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Kanetake, M.; Nollkaemper, A.

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THE APPLICATION OF INFORMAL INTERNATIONAL INSTRUMENTS BEFORE DOMESTIC COURTS

MACHIKO KANETAKE* & ANDRÉ NOLLKAEMPER**

ABSTRACT

The rigidity associated with formal international law has induced states and international organizations to resort to declarations, comments, guidelines, and other "informal" international instruments. Despite their informality, many of these nontreaty instruments have prompted actions at the domestic level, including before domestic courts. This Article analyzes on what basis domestic courts apply informal international instruments. Given that the "bindingness" is not always available as an explanatory factor, the normative basis for giving effect to informal instruments has to be found in the persuasiveness of instruments. Yet, what makes a particular instrument persuasive in the eyes of a domestic court remains unclear. The uncertainty in the notion of persuasiveness on the one hand empowers domestic courts in the development of international norms. On the other hand, the uncertainty renders unstable the legitimacy of judicial engagement and generates the varied judicial amenability to informal international instruments.

I. INTRODUCTION

A rigid treaty making process has induced international organizations, treaty monitoring bodies, nonofficial gatherings of states, and transnational private organizations to adopt a voluminous number of international instruments, which are neither part of treaties nor of customary international law.[1] As an example, the

* Lecturer in Public International Law, Utrecht University; Visiting Fellow 2014–2015, Human Rights Program, Harvard Law School. Ph.D. 2011, Kyoto University; LL.M. 2007, London School of Economics and Political Science; M.A. 2004, University of Sheffield; B.A. 2002, Aoyama Gakuin University.

** Professor of Public International Law, University of Amsterdam. Ph.D. 1993, University of Utrecht; LL.M. 1988, Erasmus University Rotterdam; M.A. 1987, Erasmus University Rotterdam. This Article is written within the framework of two research projects: (1) Informal International Law-Making (IN-LAW) sponsored by the Hague Institute for the Internationalization of Law (HiiL), and (2) the "Interfaces Between National and International Legal Orders" project conducted at the Amsterdam Center for International Law (ACIL). The authors thank Aristotelis Constantinides, Elaine Fahey, Martijn W. Hesselink, Hiromichi Matsuda, Joost Pauwelyn, Tim Staal, Eljalill Tauschinsky, René Urueña, Ingo Venzke, Ramses A. Wessel, and Jan Wouters for their helpful comments on earlier versions of this Article.

1. The use of nontreaty instruments is by no means a new phenomenon. Agreements of doubtful legal intention as a form of gentlemen's agreements have been con-

U.N. Human Rights Committee, established under the International Covenant on Civil and Political Rights (ICCPR), adopted thirty-four General Comments from 1981 to 2011, 964 "Views" for individual communications under the Optional Protocol from 1977 to March 2013,[2] and numerous reports addressed to individual states.[3] Other human rights treaty bodies, such as the Committee Against Torture and the Committee on the Elimination of All Forms of Racial Discrimination, have also publicized their comments, views, and reports.[4] In addition, the U.N. endorsed Kimberly Process Certification Scheme was jointly created by governments, the international diamond industry, and civil society organizations.[5] Nontreaty instruments are thus prevalent in a wide range of subject matters of international regulation, including finance, environment, and safety standards.[6]

Many of these nontreaty instruments are adopted with the expectation that *national* organs should take certain actions in the *domestic* legal order. For instance, the Representative of the U.N. Secretary General drafted the "Guiding Principles on Internal Dis-

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cluded since at least the late nineteenth century. *See* Jan Klabbers, *International Courts and Informal International Law*, *in* INFORMAL INTERNATIONAL LAWMAKING 219, 223 (Joost Pauwelyn et al. eds., 2012).

2. *See* U.N. G.A. Rep. of the Human Rights Comm., Volume I: 105th Sess. (July 9–27, 2012), 106th Sess. (Oct. 15–Nov. 2, 2012), 107th Sess. (Mar. 11–28, 2013), para. 126, U.N. Doc. A/68/40; GAOR, 68th Sess., Supp. No. 40 (2013). For the international and national legal status of the decisions of the U.N. Human Rights Committee, see generally Rosanne van Alebeek & André Nollkaemper, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 356 (Helen Keller & Geir Ulfstein eds., 2012) (discussing the legal status of treaty body decisions in domestic courts). The Human Rights Committee's views and interim measures are generally considered by states as nonbinding at the international level. *See id.* at 372–73, 385–90.

3. The Human Rights Committee adopts "Concluding Observations" addressed to a particular state after the consideration of its state report. Concluding Observations are available at *Treaty Bodies Search*, UN HUM. RTS.: OFF. HIGH COMMISSIONER FOR HUM. RTS., http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx (last visited Sept. 12, 2014) (check box "Concluding observations" in "Filter by Document Type"). The practice of separating General Comments (for all members) and Concluding Observations (for a particular member) started at the Human Rights Committee, which was followed by other monitoring bodies. Nisuke Ando, *General Comments/Recommendations*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., para. 12 (Nov. 2008), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1730? (last visited Sept. 12, 2014).

4. U.N. human rights treaty monitoring bodies' comments, views, and reports are available at *Human Rights Bodies*, UN HUM. RTS.: OFF. HIGH COMMISSIONER FOR HUM. RTS., http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?/Lang=EN (last visited Sept. 12, 2014).

5. *The Kimberly Process (KP)*, KIMBERLY PROCESS, http://www.kimberleyprocess.com (last visited Sept. 12, 2014).

6. *See, e.g.*, Klabbers, *supra* note 1.

placement" to guide all national authorities toward the provision of protection and assistance to the internally displaced.[7] When the U.N. Human Rights Committee adopts its "Views," it expects that national authorities will provide a remedy to the persons who successfully petitioned it.[8] In another example, the Conference of Parties to the U.N. Framework Convention on Climate Change reaches political agreements so that domestic measures should be taken to phase out emissions by carbon dioxide.[9] And the Kimberley Process Certification Scheme envisages that uncertified trade in diamonds would not be permitted under domestic administrative procedures.[10]

The aim of this Article is to assess whether and on what basis domestic organs respond to the international expectation to realize nontreaty instruments at the domestic level. Among the domestic organs, this Article will focus on the responses made by domestic *courts*. The choice of judicial bodies is due to the ostensible mismatch between the *formality*-based authority of domestic courts on the one hand and *informal* international instruments on the other.[11] As contrasted with political bodies, which have more liberty to domestically "incorporate" and apply nontreaty instruments, the standard account on the authority of judicial organs suggests that they are empowered to apply those laws to which the state has formally consented internationally and formally given effect under domestic law. Such a formality-based understanding

7. U.N. Econ. & Soc. Council, *Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General*, para. 3, U.N. Doc. E/CN.4/1998/53/Add.2; Comm'n on Human Rights, 54th Sess. (Feb. 11, 1998).

8. The U.N. Human Rights Committee anticipates a state party will respect the committee's Views because of a general obligation to provide an effective remedy under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and the obligation to act in good faith. *See* ICCPR: General Comment No. 33: The Obligations of State Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, paras. 14–15, U.N. Doc. CCPR/C/GC/33; Human Rights Comm., 94th Sess. (Nov. 5, 2008).

9. For instance, the Conference of Parties reached the legally nonbinding Copenhagen Accord in 2009 with the expectation that parties would implement emissions targets or mitigation actions. *See* U.N. Framework Convention on Climate Change, Report of the Conf. of the Parties on its 115th Sess., Dec. 7–19, 2009, Copenhagen Accord, Decision 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010); *see also* Daniel Bodansky, *The Copenhagen Climate Change Conference: A Postmortem*, 104 AM. J. INT'L L. 230 (2010).

10. *See The Kimberly Process (KP)*, *supra* note 5.

11. The term "authority" is used here as the (legal) authority of courts as *actors*, as opposed to the authority of *instruments*. In contrast, persuasive "authority"—which appears in Part IV below—uses the term "authority" (or authorities) for *instruments*, as analogous to a basis for judicial decisions. The authority of courts and the nature of instruments are inseparable; the authority of courts to apply certain instruments for their judgments is justified by the bindingness of those instruments. *See infra* Parts III, IV.

about the authority of domestic courts provides national courts with domestic political legitimacy for their decisions vis-à-vis litigants and more broadly legislative bodies. Should an informal international instrument be widely present in the legal reasoning of national courts, this would lead us to reconsider political footings for domestic courts' practice in a way not entirely dependent on the domestic political branches' formal consent and approval.

Part II of this Article begins by articulating the meaning of "informal" instruments and the normative position of domestic courts vis-à-vis those instruments. A survey of domestic court decisions[12] reveals that informal international instruments permeate into the legal reasoning of national courts.[13] The focus of this Article is to unveil on what basis domestic courts apply[14] informal international instruments.[15]

While courts may be obligated to engage with nontreaty instruments,[16] judges more frequently invoke informal international instruments for the *persuasiveness* of such instruments.[17] What constitutes persuasiveness is by no means certain and largely left to the discretion of judges. The uncertainty in the normative basis of judicial practices provides domestic courts with an opportunity to invoke informal instruments without any clear-cut constraints. At the same time, this uncertainty cautions some courts and judges in their engagement with informal international instruments.[18]

This Article is related to two wider sets of international legal studies. On the one hand, it is part of the engagement of international legal scholarship since the 1950s to unveil the regulatory

12. We have collected relevant cases reported in the International Law in Domestic Courts (ILDC), http://opil.ouplaw.com/home/oril (last visited Sept. 1, 2014), and International Law Reports (ILR). With respect to the findings of human rights treaty monitoring bodies, the International Law Association's Committee on International Human Rights Law and Practice (1997–2008) assembled and analyzed an extensive body of court decisions. *See* INT'L LAW ASS'N, FINAL REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES (2004).

13. *See infra* Part II.B.

14. In this Article, the term "application" includes not only the use of an instrument as a legal basis for courts' final findings but also the use of the instrument as an interpretive guide. We use the terms "to apply" and "to give effect" interchangeably for the purpose of this Article.

15. For the concept of "formality" and "informality," see *infra* Part II.A. For the analysis of *domestic* informal instruments, including their effect before domestic courts, see generally Alexandre Flückiger, *Keeping Domestic Soft Law Accountable: Towards a Gradual Formalization*, *in* INFORMAL INTERNATIONAL LAWMAKING, *supra* note 1, at 409.

16. *Infra* Part III.

17. *Infra* Part IV.

18. *Infra* Parts V, VI.

role of informal international instruments.[19] A major area of investigation has been "soft" law,[20] followed by studies on transgovernmental networks[21] and informal international law making.[22] The increased international importance of informal instruments has forced international legal scholarship to broaden its perspectives and look beyond traditional formality. This Article's study is part of that movement.

On the other hand, our analysis is adjacent to studies on consistent interpretation[23] and interjudicial communications.[24] This Article does not address these types of interpretative practices, but these practices may likewise involve the application of informal instruments.[25] As to consistent interpretation, courts, in construing domestic law, may refer to treaties that their forum states have not yet ratified.[26] As to interjudicial communications, foreign and

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19. International legal studies were not willing to engage in the analysis of those instruments until the 1950s. *See* Klabbers, *supra* note 1 at 219–20.

20. There is voluminous literature on soft law. *See* Joost Pauwelyn, *Is It International Law or Not, and Does It Even Matter?*, *in* INFORMAL INTERNATIONAL LAWMAKING, *supra* note 1, at 125, 127–31. The normativity of international instruments varies significantly. *See* Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J., 1865, 1884–90 (2008) (identifying the parameters with which to classify standard instruments adopted by international institutions).

21. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

22. For the overview of informal international law making (IN-LAW) project, see Joost Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions*, *in* INFORMAL INTERNATIONAL LAWMAKING, *supra* note 1, at 13. As elucidated by Pauwelyn, cross-border cooperation between "public" authorities qualifies as IN-LAW if it features one of the following informalities: process informality, actor informality, and output informality. *Id.* at 15–20.

23. *See, e.g.*, ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 139–65 (2011).

24. *See, e.g.*, Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Christopher A. Whytock, *Transnational Judicial Governance*, 2 ST. JOHN'S J. INT'L & COMP. L. 55 (2012); Christopher A. Whytock, *Foreign Law in Domestic Courts: Different Uses, Different Implications*, *in* GLOBALIZING JUSTICE: CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS 45 (Donald W. Jackson et al. eds., 2010); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009). While the use of foreign law is by no means new, domestic courts increasingly learn from each other, and transjudicial communications are becoming much more interactive. *See* Aristoteles Constantinides, *Transjudicial Dialogue and Consistency in Human Rights Jurisprudence: A Case Study on Diplomatic Assurances Against Torture*, *in* THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 267, 270–71 (Ole Kristian Fauchald & André Nollkaemper eds., 2012).

25. For the concept of "formality" and "informality," see *infra* Part II.A.

26. *See* NOLLKAEMPER, *supra* note 23, at 139–65.

international decisions are also informal unless they are given formal legal effect by domestic law. The practices of consistent interpretation and interjudicial communications have therefore triggered the same questions as those examined in this study: how precisely and on what basis do domestic courts refer to external rules and decisions, and why are some courts more willing to engage in outside materials while others are not. By addressing these questions, this Article provides feedback to the analysis of consistent interpretation and interjudicial communications.

II. INTERNATIONAL INFORMAL INSTRUMENTS BEFORE DOMESTIC COURTS

A. *International and Domestic Formality vis-à-vis Domestic Courts*

The term "formality" is one of the multifaceted lexicons defined in legal, practical, and conceptual terms.[27] Here, this Article uses the term in a narrowly defined *legal* sense. It denotes the legal rules determining that an instrument, standard, or norm is *legally binding*[28] within a particular political community. Under international law, such legal rules determine whether an instrument qualifies as one of the sources of international law—notably treaties,

27. "Formality" can be defined in many different ways, including the following: (1) a (narrowly defined) *legal* sense, meaning certain legal requirements (and the conformity to them); (2) a *practical* sense, denoting procedures, forms, or rituals; and (3) a *conceptual* sense, signifying determinacy or certainty. The difference between the legal and practical notion of "formality" is illustrated by the status of customary international law; while customary international law meets the formality in a legal sense, custom arises from a non-procedural manner and is therefore considered "informal" from a practical point of view. For the conceptual use of the term, see, for example, JEAN D' ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES (2011).

28. While the notion of legal bindingness itself gives rise to meta-level issues as to what signifies law and its binding nature, this Article does not analyze those issues. The notion of "bindingness" in this Article is, however, different from (1) imperativity and (2) judicial enforceability.

(1) For instance, a treaty is officially binding under international law, but its specific provisions do not always make it imperative to do (or not to do) something. The provisions may be only hortatory. *See* Pauwelyn, *supra* note 20, at 125–26. The imperative nature of specific treaty provisions may also appear at domestic courts. *See, e.g.*, Commonwealth v Tasmania (1983) 46 ALR 625 (Austl.) (regarding the question of whether the terms of the treaty were sufficiently precise to create any binding obligations that could be implemented by legislation); C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 863–64 (1989).

(2) Also, even if a provision becomes binding in the sense that it has legal force within a particular community, it does not necessarily mean that the provision is judicially enforceable. For instance, in monist states, a treaty may have domestic legal force upon ratification, but this does not mean that the treaty provisions are enforceable before the domestic courts.

custom, and general principles.[29] The definition of "informal" instruments here is in the same line as the definition adopted by Aust in his 1986 paper, where he distinguishes on whether an instrument is legally binding.[30]

Domestic courts are circumscribed by the formality/informality distinction at both the international and national levels. The focus of this Article is on the occasions where domestic courts confront international instruments that meet neither the international nor the domestic test for formality. Among such instruments, this Article focuses on instruments promulgated by treaty monitoring bodies (e.g., the General Comments issued by the Human Rights Committee for the ICCPR), international organizations (e.g., U.N. General Assembly resolutions), and intergovernmental forums (e.g., documents adopted by the Organisation for Economic Co-operation and Development (OECD)). Although foreign law and judgments can be treated as "informal" instruments vis-à-vis a domestic court, this Article does not include foreign law judgments in the scope of this present analysis.[31] Likewise, this Article does not focus on standards and documents adopted by transnational nongovernmental entities, such as global industry associations.[32]

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29. Statute of the International Court of Justice, 2007 I.C.J. Acts & Docs. 59, art. 38(1)(a). The question of whether the sources laid down in Article 38(1) exhaust the rules that render a norm binding under international law is beyond the scope of this Article. *See, e.g.*, Pauwelyn, *supra* note 20.

30. Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787, 787 (1986) ("'[I]nformal instrument' means an instrument which is not a treaty because the parties to it do not intend it to be legally binding.").

31. National courts have been actively cross-referring to each other's judicial practices. *See, e.g.*, Slaughter, *supra* note 24 (discussing transnational litigation in national courts); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (cross-citation in national legal systems); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 515 (2003) (relationship between national courts of various states); Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 AM. SOC'Y INT'L L. PROC. 465 (2010) (transnational judicial dialogue); Whytock, *Foreign Law in Domestic Courts: Different Uses, Different Implications*, *supra* note 24 (use of foreign law in domestic courts). Possible "norms" created by transjudicial communications can be more appropriately characterized as "dialectural regulation." *See* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2034 (2004).

32. Transnational standards, such as industry standards, have been invoked for the interpretation of domestic law, and national courts are faced with the questions of whether and how they weigh those private standards. Benedict Kingsbury, *Global Administrative Law: Implications for National Courts*, *in* SEEING THE WORLD WHOLE: ESSAYS IN HONOUR OF SIR KENNETH KEITH 101, 108 (Claudia Geiringer & Dean R. Knight eds., 2008). For example, in Smith v Air N.Z. Ltd. [2011] 2 NZLR 171 (CA) (N.Z.), a flight passenger with limited lung capacity claimed that Air New Zealand violated the Human Rights Act by requiring her to arrange and pay for her in-flight oxygen support. *Smith v Air N.Z. Ltd.*, para. 95. To determine whether Air New Zealand could rely on an exception to the Act, the New Zea-

The normative position of domestic courts examined in this Article is, in principle, fragile. This is highlighted by three other scenarios in which the authority of domestic courts can be justified by either a domestic or an international test for formality.

First, national courts have no difficulty in applying declarations and standards that are informal under international law but nevertheless meet the *domestic* formality.[33] For instance, the Kenyan High Court in *Nabori v. Attorney General* relied on the 1973 *Stockholm Declaration on the Human Environment*[34] and the 1992 *Rio Declaration on Environment and Development*[35] simply on the basis that those documents were domesticated under the country's National Environmental Management Co-ordination Act of 1999.[36] Similarly, the Israeli Supreme Court in *A.I.M.D. Ltd.* reviewed and interpreted the *Kimberly Process Certification Scheme*, which formed part of the Free Import Order of 2006.[37] Although the problem of domestic justification arises with regard to these "incorporated" declarations and schemes, it does so not before domestic judicial venues but rather before the *legislative body* that absorbed the nontreaty documents into domestic law in the first place.

Second, national courts may resort to international instruments that meet the *international* formality only (and as such could not be

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land courts took "into account" international industry standards, which were by no means conclusive but part of the variables in construing the "reasonableness" in this particular case. *Id.*

33. The domestic "incorporation" of international safety regulation on industrial products illustrates this. *See, e.g.*, Ina Verzivolli, *The Domestic Effectiveness of the International Code of Marketing of Breastmilk Substitutes, in* INFORMAL INTERNATIONAL LAWMAKING: CASE STUDIES 435 (Ayelet Berman ed., 2012) (the domestic law status and implementation of the International Code of Marketing of Breastmilk Substitutes adopted by the World Health Organization (WHO) and the U.N. Children's Fund (UNICEF)). Here, we envisage those cases in which an instrument itself becomes "binding" at the domestic level. Yet, in practice, the manner in which informal instruments are given certain domestic effect by enabling legislation is more nuanced. The procedural effect given by domestic legislation concerning the Views adopted by the Human Rights Committee is a good example. Some countries have legislation under which the Views of the Human Rights Committee may reopen a case at the domestic level, even if the legislation does not render the Views themselves binding. *See* van Alebeek & Nollkaemper, *supra* note 2, at 362–67.

34. United Nations Conference on the Human Environment, Stockholm, June 5–16, 1972, U.N. Doc A/CONF.48/14/Rev.1.

35. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc A/CONF.151/26/Rev.1 (Vol. I).

36. Nabori v. Attorney General, (2007) 2 K.L.R. 331, 336, 419 (H.C.K.) (Kenya).

37. *See* HCJ 909/08 A.I.M.D. Ltd. v. Mordechai [2009] Isr. L. Rep. 593, paras. 9, 27. In *A.I.M.D. Ltd.*, the Israeli Supreme Court considered whether the administrative bodies had discretion regarding the expropriation of uncertified diamonds under the Kimberly Process Certification Scheme. *Id.*

referred as informal international instruments). An unincorporated treaty in dualist states is a case in point. U.K. courts have addressed, from time to time, the question of whether and how they could apply unincorporated treaties in their decisions.[38]

Finally, domestic courts may engage with international instruments that satisfy the international formality in general but do *not* bind a *particular* state. In practice, we see examples where courts refer to treaties that their states have not ratified. Canadian courts, for instance, refer to the European Convention on Extradition and its jurisprudence—to which Canada cannot be a party—in interpreting the Canadian Charter.[39] The Peruvian Constitutional Court in *EMERGIA SA* regarded the U.N. Convention on the Law of the Sea as part of "soft law" vis-à-vis Peru, given that Peru had yet to sign the convention.[40]

These three scenarios are contrasted with the Article's focus, namely, the application of international instruments that are informal both internationally and nationally. Unlike the three scenarios mentioned above, the authority of domestic courts is endowed with neither international nor domestic formality. Even though the formality per se does not always suffice in securing the political legitimacy of international instruments at the domestic level, the judicial application of declarations, comments, guidelines, and so forth, would need to be supported by factors *other than* domestic political branches' formal consent and approval.

In practice, whether a particular international instrument is informal is not always clear, and this ambiguity itself paves the way for judicial engagement with informal instruments. There are indeed some examples in which courts have stretched the scope of

38. For the treatment of unincorporated treaties before the U.K. courts, see, for example, R v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [43]–[44], [62]–[68] (appeal taken from Eng.) (opinion of Lord Bingham noting that it is at least questionable that the court would or should undertake the interpretation of unincorporated treaty provisions; opinion of Lord Brown suggesting that the compelling reasons might be required for a court to decide on the questions of unincorporated international law); Ecuador v. Occidental Exploration & Prod. Co., [2005] EWCA (Civ) 1116, [2006] All E.R. 225 (Eng.) (giving effect to a 1993 Bilateral Investment Treaty between the United States and Ecuador, which is an unincorporated treaty); *see also* Katherine Reece Thomas, *The Changing Status of International Law in English Domestic Law*, 53 NETHER. INT'L L. REV. 371 (2006) (reviewing the use of unincorporated treaties in recent English cases).

39. *See, e.g.*, Minister of Justice v. Burns, [2001] S.C.R. 283 (Can.); Mike Madden, *Comparative Cherry-Picking in a Military Justice Context: The Misplaced Quest to Give Universally Expansive Meaning to International Human Rights*, 46 GEO. WASH. INT'L L. REV. 713 (2014).

40. Tribunal Constitucional [TC] [Constitutional Court], 20 enero 2006, "EMERGIA SA v. Ministry of Economy & Finance," Case No. 2689-2004-AA/TC, para. 9 of concurring opinion of Judge Landa Arroyo (Peru).

treaty instruments. For example, the Karnataka High Court of India in *CRV Committee, SLSRC College of Law v. India* treated the Gleneagles Agreement adopted by the Commonwealth Heads of Government Meeting in 1977 as an international treaty.[41] In the Japanese case of *Nishimatsu Construction Company*, the Joint Communiqué of the Government of Japan and the Government of the People's Republic of China signed in 1972 was considered a treaty even though the Diet in Japan had not given the Joint Communiqué such status.[42] The characterization of apparently informal documents as treaties may simply be due to the misunderstanding of international law by domestic judges; however, it may also be a strategy for courts to bypass questions demanding the basis for their decisions. In turn, the deliberate attempts to stretch the notion of a treaty evidence the judges' recognition that they have questions to answer if they engage in the explicit application of informal instruments.

B. *Domestic Courts' Engagement with Informal Instruments*

From the limited study of court decisions, we witnessed that informal international instruments adopted by treaty monitoring bodies, international organizations, and intergovernmental forums have been widely invoked by national judges.[43]

A common denominator is that informal instruments, in principle, only assume ancillary presence before the courts. Courts invoke declarations and comments, not as an independent and freestanding basis of decisions but to supplement the construction of formal law. While litigants attempted to use informal instruments as an autonomous legal basis for judicial decisions (namely, as the basis against which the wrongfulness of acts or the legality of law is ultimately decided), domestic courts have, not surprisingly, rejected such attempts.[44]

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41. Civil Rights Vigilance Committee, SLSRC College of Law v. India, A.I.R. 1983 (Kar.) 85; *see* Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 174–75 (1996).

42. *See* Saiko Saibansho [Sup. Ct.] Apr. 27, 2007, 61 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 3 (Japan) (The Nishimatsu Construction Case).

43. For an overview of relevant cases, see Machiko Kanetake, *International Law in Domestic Courts: Soft Law, in* CASEBOOK ON INTERNATIONAL LAW IN DOMESTIC COURTS (André Nollkaemper & Edda Kristjansdottir eds.) (forthcoming).

44. For instance, the U.S. District Court in *Carter v. Pennsylvania Department of Corrections* rejected the claim that the rights under the Universal Declaration of Human Rights (*Declaration*) and the Body of Principles for the Protection of All Persons Under Any Form of Detention of Imprisonment (*Basic Principles*) were violated. Civil Action No. 08-0279, 2008 WL 5250433, at *3 (E.D. Pa. Dec. 17, 2008). The court observed that the *Declaration*

National judges have employed informal international instruments to supplement the interpretation of customary international law or, more commonly, international treaties. A typical example is the use of general comments and recommendations adopted by the U.N. human rights treaty monitoring bodies for the interpretation of relevant human rights treaties.[45] For instance, the High Court of Delhi in *Mandal* cited General Comment No. 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to construe the meaning of the right to health under the ICESCR ratified by India.[46] The Constitutional Court of Peru in *Cuzco Bar Association* cited General Comment No. 3 of the ICESCR and the "principle of progressivity" explained in the general comment to show how Article 2(1) of the ICESCR regarding economic and social rights is interpreted.[47] In a similar vein, the Kenyan High Court in *RM* resorted to General Comment No. 18 of

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and the *Basic Principles*, which are not treaties, do not *of their own force* impose obligations as a matter of international law. *Id.* In *Feller v. Indymac Mortgage Services*, the plaintiff argued that the American General Financial Services committed BASEL III accord violations. No. 09-5720 RJB, 2010 WL 342187, at *3 (W.D. Wash. Jan. 26, 2010). The U.S. District Court dismissed this claim, as the United States was not even a signatory to the BASEL III. *Id.* (observing that the plaintiff's claim "appears not to provide a legal bases"). In *People's Union for Civil Liberties*, the petitioner relied on the Principles Relating to the Status of National Institution (Paris Principles) endorsed by a U.N. General Assembly resolution and alleged that the appointment of a former police officer as a member of the National Human Rights Commission violated international covenants. People's Union for Civil Liberties v. India, A.I.R. 2005 S.C. 2419, para. 18. The court noted that neither the Paris Principles nor the subsequent U.N. General Assembly resolution is legally binding on India. *Id.* The court criticized the earlier decision in which a judge (Hon'ble Sabharwal, J.) treated the Paris Principles and the U.N. General Assembly resolution as if they were legally binding. *Id.* paras. 17–19. *Cf.* People's Union for Civil liberties v. Union of India, (2005) 2 S.C.C. 436. Also, the Irish Supreme Court in *Kavanagh* observed that the view of the Human Rights Committee could not "prevail" against the concluded decision of a properly constituted court. Kavanagh v. Governor of Mountjoy Prison, [2002] 3 I.R. 97, para. 20 (Ir.). The argument based upon legitimate expectation was likewise rejected. *Id.* paras. 21–27.

45. For the collection and analysis of domestic court decisions, see INT'L LAW ASS'N, *supra* note 12, at 7–12, 43; Machiko Kanetake, *Domestic Courts' Engagement with UN Human Rights Treaty Monitoring Bodies: A Thematic Report for the ILA Study Group on Principles on the Engagement of Domestic Courts with International Law* 1–2 (Amsterdam Center for International Law, Research Paper No. 5, 2014). The ILA committee observed in 2004 that the outputs of human rights treaty bodies had become a relevant interpretative source for many national courts. *See* INT'L LAW ASS'N, *supra* note 12.

46. Laxmi Mandal v. Deen Dayal Harinagar Hospital, (2010) W.P.(C), Nos. 8853/2008, and 10700/2009, para. 23 (India).

47. Tribunal Constitucional [TC] [Constitutional Court], 15 junio 2005 "Cuzco Bar Association v. Congress of the Republic, Original petition" Case No. 050-2004-A1/TC, ILDC 679, paras. 49, 87–88 (Peru). Having further interpreted General Comment No. 3 along with the fundamental principles of the constitution, the Peruvian Court found that the state was not violating the principle of progressivity. *Id.*

the ICCPR to show the internationally accepted meaning of discrimination.[48] General comments have guided interpretation even when a state was not a party to a relevant human rights treaty. This was the case in *Jaftha v. Schoeman*, in which the Constitutional Court of South Africa sought guidance on the meaning of the right to adequate housing from Article 11(1) of the ICESCR as well as its General Comment No. 4, notwithstanding that South Africa had signed but was yet to ratify the ICESCR.[49]

These informal instruments—which supplement treaty interpretation—are often ultimately used for the construction of formal domestic law, which is interpreted consistently with international law. This apparently holds true in dualist states. For instance, the Canadian Supreme Court in *Suresh* referred to the position of the U.N. Committee Against Torture[50] and to the Committee's country-specific report[51] in order to interpret the U.N. Convention on Torture, which, in turn, informed the construction of the Canadian Constitution.[52] The Supreme Court of British Columbia

48. RM v. Attorney-General, (2006) 143 ILR 299 (Kenya). In this case, the applicant claimed that the Kenyan domestic law that bestowed parental responsibility for children born out of wedlock on only the "mother" was discriminatory. *Id.* The Kenyan High Court dismissed the claim and upheld the compatibility of domestic law with international instruments. *Id.* The court observed that such restrictive understanding where no distinctions are acceptable is supported neither by member states' practice nor by the "monitoring bodies." *Id.* at 324. Largely based on General Comment No. 18, the Kenyan High Court concluded that "[i]t is therefore an accepted international principle of law that differentiation based on reasonable and objective criteria does not amount to prohibited discrimination." *Id.* at 325 (original emphasis omitted). *See also, e.g.*, A. v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] A.C. 68 (H.L.) (appeal taken from Eng.) (concerning the General Comments of the Human Rights Committee for the ICCPR).

49. Jaftha v. Schoeman 2005 (2) SA 140 (CC) at 152–53 paras. 23–24 n.29 (S. Afr.).

50. The Canadian Supreme Court drew on the general point that the U.N. Committee Against Torture "has applied Article 3(1) even to individuals who have terrorist associations." Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 44.

51. The committee's report advised that "Canada should '[c]omply fully with article 3(1) [on the prohibition of expelling or extradition in danger of torture] . . . whether or not the individual is a serious criminal or security risk.'" *Id.* (quoting Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: Canada, CAT/C/XXV/Concl.4, para. 6(a)). Having considered the treaty provisions, the positions of the treaty body, and foreign decisions, the Canadian Supreme Court concluded that a "better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*." *Id.* at 45.

52. *Id.* at 11–12, 40–41. In *Suresh*, the Canadian Supreme Court encountered the question of the constitutionality of the order to deport an appellant, a Tamil from Sri Lanka, who alleged that, if deported, he would face a serious risk of being tortured. *Id.* The deportation order was based on his alleged association with the Liberation Tamil Tigers of Eelam (LTTE), which engaged in terrorism. *Id.* The Supreme Court invoked both the ICCPR and the U.N. Torture Convention to inform the content of the Canadian Charter (Section 7). *Id.* For the ICCPR, given that the relevant provisions (Articles 4 and

(Canada) in *Victoria (City) v. Adams*[53] interpreted the scope of Section 7 of the Canadian Charter with reference not only to Article 11(1) of the ICESCR but also to General Comment No. 4 on Article 11(1) of the ICESCR and the Habitat II's *Habitat Agenda*.[54] The Australian Federal Court in *Commonwealth v. Human Rights and Equal Opportunity Commission* resorted to the 1996 report issued by the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations[55] to construe the meaning of "discrimination" under the 1958 Discrimination (Employment and Occupation) Convention and the domestic implementing legislation.[56]

Despite the ancillary use, informal instruments do influence the outcome of decisions. The degree of impact varies based on the weight accorded to comments, declarations, guidelines, and other informal instruments in each case. Domestic courts often attribute confirmatory value to these informal instruments (or to international law construed by the instruments). For example, in the Canadian Supreme Court decision of *Spraytech*,[57] Judge L'Heureux-Dubé, for the majority, employed Paragraph 7 of the 1990 Bergen Ministerial Declaration on Sustainable Development[58] to give

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7) of the ICCPR do not specifically address the permissibility of a state's expelling a person to face torture, the court has invoked General Comment No. 20. *Id.* General Comment No. 20 makes clear that Article 7 (the prohibition of torture) of the ICCPR is intended to cover the scenario to expel a person to face torture. *Id.* It provides that "States parties must not expose individuals to the danger of torture . . . upon return to another country by way of their extradition, expulsion or refoulement." *Id.* at 41.

53. Victoria (City) v. Adams (2008), 88 B.C.L.R. 4th 116, paras. 85–90, 95, 239 (Can. B.C. Sup. Ct.). In *Victoria*, the Supreme Court of British Columbia held that a bylaw enacted by the City of Victoria in British Columbia, which prohibited homeless people from erecting or taking up temporary shelter in a public park, contravened the right to life, liberty, and security of the person under § 7 of the Canadian Charter of Rights and Freedoms. *Id.* In interpreting the scope of § 7, the Court invoked a range of international instruments. *Id.* While this case was brought up on appeal, the reference to these international instruments was not disputed. Victoria (City) v. Adams (2009), 100 B.C.L.R. 4th 28, para. 35 (Can. B.C. Ct. App.). The Court of Appeal observed that the use of an international instrument to aid in the interpretation of the meaning and scope of rights under the Canadian Charter is well established in Canadian jurisprudence. *See id.*

54. United Nations Conference on Human Settlements (Habitat II), Istanbul, Turk. June 3–14, 1996, *The Habitat Agenda: Goals and Principles, Commitments and Global Plan of Action*, U.N. Doc. A/CONF.165/L.6/Add.10 (June 14, 1996).

55. INT'L LABOUR OFFICE, EQUALITY IN EMPLOYMENT AND OCCUPATION (1996).

56. *See* Commonwealth v Hamilton (2001) 108 FCR 378, 387 (Austl.).

57. 114957 Canada Ltée v. Hudson, [2001] 2 S.C.R. 241, 241.

58. Bergen Ministerial Declaration on Sustainable Development in the ECE Region, para. 7, U.N. Doc. A/CONF.151/PC/10, Annex 1 (1990).

meaning to the precautionary principle.[59] In this case, the precautionary principle and the Bergen Ministerial Declaration, which gave meaning to the principle, were employed apparently in an ancillary fashion rather than as substantive guide for the interpretation of the statute.[60] In the South African case of *Jaftha v. Schoeman,* the South African Constitutional Court sought assistance from the ICESCR and its General Comment No. 4 to interpret the international concept of adequate housing and "reinforce" the domestic counterpart.[61]

On the other hand, informal international instruments have also injected new meanings into domestic treaty interpretation, constitutional provisions, and other domestic law, while bringing a material difference to judgments. In the Belgian case of *ADS a.o., Flemish League Against Cancer and Leo Leys,* for instance, the guidelines and decision adopted by the Conference of Parties had accorded substantive meaning to the constitutional right to health and led the Belgium Constitutional Court to uphold the stringent smoking ban in public places.[62]

Informal international instruments can also play a material role in developing the scope of constitutional rights in line with the development of international norms. For instance, the Colombian Constitutional Court has "incorporated," through a series of deci-

59. While Judge L'Heureux-Dubé did not make an unequivocal statement about the customary law status of the principle, the judge noted that a good argument can be made that the precautionary principle is a principle of customary international law. *114957 Canada Ltée,* [2001] S.C.R. at 267 (citing James Cameron & Juli Abouchar, *The Status of the Precautionary Principle in International Law, in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW 29, 52 (David Freestone & Ellen Hey eds., 1996)). The majority referred to international law on the basis that the legislation is presumed to respect the values and principles enshrined in international law. *Id.* at 266. Judge LeBel, for the minority, tried to confine the judicial reasoning to the construction of domestic law without reference to international sources. *See id.* at 276. However, the presumption that the legislation is consistent with international law applies to all statutes. Gibran van Ert, Commentary, *The Problems and Promise of* Spraytech v. Hudson, 39 CAN. Y.B. INT'L L. 371, 381 (2001).

60. *See 114957 Canada Ltée,* [2001] 2 S.C.R. at 266–76.

61. *See* Jaftha v. Schoeman 2005 (2) SA 140 (CC) at 144 para. 1, 152–53 paras. 23–25 (S. Afr.). In *Jaftha v. Schoeman,* the Constitutional Court of South Africa decided the question of whether a domestic law that permitted the sale in execution of people's homes to satisfy a debt violated the right to access adequate housing protected under the South African Constitution. *Id.* at 144 para. 1. Given that in South Africa, the court was constitutionally required to consider international law when interpreting the Bill of Rights, the court sought guidance on the meaning of the right to adequate housing from Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as General Comment No. 4. *Id.* at 152–53 paras. 23–24.

62. *See Cour Constitutionnelle* [*Constitutional Court*], *in* REVUE DE JURISPRUDENCE DE LIÈGE, MONS ET BRUXELLES [REVIEW OF JURISPRUDENCE OF LIÈGE, MONS AND BRUSSELS] 852, 853, 857–59, 861 (2011) (Belg.).

sions since 2000, the Guiding Principles on Internal Displacement[63]—the so-called Deng Principles—in their domestic legal system to broaden the scope of constitutional rights for internally displaced persons.[64] In another Colombian case decided in February 2013, the Colombian Constitutional Court substantively relied upon General Comment No. 15 of the ICESCR in instructing the government to guarantee the right to water.[65]

III. BINDINGNESS AS A BASIS FOR JUDICIAL ENGAGEMENT

The impact of informal instruments on the outcome of decisions and possibly wider domestic jurisprudence gives rise to the question: on what basis may domestic courts invoke a wide range of informal international instruments. A first and partial answer is that despite the informal nature of international rules, national courts may still find a basis in a notion of binding obligation.

A. *Bindingness of Instruments in Substance*

In one construction, the judicial engagement with informal international instruments is still based on binding legal rules. Here, two possible avenues can be distinguished. First, some instruments that appear to be informal could reflect, in substance, established customary law or the accepted interpretation of treaties.[66] In such cases, the judicial engagement with informal instruments would simply be understood as the application of formal international law. For instance, domestic courts have invoked U.N. General Assembly resolutions to provide evidence of a custom's existence. A typical example is the evidentiary use of the Universal Declaration of Human Rights, the large part of which reflects the

63. *Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General*, *supra* note 7.

64. For a detailed analysis, see Federico Guzmán Duque, *The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia*, *in* JUDICIAL PROTECTION OF INTERNALLY DISPLACED PERSONS: THE COLOMBIAN EXPERIENCE 175, 175 (Rodolfo Arango Rivadeneira ed., 2009).

65. Corte Constitucional [C.C.] [Constitutional Court], febrero 14, 2013, Sentencia T-077/13 (Colom.).

66. *See* Anthony Aust, *Domestic Consequences of Non-Treaty (Non-Conventional) Law-Making*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 487, 491–93 (Rüdiger Wolfrum & Volker Röben eds., 2005).

rules of customary international law.[67] For example, in *Filartiga*,[68] the U.S. Court of Appeals for the Second Circuit invoked the 1948 Universal Declaration of Human Rights[69] and the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture[70] in order to prove that customary international law prohibits torture.[71] Likewise, the Israeli Supreme Court in *Eichmann* invoked General Assembly Resolution 95(I),[72] which affirmed the Charter of the Nuremberg Tribunal as evidence of the customary law status of the Nuremberg principles.[73] Conversely, domestic courts utilize the U.N. General Assembly resolutions to *disprove* the existence of customary rules. For instance, the U.K. House of Lords in *European Roma Rights Centre* resorted to the 1948 Universal Declaration of

67. *See e.g.*, Tayazuddin v. Bangladesh, 21 BLD (HDC) (2001) 503, ILDC 479 (BD 2001) (applying Article 3 of the Universal Declaration of Human Rights); Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 563–65 paras. 99–105 (S. Afr.) (regarding Article 16); HCJ 4542/02 Kav LaOved Worker's Hotline v. Israel [2006] 1 ISR. L. REP. 260, 295 para. 35 (citing Article 23(1)). Yet, not all provisions of the Universal Declaration of Human Rights might have gained the status of customary international law. *See, e.g.*, Dem. Rep. Congo v. Dir. of Immigration, [2008] 2 H.K.C. 165, 202D (C.F.I.) (H.K.) (regarding Article 14(1) as a "proclamation of ethical values, rather than legal norms").

68. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). The *Filartiga* case concerns the victims of torture committed in Paraguay, who pursued civil remedies in U.S. courts under the Alien Tort Statute. *Id.* at 878–80. In *Filartiga*, the U.S. court invoked the U.N. General Assembly resolutions not only to prove custom but also to interpret its contents. *See id.*; *see also* Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980) (employing the Universal Declaration of Human Rights as interpretive aids for the Eighth Amendment to the U.S. Constitution, with reference to *Filartiga*).

69. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

70. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. Res. 30/3452 (XXX), U.N. Doc. A/RES/30/3452 (Dec. 9, 1975).

71. *Filartiga*, 630 F.2d at 890.

72. Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/RES/95(I) (Dec. 11, 1946).

73. CrimA 40/61 Attorney General v. Eichmann 36 I.L.R. 277 (1962) (Isr.). For other cases, see, for example, R. v. Finta, [1994] 1 S.C.R. 701 (Can.). Also, the First Instance of Brussels in *Re Pinochet* referred to U.N. General Assembly Resolution 3074 (1973) regarding the detention, arrest, extradition, and punishment of individuals guilty of war crimes and crimes against humanity to prove the existence of a rule of customary international law that recognizes permissive universal jurisdiction over crimes against humanity and authorizes national authorities to pursue and prosecute persons suspected of such crimes in all circumstances. Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Nov. 6, 1998, INT'L L. REPS. [ILR] 345, 347. *Cf.* In re Augosto Pinochet Ugarte, 119 I.L.R. 360 (Lux. Ct. App. 1999) (holding the opposite). G.A. Res. 3074 (XXVIII), para. 1, UN Doc. A/RES/3074(XXVIII) (Dec. 3, 1973) (proclaiming in Paragraph 1 of the Resolution that war crimes and crimes against humanity shall be subject to investigation "wherever they are committed").

Human Rights to deny the existence of a customary obligation to grant asylum.[74]

Apparently, not all U.N. General Assembly resolutions provide evidence of customary international law. Their provisions must be grounded in state practice and *opinio juris*.[75] In *Filartiga*, when the U.S. Court of Appeals for the Second Circuit observed that "a [U.N.] Declaration creates an expectation of adherence,"[76] the court did not seem to regard such expectation as sufficient to validate the invocation of the General Assembly resolution. The U.S. court made sure to observe that "*insofar as the expectation is gradually justified by State practice*, a declaration may by custom become recognized as laying down rules binding upon the States."[77] A large part of U.N. General Assembly resolutions likely would not be recognized as such. For instance, the Second Circuit in *Flores and Ors v. Southern Peru Copper Corporation*[78] contested the evidentiary use of the 1982 World Charter for Nature adopted by the General Assembly as well as some provisions of the Universal Declaration of Human Rights,[79] on the ground that the U.N. General Assembly resolutions invoked by the plaintiffs were not proper sources of customary law but "merely aspirational and were never intended to be binding on member States of the United Nations."[80] For informal rules adopted in other, less-representative forums than the General Assembly, the leap toward customary law is even more difficult.

Second, judicial reference to declarations and comments can be justified if such documents represent established treaty interpreta-

74. R (European Roma Rights Ctr.) v. Immigration Officer at Prague Airport, [2004] UKHL 55, [2005] 2 A.C. 1 (H.L.) (appeal taken from Eng.). In *European Roma Rights Centre*, one of the questions before the House of Lords concerned whether the rejection of Czech Rom's request for leave to enter the United Kingdom by British immigration officers posted at Prague Airport was contrary to customary international law. *Id.* at 6–8. In denying the obligation of states to grant asylum, Lord Bingham cited Article 14 of the Universal Declaration of Human Rights, observing that the drafters of the Declaration rejected a proposal that a right to asylum should be granted. *See id.* at 19.

75. These two are the necessary conditions for customary international law. *See, e.g.*, North Sea Continental Shelf (Ger./Den., Ger./Neth.), 1969 I.C.J. 3, paras. 76–82 (Feb. 2).

76. *Filartiga*, 630 F.2d at 883.

77. *Id.* (emphasis added) (quoting U.N. ESCOR, 18th Sess., Supp. No. 8, 15, 34 U.N. Doc. E/cn.4/1/610 (Apr. 2, 1962)).

78. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003).

79. Universal Declaration of Human Rights, *supra* note 69, arts. 3 (right to life), 25 (right to health); World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/RES/37/3 (Oct. 28, 1982).

80. *Flores*, 414 F.3d at 259. This case was not to leave out the evidentiary value of U.N. General Assembly resolutions in general. *See id.* at 261 (noting that the court's position is not inconsistent with *Filartiga*).

tion. Under international law, treaty interpretation can be developed through "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," as provided in Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[81] The Hong Kong Court of Appeal in *R v. Sin Yau-ming* noted that it would give "considerable weight" to the comments and decisions of the U.N. Human Rights Committee and the European Court of Human Rights jurisprudence "in so far as they reflect the interpretation of articles in the [ICCPR]" and are directly related to the domestic legislation.[82]

As with customary law, not all instruments reflect established treaty interpretation. For instance, one of the influential documents adopted by the U.N. High Commissioner for Refugees (UNHCR) is its *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, 1992).[83] The *Handbook* has been frequently referred to in British courts[84] and other jurisdictions to interpret the Refugee Convention and its implementing legislation. The Cyprus Supreme Court in *Sarmadi* extensively invoked the *Handbook* and the UNHCR *Guidelines*[85] in order to interpret the Refugee Convention implemented by national legislation.[86] Nevertheless, it

81. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331. The "subsequent practice" is not the practice of treaty bodies but the one that "establishes the agreement of the parties regarding its interpretation." *See* van Alebeek & Nollkaemper, *supra* note 2, at 409–10. Yet, uncertainties remain as to whether nonobjection to treaty bodies' opinions would suffice for the establishment of the agreement of the parties. *See id.*

82. R v. Sin Yau-ming, [1992] 1 H.K.L.R. 127 (C.A.) (H.K.).

83. U.N. High Comm'r for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/1P/4/Eng/Rev.2 (1979, reedited Jan. 1992)

84. *E.g.*, R v. Asfaw, [2008] UKHL 31, [2008] 1 A.C. 1061 (H.L.) [13] (appeal taken from Eng.); AH (Sudan) v. Sec'y of State for the Home Dep't, [2007] UKHL 49, [2008] 1 A.C. 678 (H.L.) 682–83 (appeal taken from Eng.). Also, in *European Roma Rights Centre*, Lord Bingham cited the UNHCR's *Handbook*, alongside the opinions of scholars, foreign decisions in Australia and the United States, and the drafting documents. R v. Immigration Officer at Prague Airport, [2004] UKHL 55, [2005] 2 A.C. 1 (H.L.) (appeal taken from Eng.). The House of Lords held that refugees must be outside their country of nationality for the purpose of the Refugee Convention. *Id.*

85. Human Rights Council, The U.N. Refugee Agency, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/04/06 (April 28, 2004).

86. Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 61/2006 (Cyprus) [hereinafter *Sarmadi*].

is difficult to consider the entirety of the *Handbook* and *Guidelines* as the reflection of established treaty interpretation.[87]

Another illustration would be the reference to the *Guiding Principles on Internal Displacement*, called Deng Principles.[88] In a series of cases in Colombia, judges significantly relied on Deng Principles and injected the meaning to the constitutional rights. In 2000, the Colombia Constitutional Court stated that the principles should "be used as parameters for normative creation and interpretation in the field of force displacement."[89] In the subsequent 2004 decision, the same court explained the legal status of Deng Principles as compiling the provisions of international law,[90] based on which the court extensively relied on the principles for the determination of the scope of constitutional rights.[91] From an objective point of view, the evidence may not yet be enough for Deng Principles to fully reflect customary international law or established treaty interpretation.[92] Rather, the Colombian court's strong endorsement for Deng Principles provides additional evidence toward the formulation of new rules of customary international law based on Deng Principles.[93]

As illustrated by these examples, many of the declarations, comments, guidelines, and reports cited by domestic courts, including those adopted by treaty monitoring bodies, cannot readily be seen as reflecting established customary international law or treaty inter-

87. The Cyprus court in *Sarmadi* did not directly discuss the legal relevance of these UNHCR documents, but the same judge touched on the issue a few months later in *Khereshki v. Cyprus.* Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 631/2006 (Cyprus), *cited in* Aristotle Constantinides, *Analysis:* Sarmadi v. Cyprus *per the Refugee Review Authority*, ILDC 835 (CY 2007), para. A2. The judge observed that, while the UNHCR *Handbook* was not legally binding upon the Asylum Authorities, the *Handbook* constituted a practical and guiding tool for the application of the Refugee Convention. *Id.* In a same vein, the Cyprus Supreme Court in *Novikov v. Cyprus* characterized the UNHCR *Handbook* as "soft law" which urges "voluntary compliance, and is not enforceable law." Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 681/2008 (Cyprus).

88. *Guiding Principles on Internal Displacement: Report of the Representative of the Secretary-General, supra* note 7.

89. Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 2000, Sentencia SU.1150/00, para. 38 ("como parámetros para la creación normativa y la interpretación en el campo de la regulación del desplazamiento forzado"); *translation available in* THE BROOKINGS INSTITUTION, REPORT OF THE INTERNATIONAL COLLOQUY ON THE GUIDING PRINCIPLES ON INTERNATIONAL DISPLACEMENT (2000).

90. *See* Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025, Gaceta de la Corte Constitucional [G.C.C.] (vol. 1, p. 353) (Colom.).

91. *See id.*

92. *See* Patrick L. Schmidt, *The Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment*, 35 GEO. J. INT'L L. 483, 485 (2004).

93. *See* Duque, *supra* note 64, at 175.

pretation. To this extent, other possible bases of the application of informal instruments need to be considered.

B. *Obligation to Consider*

Even when the instruments fail to reflect established customary law or treaty interpretation, domestic courts' engagement may still be based on a separate procedural obligation to consider informal international instruments, at least with regard to those adopted by human rights treaty monitoring bodies.

The applicability of such a procedural "obligation to consider" is in part illustrated by the Jamaican case of *Lewis*.[94] In *Lewis*, the appellants, who had been sentenced to death by the Jamaican courts, made an application to the Inter-American Commission of Human Rights Committee and the Human Rights Committee for the ICCPR.[95] The Judicial Committee of the Privy Council noted that "[w]hen the report of the international human rights bodies is available that *should be considered* and if the Jamaican Privy Council do [*sic*] not accept it [then] they *should explain why*."[96] This indicates the obligation to consider the Views and interim measures issued by the Human Rights Committee.

The existence of such an "obligation to consider" is, nevertheless, controversial,[97] and even if such a procedural obligation exists, it would likely be limited to documents concerning particular individuals' rights. The Privy Council's above observation in *Lewis* was based upon the individual's right to life under the American Convention on Human Rights, as well as the constitutional guarantees regarding fair and proper procedures.[98] Caution must therefore be exercised in extending the procedural obligation, such as the one enunciated in *Lewis*, to wider contexts, such as monitoring bodies' views on individuals' human rights complaints concerning items *other than* the right to life, or those bodies' reports concerning items *other than* individuals' human rights complaints.

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94. *See* Lewis v. Att'y Gen. of Jam., 134 I.L.R. 615, 635 (Jam. Judicial Comm. of the Privy Council 2000).

95. *See id.* at 615.

96. *Id.* at 635 (emphasis added). The Privy Council made this observation based on Article 4(6) of the 1969 America Convention on Human Rights and the jurisprudence of the Inter-American Court, "[w]hether or not the provisions of the Convention are enforceable as such in domestic courts." *Id.* at 634.

97. *See* van Alebeek & Nollkaemper, *supra* note 2, at 385–97.

98. *Lewis*, 134 I.L.R. at 634.

C. *Authorization to Consider*

International law does not obligate courts to consider informal instruments but simply authorizes judges to take into account informal international instruments. Such authorization is given by Article 32 of the Vienna Convention of the Law of Treaties; states, and indirectly their courts, may take into account the findings of the treaty monitoring bodies or other informal instruments as part of a "supplementary means of interpretation."[99]

In states with monist traditions, in which the Vienna Convention has domestic validity, Article 32 can serve as a formal legal basis that authorizes the reference to nonbinding instruments for the purpose of treaty interpretation (which can ultimately inform domestic law). For instance, in 2004 the Japanese Osaka District Court, in referring to some U.N. documents on the treatment of prisoners, noted that while these documents have no direct relation with and are separate from the ICCPR, they were adopted by the United Nations—of which Japan is a member—and related to the content of Article 14(3)(b) of the ICCPR.[100] On this basis, the district court observed that the U.N. documents should be taken into consideration in interpreting Article 14(3)(b) of the ICCPR as comparable to supplementary means for interpretation under Article 32 of the Vienna Convention on the Law of Treaties.[101] In the same vein, the Japanese Supreme Court, in interpreting the Japan-Singapore Tax Treaty, drew on the OECD commentary to the model tax convention as a "supplementary means of interpretation," set forth in Article 32 of the Vienna Convention on the Law of Treaties.[102]

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99. *See* Hugh M. Kindred, *The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach*, *in* THE GLOBALIZED RULE OF LAW: RELATIONSHIPS BETWEEN INTERNATIONAL AND DOMESTIC LAW 5, 27–28 (Oonagh E. Fitzgerald et al. ed., 2006) (suggesting that Articles 31–32 might determine the contextual significance of soft law sources before Canadian courts).

100. The Japanese Osaka District Court referred to the *Standard Minimum Rules for the Treatment of Prisoners* (Art. 93) adopted by the U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* (1988) (Principle 18), and *Basic Principles on the Role of Lawyers* (1990) (Principles 8 and 22). *See* Osaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 9, 2004, 1858 HANREI JIHŌ [HANJI] 79 (Japan), *translation available at* TRANSPARENCY JAPANESE L. PROJECT, http://www.tomeika.jur.kyushu-u.ac.jp/intl/public (last visited Oct. 6, 2014).

101. The Osaka District Court also observed that the General Comments of the Human Rights Committee should be respected to a considerable extent in interpreting the ICCPR as comparable to subsequent practice under Article 31(3)(b) of the Vienna Convention on the Law of Treaties or supplementary means of interpretation under Article 32. *See id.*

102. Saiko Saibansho [Sup. Ct.] Oct. 29, 2009, 63 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHU] (Japan).

In dualist states, the Vienna Convention on the Law of Treaties may not have formal domestic validity, yet Article 32 of the Vienna Convention may still be referred to in the context of interpreting treaties (which ultimately inform constitutional or statutory interpretation).[103] Also, domestic law may explicitly authorize the judicial reference to the documents of treaty monitoring bodies. For instance, in Australia, the Victorian Charter of Human Rights and Responsibilities Act authorizes the interpretive reference to international and foreign instruments, arguably including the instruments of human rights treaty monitoring bodies. Section 32(3) of the Victorian Charter, cited in the Australian *Kracke* case,[104] provides that "[i]nternational law and the judgments of domestic, foreign, and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision."[105] The explanatory memorandum quoted again in *Kracke* provides that, under Section 32(2):

> [A] court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilized nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations (see article 38 of the Statute of the International Court of Justice). Decisions of the International Court of Justice, European Court of Justice, Inter-American Court of Human Rights and *United Nations treaty monitoring bodies including the Human Rights Committee*, will be particularly relevant.[106]

According to the explanatory memorandum of the Act, Section 32(2) of the Victorian Charter of Human Rights permits consideration of the decisions of the Human Rights Committee in the process of interpreting the domestic human rights law.

IV. Persuasiveness as a Basis for Judicial Engagement

While bindingness could provide a basis for judicial engagement, it does not serve all the instances of judicial engagement with informal international instruments. The documents may not reflect established customary law or treaty interpretation, and the

103. For instance, U.K. courts accept and explicitly refer to Articles 31–32 of the Vienna Convention on the Law of Treaties. *See, e.g.*, Morris v. KLM Royal Dutch Airlines, [2002] UKHL 7, [2002] 2 A.C. 628 (H.L.) [80] (appeal taken from Scot.).

104. Kracke v. Mental Health Review Bd., [2009] VCAT 646 (Victorian Civ. & Admin. Trib.).

105. *See id.* para. 202.

106. *See id.* (emphasis added).

procedural duty is very restricted.[107] International law provides authorization, but such international authorization may not have domestic validity, and even if it does, it does not provide a normative basis as to which specific instruments domestic courts would apply.[108]

Therefore, this Article moves on to consider an alternative set of normative bases for the application of informal instruments, which is grouped under the concept of "persuasiveness." As will appear below, however, the notion remains underdeveloped in terms of its concept and political underpinnings.

A. *Bindingness and Persuasiveness*

Persuasiveness—or in a more familiar term, the idea of "persuasive authority"[109]—has been used in the comparable context of interjudicial communications.[110] The idea of persuasiveness is contrasted with bindingness—or "binding authority" in the more common usage—which carries independent obligatory force.[111] A binding authority is authoritative just by virtue of its pedigree, while "persuasive authority" stems from its merit,[112] either in substance or in terms of the process by which a particular instrument was adopted. Potentially, courts may find persuasiveness in any norms (whether domestic or international, and whether binding or not) that are helpful in shedding light on the meaning and purpose of a particular domestic obligation.[113] It can be used as a concept to cover the interpretive reference to comments, declarations, and guidelines.

In some cases, courts have expressly referred to the persuasiveness of particular informal instruments. Consider the case of *Adan* (2000) before the U.K. House of Lords.[114] In *Adan*, Lord Steyn

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107. *See supra* Parts III.A, III.B.

108. *See supra* Part III.C.

109. For the meaning of "authority" here, see *supra* note 11. The concept of persuasive authority is, however, underdeveloped. *See* Ingo Venzke, *Between Power and Persuasion: On International Institutions' Authority in Making Law*, 4 TRANSNAT'L LEGAL THEORY 354, 361 (2013) (suggesting that the persuasiveness of arguments per se does not provide a content-independent meaning to the notion of "authority").

110. Slaughter, *supra* note 31, at 124–25. On interjudicial communications, see *supra* note 24.

111. *See* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 59–61 (2009).

112. *See id.* at 62.

113. *See e.g.*, *id.* at 62 n.30 (explaining how the U.S. Supreme Court looked to international norms when determining the constitutionality of the juvenile death penalty).

114. *See* R v. Sec'y of State for the Home Dep't (*Ex parte* Adan), [2001] 2 A.C. 477 (H.L.) (appeal taken from Eng.) [hereinafter *Adan*]. This case concerned the status of two

and Lord Hutton resorted to the *Handbook* of the UNHCR in order to interpret the Refugee Convention (which was eventually used for the construction of the Asylum Act).[115] With regard to the reference to the *Handbook*, Lord Steyn observed as follows:

> Under arts 35 and 36 of the Geneva Convention [relating to the Status of Refugees], and under art II of the protocol, the UNHCR plays a critical role in the application of the Geneva Convention: compare the Statute of the Office of the United Nations High Commissioner for Refugees (UN GA Resolution 428(V) (1950), Doc A/1775) (para 8). Contracting states are obliged to co-operate with the UNHCR. It is not surprising therefore that the *UNHCR Handbook*, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals (see Aust, *Modern Treaty Law and Practice* (2000) p 191).[116]

In this passage, Lord Steyn regarded the UNHCR *Handbook* as a "high persuasive authority" on the basis of the UNHCR's critical role in treaty application and member states' obligation to cooperate with the UNHCR.[117] Likewise, the General Comments and Views of the Human Rights Committee were regarded as "authoritative" or "persuasive" in the courts of several countries, including South Africa, New Zealand, and the Netherlands.[118]

What constitutes persuasiveness in the eyes of courts remains unclear. This Article's limited survey has derived at least three broad criteria that determine the persuasiveness of nontreaty instruments, each of which will be explained in the following Sections. Nevertheless, it appears that these criteria do not exhaust the range of relevant factors and do not exclude the possibility that case-specific and more value-laden factors play a role in determining judicial reference to informal international instruments. It is difficult to identify such value-laden factors, as judges are by no

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asylum seekers who feared persecution by nonstate agents. *Id.* German and French authorities had interpreted Article 1A(2) of the Refugee Convention as applicable only to events of persecution by the state. *Id.* Yet, the U.K. House of Lords confirmed the broad interpretation of persecution to encompass cases in which a person is persecuted from nonstate actors and in which a state does not exist or is unable to afford the necessary protection to its citizens. *Id.*

115. *Id.* at 520, 528.

116. *See id.* at 520.

117. *Id.*

118. Residents of Bon Vista Mansions v. S. Metro. Local Council 2002 (6) BCLR 625 (W) at 629 F (S. Afr.) ("General Comments have authoritative status under international law."); R v. Goodwin [1993] 2 NZLR 390, 393 (CA) (N.Z.) ("considerable persuasive authority"); CRvB 21 juli 2006, AB 2007, 97 m.nt. T. Barkhuysen (Appellante/de Raad van Bestuur van de Sociale Verzekeringsbank) (Neth.) (referring to the committee's view as "authoritative").

means unequivocal about what factors render comments and guidelines more than mere nonbinding documents. This conceptual uncertainty pertaining to persuasiveness renders unstable the legitimacy of judicial engagement with informal instruments.

B. *Association with Formal Law*

A first factor that may determine the persuasiveness of informal international instruments is their association with the formal law to be interpreted. Such association can be both institutional and substantive.

1. Institutional Link Between Formal Law and Informal Instruments

The institutional connection is one of the elements that may render informal instruments persuasive. The New Zealand case of *Mansouri-Rad*,[119] concerning the refugee status of a homosexual man, illustrates the relevance of the institutional link. In interpreting human rights treaties, the Refugee Status Appeals Authority of New Zealand, while recognizing the controversy over the binding effect of the decisions of the human rights treaty monitoring bodies, went on to observe that "[t]he decisions of the Human Rights Committee can be at least of *persuasive authority*."[120] Interestingly, the Refugee Status Appeals Authority contrasted the treaty monitoring bodies with the U.N. Human Rights Commission (now the U.N. Human Rights Council) established by the U.N. General Assembly and found the interpretive relevance only in the former.[121] This is in part because the latter Commission operates outside the framework of the human rights treaties. The Refugee Status Appeals Authority noted that "[i]t is almost unnecessary to add that we do not see the U.N. Human Rights Commission as an appropriate point of reference, lying as it does *outside the treaty framework* earlier described."[122] A similar disconnect may also be found in the reference to declarations adopted by intergovernmental forums for the purpose of interpreting particular treaties.

As illustrated by *Mansouri-Rad*, the institutional link is apparently present when the instruments of treaty monitoring bodies are used for the interpretation of the same treaty provisions. The examples

119. Mansouri-Rad v. Dep't of Labour [2005] NZAR 60 (Refugee Status App. Authority) (N.Z.).

120. *Id.* para. 73 (emphasis added).

121. *See id.* para. 78.

122. *Id.* (emphasis added).

are abundant with respect to judicial reference to general comments and recommendations adopted by U.N. human rights treaty monitoring bodies.[123] General Comments, issued by the U.N. Human Rights Committee, are institutionally connected to the ICCPR which entrusts the Committee to issue its general comments and therefore, effectively, to interpret the treaty provisions.[124] The Human Rights Committee itself observed that its Views "represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument."[125] Such an institutional connection renders instruments persuasive and gives rise to the strongest justification. The same may hold true for the interpretation given by the conference of parties. The Colombian Constitutional Court in its 2004 decision characterized the ICESCR Committee, which adopts the general comments, as an "authorized interpreter."[126]

Such an institutional linkage can also be seen with regard to documents prepared by a "conference of parties," which have been relied upon by the national judges. In *ADS a.o., Flemish League Against Cancer and Leo Leys,*[127] the Belgium Constitutional Court, in interpreting a constitutional right to health, resorted not only to Articles 8 and 18 of the Framework Convention on Tobacco Control, which binds Belgium under international law (if not directly applicable in domestic law),[128] but also to the related guidelines: *Guidelines for Implementation of the Framework Convention on Tobacco Control* (adopted by the Conference of the Parties of the Tobacco Agreement in 2007),[129] *Decision FCTC/COP1(15) of the Conference of*

123. *See Residents of Bon Vista Mansions,* (6) BCLR at 629–30; Goodwin [1993] 2 NZLR at 393; *de Raad van Bestuur van de Sociale Verzekeringsbank,* AB 2007.

124. The legal basis for the U.N. Human Rights Committee to adopt its General Comments is Article 40(4) of the ICCPR. *See* Ando, *supra* note 3, paras. 11–12.

125. ICCPR: General Comment No. 33, *supra* note 8, para. 13.

126. Corte Constitucional [C.C] [Constitutional Court], enero 22, 2004, Sentencia No. T-025, Gaceta de la Corte Constitucional [G.C.C.] (vol. 1, p. 353) (Colom.) ("como intérprete autorizado del Pacto sobre la materia").

127. Cour Constitutionnelle [CC] [Constitutional Court] decision no 37/2011, Mar. 15, 2011 MONITEUR BELGE [MB] [Official Gazette of Belgium], May 6, 2011, 26555 (Belg.). The *ADS* case concerned the issue of whether the exceptions with regard to the prohibition of smoking in public places violated the right to health. *See id.*

128. *See id.* para. B.6.1 (2011).

129. WORLD HEALTH ORGANIZATION FRAMEWORK CONVENTION ON TOBACCO CONTROL, GUIDELINES FOR IMPLEMENTATION 17–30 (2013).

the Parties,[130] and *Recommendation of the Council of the European Union of 30 November 2009 on Smoke-Free Environments*.[131]

Recourse is also made to documents adopted by a body which is, albeit not strictly a treaty monitoring body, tasked with applying the treaty in question. Illustrative is judicial reliance on documents prepared by the UNHCR. While the UNHCR is not a treaty body for the Refugee Convention per se and its documents are not adopted within the treaty, it regularly undertakes the refugee status determination according to the convention and develops its interpretation.[132] As noted above,[133] the UNHCR's *Handbook* has been employed by domestic courts to interpret the Refugee Convention and its implementing legislation. In the above-quoted passage of Lord Steyn in *Adan*, the UNHCR's systematic association with formal international law in terms of law application seems to have contributed to the persuasiveness of the UNHCR *Handbook*.[134] The UNHCR is systematically associated with the Refugee Convention and its protocol, which acknowledges its critical role and under which member states are obligated to cooperate with the body.[135] Similarly, Judges McGrath and Glazebrook of the New Zealand Court of Appeal in *Attorney-General v. Refugee Council of New Zealand*,[136] in elaborating the scope of Article 31(2) of the Refugee Convention, had recourse to Conclusion 44 of the *Executive Committee of the United Nations High Commissioner for Refugees' Programme* (1986)[137] and the UNHCR's revised *Guidelines on Applicable Criteria*

130. World Health Organization [WHO], *Conference of the Parties to the WHO Framework Convention on Tobacco Control, June 30–July 6, 2007, Elaboration of Guidelines for Implementation of the Convention*, art. 8, Dec. FCTC/COP1(15), WHO Doc. A/FCTC/COP/2/7 (Apr. 26, 2007).

131. Council Recommendation of 30 November 2009 on Smoke-Free Environments, 2009 O.J. (C 296) 4.

132. For the development of refugee law through the UNHCR's communicative practice, see INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW ch. 3 (2012).

133. *See supra* notes 83–87 and accompanying text.

134. *See supra* note 116.

135. Convention Relating to the Status of Refugees art. 35, July 28, 1951, 189 U.N.T.S. 150. Also, it is noteworthy that, in *Novikov v. Cyprus*, the Cyprus Supreme Court held:

> When examining asylum requests the competent organs should take into account the UNHCR Handbook. It is an international instrument of non-binding but guiding character, since it includes the best practices and indicates the way of holding interviews and the minimum procedural guarantees with regard to the treatment of refugees during the examination of asylum requests. It therefore states "soft law", urging for voluntary compliance, and not enforceable law.

Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 681/2008 (Cyprus).

136. Att'y Gen. v. Refugee Council of N.Z. Inc. [2003] 2 NZLR 577 (CA).

137. U.N. High Comm'r for Refugees, Detention of Refuges and Asylum-Seekers, U.N. Doc. A/41/12/Add.1 (Oct. 13, 1986).

and Standards Relating to the Detention of Asylum Seekers (1999).[138] The judges noted that the guidelines "are to be seen as an interpretive aid, in the same way that [c]ourt decisions from other jurisdictions would be regarded."[139] As suggested by this passage, the UNHCR guidelines are treated as part of broad "foreign" resources that are nonbinding but nevertheless could assist the interpretation.

The degree of institutional linkage varies, which may impact on the degree of persuasiveness. In the New Zealand case of *Attorney-General v. Refugee Council of New Zealand,* Judge McGrath attached greater weight to a statement of the UNHCR's Executive Committee than he did to the UNHCR *Guidelines.* With regard to the Executive Committee's statement, Judge McGrath observed as follows: "[the value of the 1986 statement of the Executive Committee] derives in part from the fact that the Executive Committee is itself an assembly of states which has debated the issue [regarding the obligation under Article 31.2 of the Refugee Convention] and settled on a formal statement concerning it."[140] In contrast, with respect to the UNHCR *Guidelines,* the judge observed that they "do not however have a status in relation to interpretation of the Refugee Convention that is equal to that of the resolutions of the UNHCR Executive Committee,"[141] presumably because the latter was officially adopted by the assembly of states.

2. Substantive Link Between Formal Law and Informal Instruments

Even if an informal international instrument is not institutionally linked to a particular formal law, national judges still find the former relevant to the construction of the latter. The medium between formal law and informal instruments is based upon substantive connection, which is often less obvious than the case of institutional link and thus depends more on judicial discretion.

Domestic courts find the substantive link between formal and informal instruments in various different ways. There are at least three groups of domestic court decisions.

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138. OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, UNHCR'S REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS (1999), *available at* http://www.unhcr.org/refworld/docid/3c2b3f844.html; *see Refugee Council of N.Z. Inc.* [2003] 2 NZLR at 608–09, 612, 647–50.

139. *Refugee Council of N.Z. Inc.* [2003] 2 NZLR at 650.

140. *Id.* at 608–09.

141. *Id.* at 612.

First, courts consult the documents of international organizations and intergovernmental forums for the interpretation of the treaties, which are in substance related to such informal documents. An illustrative instance is *Director of the Public Prosecutions KwaZulu-Natal v. P*, in which the South African Supreme Court of Appeal interpreted the Convention on the Rights of the Child by consulting a U.N. General Assembly resolution.[142] The court drew on the Convention on the Rights of the Child, which constituted the basis for the relevant constitutional provision (Section 28),[143] and observed that "the convention has to be considered in conjunction with other international instruments," including the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) adopted by the U.N. General Assembly.[144] In a similar vein, the Supreme Court of British Columbia (Canada) in the aforementioned *Victoria (City) v. Adams*,[145] when interpreting the scope of Section 7 of the Canadian Charter, invoked not only the ICESCR and its general comment but also the Habitat II's *Habitat Agenda*,[146] which addressed "adequate shelter for all" as a theme of global importance.[147] As another example, the Japanese Supreme Court interpreted the Japan-Singapore Tax Treaty by drawing on the OECD Model Tax Convention—upon which the Japan-Singapore Tax Treaty is based—and the commentary to the model tax convention, prepared by the OECD Committee on Fiscal Affairs.[148] In these exam-

142. Director of the Public Prosecutions KwaZulu-Natal v. P 2006 (1) SA 446 (SCA) (S. Afr.). In this case, the South African Supreme Court of Appeal decided on the question of whether the imprisonment of a child was permissible under the South African Constitution and pertinent international law. *Id.*

143. *Id.* para. 15.

144. *Id.* para. 16. Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

145. Victoria (City) v. Adams (2008), 88 B.C.L.R. 4th 116, paras. 85–89 (Can. B.C. Sup. Ct.).

146. United Nations Conference on Human Settlements (Habitat II), *supra* note 54.

147. *Victoria*, 88 B.C.L.R. 4th, paras. 91–93.

148. *See* Saiko Saibansho [Sup. Ct.] Oct. 29, 2009, 63 SAIKÔ SAIBANSHO MINJI HANREISHŪ [MINSHU] (Japan). In this case, the Supreme Court decided upon the compatibility of the domestic tax law (Article 66-6, paragraph (1) of the Act on Special Measures Concerning Taxation, before the revision by Act No. 97 of 2000) with the Japan-Singapore Tax Treaty (Art. 7(1) of the Agreement Between the Government of Japan and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion). *See id.* Based upon the Organisation for Economic Co-operation and Development (OECD) commentary, the Supreme Court observed that the tax measures under the domestic tax law would not be in violation of Article 7(1) of the Model Tax Convention, which is equivalent to Article 7(1) of the Japan-Singapore Tax Treaty. *Id.* The Supreme Court referred to the interpretation based upon the OECD commentary as "a widely accepted view in the international community." *Id.*

ples, courts import U.N. resolutions and conference outcome documents without systematic association to the treaties.

Second, domestic courts have also found a substantive link between informal international instruments and the interpretation of domestic law per se, without the medium of customary international law or treaties (as was in the British case of *Adan*[149]) or in conjunction with custom or treaties (like the Canadian case of *Victoria v. Adams*[150]). This seems to have been the reasoning adopted by the Cyprus Supreme Court in *Constantinou.*[151] There, the Cyprus Supreme Court had to decide whether the applicant, who was deaf and intellectually disabled from birth, was a "disabled person" for the purpose of importing a duty-free motor vehicle.[152] The court, in its brief judgment, invoked General Assembly Resolution 3447 (XXX) (1975)[153] to define the term "disabled person" provided in domestic law.[154] The court regarded the definition as the "generally accepted sense of the term."[155]

Finally, judges employ the documents not as specific interpretive guides to treaties or domestic law but rather to shape the general direction of judicial reasoning. While the instruments included in this category are ultimately used to construe international or domestic law, the linkage between formal and informal instruments would be diluted if the latter serves as general guidance. For instance, courts have invoked instruments to stress the importance of particular rights or interests. For example, the South African Constitutional Court in *Fuel Retailers Association* resorted to the 2002 Johannesburg Principles,[156] adopted at the Global Judges Symposium to emphasize the important role of courts in the pro-

149. *See supra* note 114; R v. Sec'y of State for the Home Dep't (*Ex parte* Adan), [2001] 2 A.C. 477 (H.L) (appeal taken from Eng.).

150. *See generally* Victoria (City) v. Adams (2008), 88 B.C.L.R. 4th 116, paras. 85–100 (Can. B.C. Sup. Ct.) (applying international principles such as "adequate shelter for all").

151. Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 302/80 (Cyprus); *see* Aristotle Constantinides, *Analysis:* Constantinou v Cyprus, *Judicial Review Decision*, ILDC 917, para. A3 (1984).

152. Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 302/80 (Cyprus); *see* Constantinides, *supra* note 151, para. A3.

153. Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. Doc. A/RES/3447(XXX) (Dec. 9, 1975).

154. Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 302/80 (Cyprus).

155. *Id.* para. 7.

156. U.N. Governing Council of the U.N. Environment Programme, *Report of the Global Judges Symposium on Sustainable Development and the Role of Law*, U.N. Doc. UNEP/GC/INF/24 (Nov. 12, 2002).

tection of the environment.[157] Similarly, the Tribunal of Bogotá in Colombia in *Rendón Herrera* invoked the 2007 Paris Principles and Guidelines on Children Associated with Armed Forced or Armed Groups to demonstrate the need for the special treatment and protection of children in armed conflicts.[158] Likewise, the Court of Appeal of the Republic of Botswana in *Mosetlhanyane*[159] relied on General Comment No. 15 adopted by the U.N. Committee on Economic and Social and Cultural Rights[160] and the Resolution of the Human Rights Council[161] to highlight "international consensus on the importance of access to water."[162]

C. *The Impartiality of the Body and the Instruments*

A second factor sustaining persuasiveness of informal instruments appears to be the impartiality of the bodies that adopt informal instruments. In resorting to the report of the ILO Committee of Experts, the Australian Federal Court in *Australia v. Human*

157. Fuel Retailers Ass'n v. Dir.-Gen. Envtl. Mgmt. 2007 (6) SA 4 (CC) at 20 B (S. Afr.). In *Fuel Retailers Association*, the applicant claimed that the environmental authorities failed to consider the need, desirability, and sustainability of the proposed petrol station that the government had authorized to construct. *Id.*

158. Tribunales Superiores [T. Sup.] [Appellate Court], diciembre 16, 2011, Sentencia 2007-82701.

159. Matsipane Mosetlhanyane v. Att'y Gen., Appeal No. CACLB-074-10 (Ct. App. Jan. 27, 2011) (Bots.) [hereinafter *Mosetlhanyane*]. In *Mosetlhanyane*, the residents of the Central Kalahari Game Reserve (CKGR), who are part of the Basarwa communities, instituted court actions against the government that had terminated the provision of water to the Basarwa communities. *Id.* The court decided in favor of the residents, which claimed the right to abstract water. *Id.* The court's finding was primarily based on the construction of domestic law (the Water Act). *Id.* paras. 13–18. Yet, the court also touched on the resident's claim regarding the violation of the right not to be subjected to torture or to inhuman or degrading treatment (provided in Section 7(1) of the Botswana Constitution). *Id.* In interpreting the constitutional right, the court has drawn on the two informal international instruments mentioned above. *Id.* In this case, the international instruments were invoked to show the international consensus on the importance of access to water, and such consensus informed the value judgment involved in the interpretation of the constitutional right. *See id.* paras. 19, 22.

160. United Nations, Eco. & Soc. Council, Comm. on Econ., Social and Cultural Rights, Gen. Comment No. 15, UN Doc. E/C.12/2002/11 (2003). From General Comment No. 15, the court quoted not only the phrase, which stated that the human right to water is indispensable (para. 1), but also the special protection for indigenous peoples (para. 16(d)). *Mosetlhanyane*, para. 19.

161. G.A. Res. 15/9, U.N. Human Rights Council, 15th Sess., U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010). The Court of Appeal is referring to the document adopted by the U.N. General Assembly in July 2010. *Mosetlhanyane*, para. 19. Yet, it cites the phrase from the resolution of the Human Rights Council adopted in October 2010. *Id.* The Human Rights Council resolution called upon states "[t]o ensure . . . the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein." G.A. Res. 15/9, para. 8(b)). *Id.*

162. *Mosetlhanyane*, para. 19.

Rights and Equal Opportunity Commission[163] emphasized the independence and the highest qualifications of the experts and noted that the Committee of Experts' body of opinions acquired "considerable weight."[164]

The impartiality was one of the reasons why the Privy Council in the New Zealand case of *Tangiora* found the Human Rights Committee's views hard to dismiss, despite the lack of binding force.[165] The privy council, drawing on the observation of Tomuschat, noted:

> [A] state party may find it difficult to reject such findings when they are based on orderly proceedings during which the state party has had a proper opportunity to present its case. The views of the Human Rights Committee acquire *authority from the standing of its members and their judicial qualities of impartiality, objectivity, and restraint.*[166]

Moreover, the Privy Council suggested that the functions of the committee are "*adjudicative*," as it makes definitive and final rulings, which are determinative of an issue before it.[167]

This does not mean that all the documents adopted by the Human Rights Committee possess the "judicial qualities" of impartiality and objectivity. As suggested in the *Tangiora* case, the function of the Human Rights Committee is akin to that of an adjudicative body when it adopts its "Views" in response to individuals' communications; on the other hand, it has a relatively wider discretion and thereby operates in a less-adjudicatory manner when adopting general comments to assist member states.[168] Also, the method or procedure of adopting general comments or recommendations is underdeveloped, depending on human rights treaty bodies. Certainly, there are no established rules or practices universally applicable to all the monitoring bodies.[169]

Conversely, the nonimpartiality and nonobjective features of treaty bodies' findings are also some of the grounds that have led courts to reject a reference to those bodies' views. In the afore-

163. Commonwealth v Hamilton (2001) 108 FCR 378, 387 (Austl.).

164. *Id.* at 386 (citing NICOLAS VALTICOS & GERALDO VON POTOBSKY, INTERNATIONAL LABOUR LAW 284–85 (2d rev. ed. 1995).

165. *See* Tangiora v Wellington Dist. Legal Servs. Comm. [2000] 1 NZLR 17 (P.C.) (N.Z.).

166. *Id.* at 21 (emphasis added). In this case, the New Zealand Privy Council determined the question of whether the Human Rights Committee is "judicial authority" under New Zealand legislation; the council denied this point but made a few limited remarks on the nature of the committee. *Id.*

167. *Id.* (emphasis added).

168. *See id.*

169. *See* Ando, *supra* note 3, para. 42.

mentioned *Mansouri-Rad* case, a New Zealand court negated the persuasiveness of the decisions of the U.N. Human Rights Commission on the basis of its nonjudicial nature; the court observed that "the 52-state Commission is *highly politicised,* as witness the circumstances in which Cuba and China were successful in having the United States lose its seat in 2001."[170] Also, in *Jones v. Saudi Arabia*[171] before the House of Lords, Lord Bingham observed that the Committee Against Torture is "not an exclusively legal and not an adjudicative body" and that the legal authority of the committee's recommendation is slight[172]—or even of "no value" in Lord Hoffmann's view.[173]

These cases illustrate that, in contrast to justification based on bindingness—which can be traced to an objective assessment of a source—justification based on the qualities of the nature of the body and/or the procedure is a much more subjective assessment, which may lead to different evaluations in different courts.

D. *Wider Domestic and International Acceptance*

Finally, there is some evidence that some courts have considered wider public acceptance as a factor that would determine persuasiveness of a particular international informal instrument. In *Constantinou,* a Cyprus court relied on U.N. General Assembly resolutions to construe the concept of terms under domestic law, presumably because the resolutions define "the generally accepted sense of the term."[174] Whose acceptance matters for the courts, however, varies depending on each case.

First, the acceptance by domestic constituencies is one of the factors that supports the persuasiveness of nontreaty documents. For instance, the Supreme Court of Appeal of South Africa in *Director of the Public Prosecutions KwaZulu-Natal v. P,* in which the Court consulted the Beijing Rule, mentioned the acceptance of the international instrument by the South African Law Commission.[175] Domestic constituencies differ in terms of their representational value. In this South African case, the court found only "peripheral

170. Mansouri-Rad v. Dep't of Labour [2005] NZAR 60, para. 78 (Refugee Status App. Authority) (N.Z.).

171. Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) (appeal taken from Eng.).

172. *Id.* at [23] (opinion of Lord Bingham).

173. *Id.* at [57] (opinion of Lord Hoffmann).

174. Anotato Dikasterio Kgproi [A.D.] [Supreme Court] 302/80, para. 7 (Cyprus).

175. Director of the Public Prosecutions KwaZulu-Natal v. P 2006 (1) SA 446 (SCA) para. 20 (S. Afr.).

value" in the views of the South African Law Commission in the absence of ultimate parliamentary approval of the commission's positions.[176]

At the same time, domestic courts invoke instruments based upon acceptance by the larger international community. The Egyptian Supreme Constitutional Court in *Elmorsi*[177] invoked treaties and a series of U.N. resolutions concerning the promotion of the rights of disabled persons to strengthen the particular reading of domestic law, despite that neither party invoked international norms in their arguments.[178] According to the Egyptian court, U.N. resolutions provide proof of the current trend in the international community toward greater recognition of the rights of the disabled, which the court found could not be disregarded by national authorities.[179]

In a similar vein, the Court of Appeal of the Republic of Botswana in *Mosetlhanyane*[180] invoked a general comment and the Human Rights Council's resolution as some of the materials to demonstrate the existence of "international consensus" on the importance of access to water.[181] There is, however, apparently a great difference among nontreaty instruments in terms of the representational value of international community. A U.N. General Assembly resolution, if adopted by consensus or with the affirmative vote of most member states, more convincingly demonstrates international consensus than the resolutions of more restrictive international organizations.

Wider international acceptance was also one of the grounds for the interpretive use of the U.N. General Assembly resolution by the Takamatsu High Court of Japan in its 1997 judgment. The high court employed the European Convention on Human Rights, the Body of Principles (U.N. General Assembly Resolution),[182] and the

176. *Id.* para. 17.

177. Case No. 16/08/1995/CC (Egypt) [hereinafter *Elmorsi*].

178. *See id.*; Nasser Algheitta, *Analysis:* Elmorsi v. President of Egypt, ILDC 793 (1995), para. A1 (2010). The *Elmorsi* case concerned the constitutionality of the domestic legislation that obligated public authorities and public companies to hire disabled persons. Algheitta, *supra*, para. A1.

179. *Elmorsi*, Case No. 16/08/1995/CC.

180. *Mosetlhanyane v. Attorney General*, Appeal No. CACLB-074-10 (C.A.) (Bots. Jan. 27, 2011).

181. *Id.* para. 19.

182. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res 43/173, UN Doc. A/RES/43/173 (Dec. 9, 1988). In making reference to the Body of Principles, the high court acknowledged that it is difficult to consider that the relevant provision in the Body of Principles falls under "subsequent practice" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties. Takamatsu

Human Rights Committee opinions as interpretive guidance on Article 14(1) of the ICCPR.[183] In making reference to the Body of Principles, the court observed that the principles are "international standards for the protection of detainees," paying attention to the fact that the principles were drafted by experts, were acceptable by almost all states, and were adopted after deliberate consideration without any positive objections.[184] Likewise, in the aforementioned example of the Colombian court decisions regarding the rights of the internally displaced persons, the Colombian Constitutional Court referred to the international recognition given to Deng Principles by the Inter-American Commission on Human Rights, international organizations, and nongovernmental organizations.[185]

These rather nonsubstantive factors are likely, but by no means determinate, elements that constitute persuasiveness in the eyes of particular courts. We can presume that there are more value-laden factors that are case specific and reflect the subjective views of judges. The presence of case-specific and value-laden factors can be suggested, for instance, by the varied approaches taken by the U.K. House of Lords' judges to the observations of U.N. human rights treaty monitoring bodies. In *Jones v. Saudi Arabia*, as noted above, Lord Bingham and Lord Hoffmann dismissed the relevance of the country-specific observations of the Committee Against Torture.[186] By contrast, in *European Roma Rights Centre*, before the U.K.

Koto Saibansho [High Ct.] Nov. 25, 1997, 997 HANREI TAIMUZU [HANTA] 65 (Japan), *translation available at* TRANSPARENCY JAPANESE L. PROJECT, http://www.tomeika.jur.kyushu-u.ac.jp/intl/public/ (last visited Oct. 6, 2014). Nevertheless, the high court observed that the Body of Principles is an international standard and may be used as an interpretive guide. Takamatsu Koto Saibansho [High Ct.] Nov. 25, 1997, 997 HANREI TAIMUZU [HANTA] 65 (Japan).

183. Takamatsu Koto Saibansho [High Ct.] Nov. 25, 1997 997 HANREI TAIMUZU [HANTA] 65 (Japan). In this case, the plaintiffs argued that the Prison Law and its Rules of Implementation, which restrict the visiting time to thirty minutes and require prison officials to be present during the visiting, would be incompatible with Article 14. *Id.* On March 15, 1996, the Tokushima District Court (1597 Hanrei Jiho 115) decided in favor of the plaintiffs, which was followed by the Takamatsu High Court in its decision in 1997. *See* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 119, n.402 (1998). The Supreme Court rejected these decisions without discussing the ICCPR interpretation. Saiko Saibansho [Sup. Ct.] Sept. 7, 2000, 199 SHUMIN 371 (Japan).

184. Takamatsu Koto Saibansho [High Ct.] Nov. 25, 1997, 997 HANREI TAIMUZU [HANTA] 65 (Japan).

185. Corte Constitutional [C.C.] [Constitutional Court], agosto 30, 2000, Sentencia SU-1150/2000, para. 38 (Colom.); Corte Constitutional [C.C.] [Constitutional Court], enero 22, 2004, Decision No. T-025 of 2004, para. 5.2, n.22 (Colom.).

186. Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) [23], [57] (appeal taken from Eng.).

House of Lords, Baroness Hale accommodated in her separate opinion the concluding observations of the Committee Against the Elimination of Racial Discrimination (which expressed concern over discrimination in immigration laws and practices).[187] Some case-specific and value-laden factors might have played a role in these judges' varied engagement with the monitoring bodies' observations.

The conceptual elusiveness of persuasiveness can enclose multiple factors therein, which further weakens the just value of persuasiveness as a general concept. The uncertainty in the normative basis of judicial practices, at least in part, explains why some courts are less willing to engage with informal international instruments, as this Article will explore in the next Part.

V. The Variance in Judicial Amenability to Informal Instruments

A. *Varied Judicial Amenability*

Our study of court decisions revealed not only the judicial use of declarations, general comments, reports, and so forth, but also the variations in the judicial amenability to these documents. Canada, the United Kingdom, New Zealand, and other common law countries tend to be less hesitant to employ instruments based upon their persuasiveness.[188] As noted above,[189] the courts of the United Kingdom and New Zealand treated the UNHCR *Handbook* and the opinions of the Human Rights Committee as persuasive and authoritative and thus applicable to their judicial reasoning.[190]

187. R (European Roma Rights Ctr.) v. Immigration Officer at Prague Airport, [2004] UKHL 55, [2005] 2 A.C. 1 (H.L.) 65 (appeal taken from Eng.) (opinion of Baroness Hale); *see* International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, para. 16, U.N. Doc. CERD/C/63/CO/11 (Dec. 10, 2003).

188. For instance, the reliance on "persuasive authority" can be seen in the case law of the Canadian Supreme Court. *See* Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 Canadian Y.B. Int'l L. 3 (2002); H. Patrick Glenn, *Persuasive Authority*, 32 McGill L.J. 261 (1986); Graham Hudson, *Neither Here nor There: The (Non-)Impact of International Law on Judicial Reasoning in Canada and South Africa*, 21 Canadian J. L. & Jurisprudence 321, 327 (2008); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. Int'l L. & Pol. 501, 504–05 (2000).

189. *See supra* notes 117–18 and accompanying text.

190. *See* Residents of Bon Vista Mansions v. S. Metro. Local Council 2002 (6) BCLR 625 (W) at 629 F ("General Comments have authoritative status under international law."); R v. Goodwin [1993] 2 NZLR 390, 393 (CA) (N.Z.) ("considerable persuasive authority"); CRvB 21 juli 2006, AB 2007, 97 m.nt. T. Barkhuysen (Appellante/de Raad van Bestuur van de Sociale Verzekeringsbank) (Neth.) (referring to the committee's view as "authoritative").

The Supreme Court of British Columbia in *Victoria (City) v. Adams*, in which the court invoked treaties and pertinent informal instruments, observed that the reference to international covenants is proper because the court is *not enforcing* various international instruments that do not form part of the domestic law of Canada but rather is *informed* by those instruments.[191] The case acknowledged the *informative value* of international instruments in constructing judgments.[192]

The relatively lower threshold that some common law countries have toward informal international instruments can be contrasted with countries following civil law traditions. The French Conseil d'Etat emphasized in its 2001 decision that the Human Rights Committee was a nonjudicial organ whose findings were not binding.[193] The same reluctance is also evident in Japanese courts. The courts often ignore or reject the arguments based on nonbinding documents, unless the judges find those documents reflect customary international law or established treaty interpretation.[194] For instance, parties frequently rely on the 1957 Standard Minimum Rules for the Treatment of Prisoners[195] and the 1988 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment[196] together with the ICCPR.[197] The Sapporo High Court of Japan has rejected the relevance of U.N. General Assembly resolutions on the ground that "they possesses neither the force of treaties . . . nor the force equivalent to treaties as [standards for the interpretation of] the ICCPR or as customary international law."[198] The Tokyo District Court observed in 2001 that general comments to the ICCPR "neither represent the authoritative interpretation of the ICCPR nor have legal binding force."[199] There are still several noteworthy cases in Japan, espe-

191. *See* Victoria (City) v. Adams (2008), 88 B.C.L.R. 4th 116, para. 100 (B.C. Sup. Ct.).

192. *Id.*

193. *See* Conseil d'État [CE] [council of state], Oct. 11, 2001, para. 22 (Fr.).

194. *See* IWASAWA, *supra* note 183, at 37–40. Some court decisions, however, are apparently affected by general comments, despite the lack of explicit reference to them. *Id.* at 120 (regarding Judgment of June 23, 1993, Tokyo High Ct., 46 Kominshu 43, 14 WASEDA BULL. COMP. L. 58 (1993)).

195. E.S.C. Res. 663 (XXIV) (C), U.N. ESC, 24th Sess., Supp. No. 1, U.N. Doc. E/3048 (Aug. 30, 1955).

196. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

197. IWASAWA, *supra* note 183, at 39.

198. *Id.* at 39–40 (quoting Sapporo Kōtō Saibansho [Sapporo High Ct.] May 19, 1993, 1462 HANREI JIHŌ [HANJI] 107, 117 (Japan)).

199. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 15, 2001, 1784 HANREI JIHŌ [HANJI] 67 (Japan).

cially at the lower courts, which have found the interpretive use of informal instruments. The aforementioned judgment of the Japanese Osaka District Court is one example.[200] Also, the Takamatsu High Court of Japan employed a U.N. General Assembly resolution and the Human Rights Committee opinions.[201] Yet, this resolution and these opinions did not appear in a subsequent appeals decision by the Japanese Supreme Court, which ultimately rejected the decision of the Takamatsu High Court.[202]

B. *Reasons for the Variance: Three Tentative Accounts*

A number of historical, conceptual, and pragmatic factors lead to the varied judicial amenability to informal international instruments. While this Article does not conduct any detailed analysis on the reasons for the variations, the cases examined give rise to at least three preliminary explanations as to why some courts are more willing to employ the instruments while others are not.

First, the uncertainty in the notion of persuasiveness may lead to courts being seen as arbitrary, and therefore judges maintain caution in determining whether to invoke informal international instruments. As contrasted with the notion of bindingness, persuasiveness appears nascent in terms of underlying ideas and reasons as to why judges can consult instruments based on their virtue of persuasiveness. The weakness of the concept has also been discussed within the context of interjudicial communication. Knop critically observed that debates on persuasive authority tend to presuppose the goodness in the application of international law and the reference to the foreign judgments of liberal democratic states.[203] This critical observation might apply to judicial practices on informal instruments, as well as to the academic understanding about such practices. The broad social acceptance of the goodness in international law and institutions would likely encourage litigants, and eventually judges, to invoke declarations, general comments, and international guidelines to support their case. On the

200. Osaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 9, 2004, 1858 HANREI JIHŌ (HANJI) 79 (Japan). The Osaka District Court observed that the existence of legal binding force is a separate question from whether the General Comments are taken into consideration in interpreting the ICCPR. *Id.* For the use of international human rights standards in Japanese courts, see Yuji Iwasawa, *The Domestic Impact of International Human Rights Standards: The Japanese Experience, in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 245 (Philip Alston & James Crawford eds., 2000).

201. *See supra* note 182.

202. *See supra* note 183.

203. *See* Knop, *supra* note 188, at 505, 521–25.

contrary, if international law and institutions are socially seen as unfair or unnecessary, this may distance litigants and judges from nontreaty instruments that they are not obliged to follow.

Second, the variance can also be ascribed to the rigorousness of the separation of powers between the judiciary and the political branches of government. The application of informal international instruments may signify the judicial encroachment on the authority of legislative and executive bodies endowed with democratic legitimacy because they would channel international norms into the domestic order without being intermediated by the legislative or executive approval processes. Some courts indeed refuse to give effect to nontreaty instruments because of judicial intrusion on the authority of political organs. For instance, the Sri Lanka Supreme Court in *Singarasa* rejected giving effect to the findings of the Human Rights Committee on the ground that the legislature has not taken measures to give effect to the rights under the ICCPR.[204] Likewise, the Court of Appeal of Singapore in *Yong Vui Kong* acknowledged the "inherent limits" in resorting to consistent interpretation; the reference to international human rights norms would not be appropriate if it was inconsistent with the express wording of the Singapore Constitution or the country's constitutional history.[205] The Singapore court cited Lord Bingham's comments made in *Reyes*[206] that "*[i]t is open to the people of any country to lay down the rules by which they wish their state to be governed* and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies."[207] It would have been necessary for parliament to first enact new laws or amend the Singapore Constitution to give effect to

204. Singarasa v. Attorney General, 138 I.L.R. 451 (2006) (Sri Lanka). In *Singarasa*, the petitioner was convicted of conspiracy to overthrow the Sri Lankan government. *Id.* The petitioner has brought the matter to the U.N. Human Rights Committee, which found that Sri Lanka had violated some provisions of the ICCPR. *Id.* Based on the committee's views, the petitioner argued that he had a legitimate expectation that the committee's findings would be given effect by the Supreme Court. *Id.* at 478. The court rejected this argument based on legitimate expectations by pointing out that the legislature had not taken measures to give effect to the rights under the ICCPR. *Id.* at 478–81.

205. Yong Vui Kong v. Public Prosecutor, 143 I.L.R. 374, 401 (Ct. App. 2010) (Sing.). In this case, the appellant claimed that the mandatory death penalty for drug trafficking was unconstitutional. *Id.* As a matter of principle, the Singapore Court of Appeal has agreed that domestic law, including the Singapore Constitution, should be interpreted consistently with Singapore's international legal obligations as far as possible. *Id.* Nevertheless, the court pointed out the limits to consistent interpretation. *Id.*

206. Reyes v. The Queen, [2002] 2 A.C. 235 (P.C.) 247 (opinion of Lord Bingham).

207. Yong Vui Kong, 143 I.L.R. 374, 401.

international human rights norms.[208] From these judgments, one could argue that the more faithful the judicial organs are to the separation of powers and the legislative authority of political organs, the less amenable the courts are to informal international instruments. For instance, in the United Kingdom, judges historically enjoy a privileged presence and make rules through their own jurisprudence,[209] which would be one of the factors that facilitate the judicial invocation of informal international instruments.

Finally, the varied amenability to the use of informal international instruments and to the idea of persuasiveness might bespeak the differences among states and judges on the rigorousness of the distinction between bindingness and persuasiveness. From our survey of domestic court decisions, we have witnessed that national courts sometimes group together treaties and informal instruments under the same heading of "international instruments" and do not always find it necessary to add explanations for why informal instruments are cited. For instance, in the Kenyan case of *RM*, the Kenya High Court referred to the general comment as part of "International Instruments."[210] Some courts or judges are thus less sensitive about the separation between bindingness and persuasiveness, even in their judicial reasoning, which seems to be the last stronghold of such a distinction.

VI. Conclusion

The normative roles assigned to domestic courts are subject to changes by the transitions in international and domestic societies. In the international context, formal law and informal norms develop and operate side-by-side.[211] The development of informal international instruments alongside the expansion of formal international law has influenced the exercise of authority by domestic organs, including domestic courts. While treaty monitoring bodies and international organizations produced a voluminous number of informal international instruments, their effectiveness often relies on the actions voluntarily taken at the domestic level. Various informal instruments adopted by intergovernmental forums also anticipate the necessary actions to be taken at the domestic level to

208. *Id.*

209. *See* Robert Kolb, Interprétation et Création du Droit International [Interpretation and Creation of International Law] 63–73 (2006).

210. *See* RM v. Attorney-General, (2006) 143 ILR 299, 308, 324 (Kenya).

211. *See* Stephen J. Toope, *Formality and Informality*, *in* The Oxford Handbook of International Environmental Law 107, 107–08 (Daniel Bodansky et al. eds., 2007).

realize the goals of those instruments. This study of domestic court decisions demonstrates that national courts have not been ignorant to the mounting international expectation that domestic organs will materialize the informality.

Domestic courts' engagement in applying nontreaty instruments has been facilitated not only from international expectation toward domestic organs but also by the demand of domestic constituencies. In court proceedings, not surprisingly, each party will bring as many materials as possible to support their arguments. If specific comments, declarations, and guidelines issued by treaty monitoring bodies and international organizations are widely known to domestic communities, there is strong incentive for litigants to argue that those instruments support their contention. Judges will continue to hear these arguments, and informal international instruments may eventually appear within the reasoning of hesitant courts.

Domestic courts' incremental engagement in informal instruments, however, may be normatively problematic at the domestic level. The judges are applying instruments that lack formal approval by legislative and/or executive bodies. The gravity of tension between judicial and other branches of government varies based on how the instruments are employed, the types of instruments invoked, and the weight accorded to those instruments among interpretive variables. The interpretive use of informal instruments requires greater justification than the evidential reference to them. The justification is called for if an informal instrument carries conclusive weight among interpretive variables. Stronger justification is needed if domestic courts apply informal instruments adopted outside the specific treaty that a court seeks to interpret.

This Article has argued that an alternative justification for the invocation of informal international law is the notion of the instruments' persuasiveness, as opposed to their bindingness. The former presumes that the authority is a matter of degree, while the latter is based on the binary model. While the manner in which judges refer to persuasiveness is by no means uniform, in general, the systematic association with formal law—the judicial nature of the body and procedure according to which the instruments are adopted—and the wider acceptance of informal instruments would likely determine the persuasiveness of informal instruments in the eyes of domestic courts. Yet, the notion of persuasiveness is still underdeveloped as justification for the practices of domestic

courts. The notion may lack the political underpinnings as to why domestic courts can invoke persuasiveness in the first place. The weak theoretical backbones for persuasiveness resulted in and from the varied amenability among states to the idea of persuasiveness and the associated discretion of judges. In part, the systematic association with formal law—from which national courts may indirectly gain their legitimacy to employ nontreaty standards for judicial reasoning—sustains the instruments' persuasiveness.

The permeation of informal international instruments into domestic courts would likely continue due to the growing international and domestic expectation placed on national judges. While in many jurisdictions domestic courts still resist in combining formality with informality in their decisions, the growing judicial practices to realize nontreaty instruments at the domestic level may incrementally mobilize skeptical judges to consult those instruments.

The continuing application of informal instruments by domestic courts has normative and legal effects at the international level. The domestic courts' application of informal instruments first strengthens the normativity of those instruments at the international level and may encourage other states and international organizations to follow them, despite the lack of formal legal binding force. The respect that domestic courts have paid to the instruments may further serve to strengthen the authority of international bodies and networks that have promulgated those instruments.

In addition, domestic courts' reference to informal instruments helps turn those instruments into formal international law—albeit, only in a remote sense. Domestic court decisions are, after all, state acts.[212] Within this limited venue, domestic courts' decisions convert informal international instruments into part of formal international law. National case law can contribute to both the for-

212. National judicial acts are treated traditionally as "facts which express the will and constitute the activities of States." Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25). As Conforti observed, "domestic court decisions constitute one of the most important categories of custom-shaping State behaviour." BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 79 (René Provost trans., 1993).

mation and interpretation of customary law[213] and the development of precedential treaty interpretation.[214]

The international normative impact of domestic practices suggests that the application of informal international instruments, precisely because it remains a largely unregulated undertaking by domestic courts, empowers domestic courts in the development of international regulation. While domestic courts have long been a submerged presence in a single "state" unit, which is supposed to be a monolithic actor in the process of development of international law, domestic courts are no longer the mere spokespersons of the legislative or executive bodies. Insofar as domestic courts apply informal international instruments, they are better regarded as an autonomous normative enterprise in developing international regulation sustained by both formality and informality.

213. *See* Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y.B. INT'L L. 65 (1929) (discussing municipal courts as a source of international law); INT'L L. ASS'N, FINAL REPORTS OF THE COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW § 9, at 17 (2000). Lauterpacht observes that the decisions of municipal courts within a particular state, "when endowed with sufficient uniformity and authority, may be regarded as expressing the *opinio juris* of that State." HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 20 (1934).

214. *See* Vienna Convention on the Law of Treaties, *supra* note 81, art. 31(3)(b).