyrgyz Republic is a party.' Reported in Lisitsyna & Miller (n 49).

53 B Çalı 'How loud do the alarm bells toll? execution of the 'article 18' judgments of the European Court of Human Rights' (2021) 2 *European Convention on Human Rights Law Review* 1-29.

of domestic courts, parliaments and executives to ensure compliance with human rights judgments, either by way of doctrinal innovations, such as the ‘conventionality control doctrine’ in the case of the Inter-American Court of Human Rights<sup>54</sup> and the pilot judgment procedure of the European Court of Human Rights<sup>55</sup> or by way of extra-legal initiatives, such as the Superior Courts Network of the European Court of Human Rights or the Judicial Dialogue between the African Court on Human and Peoples’ Rights and national supreme or constitutional courts.<sup>56</sup>

The recent successes of ensuring impact of UN views through domestic legalisation and the similarities in compliance challenges shared by human rights judgments and human rights views, opens up rethinking how to best boost domestic legal opportunity structures to ensure more routine forms of compliance with UN views domestically. In this regard, the non-legally binding status of UN views under international law does not present a significant weakness, if this is compensated by ensuring the legal effects of views under domestic law through advocacy for legislative frameworks or domestic judicial precedents. The judgment-like nature of the views offers them a better chance to have impact through domestic courts. That said, one of the standard weaknesses of the views, their quality in reasoning, becomes all the more important to enhance their chances of buy-in via domestic courts, so that they can be taken into account in similar cases.

### *Harnessing regional human rights courts and commissions for impact*

The reasons as to why UN views are more amenable to domestic judicial impact – due to their quasi-judicial form – further applies to their uptake by regional human rights courts and commissions when it comes to influencing outcomes both in individual cases and as a matter of *erga omnes* impact, understood as application of UN treaty body case law as part of the international human rights corpus juris.<sup>57</sup> UN views

54 AE Dulitzky ‘An Inter-American Constitutional Court? the invention of conventionality control by the Inter-American Court of Human Rights’ (2015) 50 *Texas International Law Journal* 45–93.

55 L Glas ‘The functioning of the pilot judgment procedure of the European Court of Human Rights in practice’ (2016) 34 *NQHR* 41.

56 See, the Superior Rights Network Superior Courts Network launched by the European Court of Human Rights in 2015 to enrich dialogue and implementation of the Convention. <https://www.echr.coe.int/Pages/home.aspx?p=court/dialogue/courts/network&c=> (accessed 28 October 2021) or the 5th session of the Judicial Dialogue between the African Court of Human and Peoples Rights and national supreme or constitutional courts in 2021. <https://www.african-court.org/wpafc/fifth-african-judicial-dialogue-building-trust-in-african-judiciaries/>

57 The impact of UN views extends beyond regional human rights courts to international courts and tribunals more generally. See, for example, ICTY, *Prosecutor v Hartmann* (Judgment) Appeals Chamber (2011) IT-02-54-R77.5-A, ICC, *Prosecutor v Bemba* (Decision on the Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber

having an impact on the case law of the regional human rights courts and commissions, therefore, can be understood to be uniquely situated to generate both a form of direct impact, and also indirect impact on the ground for the lived experiences of individuals and communities, a central theme in Professor Heyns' scholarship.

Of the three regional systems, the design features of the African Court on Human and Peoples' Rights stands out as the most likely context for such indirect impact, as the Statute of the Court explicitly allows for the African Court on Human and Peoples' Rights to adjudicate cases brought by individuals under AU human rights treaties as well as under those UN human rights treaties which a state is party to.<sup>58</sup> The presence of a well-developed body of case law by the UN human rights treaties, therefore, has real potential for the African Court of Human and Peoples' Rights to take into account UN views in applications brought before it with a similar scope. This allows for the African Court of Human and Peoples' Rights to legalise the interpretive principles developed through UN views beyond merely treating them as persuasive authority.<sup>59</sup>

In the case of the Inter-American Court of Human Rights, rules and limitations regarding the interpretation of its provisions in Article 29 (restrictions regarding interpretation),<sup>60</sup> alongside the general openness of the Inter-American Court of Human Rights to treat its own treaty as an indispensable part of the broad international human rights corpus juris<sup>61</sup> further opens up the possibility that the UN views can be treated as relevant sources regarding the treatment of similar cases in the case law of this Court. The European Court of Human Rights, too, through the doctrine of 'global consensus' takes into account developments in international human rights law more broadly,<sup>62</sup> including through the development of UN views, is capable of directly engaging with UN views. This, for example, has been the case in its ground-breaking judgment

Ill's Decision on Disclosure) Pre-Trial Chamber III (2008) ICC-01/05-01/08-75.

58 Art 3(1) of Protocol on the Establishment of the African Court on Human and Peoples' Rights states

'The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'.

59 See, *Zongo and Others v Burkina Faso* (reparations) (2015) 1 AfCLR 258 para 48 citing *Shirin Aumeeruddy and 19 other Mauritian Women v Mauritius* Communication No 035/1978 (9 April 1981) UN Doc CCPR/C/12/D/35/1978.

60 American Convention on Human Rights art 29.

61 IACtHR (Advisory Opinion) OC-1/82, 24 September 1982, "Other treaties" subject to the advisory jurisdiction of the Court (Article 64 American Convention on Human Rights). Also see, IACtHR, taking into account the case law of the UN Human Rights Committee on enforced disappearances in 'Street Children' (*Villagran-Morales et al v Guatemala*) (Merits) (1999) Series C No 63.

62 *Demir and Baykara v Turkey* (2008) 48 EHRR 54.

on domestic violence in the case of *Opuz v Turkey*.<sup>63</sup> The Court, in this case, directly cited two CEDAW decisions on domestic violence.<sup>64</sup>

Even if it may be held that taking cases before regional human rights courts is likely to be more impactful than UN treaty body views, the UN treaty bodies have also turned this assumption around by focussing on the shortcomings of the practices of the regional human rights courts in their approach to admissibility of cases that have been already examined by human rights courts. Specifically, and perhaps in an unexpected way, this has been the case with the UN Human Rights Committee's approach to handling individual complaints that have received a decision of inadmissibility from the European Court of Human Rights.<sup>65</sup> The UN Human Rights Committee in the case of *Achabal Puertas v Spain* in 2010, for example, clearly held that the 'limited reasoning contained in the succinct terms of the Court's letter does not allow the Committee to assume that the examination included sufficient consideration of the merits', and declared the communication admissible.<sup>66</sup> This has allowed individuals whose cases were summarily dismissed by the European Court of Human Rights to have a second chance of international review at the UN Human Rights Committee.<sup>67</sup> This approach has also been followed by the Committee against Torture.<sup>68</sup> The handling of the summary reviews of human rights cases by the European Court of Human Rights by UN Human Rights Treaty bodies show that the pathways of impact of UN treaty body views can also come about by the UN treaty bodies acting as correctives to the practices of regional human rights courts and commissions as a matter of practice.

63 *Opuz v Turkey* (2010) 50 EHRR 28. Also see the engagement with the UN Human Rights Committee case law on conscientious objection in the case of *Bayatyan v Armenia* (2012) 54 EHRR 15.

64 (n 56) paras 76 and 77 citing *AT v Hungary* Communication 2/2003 (26 January 2005) UN Doc CEDAW/C/32/D/2/2003 and *Fatma Yildirim v Austria* Communication No 6. 2005 (1 October 2007) CEDAW/C/39/D/6/2005.

65 C Deprez 'The admissibility of multiple human rights complaints: Strasbourg and Geneva compared' (2019) 19 *Human Rights Law Review* 517.

66 *Achabal Puertas v Spain* Communication 1945/2010 (27 March 2013), UN Doc CCPR/C/107/D/1945/2010, para 7.2.

67 Also see *X v Norway* Communication 2474/2014 (5 November 2015) UN Doc CCPR/C/115/D/2474/2014, para 6.2; *AGS v Spain* Communication 2626/2015, (2 November 2015) UN Doc CCPR/C/115/D/2626/2015, para 4.2.

68 *JM v The Netherlands*, Communication 768/2016, UNCAT Committee (12 June 2019) UN Doc CAT/C/66/D/768/2016, *Jl v The Netherlands*, Communication 771/2016 (11 June 2019) CAT/C/66/D/771/2016.



## Conclusion

This chapter has showed that the domestic impact of UN views continues to suffer from the standard weaknesses seminally identified by Heyns and Viljoen. The judgment-like, or quasi-judicial nature of views, however, also offer distinct opportunities for impact, understood both as direct and indirect impact. Specifically, the views of UN treaty bodies are capable of generating distinct opportunities for impact. Views connect the remote structures of Geneva to the victims of human rights violations. They in turn are capable of receiving more attention in domestic contexts due to their ability to put a human face to UN human rights law and violations. In addition, UN views more easily garner the attention of domestic judiciaries, precisely because of the ways in which they are capable of creating specific feedback loops for impact. Individuals return to domestic courts to obtain remedies and require them to directly engage with such views and their consequences. While domestic courts in different countries continue to resist the implementation of UN views based on their non-binding legal status, there is now evidence showing that domestic courts around the world are also capable of clarifying the domestic legal status of UN views, drawing on resources from constitutional and public law interpretation. In this respect, the proliferation of UN views from nearly all of the UN human rights treaty bodies addressing a truly global audience is in the process of generating a new field of comparative constitutional and public law. The precedents created by the treatment of UN views by domestic courts across the world offers opportunities for comparative judicial dialogues amongst courts, making it more costly to ignore such views.

All of this is not to say that the original findings of Heyns and Viljoen in 2001, and subsequently others, that there is no significant and routine impact when seen from a global perspective, is fundamentally altered. However, it should be emphasised that the UN views and the specific interfaces they have created with domestic and international compliance audiences have become more dominant features of the UN human rights law architecture in particular in the last two decades. The significant trend of states opting into UN individual complaints mechanisms, and in turn the volume of UN views holding states accountable across the globe, both with respect to states that are parties to regional human rights courts and those that are not, have given a new impetus to the efforts towards the positive impact of UN human rights treaties on the lives of individuals.

What is clearly needed to further enhance the impact of UN views is creating more awareness and knowledge about them, not only

with respect to the procedural and substantive aspects of how these views contribute to the interpretation of UN human rights law, but also concerning the domestic pathways through which they become impactful. The latter, in turn, requires scholars of UN human rights law to focus further attention to the comparative reception of UN views in domestic legal contexts with a view to amplifying best practices and enhancing their ability to harness impact by way of comparative learning.