



**CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER
NUMBER 17, 2008**

**NORMATIVE INSTRUMENTS IN INTERNATIONAL HUMAN
RIGHTS LAW:
LOCATING THE GENERAL COMMENT**

CONWAY BLAKE

NYU School of Law • New York, NY 10012
No part of this paper may be reproduced in any form
without permission of the author.

**NORMATIVE INSTRUMENTS IN INTERNATIONAL HUMAN
RIGHTS LAW:
LOCATING THE GENERAL COMMENT**

© CONWAY BLAKE
PhD Candidate
Cambridge University, Faculty of Law
E-mail: ckb24@cam.ac.uk

The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. Philip Alston is the Center's Faculty Chair; Smita Narula and Margaret Satterthwaite are Faculty Directors; and Jayne Huckerby is Research Director. The Center's website is: www.chrgj.org.

Abstract

A prominent feature of contemporary international legal process has been the proliferation of human rights norms. Out of this has grown a complex structure of various interrelated normative instruments, which together form the corpus of international human rights law. One instrument that has emerged in recent times, is the interpretative statements issued by UN treaty bodies formally referred to as 'General Comments.' However, despite their wide currency and appeal in international human rights discourse and practice, their jurisprudential value remains remarkably unclear. Indeed, very little in the way of sustained analysis has been said about their role and status in international law.

This paper examines the origins and evolution of the General Comment, and assesses its contemporary role in the practice and understanding of human rights law. It traces how this instrument has emerged from the obscurity of treaty texts to become an important tool in the development, understanding and practice of international human rights law. It further analyses the spectrum of claims about the normative status of General Comments in international law. More precisely, it attempts to locate the General Comment in the over-all scheme of international normativity, and seeks to suggest a way in which we can understand the potential and complexity that these instruments present.

From this enquiry it emerges that the General Comment is one of the most dynamic and significant normative tools in contemporary human rights law. However, it also makes plain that this instrument does not fit easily within the traditional schema of international law. Simply put, General Comments are non-binding. This notwithstanding, the analysis reveals that these instruments do possess normative significance. The paper therefore, tries to grapple with the idea of the authoritativeness of these instruments. It concludes that their 'authority' cannot be viewed in traditional legal terms, as General Comments do not bind states, and are not determinative of state's obligations. However, when viewed in the context of the various discursive and ideational processes which are central to human rights law, General Comments can be viewed as authoritative interpretative instruments, which gives rise to a normative consensus on the meaning and scope of particular human rights.

NORMATIVE INSTRUMENTS IN INTERNATIONAL HUMAN RIGHTS LAW: LOCATING THE GENERAL COMMENT*

CONWAY BLAKE

Introduction	2
Defining the General Comment	3
The History of the General Comment	4
The Present Role of the General Comment	8
Treaty Bodies and the General Comment	9
NGOs and the General Comment	12
Human Rights Adjudication and the General Comment	15
<i>International Courts, Tribunals and other Mechanisms</i>	15
<i>Domestic Courts</i>	17
The Legal Status of the General Comment	20
<i>The Problem with Traditional Sources: Indeterminacy of Sources Doctrine</i>	23
<i>General Comment and Traditional Sources</i>	24
<i>The General Comment as a New Source of Law?</i>	25
<i>The General Comment as Authoritative Interpretation</i>	27
<i>The Competence of UN Treaty Bodies</i>	28
<i>Not Binding = Not legal?</i>	30
Towards an Understanding of the General Comment	31
<i>Interpretive Communities</i>	32
<i>Interpretive Communities in International Law</i>	33
<i>The Authority of Interpretive Communities</i>	33
<i>Law, Process and Interpretation</i>	34
Conclusion:	35

* An advanced version of this paper will be published in the (2009) Volume 1, No. 50 of the Harvard International Law Journal. ©

Introduction

A prominent feature of contemporary international legal process has been the proliferation of human rights norms. Out of this has grown a complex structure of various interrelated normative instruments, which together form the corpus of international human rights law. One instrument that has emerged in recent times, is the interpretive statements issued by UN treaty bodies formally referred to as 'General Comments.'

Despite its recent vintage, the 'General Comment' is now one of the most significant and influential normative tools in international human rights law and practice. It has become an important part of the normative armoury of the international human rights movement. Indeed, the content of many human rights are often defined and discussed exclusively in terms of General Comments. These instruments cover a broad spectrum of the human rights domain, running the gamut of the seven major UN human rights treaties.

At writing, 120 General Comments were adopted by five of the seven UN human rights treaty bodies. And with as many as three being issued by a single Committee in a single year, they are likely to continue to increase in number. The growing prominence and prevalence of the General Comment can be attributed to the marked activism on the part of Committees, and the now frequent interface between treaty bodies and NGOs/activists. In short, the emergence and proliferation of the General Comment in its present form, reflects the multiplicity of actors, and the growing complexity of contemporary international human rights norm generation.

While the notion of a mere 'comment' belies any significant normative value, these instruments provide a potentially critical layer of concrete meaning to human rights standards. It is here that potentially authoritative international legal rules and decisions regarding human rights are developed.¹ Yet despite their wide currency and appeal, their jurisprudential value remains remarkably unclear.

It is often said of the human rights movement, that it has not been critical and discerning in relation to the various sources of human rights norms which it invokes.² Consequently, it has been indicted for its lack of formalism in relation to jurisprudential sources. Similarly, NGOs have been said to draw little distinction between legally and non-binding instruments when agitating for norm compliance.³ Thus, Kennedy has argued that this laxity has led to a degradation of the legal profession, 'by encouraging a combination of overly formal reliance on textual articulations that are anything but clear or binding and sloppy humanitarian argument.'⁴

General Comments and other frequently invoked non-treaty instruments raise questions about the integrity, coherence and legitimacy of international human rights

¹ Douglas Lee Donoho, 'Democratic Legitimacy in Human Rights: The Future of International Decisional-Making' (2003) 21 *Wisconsin International Law Journal*, p. 2, 31

² See, for example, Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1992) 12 *Australian Yearbook of International Law* 82; Upendra Baxi, 'Too Many or Too Few Human Rights?' (2001) 1 *Hum. Rts. L. Rev.* 1; Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 907.

³ Douglass Cassel, Christopher McCrudden et al, 'Human Rights' in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford 2000), p. 345

⁴ David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Law Journal* 101, 120.

norms and their development. Indeed, these emerging normative instruments have become a contested site, where states challenge their increased exclusion from the international normative processes. In light of the ever-growing number of human rights norms and the expanding contexts in which they are being invoked, there is a real need for the relevant norms to be solidly grounded in international law.

This paper brings all these issues into focus. It analyses the spectrum of claims about the normative status of these instruments. It examines the nature of the General Comment, and assesses its contemporary role in the practice and understanding of human rights law. More precisely, it attempts to locate the General Comment in the over-all scheme of international normativity, and seeks to suggest a way in which we can understand the legal significance of this instrument.

From this enquiry it emerges that the General Comment is one of the most dynamic and significant normative tools in contemporary human rights law. However, it also makes plain that this instrument does not fit easily within the traditional schema of normativity in international law. Simply put, General Comments are non-binding. This notwithstanding, the analysis reveals that these instruments do possess normative significance. The paper therefore, concludes by trying to present a context and framework in which we can begin to understand something of the potential and complexity that these instruments present.

Defining the General Comment

General Comments are issued by the UN bodies charged with the supervision of human rights implementation under the universal human rights treaties. Treaty bodies are independent specialist committees composed of between 14 to 23 experts of 'high moral character' and 'recognised competence' in the fields covered by the Conventions.⁵ Though nominated by states, Committee members are not states' delegates, and once elected serve in their personal capacity. The Committees exercise a range of functions including, issuing responses to individual complaints, entering into dialogue with states representatives, adopting concluding observations on reviewed states' reports, and issuing recommendations and comments based on the examination of states' reports and treaty provisions in general.⁶ It is this latter recommendatory function that has given rise to the practice known as the issuing of 'General Comments.'

Alston has described the General Comment as the "means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty, whose implementation it supervises, and presents those view in the context of a formal statement...."⁷ They function primarily as interpretative instruments, aimed at elucidating and making more accessible, the 'jurisprudence'

⁵ ICCPR, Article 28 (Human Rights Committee); ICESCR (Committee on Economic, Social and Cultural Rights established by ECOSOC Resolution in 1987); Race Convention, Article 8 (Committee on the Elimination of Race Discrimination); Women' Convention, Article 17 (Committee on the Elimination of Discrimination Against Women); Torture Convention, Article 17 (Committee Against Torture); Children's Convention, Article 43 (Committee on the Rights of the Child); Convention in the Protection of the Rights of All Migrant Workers and Member of their Families, Article 72.

⁶ See ICCPR, Article 40; ICERD, Article 9; CEDAW, Article 21; CRC, Article 45; Torture Convention, Article 19; Migrant Workers' Convention, Article 74; and ICESCR, (ECOSOC Resolution in 1987/5 para. 9, May 26, 1987 in UN Doc. E/C. R/1989).

⁷ Philip Alston, "The Historical Origins of 'General Comments' in Human Rights Law," in Laurence Boisson De Charzournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (2001), p. 764

emerging from the work of the treaty bodies. In many respects the General Comment has become a focal point for the conceptual and normative development of human rights norms within the UN treaty system.

Though the descriptive term 'General Comment' is often employed, this term does not refer to a homogenous group of documents. While the majority of treaty bodies issue General Comments, some issue what are termed 'General Recommendations'.⁸ The differences between these devices are largely linguistic, merely reflecting variations in the wording of the human rights treaties. While there were initial differences between recommendations and comments in terms of their length and formulation, practice in the treaty bodies has more or less converged and both descriptions are now used interchangeably.⁹

It is also apt to note that the form and content of General Comments vary. Steiner has therefore observed that 'the accumulated general comments range from spelling out the internal procedures of the committees or requiring states to include certain information in their periodic reports, to making general interpretations of the substantive provisions of the Covenants.'¹⁰ However, as discussed below, current Committee practice has seen the General Comments largely taking the form of interpretive pronouncements.

The text of the relevant treaties do not speak of the interpretative function of the Treaty Committees, nor do they appear to envision this role for the General Comment. The practice of using the General Comments as an interpretative device arose out of the evolution of the procedures in the UN treaty bodies. Indeed, time has seen a growth of activism within the Committees, and with this a willingness to transform and creatively use existing procedures and texts to improve the effectiveness of the treaty regime. It is therefore impossible to understand the role General Comments have come to play without looking at their history and development within the UN treaty system.

The History of the General Comment

The origins of the General Comment are far removed from its present incarnation in human rights law. As Steiner remarks, 'this terse phrase has experienced a life of its own.'¹¹ And although these instruments have become a general feature of the UN human rights system, the treaty texts are decidedly obscure about their origins, form or purpose. Likewise, the *travaux préparatoires* are generally unhelpful in shedding any light on this matter.

It appears that the early influences for the General Comment can be traced to proposals for the establishment of a periodic system of reporting under the Universal

⁸ These are: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), UNGA resolution 2106 A (XX), 21 December 1965, in force 4 January 1969, 660 UNTS 195, (1966) 5 ILM 352.; and The Convention on the Elimination of All forms of Discrimination against Women (CEDAW), UNGA resolution 34/180, 18 December 1979, in force 3 September 1981, (1980) 19 ILM 33.

⁹ There is however, a perceptible difference in the practice of the CERD, which tends to issue quite short hortatory recommendations, which contrast with the more extensive and declaratory style reflected in the comments of the practice of, for example, the HRC and CESCR.

¹⁰ Henry J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000), p. 17

¹¹ *Ibid*, p. 22

Declaration on Human Rights (UDHR), which was put forward by the United States¹² in 1953.¹³ These proposals envisioned the submission of voluntary state reports to the Commission on Human Rights, and authorised the Commission to make 'recommendations, comments and conclusions'¹⁴ on reports as it deemed appropriate. This proposal for UDHR reporting was ultimately rejected, but the idea of human rights bodies issuing 'comments' and 'recommendations' to states parties was to survive.

References to 'general recommendations' later emerged in the negotiations of the Convention on the Elimination of Racial Discrimination (ICERD). These references however, were also concerned with the powers and functions of the Human Rights Commission and UN Specialized Agencies, and not that of the treaty bodies.¹⁵

While these references were later abandoned, they served as a precursor and eventual influence for the General Assembly to accord the Committee on the Elimination of Racial Discrimination (CERD) the power to 'make suggestions and general recommendations based on the examination of the reports and information received from the States Parties.'¹⁶

This modest provision spawned the early practice of the CERD in issuing 'general recommendations,' and the evolution of the device now known as the General Comment. Since the ICERD in 1965, the main UN human rights treaties have all been drafted with provisions empowering the respective treaty bodies to issue 'General Comments' or 'Recommendations.'

Despite this widespread adoption of the General Comment throughout the human rights regime, this device attracted great scepticism from many states, who expressed misgivings about its potential for political abuse. These attitudes were engendered and heightened by the prevailing geo-political and ideological cleavages which characterized human rights law-making in the Cold War era. Anxious that the UN treaty system would be used as a pretext for launching hostile criticism against their regimes, Eastern European states sought to restrict the potential for human rights mechanisms to scrutinize domestic activities, or highlight human rights abuses in individual countries.

The contested nature of the General Comment was vividly seen, for example, in the early sessions of the Human Rights Committee. While article 40(4) of the ICCPR authorized the pronouncement of 'general comments...to the state parties,' there was great incertitude and disagreement among committee members about the scope of the Committee's power to issue such comments. The controversy mainly concerned the question of whether Comments were intended to be used as a device for singling out individual states and highlighting their human rights violations. Committee members from the Eastern bloc contended that such an approach would be beyond the powers

¹² United States of America: Revised Draft Resolution on Annual Reports', UN Doc E/CN.4/L.266/Rev.2 in Report of the Ninth Session of the Commission on Human Rights, UN ESCOR, 16th sess, Annex, Supp 8, UN Doc E/2447 (30 May 1953) [263].

¹³ Alston notes that the proposition for reporting under the Universal Declaration was made by the United States and United Kingdom and others in their attempt to prevent the drafting of the two covenants --the ICCPR and the ICESCR- by making them redundant. For general discussion of the American proposal see, Alston note 7, supra, p. 771.

¹⁴ See, UN Docs. E/CN.4/L.22/Rev.2 ; UN Doc. A/C.3/L.1221 (1965) At this stage of negotiations the references to 'suggestions' or 'recommendations' was used to describe the action which might be taken in relation to state's parties reports by either the Commission on Human Rights of the UN specialized agencies to which the reports might be transmitted.

¹⁵ See, UN Doc. A/C.3/L.1221 (1965)

¹⁶ Article 9 (2).

of the Committee and contrary to the spirit of the Covenant. In their view, the Committee had no right to evaluate States parties' compliance with the Covenant, nor did it have the power to seek to correct the actions of States concerned.¹⁷

They applied a restrictive interpretation to the term 'general comments', arguing that there was:

No reason why this term should be given a new interpretation in the sense of concrete assessments of the state or implementation of the Covenant or the establishment of violations of human rights by individual states parties to change certain practices or introduce certain measures.¹⁸

This interpretation coincided with the belief held by many states, that the human rights reporting mechanism was only relevant for the purposes of information and study, and not for monitoring and scrutiny.¹⁹

In contrast, Committee members from Western Europe conceived the Comment as a device with great potential for assisting in monitoring and securing compliance with treaty norms and standards. As such they argued that the Committee could use the Comment to: 'interpret the Covenant, apprise State parties of erroneous interpretations of the Covenant and address violations or issues of concern in one state party or the ICCPR members as a whole.'²⁰

The battle between these seemingly intractable positions was however resolved in a compromise, and the dead-lock was ultimately determined in favour of non-country specific comments.²¹ Non-specificity therefore prevailed, and the HRC adopted a weak and restrictive approach to General Comments. It was agreed that the Comments were to be addressed to the states parties in general, aimed at promoting cooperation, and drawing states' attention to matters relevant to improving their reporting and implementation of the Covenant.²² They therefore took on an essentially technical and procedural emphasis.

Therefore, the initial rationale behind the General Comments stemmed from a desire "to encourage states parties to provide in their periodic reports more complete information which was either required by the Convention or which was relevant to the principles and aims of the Convention, and helped [the treaty body] in discharging its own obligations."²³ Comments were therefore concise and specific exhortatory statements,²⁴ encouraging states to bring their reports in conformity with the Convention's requirements.

¹⁷ Ineke Boerefijn, *The Reporting procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee*, (Intersentia 1999) p. 287

¹⁸ Quoted in, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (Engel, 1993) p. 569

¹⁹ See, E/CN.4/SR.430 (United Kingdom) .

²⁰ See, Statements of Tomuschat, UN Doc. CCPR/C/SR.50 (1978), para. 13.

²¹ At the Committee Session in 1980, a compromise reached in a small working group. See UN Doc. CCPR/C/SR.260 (1980) para.

²² See, UN Doc. CCPR/C/SR.260 (1980) para. 1.

²³ Jose L Gomez del Prado, "United Nations Convention on Human Rights: The Practice of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination in Dealing with Reporting Obligations of States Parties" (1985) 7 *Hum. Rts. Q* 492, 507

²⁴ The wording is somewhat akin to ECOSOC or General Assembly resolutions.

The first 'General Comments' ever issued, took the form of two recommendations produced by the CERD at its fifth session in 1972.²⁵ The early practice that emerged, showed an emphasis on procedure and the reporting obligations under ICERD.²⁶ The CERD narrowly construed its power under article 9 (2) and therefore in practice, these instruments were concerned with spelling out the internal procedures of the committee. Likewise, early HRC practice showed a technical orientation. These early 'Recommendations' were innocuous, and would have scarcely drawn attention or comment. They were primarily aimed at drawing states' attention to informational omissions or deficiencies in their human rights reports.

As noted above, the General Comment was conceived as a way of complementing the reporting system under the various conventions. As such, the CESCR has described the function of the General Comment, as a means of making:

the experience gained so far through the examination of those reports available for the benefit of all state parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the states parties to insufficiencies disclosed by a large number of reports, to suggest improvements in the reporting procedures and to stimulate the activities of the State parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant.²⁷

This brief examination of the history of the General Comment reveals something of its intended role. They were technical and procedural in emphasis, functioning primarily to clarify the desired form and content of states' periodic reports.²⁸ Given the centrality of the reporting system to the UN human rights regime, such a function was indeed essential for the effectiveness of the human rights monitoring mechanism. However, this modest interpretation of the scope of the General Comment prevailed, because early attempts to fashion the General Comment as a tool of scrutiny and normative guidance were opposed. Presumably also, at this early stage treaty bodies were still working hard to attract ratifying States, and were therefore cautious not to overextend their authority for fear of deterring treaty participation. Consequently, early Comments were largely programmatic, short and narrowly focused. In some ways, they operated to limit the potential development of the treaty regime. However, this

²⁵ CERD, General Recommendation I: Concerning States Parties Obligations (art. 4), 5th Session, 1972; CERD, General Recommendation II, 5th Session, 1972, UN Doc. HRI/GEN/1/Rev.5, 26 April 2001.

²⁶ This is further shown in the fact that early CERD recommendations were all incorporated into the Committee's General Guidelines. See, United Nations, Committee on the Elimination of Racial Discrimination, Revised General Guidelines concerning the form and content of reports by stated parties under article 9, paragraph 1, of the Convention (CERD/C/70/Rev. 1), 1983.

²⁷ Committee on Economic Social and Cultural Rights, Report in the 8th and 9th Session, E/1994/23; E/C.12/1993/19 (1994), pg. 20, para. 51.

²⁸ This approach can be seen in the recommendations issued by CERD aimed at clarifying the form and content of reports. Another example is CESCR's General Comment No. 1 (E/1989/22) on 'Reporting by States Parties,' which sought to clarify the objectives of the reporting system under the ICESCR, and encourage States Parties' engagement with the Committee.

The Present Role of the General Comment

The General Comment was therefore not intended to have any distinct legal character, nor was its scope to extend beyond the direct functioning of the treaty monitoring system. They were neither scholarly studies nor secondary legislative acts.²⁹ Accordingly, Committee members stressed the fact that the Comments were 'based on the practice of the Committee, and should not be seen as a general, abstract interpretation of the Covenant's provisions.'³⁰ However over the years, the underlying philosophy of these documents has changed, and their texts have matured, assuming an altogether different role than that originally conceived for them.

While treaty bodies continue to emphasise the orthodox 'advisory' and 'procedural' role of the General Comment, these instruments have come to take on an almost exclusively 'law-making' function. Often characterised by abstract normative enunciation, their scope far exceeds the narrow boundaries of states' periodic reports. They are widely considered as authoritative interpretative statements, and a device through which treaty bodies articulate their understanding of human rights norms. Far from being merely hortatory, they can in some ways be likened to the advisory opinions of the International Court of Justice or the Inter-American Court of Human Rights; purposive tools, aimed primarily at improving the promotion and implementation of human right norms.

It appears that this refashioning of the General Comment took shape under the auspices of the Human Rights Committee (HRC). The first Comments by the HRC were at the time of the Cold War of a rather descriptive nature,³¹ whereas, more recent ones have provided a comprehensive interpretation of certain of the Covenant's provisions.³² They have become so far removed from their former practical and descriptive nature, that one commentator has seen it fit to describe them as 'theoretical exercises based on lengthy and technical discussion.'³³ The other treaty bodies have to a large extent followed suit, many of them issuing Comments in the form of lengthy and sophisticated interpretative statements.³⁴

The remainder of this section examines in more detail the transformation, and contemporary role of the General Comment in human rights practice. It explores their operation within the UN Treaty bodies, using the practice of the Committee on Economic, Social and Cultural Rights (CESCR) as an illustrative study. It further considers their invocation before domestic and international courts and in other international enforcement mechanisms. Their effect on the practice of NGOs is also considered.

²⁹See, note 17 supra, p. 294

³⁰See CAT General Comment No. 1, A/53/44, annex IX (1997) para. 9; E/C.12/1993/13 (1994) para. 51; Boerefijn note 17, supra, p. 294.

³¹ See, for example, the terse language in the HRC's General Comment No. 3 on Implementation (1981) UN Doc.HRI/Gen/1/Rev.6, p. 125.

³² See Eric Tistounet, 'The Problem of Overlapping Among Different Treaty Bodies,' printed in Philip Alston and James Crawford (eds.), *The Future of the UN Human Rights Treaty Monitoring*, (Cambridge 2000) p. 383.

³³ Ibid, p. 395

³⁴ For discussion of the development of the General Recommendation in CEDAW see, Mara R. Bustelo, "The Committee on the Elimination of Discrimination Against Women at the Crossroads," in Philip Alston and James Crawford (eds.), *The Future of the UN Human Rights Treaty Monitoring*, (Cambridge 2000) p. 79, 96

Treaty Bodies and the General Comment

The contemporary function of the General Comment is nowhere more vividly demonstrated than in the practice of the Committee on Economic, Social and Cultural Rights (CESCR). Indeed, the single most significant contribution of that Committee to the promotion of the Covenant, has been its bold and innovative General Comments. The practice of issuing comments has contributed to the general understanding of the Committee's work and the development of a common understanding of the normative standards in the Covenant.³⁵ The role that General Comments have come to play in the CESCR is best understood in light of the traditionally indifferent and sceptical attitude of states towards socio-economic rights, and the active role of the Committee in addressing this imbalance through its normative work.

Economic, social and cultural rights were historically, and to a certain extent remain, the normatively underdeveloped stepchild of the human rights family.³⁶ They were widely perceived by states as juridically distinct from their civil and political cognates; demarcated as different in nature and origin and being of little legal significance. This supposed non-judicial understanding of these rights is partly explained by the linguistic idiosyncrasies of the Socio-Economic Rights Covenant, which unlike the ICCPR couches the obligations of member states in programmatic terms. This was compounded by the paucity of domestic legislation and jurisprudence, which retarded the general understanding and monitoring of these rights at the international level.³⁷

While the CESCR's review of states' reports offered some insight into the implementation of the Covenant, in general, the reporting system failed to shed significant light on the normative content of socio-economic rights.³⁸ This can largely be explained by the fact that the compilation and presentation of reports has tended to be seen almost exclusively as a diplomatic chore, and not as an opportunity for working out a common understanding of the treaty.³⁹ Furthermore, the lack of a formal complaints procedure under the ICESCR, has also significantly limited the potential for interpretative case-law and normative development of the Covenant.⁴⁰

³⁵ See, Mathew Craven, *The Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*, (Oxford 1995) p. 91

³⁶ See, J.M. Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm,' (2003) 38 *Texas International Law Journal* 763, 793.

³⁷ The literature on this issue is extensive; see for example: P. Alston, "Economic and Social Rights" (1994) 26 *Stud. Transnat'l Legal Pol'y* 137; K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*, (1999), p. 357; Mathew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (Oxford 1995); G. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views,' in Philip Alston and K. Tomasevski (ed.), *The Right to Food*, (1984), pp. 97-110; P. Hunt, *Reclaiming Social Rights: International and Comparative Perspective*, (Dartmouth 1997).

³⁸ See Jane Connors, 'An Analysis and Evaluation of the System of State Reporting' in Anne F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century* (Kluwer 2000), p. 3.

³⁹ See Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Oxford 1992) p. 491; Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies,' [2006] *Hum. Rts. L. Rev.* 29, 37.

⁴⁰ While the HRC can adjudicate individual complaints pursuant to the Optional Protocol to the ICCPR, the ICESCR was not so empowered. At present a Working Group has been charged with the elaboration of an Optional Protocol to establish an individual complaints mechanism under the ICESCR. (See Report 10th Feb. 2005, E/CN.4.2005/52). In this regard see, Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social and Cultural Rights: Should there be an

Facing this great legal and ideological aversion to the Covenant, the CESCR resorted to the General Comment to remedy the jurisprudential deficit in socio-economic rights. Through its interpretative enterprise it has started to synthesise a body of international socio-economic rights jurisprudence. These normative elucidations started to clarify the content of these rights, and hence formed the basis for concrete evaluations as to compliance with treaty norms.⁴¹ General Comments have therefore become valuable tools of evaluation, integral to the Committee's effective monitoring of the Covenant. In addition, they also assist states and other actors in their promotion and implementation of the rights by clarifying the requirements of the Covenant.

In its attempt to address the normative imbalance with regard to socio-economic rights, the Committee did more than merely elaborate a 'common understanding' of the Covenant. Indeed, there was no such 'common understanding' among states, who generally viewed the Covenant and its provisions as having negligible legal significance and low priority. What the Committee achieved in its Comments was the construction of a new understanding of the rights and obligations of the Covenant, in many cases accomplished through a creative and often prescriptive 'interpretative' approach.

The Committee's first steps in deriving concrete normative standards from the ICESCR's abstract obligations can be identified in General Comment No. 3 on the 'Nature of States' Obligations.'⁴² Notwithstanding the Covenant's injunction to states, to 'work progressively' towards the realization of human rights aims, the Committee held that states had immediate obligations to respect, protect and fulfil all the rights in the Covenant.⁴³

In a further attempt to provide a more concrete specification of these rights, the Committee adopted a 'minimum core approach' to the Covenant. Through purposive interpretation of the Covenant's programmatic scheme and language of contingency, the Committee imposed a non-derogable 'minimum core' obligation on states to provide material necessities to all individuals.⁴⁴ Therefore, a State party in which any significant number of individuals is deprived of essential food, health care or shelter would be held to be prima facie in breach of its obligations. This approach not only had far-reaching implications for states, it had a profound impact on the general understanding of socio-economic rights.

The Committee has further elaborated its understanding of States' obligations, in the context of particular rights. For example, in General Comment No. 4,⁴⁵ the Committee sought to 'clarify' the content of the right to adequate housing. It must be noted, that the Covenant does not itself enshrine a free-standing 'right to housing;' housing features in the Covenant merely as an element of the general right to an 'adequate standard of living.' However, the Committee derived an autonomous right to housing from the Covenant, and has sought to clarify its various normative dimensions through two General Comments.⁴⁶ These included inter alia, the

International Complaints Mechanism to Adjudicate the Right to Food, Water, Housing and Health?" (2004) 98 *American Journal of International Law* 462.

⁴¹ See, for example, note 40, supra.

⁴² U.N. Doc. E/1991/23, annex III at 86 (1991).

⁴³ In some General Comments, the Committee has split the obligation to fulfil into two parts: an obligation to facilitate and an obligation to provide.

⁴⁴ General Comment 3, para. 10.

⁴⁵ U.N. Doc. E/1992/23, annex III at 114 (1991).

⁴⁶ See *The Right to Adequate Housing (Art. 11.1): Forced Evictions*. CESCR General Comment 7 (1997) E/1998/22, annex IV.

guarantee of privacy, adequate space, security, lighting and ventilation, basic infrastructure, adequate location with regard to work and affordability.⁴⁷ In this regard Craven observes that:

in outlining the essential qualitative elements of the right to housing in article 11, it could hardly be said that the Committee was merely describing its ... practice or that it was merely reflecting the information collected from states.⁴⁸

Such a statement could also be made with respect to the Committee's General Comment No. 15 on the right to water,⁴⁹ which is further discussed below. Undoubtedly, the CESCR has brought the General Comment out of the realm of the descriptive, and has firmly established it as a prescriptive normative instrument.

Other treaty bodies have also employed the General Comment in similar ways, as typified in the CEDAW's treatment of the issue of violence against women. There is no specific provision concerning violence against women in the Convention on the Elimination of All Forms of Discrimination against Women, an omission that has been a constant source of dissatisfaction for activists. However, in 1992 CEDAW adopted General Recommendation 19, in which it stated that, 'gender based violence is a form of discrimination which...impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.'⁵⁰ This effectively brought gender violence under the rubric of discrimination, and within the ambit of the Convention. While the Committee 'firmly rooted' the Recommendation in the terms of the Convention by emphasising the issue of discrimination,⁵¹ it did so by a constructive re-interpretation of the concept of discrimination found in the Convention.

The growing emphasis on normative development in the content of General Comments, signals an evolution in the practice of human rights law and the international normative landscape. It reflects a conceptual shift in the Committees' perception of their role in implementing human rights treaties, and an awareness of the limits of international mechanisms in procuring transformative results in domestic constituencies. It has long been argued that the primary role of treaty bodies in the implementation of human rights, should be the task of developing authoritative understandings of the normative content of the rights and of promoting these understandings internationally.⁵² The treaty bodies have therefore used the Comments as a means of explaining the treaties. Acting as deliberative bodies, they seek to illuminate and advance understanding of the Covenants through these interpretive pronouncements.

⁴⁷ For a discussion of the Committee's approach to the Right to Adequate Housing, See Scott Leckie, 'The Human Right to Adequate Housing,' in Asbjørn Edie et al (eds.), *Economic, Social and Cultural Rights: A Textbook*, (2nd ed. 2001), p.149

⁴⁸ See note 35, supra.

⁴⁹ U.N. Doc. E/C.12/2002/11 (2002).

⁵⁰ General Recommendation No.19, UN Doc. A/47/38, CEDAW/C/1992/L.Add. 15, 30 January 1992, paras. 1 and 7.

⁵¹ See, note 137 infra, p.155.

⁵² For example, Steiner has argued, in relation to the Human Rights Committee, that it could make its most significant contribution to the ICCPR and the human rights movement by concentrating on expounding the ICCPR. See, Henry J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000), p. 17. See also, Mathew Craven, 'The Committee on Economic Social and Cultural Rights,' in Asbjørn Edie et al (eds.), *Economic, Social and Cultural Rights: A Textbook*, (2001), p.455 at 471.

The turn to normativity may also have been influenced by the growing activism within treaty bodies, which saw them beginning to assert their implied powers to promote compliance with the human rights treaties. The end of the Cold War saw a significant subsidence of States' anxieties towards the UN human rights treaty system. In the 1990's treaty bodies initiated the practice of issuing 'Concluding Observations' following the consideration of states' reports, thereby making specific evaluative statements and conclusions about the adequacy of state reports and their implementation of human rights domestically.⁵³ With this development, there was no need for the General Comments to be overly concerned with the technical or procedural aspects of state reports, as these were addressed adequately in the various concluding observations. The General Comment was therefore free to develop as a tool for normative guidance.

This tool has not only served to develop international human rights law, but has also ensured its effectiveness, by functioning as a corrective to the vagaries of international law-making. While treaties remain the conventional route through which to develop international norms, treaty texts often conceal the politics and the exploitation of power, which plays out during inter-state negotiations and which often neutralizes forces advocating progressive legal change. Indeed, traditional accounts of law-making `assume a monolithic state voice, that silences individuals and other non-elite groups in the international arena except in so far as their interests are championed by states.'⁵⁴ Feminists, sexual minorities, the disabled and other such groups are well acquainted with the obstacles of getting particular issues on the international human rights agenda. General Comments, by elaborating progressive and often politically unpopular interpretations, operate as a counter-hegemonic balance to these deleterious influences of state sovereignty and international human rights realpolitik.

NGOs and the General Comment

The General Comment has not only altered the substance of human rights norms, but has in some ways transformed the processes of norm generation, by expanding the range of participants and their modes of engagement in international normative development. Reference is here made to the growing prominence of NGOs in human rights negotiations and treaty monitoring. But, despite their high profile, such NGO activities do not challenge the primacy of states in law-making. In the main, the growing influence and input of NGOs on law-making has not changed the fact that the final documents whether treaty or soft law, are ultimately agreed on by states. The General Comment has offered them an unparalleled opportunity to engage and directly influence the form and substance of human rights law, while obviating the excessive and often obstructive interference of states.⁵⁵

The precise role that NGOs are invited to play in the interpretative and normative process varies from Committee to Committee. For example, the Economic, Social and Cultural Rights Committee actively encourages NGOs to become involved in its

⁵³ Started in 1992 by the Human Rights Committee. See UN Doc. A/44/40, para. 18 and 45; The CERD in 1993, see 1993,A/48/18; The CRC in 1993, see CRC/C/15/Add.8; The CAT in 1994, see A/49/44; The CEDAW in 1994, see A/49/38. The Migrant Workers Committee (MWC), became functional in 2003 and is yet to begin review of states' reports.

⁵⁴ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester 2001) p. 69.

⁵⁵ See, Upendra Baxi, *The Future Of Human Rights* (Oxford 2002) p. 71

thematic work and to assist with the development of its doctrine.⁵⁶ This is primarily facilitated through the 'Days of General Discussion,' which sees considerable participation of NGOs and experts in the work of the Committee. The Committee has described these days as having a twofold function. They 'assist the Committee in developing greater depth in its understanding of the relevant issues; and it enables the Committee to encourage input into its work from interested parties.'⁵⁷ The general discussions often provide the basis for the drafting of General Comments. They therefore facilitate the direct intervention of NGOs into the interpretative and norm-generative processes, by allowing them direct influence on the conceptualization, preparation and drafting of General Comments.⁵⁸

An instance of NGO participation in this process is seen in work of these organizations in sponsoring or initiating General Comments in specific issue areas. In this regard, Craven notes that the CESCR's General Comment No. 4 on the right to adequate housing, was produced as a result of 'extensive co-operation with NGOs, one of which drafted the initial version.'⁵⁹ This was also the case with the right to water.⁶⁰ And while NGOs have been excluded from the working groups of the CEDAW when general recommendations have been elaborated, there has been sustained contact between members of CEDAW and NGOs relating to the drafting of General Comments outside Committee sessions.⁶¹

The intervention of NGOs into the normative work of treaty bodies, has also allowed the General Comment to become a dynamic and responsive aspect of a UN treaty system that has been criticized as static and largely ritualistic.⁶² Through this informal system of 'rights lobbying,' NGOs are able to use comments to address the real concerns of activists, and the obstacles that continue to plague the implementation of human rights norms on the ground.

This 'responsiveness' is illustrated in the response of treaty bodies to problems facing women in the international human rights system, through the policy of 'gender-mainstreaming.' At the Vienna Conference on Human Rights in 1993, it was accepted that the human rights of women should form 'an integral part of the United Nations human rights activities.'⁶³ Treaty bodies have therefore become responsive to the 'call for gender mainstreaming,' integrating gender concerns into their normative work.⁶⁴ Chinkin and Charlesworth comment that, 'the Committee on Economic Social and

⁵⁶ See, Report on NGO Participation in the Activities of the Committee on Economic, Social and Cultural Rights, E/C.12/2000/6, July 7th 2000.

⁵⁷ See, UN Doc. E/1995/22 (E/C.12/1994/20), para. 44.

⁵⁸ See Andrew Clapham, 'Defining the Role of Non-Governmental Organizations with Regard to the UN Human Rights Treaty Bodies,' in Anne F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, (Kluwer, 2000), p. 183,190.

⁵⁹ See, note 35 supra, footnote 426.

⁶⁰ Stephen Tully, 'A Human Rights to Access Water? : a Critique of General Comment No. 15' (2005-4) 22 *Netherlands Quarterly of Human Rights*, p. 35, 42.

⁶¹ See for example, the history of the drafting of CEDAW's General Recommendation No. 24: Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women -- Women and Health, Report of the Committee on the Elimination of Discrimination Against Women, A/53/38/Rev.1 (1988) at 7, para. 31.

⁶² See Scott Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform,' in Alston and Crawford (eds) *The Future of UN Human Rights Monitoring* (Cambridge 2000) p.129; Anne F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century* (Kluwer 2000).

⁶³ Vienna Declaration and Programme of Action, A/CONF. 157/23(1993), I, para 18; II, para. 37.

⁶⁴ Guidelines designed to 'mainstream' gender perspectives in the international human rights system were formulated in 1995 by the annual meeting of the Chairpersons of the human rights treaty bodies.

Cultural Rights has generally taken the task of gender mainstreaming seriously, referring to the position of women regularly in...General Comments.⁶⁵ Similarly, the HRC has been progressive in this regard, and has adopted a number of useful General Comments on articles of the ICCPR that show a sensitivity to gender issues.⁶⁶

This engagement with NGOs, however reflects a much larger effort by treaty bodies, the UN and other Inter-governmental Organizations to foster greater participation and transparency in their operations. This phenomenon has been influenced by the percolation of democratic discourse into the sphere of international law, and the consequent demands for greater civil society involvement in international processes.⁶⁷ As Lindbolm has argued, 'the process of globalization, with its diffusion of state power, can cause democratic deficits which weaken the legitimacy of international law in relation to people all over the world.'⁶⁸ NGOs are widely viewed as legitimating actors, and are now much sought after in the political process.⁶⁹ NGO participation therefore re-constitutes the international human rights arena as a more inclusive if not democratic space, and operates as a counter-hegemonic force against powerful political interests that have historically been presented as the 'sovereign will of the state.'

Treaty bodies have provided greater opportunity for NGO participation at their meetings. The annual meeting of the chairpersons of the treaty bodies also holds informal consultations with NGOs. Proposals for reform of the treaty bodies have taken account of NGO participation.⁷⁰ With the increased rhetoric of transparency, democratization and accountability in the UN organs, it is reasonable to project that the future will see the increased prominence of NGOs in the various functioning of the UN human rights bodies, such as the promotion and formulation of General Comments.

The active participation of NGOs in crafting General Comments, though welcomed, is not unproblematic.⁷¹ It is important to note that the agendas of NGOs are not necessarily produced with greater democracy or transparency than the agendas of individuals or states.⁷² Indeed, many view their activities as a specious route to engendering greater democratic governance in the human rights arena.⁷³ Lindbolm, for example, observes that: 'NGOs are self-appointed, often oriented towards single

⁶⁵ See note 54 supra p. 246.

⁶⁶ Ibid, p. 247.

⁶⁷ See for example, Susan Marks and James Crawford, 'The Global Democracy Deficit: An Essay In International Law and Its Limits,' in D. Archibugi and D. Held (eds), *Re-Imaging Political Community: Studies in Cosmopolitan Democracy* (Cambridge, 1998) p. 72-90.

⁶⁸ Anna-Karin Lindbolm, *Non-Governmental Organizations in International Law*, (Cambridge 2005), p. 524.

⁶⁹ K. Knop, 'Re/statements: feminism and state sovereignty in international law', (1993) 3 *Transnational and Contemporary Legal Process*, p. 293 at 310.

⁷⁰ See eg. Report of a Meeting on Reform of the Human Rights Treaty Body System (Malbun, Liechtenstein, 4-7 May 2003), UN Doc A/58/123, 8 July 2003, para. 3; Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, UN Doc HRI/MC/2006/2, 2 March 2006, para 29.

⁷¹ See Chinkin and Boyle note 137 infra, p. 58.

⁷² See the discussion of the great variety and varying 'legitimacy' of NGOs in the Proceedings of the 92nd Annual Meeting of the American Society of International Law (Washington DC, American Society of International Law, 1998) at 20-36.

⁷³ See for example, the concerns expressed about the bias of NGOs and the anti-democratic nature of NGOs discussed in, Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance*, (Cambridge 2003).

issues, mostly based in the North, often have their basis in the middle class and are often not accountable to the people on whose behalf they claim to speak.⁷⁴ In addition to this lack of transparency, Keohane notes that 'perhaps more seriously, their legitimacy and their accountability are disconnected.'⁷⁵

Yet, for all these concerns NGOs have been a driving force behind many General Comments, and the continued development of human rights law in general. General Comments have been integrated into their vocabularies and strategies, and in so doing have raised the profile of these normative instruments and pushed the boundaries of the law.

Human Rights Adjudication and the General Comment

The reach and utility of General Comments has not been confined to the deliberations of the UN Committees or to the various advocacy initiatives of NGOs. They have become important tools in human rights enforcement at both the national and supra-national level. General Comments emanating from the HRC and other treaty bodies are frequently invoked before tribunals, particularly by litigants seeking a progressive interpretation of the law. Therefore, tribunals when interpreting treaties, constitutions, statutes or when searching for general jurisprudential guidance, often apply the interpretative approaches articulated by the UN treaty bodies.

International Courts, Tribunals and other Mechanisms

At the supra-national level, the Committees' interpretive approaches have been integrated into the work of the various regional human rights institutions. The European Court (ECHR) has frequently discussed and applied General Comments from various treaty bodies in its decisions.⁷⁶ This reflects the court's tendency to apply norms from universal treaties and its general openness to jurisprudential sources from outside the European human rights regime. In general, the Court has treated the Comments as authoritative statements of the law, and has given them equal weight as its own precedent.

Unsurprisingly, UN treaty bodies also apply General Comments in the course of their adjudication under the UN complaints mechanisms.⁷⁷ In the course of issuing 'views' in submitted 'communications,' Committees often evaluate states' liabilities in

⁷⁴ See note 68 supra, p. 33.

⁷⁵ Robert A. Keohane, 'Global Governance and Democratic Accountability,' in David Held and Mathias Koenig Archibugi (eds.), *Taming Globalization: Frontiers of Governance*, (Cambridge: Polity 2003) p. 148.

⁷⁶ See for example, *Hirst v. United Kingdom (No.2)*, Application No.74025/01 (2005); *Öcalan v. Turkey*, Application No.46221/99 (2005); *Makaratzis v. Greece*, Application No.50385/99 (2004); *Melnychenko v. Ukraine*, Application No.17707/02 (2004); *Kurt v. Turkey*, Application No. 24276/94 (1998).

⁷⁷ Four of the human rights treaty bodies (HRC, CERD, CAT and CEDAW) may, under certain circumstances, consider individual complaints or communications from individuals. The HRC may consider individual communications relating to States parties to the First Optional Protocol to the ICCPR. The CEDAW may consider individual communications relating to States parties to the Optional Protocol to CEDAW. The CAT may consider individual communications relating to States parties who have made the necessary declaration under article 22 of CAT. The CERD may consider individual communications relating to States parties who have made the necessary declaration under article 14 of ICERD. The Convention on Migrant Workers also contains provision for allowing individual communications to be considered by the CMW; these provisions will become operative when 10 states parties have made the necessary declaration under article 77.

light of treaty provisions, as well as those set forth in General Comments. Thus, in the recent case of *SPA v Canada*,⁷⁸ the Committee Against Torture (CAT) applied its General Comment No.1 in establishing the burden of proof, and the substantive requirements for bringing a claim under article 22 of the Torture Convention. This not only promotes the Committees' normative work, but also maintains coherence between the reporting, normative and adjudicatory functions of the treaty bodies.

The active jurisprudential cross-fertilization among courts, commissions and treaty bodies is also evidenced in the work of the African Commission of Human and Peoples' Rights.⁷⁹ This has been most perceptible in the area of socio-economic rights. The Commission has noted that, 'in interpreting and applying the Charter,⁸⁰ the Commission relies on the growing body of legal precedent...which includes decisions and General Comments by UN treaty bodies.'⁸¹ Consequently, the normative framework, which has arisen from the CESCRC's General Comment jurisprudence, has provided a context in which to understand these rights, and has therefore paved the way for their judicial enforcement. The near monopoly status of the CESCRC in relation to the interpretation of socio-economic rights, has meant that bodies like the African Commission have turned to the Committee for interpretative guidance.⁸²

Thus in the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*,⁸³ the Commission introduced the CESCRC's 'multi-layered approach' to socio-economic rights obligations into the African Charter's jurisprudence. The Commission noted that:

all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.⁸⁴

This represented a wholesale adoption of the CESCRC's interpretive framework, which manifested little regard for the differences between the two instruments. In fact the Commission 'goes beyond merely referring to the general comments of the Committee as an interpretive tool and bases its arguments upon them in the absence of similar provisions in the Charter.'⁸⁵ The Commission however justified its approach, by explaining that the concepts were not 'alien' to the African Charter. It emphasised that the CESCRC's approach accorded with 'internationally accepted ideas of the various obligations engendered by human rights.'⁸⁶ Similarly, the Commission adopted the Committee's much contested 'minimum core content approach' to socio-

⁷⁸ Communication No. 282/2005, *SPA v Canada*, Views adopted on 7 November 2006, para.4.2 and 7.5.

⁷⁹ See, *Media Rights Agenda v Nigeria*, Communication No. 224/98, November 2000. para. 51, 64; *Purohit and Moore v Gambia*, Communication No. 241/2001, May 2003 para. 76.

⁸⁰ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁸¹ *Civil Liberties Organizations and Others v Nigeria*, Communication No. 218/98, May, 2001, para. 24. See also Article 60 of the African Charter which enjoins the Commission to 'draw inspiration' from instruments adopted within the Specialized Agencies of the United Nations.

⁸² See, *Legal Resources Foundation v Zambia*, Communication No. 211/98, May 2001, paras 59, 63, 70.

⁸³ Communication No. 155/96 (2001).

⁸⁴ *Ibid.* para 44.

⁸⁵ See note 93 supra. p, 33.

⁸⁶ *Ibid.*

economic rights, holding in the same case that 'the minimum core of the right to food required that the Nigerian Government not destroy or contaminate food sources.'⁸⁷

While, the Inter-American Commission⁸⁸ and Court of Human Rights⁸⁹ have applied Comments from the HRC, there is as yet no evidence of the CESCR's jurisprudential influence on the work of these institutions. Although interpretations derived from CESCR General Comments have been invoked before these institutions, this has generally not been reflected in their decisions on socio-economic rights violations.⁹⁰ This is largely explained by the fact that the Inter-American system has taken a restrictive approach to socio-economic rights,⁹¹ and has consequently not sought to elaborate a jurisprudential understanding of these rights in the Inter-American context. Similarly, the European Social Charter (ESC) has remained a closed regime. This may in part stem from the fact that the Committee on Social Rights (ESCR) has not placed priority on the normative elaboration of the Charter's provisions. Alston further explains that this normative isolation exists because:

each of the two systems has its own separate texts with very different drafting histories, a quite different set of assumptions motivating the original drafters, different governmental actors and traditions, and different inherent strengths and weaknesses which cannot necessarily be transplanted in any meaningful way.⁹²

Domestic Courts

At the domestic level, the Committees have had an appreciable influence on rights litigation, and the promotion of human rights in general. This is exemplified by cases emanating from jurisdictions where courts have embraced the language and interpretative framework enunciated in the various General Comments.⁹³ For example, in Japanese courts, General Comments adopted under ratified conventions have been regularly invoked.⁹⁴ Thus in 1994, the Osaka High Court declared that: 'General Comments and 'views' [of treaty bodies] should be relied upon as supplementary means of interpretation'⁹⁵ of human rights treat norms. Additionally,

⁸⁷ See note 83 supra, para 65.

⁸⁸ *Maria Eugenia de Sierra v Guatemala*, Inter-American Commission, Report No 4/01, Case 11.625, 19 January 2001 (citing CEDAW General Recommendation No. 21).

⁸⁹ See, *Caballero-Delgado Case*, Series C, No. 22, Judgement of 8 Dec. 1995, and *Bámaca Velasquez case*, Series C, No. 70, Judgement of 25 November 2000.

⁹⁰ See, James Cavallaro and Emily Schaffer, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas,' (2004-2005) 56 *Hastings L. J.* 217, 263

⁹¹ See for example, "*Five Pensioners v Peru*, Inter Am Ct. H.R. (Ser. C) No. 98. (2003), para. 147.

⁹² Philip Alston, 'Assessing the Strength and Weaknesses of the European Social Charter's Supervisory System,' *NYU Law School, Centre for Human Rights and Global Justice Working Paper, Economic, Social and Cultural Rights Series* No. 6, 2005, p. 5.

⁹³ See, International Law Association, Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Treaty Bodies, Berlin, 2004. Available at: <http://www.abo.fi/instut/imr/research/seminars/ILA/Report.pdf>.

⁹⁴ Yuji Iwasawa, 'The Domestic Impact of International Human Rights Standards: The Japanese Experience,' in Philip Alston and James Crawford (eds.), *The Future of the UN Human Rights Treaty Monitoring*. (Cambridge 2000) p, 245, 259.

⁹⁵ Judgement of 28 October 1994, Osaka High Court, Hanrie Jiho, 1513, pp. 71, 87, 38 Japanese Annual of International law (1995), p. 118.

General Comments from various treaty bodies have been relied upon by courts in Canada,⁹⁶ India,⁹⁷ Hungary,⁹⁸ United States,⁹⁹ Mauritius,¹⁰⁰ Hong Kong,¹⁰¹ among others.¹⁰²

However, the General Comment has experienced mixed fortunes in the domestic context, and not all jurisdictions adopt the disposition of the Japanese courts. This is clearly seen when one examines judicial attitudes towards General Comments in the United Kingdom. English Courts seem to apply or cite General Comments when they accord with the textual meaning of the treaty norm in question, or when they reflect generally accepted jurisprudential advances in the European human rights system.¹⁰³ However, insofar as the Comments provide a novel interpretation, the courts have been cautious, and quick to highlight the non-judicial nature of the committee, and assert the non-binding nature of the Comments.

In the case of *R (On the Application of Al-Skeini and Others) v. Secretary of State for Defence*,¹⁰⁴ the Court of Appeal relied on among other things, the HRC's General Comment No. 31 in supporting its findings regarding the extra-territorial reach of the ECHR and the Human Rights Act 1998.¹⁰⁵ Further, in *A v. Secretary of State for the Home Department*, the House of Lords drew from the HRC's General Comments in establishing an exclusionary rule of evidence that prevents the use of information obtained by means of torture.¹⁰⁶

The House was, however, more cautious in *Sepet and Another v. Secretary of State for the Home Department*.¹⁰⁷ Here, the applicant sought to rely on the HRC's General Comment No.22 in claiming the right to 'conscientious objection' to military service. The court rejected the Committee's derivation of an unarticulated right from the ICCPR, noting that 'while the thrust of the committee's thinking is plain, one finds no clear binding principle.'¹⁰⁸

One can also detect indifference or even scepticism towards the authority of the UN treaty bodies in the House's recent judgement in *Jones v Ministry of Interior for Saudi Arabia*.¹⁰⁹ In this case, their lordships sought to determine whether international law required the provision of a civil remedy for victims who suffered torture in a foreign state. In the lead judgement, Lord Bingham sympathized with the Torture Committee's concerns, but went on to note that:

the Committee is not an exclusively legal and not an adjudicative body; its power under article 19 is to make general comments; the Committee did not, in making this recommendation, advance any analysis or interpretation of article 14 of the Convention; and it was no more than a recommendation.

⁹⁶ *Sauvé v Canada (Chief Electoral Officer)*(2002) 98 CRR (2d)1; *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) SCC 1.

⁹⁷ *TMA Pai Foundation and others v State of Karnataka* [2002] 4 LRI 329.

⁹⁸ Decision 719/B/1998 of the Constitutional Court.

⁹⁹ *Dubai Petroleum v Kazi* 12 SW 3d 71; *United States v Bakeas* 987 F Supp 44 (D Mass 1997).

¹⁰⁰ *Tengur v The Minister of Education and the State of Mauritius* Record No. 77387.

¹⁰¹ *Prabakar v Secretary for Security* [2004] HKCFA 39.

¹⁰² See note 93 supra.

¹⁰³ See, for example, *In Re D. (Minors) (Adoption Reports: Confidentiality)* [1995] 3 W.L.R. 483 and *A and Others v. Secretary of State for the Home Department* [2005] UKHL 71.

¹⁰⁴ [2006] 3 WLR 508.

¹⁰⁵ *Ibid* para. 101.

¹⁰⁶ [2005] UKHL 71, para. 34.

¹⁰⁷ [2003] UKHL 15.

¹⁰⁸ *Ibid* para. 13.

¹⁰⁹ [2006] 2 WLR 1424.

Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.¹¹⁰

Further on, Lord Hoffman declared that, "as an interpretation of article 14 or a statement of international law, I regard it as having no value."¹¹¹ To the extent that the Committee's view sought to override the UK's interpretation of article 14 of the Torture Convention, he noted that, "the Committee has no legislative power."¹¹²

The South African Constitutional Court, often lauded for its openness to international jurisprudential sources, has been less than predictable in its treatment of General Comments. Thus, in *Government of South Africa v Grootboom*,¹¹³ the Court was asked to take into account the CESCR's General Comment No.3 in interpreting the right to adequate housing under the South African Constitution. More specifically, the Court considered the Committee's 'minimum core content' approach. Though, the court did not explicitly reject its value, it levelled several criticisms against the approach and concluded that it was not 'necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right.'¹¹⁴ The court then went on to enunciate its own approach to socio-economic rights adjudication, based on considerations of reasonableness in government policy.¹¹⁵ In the later case of *Minister of Health v Treatment Action Campaign*,¹¹⁶ the Court again rejected the Committee's views in construing the right to health.¹¹⁷

This account illustrates the way in which the General Comment has evolved from an obscure textual reference, to a tool of fundamental importance in the armoury of those seeking to promote international human rights law.¹¹⁸ Treaty bodies have through imaginative and purposive action crafted these once innocuous devices into important normative instruments. States communicate in the language and normative frameworks set forth in General Comments.¹¹⁹ Treaty bodies, activists and NGOs¹²⁰ find it useful to be able to point to these instruments as authoritative interpretations of human rights treaty provisions.¹²¹ As seen above, these instruments have created the opportunity for NGO intervention into the processes of normative generation. While this raises questions of legitimacy, it has indubitably engendered greater inclusiveness and participation in these international processes.

¹¹⁰ Ibid para. 23.

¹¹¹ Ibid para. 56.

¹¹² Ibid para 57.

¹¹³ CCT 11/00, 4 October 2000.

¹¹⁴ Ibid para. 33.

¹¹⁵ See David Bilchitz, *Poverty and Fundamental Rights: Justification and Enforcement of Socio-Economic Rights*, (Oxford 2007) p.135.

¹¹⁶ CCT 8/02, 5 July 2002.

¹¹⁷ Ibid para 37.

¹¹⁸ See note 7 supra, p. 776.

¹¹⁹ See, Draft resolution on Question of the Realization in all Countries of Economic, Social and Cultural rights. E/CN.4/2005/L.24, 11 April 2005. See also, Report of Working Group on Optional Protocol to the ICESCR, E/CN.4/2006/47.

¹²⁰ See, Written Submission of the Center on Housing Rights and Evictions (COHRE) to the Human Rights Committee at its 87th Session (2006), available at:

<http://www.ohchr.org/english/bodies/hrc/docs/ngos/87cohre.pdf>.

¹²¹ See, for example, Concluding observations of the Committee on Economic, Social and Cultural Rights, ALBANIA, E/C.12/ALB/CO/1, 24 November 2006, para. 66. Here the Committee urged, 'the State party to take all necessary measures to allocate the required resources to improve the quality of education offered in schools at all levels, in line with the Committee's general comment No. 13 on the right to education.

The application of General Comments by Courts and other tribunals further highlights their actual and potential role in the enforcement of human rights. However, accounts of their treatment in domestic courts exposes something of the difficulties with these instruments. General Comments are often characterised by a level of plasticity, whereby their authoritative nature changes depending on the context and subject matter of the comment. This indeterminacy in relation to normative instruments is a problematic phenomenon, which casts doubt upon the coherence and certainty of this aspect of the international human rights enterprise.

This problem of judicial attitude, however, reflects a larger concern about the use of international law as a guide to the interpretation of municipal law.¹²² But more specifically, it brings into focus the uncertainty about the juridical status of the General Comment in both international and domestic law. In this regard one commentator reflecting on the experience of socio-economic rights litigation in Argentinean courts has observed that the reference in domestic courts to, 'General Comments by the Committee on Economic, Social and Cultural Rights have been erratic, and there are no clear criteria about their normative value.'¹²³

Despite the undeniable significance of General Comments, very little in the way of sustained analysis has been said about their juridical value and status, or their precise location in the general scheme of international normative sources.¹²⁴ It is this issue that is addressed in the remainder of this paper. The following examines the validity of certain claims that have been put forward to account for the normative character of the General Comment.

The Legal Status of the General Comment

General attitudes towards General Comments cover a broad spectrum of views. However, none of them has gained general acceptance. Alston has observed that these views range from those:

That seek to portray them as authoritative interpretations of the relevant treaty norms, through others that see them as a de facto equivalent of advisory opinions which are to be treated with seriousness but no more, to highly critical approaches that classify them as broad, unsystematic statements which are not always well founded, and are not deserving of being accorded any particular weight in legal settings.¹²⁵

These views indeed run the gamut, and underlie the uncertainty which shroud the General Comment.

From the cursory historical account in section 2, it is plain that these instruments were never intended to possess normative force, nor to have distinct juridical value. Indeed, the Committees have emphasised that General Comments function solely as descriptive devices; intended to convey a sense of the 'existing jurisprudence' of the

¹²² See for example, Harold Hongju Koh, 'International Law as Part of Our Law' (2004) 98 *Am. J. Int'l L.* 43; Dermott J. Devine 'The Relationship Between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia,' (1994) 26 *Case. W. Res. J. Int'l L.* 295.

¹²³ Christian Courtis, 'Socio-Economic Rights in Argentina,' in Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006), p. 325.

¹²⁴ Consideration of the legal status of these instruments has generally been examined cursorily. While many authors have discussed these issues, this is merely done in passing, by way of mere suggestion, or through 'footnote treatment.' Few exceptions exist however. See notes 93 and 7 supra.

¹²⁵ See note 7 supra, p. 764

treaties as viewed by the Committees.¹²⁶ However, as the previous analysis has shown, in cases such as that of the socio-economic rights covenant there has often been no 'existing jurisprudence' to speak of. Consequently, Committees have used the General Comment to address deficiencies in the law, not only interstitially, but also in quite substantial ways.

This process of normative development has taken on what can best be described as a legislative orientation. And though the contours of interpretation and law creation are admittedly unclear, there are increasing instances that would seem to take the Committees into the legislative sphere. The CESCR's General Comment No. 15 on the Right to Water is an apt illustration of this.¹²⁷ Prior to this Comment, the articulation of an autonomous right to water was without precedent in international law.¹²⁸ However, through Comment No. 15 the Committee has declared a universal entitlement to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.¹²⁹

Indeed, the very treaty text that General Comment No. 15 purports to interpret does not contain any reference to water. Furthermore, several readings of the *travaux préparatoires* point to the fact that the drafters deliberately omitted water as an explicit right in the negotiations.¹³⁰ It therefore appears that the Committee has offered an 'interpretation' which disregards the intention of states parties, and the established canons of treaty interpretation. Moreover, it seems likely that subsequent Comments will be formed in this mould. Considering the Committee's derivation of the right to housing and water, it can be anticipated that the Covenant's provisions with respect to standard of living will be further deconstructed into an all-encompassing concept containing several novel rights.¹³¹

Equally instructive in this regard, is the practice of the Committee on the Rights of the Child (CRC). In its recent Comment on protection from corporal punishment, it admitted that its reading of certain provisions was not supported by the *travaux préparatoires* or the text of the Convention.¹³² It however, sought to justify its opinion by emphasising that 'the convention, like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time.'¹³³ But while interpretative communities have long employed this 'evolutionary' approach to human rights treaty interpretation, cloaking these bold interpretative acts in the innocuous language of consensus and progress has failed to mask their essentially legislative character.

¹²⁶ See, for example, Report of the Committee's Seventh Session UN Doc. E/1993/22 at 19, para. 49; A/53/44, annex IX, CAT General Comment No. 01. (General Comments) para. 9 ; UN Doc CPPR/C/SR.260 (1980) para. 1; UN Doc. CCPR/C/21/(1981); UN Doc. A/35/40 paras. 376-83 (1980).

¹²⁷ General Comment No. 15, The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2002/11.

¹²⁸ See note 40 supra, p. 494. The only international human rights instrument that mentions water is article 24(2)(c) of the Convention on the Rights of the Child, which includes 'the provision of adequate nutritious foods and clean drinking water' within the measures that state parties must take in order to secure the right to enjoy the highest attainable standard of health.

¹²⁹ See note 127 supra.

¹³⁰ See P.H. Gleik, 'The Human Right to Water,' (1999) Vol. 1, No. 5, *Water Policy*, p. 487.

¹³¹ See note 60 supra, p. 37; Stephen Tully, 'Access to Electricity as a Human Right' (2006) 24 *Neth. Q. Hum. Rts.* 557.

¹³² General Comment No. 8, The Right of the Child to Protection from Corporal Punishment and to Cruel or Degrading Punishment. CRC/C/G8/8 (2006), para. 20.

¹³³ *Ibid.*

A quite revealing admission of the consequences of the 'living instrument' approach to interpretation was made in the ECHR's decision of *Öcalan v Turkey*. There Judge Garlicki noted that:

This may result (and, in fact, has on numerous occasions resulted) in judicial modifications of the original meaning of the Convention...the Strasbourg Court has demonstrated such a creative approach to the text of the Convention many times, holding that the Convention rights and freedoms are applicable to situations which were not envisaged by the original drafters.¹³⁴

The use of the General Comment to make forays into law-making has been much criticised by both commentators and states parties. Thus, the CESCR's approach has been deplored as revisionist, and criticised for "resurrecting and adopting alternatives which were rejected by the original negotiators."¹³⁵ Former Special Rapporteur Tomasevski has also remarked that the Committee's approach 'undermines the principle of legal security by reading into a legal text a content that simply is not there.'¹³⁶ Similarly, Chinkin and Boyle observe that the HRC 'went beyond the terms of the ICCPR and general international law in its General Comment 24 on reservations.'¹³⁷ There the committee held that it had the authority to judge the validity of a state's reservation to the Covenant, and thus the ability to declare it inoperative. This elicited vehement objection from countries including France, Britain and the United States, who argued that the Committee had usurped its power under the Vienna Convention and general international law.¹³⁸

The possibility of norm generation through General Comments gives rise to many critical questions. One obvious issue is that of the legitimacy and authoritativeness of such normative processes. For as Tully points out, 'the Committee does not possess authority to create human rights since its principal function is to monitor implementation.'¹³⁹ However, putting issues of legislative authority aside for the moment, this notion of new law-making instruments demand that we reconcile these normative phenomena with conventional accounts of the sources of normativity in international law.

¹³⁴(Appl. No. 46221/99), GC (2005) partly concurring, partly dissenting opinion of Judge Garlicki, para 4.

¹³⁵ See note 40 supra.

¹³⁶ See note 60 supra.

¹³⁷ See, Christine Chinkin and Allan Boyle, *The Making of International Law*, (Oxford 2007) p. 217.

¹³⁸ States have challenged the Committees' interpretations through statements, but also by implication. For example, Italy rejected the CESCR's General Comment No. 3 when it asserted that 'economic, social and cultural rights are only declarations of intent that carry moral and political weight but do not constitute direct legal obligations for the State party.' See Report of the Secretary-General in response to Commission Resolution 2003/18, E/CN.4/2004/WG.23/2 (2003) para. 10. See also, views expressed by other countries in the Working Group considering the Optional Protocol to the ICESCR. E/CN.4/2006/47(2006). States have further threatened or actually withdrawn from treaty body mechanisms owing to disagreements with Committees' interpretation. See, for example, Summary Record of the 1623rd Meeting: Jamaica. 27/10/97. CCPR/C/Sr.1623/Add.1; Summary record of the 15th Meeting: Trinidad and Tobago. 20/02/2003, E/C.12/2002/SR.15.</footnote>

¹³⁹ See note 60 supra, p. 43.

The Problem with Traditional Sources: Indeterminacy of Sources Doctrine

Such an enquiry brings into focus the changing nature of the international landscape, and the normative flux¹⁴⁰ that has accompanied these changes. Indeed, forces such as globalisation have operated to diminish the importance of states in international norm generation. Concurrently, actors such as international organizations, multinational corporations and even individuals have been exercising increased influence in the creation, implementation and enforcement of international law. In light of these realities, the classic narratives of international legal sources, steeped as they are in notions of state sovereignty, are now greatly contested.

Traditional international law doctrine points exclusively to the formal list of sources enshrined in article 38 of the statute of the International Court of Justice as an authoritative account of the sources of obligation in international law. While those of a positivist orientation might cling to this articulation as a totem,¹⁴¹ other scholars and practitioners have never been able to agree on a definitive list of what sources contain rules of international law. Thus Jennings considered it 'an open question whether [article 38] is now itself a sufficient guide to the content of modern international law.'¹⁴² And more generally, the traditional schema of sources has been criticised as limited, outmoded, and an incomplete reflection of the realities of contemporary international law-making.¹⁴³

As human rights endeavours expand in scope and reach, and the demands on the international legal framework become greater, the limitations of traditional sources become apparent. Thus, despite the constant increase in the number of international treaties and states parties to existing agreements, reliance upon treaties alone provides "an ultimately unsatisfactory patchwork quilt of obligations."¹⁴⁴ Exclusive reference to such notions as *pacta sunt servanda* disregards other accounts of normative behaviour, which exist as a matter sociological and empirical fact. Furthermore, the contemporary relevance of customary international law has sparked much debate. Thus Chinkin and Charlesworth have remarked that 'this mode of informal and unwritten law-making is inherently conservative and backward looking because of its reliance upon existing state practice.'¹⁴⁵ Some may retort by pointing to the acceleration in the formation of contemporary customary rules, even claiming the

¹⁴⁰ See Jan Klabbbers, 'Reflections on Soft International Law in a Privatized World,' (2006) 104 *Lakimies* 1191-1205.

¹⁴¹ See G.M. Danilenko, *Law Making in the International Community* (Kluwer 1993) p. xiv. Here the author argues that but for the possible exception of the concept of *jus cogens*, the traditional sources of international law retain their exclusive validity and explanatory power. See also, Jan Klabbber, 'The Redundancy of Soft Law' (1996) 63 *Nordic Journal of International Law* 167-182; Prosper Weil, 'Towards Relative Normativity in International Law?', (1983) 77 *American Journal of International Law* 413-442.

¹⁴² Quoted in, Duncan Hollis, 'Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International law,' (2005) 23 *Berkley Journal of International Law*, p. 137, 141.

¹⁴³ See note 54 *supra*, p. 65. Chinkin and Boyle also argue that 'the international legal system has moved far beyond the categorization of the sources of international law in the Statute of the ICJ.' See note 137 *supra*, p. 35.

¹⁴⁴ Philip Alston and Bruno Simma, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles,' (1988-1989) 12 *Aust. YBIL* p. 82

¹⁴⁵ See, note 137 *supra*, p. 21; I. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights,' (1991) 31 *Virginia Journal of International law*, p. 211; P. Kelly, 'The Twilight of Customary International Law,' (2000) 40 *Virginia Journal of International Law*, p. 449.

emergence of 'instant custom.'¹⁴⁶ However, it is clear that the process by which custom is created and determined has undoubted deficiencies, and is marked by many uncertainties about the existence and content of rules in particular cases.¹⁴⁷

More to the point, the discourse of human rights is a progressive one, aimed at the amelioration of welfare and maximizing conditions for human flourishing. Multilateral treaty-making and custom, owing to their basis in consensus, often bring about only modest outcomes, often reflecting a position of lowest common denominator. Moreover, they develop through slow and cumbersome processes, and are often subject to political hijacking.¹⁴⁸ Because of these complexities, activists and NGOs have sought to engage more flexible means of norm-generation. In this regard, General Comments provide a means by which jurisprudence may be generated at an accelerated rate (which is particularly important to a Committee in the early stages of its development).¹⁴⁹

General Comment and Traditional Sources

General Comments cannot be easily accommodated within the standard catalogue of international legal sources mentioned above. One may consider that General Comments can be formative of *opinio juris* or state practice, which may in turn generate customary law. However, the relevant question would be whether General Comments can be regarded as a form of state practice or as an expression of *opinio juris*?

As far as *opinio juris* is concerned, the ICJ has established that declaratory instruments (such as a General Assembly resolution) may contain expressions of *opinio juris* with respect to a certain rule.¹⁵⁰ However, since General Comments emanate from a panel of experts and not a multi-lateral declaration from states, it is doubtful whether Comments possess a similar quality in and of themselves. One may however imagine that to the extent that States may adopt a Treaty Body's interpretation, implement it domestically and assert it in multilateral fora, General Comments may impact on the formation of customary law. However, while the attitude and statements of states parties may be relevant for establishing *opinio juris*, this must be highly discounted by the fact that states continue to assert the non-binding nature of the Committees' findings.

Furthermore, even if a General Comment could be taken to constitute an expression of *opinion juris*, what is required in addition is, of course, the existence of state practice sufficient to delineate the content of the rule concerned. Indeed, General Comments do not constitute 'state practice' in the traditional sense. Consequently,

¹⁴⁶ See, Bin Cheng, 'Custom: The Future of General State Practice In a Divided World,' in R. St. J. Macdonald & Douglas M. Johnston (eds.) *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983) p. 513, 532; Bin Cheng 'United Nations Resolutions on Outer Space: "Instant" Customary Law?' (1965) 5 *Indian JIL* 23.

¹⁴⁷ See Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development,' (1988) 1 *Harv HRYB* 3; J. Kammerhofer, 'Uncertainties in the Formal Sources of International Law: Customary International Law and Some of its Problems,' (2004) 15 *European Journal of International Law* 523.

¹⁴⁸ See, note 137 supra, p. 21; An example is the successful hijacking by certain states of the proposed ECOSOC resolution on 'Human Rights and Sexual Orientation' E/CN.4/2003/L.92, 17 April 2003.

¹⁴⁹ See, note 35 supra, p. 90.

¹⁵⁰ See, *Nicaragua v United States*, ICJ Reports, 1986.

scholars such as Van Hoof would reject such instruments as not constituting 'material acts'.¹⁵¹

However, the attitude and reactions of States to treaty body findings may be relevant for the purpose of practice. In this regard, the picture is unclear. Indeed, as this paper has shown, the attitudes of governments and courts can be described as anything but uniform.

It would therefore be an exaggeration to claim that General comments represent customary law. For if it is true that General Comments do (like some treaties) form part of the process by which custom evolves, then it is equally true that in the 'evolutionary stage' they do not yet generate actual law. To assert otherwise, would be to strain the concept of customary sources. Therefore, even if we establish the 'customary potential,' of General Comments, this is not determinative of their legal status.

Similarly, General Comments do not seem to fall within the category known as the subsidiary sources of international law. While an attempt to lump these instruments under judicial decisions may be attractive, it is clear that the UN Committees are not judicial bodies. The Committees have themselves stressed this fact. And while some treaty bodies are charged with providing their 'views' on complaints, it is clear that they do not exercise a judicial function when issuing General Comments.

The General Comment as a New Source of Law?

The limits of the traditional sources of law in capturing the range of contemporary international normative behaviour raises the question as to whether General Comments are emerging as a source of law. Indeed, their role in human rights practice reveals something of their prescriptive character and distinctiveness as a normative tool. General Comments set legal standards, they are often invoked and 'enforced' in tribunals, and they possess the potential to affect state behaviour. However, while many jurists have identified new "sources" of international law, others just as definitively deny such independent status. The latter have come to view the traditional sources as ossified and therefore incapable of amplification.

It is not clear why this should be the case. Van Hoof has rightly observed that 'states acting collectively as the law-givers in international law, can also change or supplement the sources of international law.'¹⁵² Indeed, it follows that if it is states' consent and not article 38, which gives rise to international obligation,¹⁵³ then states may subsequently consent to being bound by new rules, new instruments and in new ways.

The independence of states as the basic feature of international society, and the ensuing lack of a hierarchically organized law-making or legislative body, results in one of the most fundamental aspects of the international law-making process, that is, that the consent of states has to be regarded as the constitutive element of rules of international law.¹⁵⁴ Consequently, in order to answer the question of whether a given instrument is binding upon a state as a rule of international law, the point of departure,

¹⁵¹ G.J H. Van Hoof, *Rethinking the Sources of International Law*, (Kluwer 1983) p. 182.

¹⁵² *Ibid*, p. 185.

¹⁵³ See, Lotus case, Judgement No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10, p. 18. Here the Permanent Court stated that 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will.'

¹⁵⁴ See, note 151 *supra*, p. 76.

must be whether or not states have come to view (or consented to) this instrument as binding.

It would be grossly exaggerated to maintain that states have consented to be bound by General Comments, and therefore difficult to regard them as an autonomous source of law. As the history of the UN treaties confirms, states parties did not intend General Comments to serve a normative or juridical function. Indeed, in its most recent resolution on the 'International Covenants on Human Rights,' the General Assembly described the role of the treaty bodies as that of 'examining the progress made by states parties in fulfilling the obligations undertaken in the international Covenants on Human Rights' and that of 'providing recommendations to States parties on their implementation.'¹⁵⁵ Such a description does not suggest the recognition of the normative or binding character of the activities of the treaty bodies.

Traditionally states have evidenced their intention to be bound in writing or through practice.¹⁵⁶ General Comments by their very nature preclude the facility of states 'signing up' to their normative standards. State practice in relation to General Comments remains sparse. However, from what can be gleaned, it appears that states do not recognize these instruments as a source of binding obligation. It is possible that General Comments may affect states' reporting patterns or even shape the practice of states in their application of the treaty. However, this does not necessarily reflect a recognition that the instruments are binding as such. In actuality, states have often rejected the normative statements in General Comments.¹⁵⁷ Indeed, on occasion states have taken issue with the decisions of treaty bodies applicable to themselves and have contested the findings on questions of law. Governments have also tended to stress the non-binding nature of these instruments.¹⁵⁸ Further to this, we have seen that domestic courts have been less than consistent in their approach and attitude to General Comments.

The General Assembly's treatment of General Comments is further instructive. In its resolutions the Assembly has merely 'taken note' of General Comments, rather than calling upon states to comply with or implements their normative stipulations.¹⁵⁹

¹⁵⁵ A/RES/60/149 (21 February 2006), para. 5.

¹⁵⁶ Unilateral declarations may also be binding, however, this is of little applicability in the present case. See, James W. Garner, 'The International Binding Force of Unilateral Oral Declarations' (1993) 27 *American Journal of International Law*, p. 493.

¹⁵⁷ See note 138 supra. See also, "Improving the Effectiveness of United Nations Committees," joint media release by, Australian Minister for Foreign Affairs, Attorney General and Minister for Immigration and Multicultural Affairs, Tuesday, 29 August 2000 http://www.dfat.gov.au/media/releases/foreign/2000/fa097_2000.html. See also, Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford 2003) 812-813; International Law Association, *Final Report on the Impact of Findings of the United Nations Treaty Bodies*, Berlin, 2004. Available at: <http://www.abo.fi/institut/imr/research/seminars/ILA/Report.pdf>.

¹⁵⁸ See 'Promises to Keep: Implementing Canada's Human Rights Obligation' (Report of the Standing Senate Committee on Human Rights), December 2001. Available at: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/huma-e/rep-e/rep02dec01-e.htm>. Here it states, 'the views and decisions of these treaty-monitoring bodies are not binding on Canada, either under international or domestic law.';

Similarly the Norwegian Foreign Affairs Ministry has commented: 'the recommendations and criticism of the monitoring committees are not legally binding.' Norwegian Ministry of Foreign Affairs, Report No 21 to the Storting (1999-2000): Focus on Human Dignity-A Plan of Action for Human Rights, Chapter 4, Box 4.2. Available at: <http://odin.dep.no/ud/engelsk/publ/p10001859/03001-040007/index-hov004-b-n-a.html>.

¹⁵⁹ See, for example, A/Res/60/149 (2006) para. 9.

This can be contrasted with the Assembly's attitude to, for example, the Advisory Opinions of the International Court with which it urges compliance.¹⁶⁰ This cautious approach to General Comments may reflect the great uncertainty among many states about their value, and the belief among others that these instruments do not give rise to binding obligations.

It is therefore difficult to argue that states in general consider themselves bound by General Comments. Consequently, any claim that these instruments are emerging as an independent source of law would be without basis. Clearly, General Comments do not fit easily within the traditional schema of normative sources. However, making unsubstantiated assertions of 'new sources' because traditional frameworks do not easily accommodate certain normative phenomena is an inelegant, unsystematic and unsustainable way to proceed. This is not to say that, the development of an independent source is not likely in the future. However, such a claim would have to be firmly grounded in states' practice, and reflective of their free will.

The General Comment as Authoritative Interpretation

Rather than an independent source of obligation, General Comments have largely come to be seen as declaratory, and hence a formal elucidation of states' human rights obligations. This has been more commonly expressed in the idea that General Comments represent an "authoritative interpretation" of human rights norms and treaty texts. But while this notion of 'authoritative interpretation' has gained much currency among activists and in the academy, its precise meaning remains unclear.¹⁶¹

There is generally no articulation of the full import of the designation "authoritative interpretation", legally or otherwise. Indeed, 'authoritative' may take on various shades of meaning in different contexts. Therefore, when one speaks of 'authoritative' it may refer to interpretative authority in the sense attributed to literary critics, who speak of authoritativeness with sole reference to the intellectual cogency of an interpretive view. Quite differently, 'authoritative' may suggest that a particular view is determinative and definitive of a party's obligations.

To speak of legal 'authority' is to adopt the latter view, that is, to speak of a final and determinative power to decide or act. Viewed from this perspective, it is important to consider the notion of authority in relation to treaty interpretation, and also to identify those entities properly vested with such interpretive power. In identifying authority, one is looking at the distribution of decision-making power among actors and institutions.

Locating the sites of authoritative decision-making in international society can be problematic, largely because of its decentralised character. There is no legislative body in the international system, nor any central judicial organ properly authorised to make definitive interpretations of states' obligations. Therefore, states assume the multiple identities of law-maker, law-subject and law-interpreter. Consequently states

¹⁶⁰ See, Follow-up on the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons: Resolution/Adopted by the General Assembly. A/Res/61/83, 11th September 2006; and Advisory Opinion of the International Courts of Justice in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Including in and Around East Jerusalem: Resolution/Adopted by the General Assembly. 16 December 2004, A/RES/59/83.

¹⁶¹ See Andrew Byrnes, 'The "other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' (1989) 14 *Yale J. Int'l L.* 1, 46; Elena Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties (1999) 17 *Berkeley J. Int'l L.* 279. See also notes 17, 35, 93 and 137 supra.

have a right of auto-interpretation, and are therefore the actors vested with the formal legal authority to make, interpret and apply treaties.

This principle is equally applicable to human rights treaties. Given the lack of an authoritative procedure for settling divergences of opinion over the interpretation of the UN human rights instruments, it is for the state parties to construe the treaties for themselves. Thus Craven points out that, 'individual States may put forward their own interpretation of the treaties' provisions but such interpretations are by no means authoritative and may be rejected by other states.'¹⁶²

Quite obviously, states can and often do delegate authority to interpret and apply human rights treaties in specific cases. Two examples of this are the European and Inter-American Courts of Human Rights, each responsible for interpreting states obligations under the regional human rights regimes. This will also be the case with the African Court of Human and People's Rights.¹⁶³ However, with regard to the universal human rights treaties, states have not established an international human rights court. Instead, each instrument has established a treaty body, vested with authority to monitor states' compliance with their treaty obligations.

As discussed above, it is these bodies that issue interpretations of the UN treaties through General Comments. The critical consideration therefore relates to the authority of such bodies and their interpretive output. This, in turn, will depend on the mandate of these international institutions.

The Competence of UN Treaty Bodies

The exact competence of UN human rights treaty bodies regarding state reports and the issuing of General Comments remains largely unclear. Generally their activities are ambiguously described as 'supervisory,' 'monitoring' or 'implementation' of the treaty regimes. This has led one commentator to remark that, "it is probably fair to say that the teleology of the generic reporting system as a system of implementation has never been entirely clear."¹⁶⁴ This is evident in the many protracted discussions and the disagreements that transpired within treaty bodies about the precise nature and scope of Committee powers.¹⁶⁵ This lack of clarity in relation to function and purpose makes it difficult to determine the existence or scope of any interpretive power within treaty bodies.

Nor do the Committees themselves offer a satisfactory answer to these issues. For example, the Committee Against Torture has largely defined its functions in negative terms, rather than clarifying its precise nature. Thus in its General Comment No.1 the Committee stated that it was 'not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the states parties themselves with declaratory powers only...'¹⁶⁶ Here the Committee seems to be defining its role as solely descriptive, rather than evaluative. It also appears to be making a distinction between 'interpretative' and 'declaratory' power. However, such a dichotomy would

¹⁶² See note 35 supra, p. 91.

¹⁶³ See, Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

¹⁶⁴ See Mathew Craven, The Committee on Economic Social and Cultural Rights, in Asbjørn Edie et al (eds.), *Economic, Social and Cultural Rights: A Textbook*, (2001), p.455, 471.

¹⁶⁵ See, for example, UN Doc. CEDAW/C/SR.34 (1984); UN Doc. CEDAW/C/SR.46 (1985); UN Doc. CEDAW/C/SR.68 (1986); UN Doc. CEDAW/C/SR.131 (1988).

¹⁶⁶ A/53/44, Annex IX, (1996) CAT General Comment No. 1, para. 9.

be unsustainable. It is therefore fair to say that the statement does not bring the enquiry much further.

Additionally, treaty provisions delineating the Committees' functions are often poorly drafted, leaving their powers largely ill-defined.¹⁶⁷ The treaties have generally empowered the Committees to either study,¹⁶⁸ review,¹⁶⁹ examine¹⁷⁰ or consider¹⁷¹ the reports and progress of states parties on the implementation of their treaty obligations. And as the cursory examination of the history of these provisions make plain, there was no intention to grant a significant evaluative element in the Committees' powers. Furthermore, treaty bodies were not formally vested with the authority to interpret treaties. Indeed, 'the practice of at least some states suggest that this power has not been conferred implicitly.'¹⁷² Donoho, has therefore commented that 'these Committees of experts invariably have a relatively constricted mandate,' and further characterizes the Committees' role as a largely promotional one.¹⁷³

Yet, the Committees' interpretive work may not necessarily amount to a usurpation of power. An international body may exercise various powers without explicit treaty basis. These may arise subsidiarily as implied powers, if necessary for the fulfilment of their proper functions.¹⁷⁴ As the ICJ noted in the Reparations Case, 'under international law the organization must be deemed to have those powers which, though not expressly provided ...are conferred upon it by necessary implication as being essential to the performance of its duties.'¹⁷⁵

Thus as Meron has explained:

the Committee may be competent to interpret the Convention insofar as required for the performance of the Committee's functions. Such an interpretation per se is not binding on states parties, but it affects their reporting obligations and their internal and external behaviour. It shapes the practice of States in applying the Convention and may establish and reflect the agreement of the parties regarding its interpretation.¹⁷⁶

Undoubtedly, the treaty bodies have asserted implied powers of interpretation, and have exercised them through the General Comment. As Arambulo has observed, the activities of the Committees have been 'moving from merely commenting on the state reports, which is the original task bestowed upon [them], towards also establishing certain standards and norms through interpretation...'¹⁷⁷ Craven further notes in relation to the CESCR that, 'the Committee appears to be asserting its authority to exercise an interpretive function in *abstracto*, rather than confining that function to its particular role in the consideration of State reports.'¹⁷⁸

¹⁶⁷ T. Meron, *Human Rights Law-Making in the United Nations* (1986), p.123.

¹⁶⁸ ICCPR art. 40(4).

¹⁶⁹ Migrant Worker Convention art. 72(1).

¹⁷⁰ ICERD art. 9(2); CRC art. 43(1); CERD art. 9(2).

¹⁷¹ (CESCR) Economic and Social Council resolution 1985/17, para. (f); CEDAW art. 17(1); CAT art. 19(3).

¹⁷² See, note 93 supra, para. 18.

¹⁷³ See, note 1 supra p. 31.

¹⁷⁴ See, Malcolm Shaw, *International Law*, (Cambridge 2001), p. 916.

¹⁷⁵ ICJ Reports, 1949, pp. 174, 182; 16 ILR, pp. 318, 326.

¹⁷⁶ T. Meron, *Human Rights Law-Making in the United Nations* (1986), p. 10.

¹⁷⁷ Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*, (Hart-Intersentia 2000) p.41.

¹⁷⁸ See note 35 supra, p. 91.

There are strong grounds for arguing that State parties to human rights treaties, having in good faith taken on the obligations to respect human rights, should be subsequently bound to accept, for the purposes of interpreting their treaty obligations, the definition of 'human rights' which has evolved over time on the basis of the practice of UN organs.¹⁷⁹ Nevertheless, there is a certain limit to this approach. As the ICJ's opinion in the *Legality of the Use by a State of Nuclear Weapons*¹⁸⁰ case outlined, implied powers operate within the framework of those express powers laid down by a body's constitutive document.

It is therefore questionable whether any implied interpretive power a Committee may possess in connection with its monitoring function extends to the bold enunciations, free-standing interpretations or amplification of treaty norms evidenced in the Committees' work. Indeed, it may be accepted that the Committees must of necessity be able to construct an understanding of the treaty norms in order to facilitate their monitoring function. However, as discussed above, it appears that states have come to view these statements as purely recommendatory and not binding.¹⁸¹ It is therefore clear that those interpretations issued pursuant to any 'implied powers' of the Committees, are not authoritative in the sense of being definitive and binding statements of states' obligations.

This is not to suggest that the normative work carried out by treaty bodies is without value. Indeed, many General Comments represent sound and cogent expositions of the law, and reflect a firm commitment to the protection of human rights. This, however, does not detract from the fact that states are not obligated to adopt the Committees' interpretive posture. Thus, one state's insistence that the Committee's application of its treaty obligation constitutes a legitimate interpretation may be countered by another state viewing the same action as an entirely improper approach. Alston has described this situation as a doubled-edged sword.¹⁸² It reflects governmental dissent both from the specifics of the Comment in question, but also challenges the proposition that the Committees have a powerful and legitimate imperative weapon at their disposal.

Describing a General Comment as an 'authoritative interpretation' of the UN treaties in the sense here discussed ascribes to it a legal weight which it does not possess. The analysis here has revealed the limits of treaty bodies in relation to interpretation and their actual impact on state behaviour. However, this leaves unanswered the vexed question of the status of the General Comment, and provides no guidance as to how they ought to be conceived.

Not Binding = Not legal?

Is it then the position, that General Comments have no legal weight? Does the conclusion that they are incapable of binding states banish them to the category of moral statements? Many commentators view such non-binding instruments as purely symbolic, having no normative significance. Scholars, such as Klabbers therefore implore us to disregard these forms of 'soft law.'¹⁸³ He argues that law knows 'only

¹⁷⁹ See note 144 supra, p. 100.

¹⁸⁰ ICJ Reports, 1996.

¹⁸¹ See note 1 supra, p. 33-34.

¹⁸² See note 7 supra, p. 765.

¹⁸³ See note 137 supra. Here Chinkin and Boyle note that, 'Soft law has a range of possible meanings. From a legal perspective, the term is simply a convenient description for a variety of non-legally binding instruments used in contemporary international relations.'

categories of legal and illegal, in force or not in force, binding or non-binding...¹⁸⁴ and therefore denies the significance of these instruments.

However, such a position rests on a bright line distinction between law and non-law. It reflects a static positivism, which rigidly defines the notion of law and, consequently, ignores as irrelevant to lawyers everything that falls outside the scope of this definition, treating them as mere moral and political obligations.¹⁸⁵ The reality is that there is, as Judge Baxter declares, 'an infinite variety' of international law.¹⁸⁶ And as we saw above, it is not possible to explain the products of contemporary international law-making processes within the outdated terms of Article 38(1).

As the previous discussion has shown, these instruments operate in a complex relationship with legal instruments, legal institutions and legal and political actors. It must be noted that the legal norms on which the treaty bodies pronounce are binding obligations of the states parties, and therefore these pronouncements are not without importance. Thus, despite the formally non-binding character of these instruments, it is generally thought that an analysis of their legal nature cannot be confined to simply classifying them as non-law. For example, Craven has observed that while the Committee's interpretations of the Covenant are 'not binding per se, it is undoubtedly true that they have considerable legal weight.' Consequently, it is a fallacy to dismiss such instruments as 'not law,' as they can and do contribute to the corpus of international law.¹⁸⁷ They do have normative significance. It however remains unclear how we ought to understand these instruments. In what follows, I make a tentative suggestion about how we ought to begin to conceive of these normative instruments.

Towards an Understanding of the General Comment

Here I would like to suggest that General Comments do in fact represent an 'authoritative interpretation' of human rights law. I argue that this follows from the very fact that treaty bodies are "interpretive communities", and are therefore possessed of 'interpretive authority.' In coming to this view it is important to explain the sense in which authority is being used here. In the sections above, we examined the formal legal authority of General Comments, and concluded that treaty bodies did not have the authority to issue definitive and binding interpretations of states' human right obligations through these instruments. In that sense, authority was being discussed as it would be in the domestic legal order (or vertical system) with a central judicial or other interpretive organ. However, in what follows I argue that in a regime that lacks a central judicial organ, such a conception of 'interpretive authority' is not wholly appropriate. Indeed, we can come to view General Comments as authoritative interpretations if we conceive of authority in (horizontal) terms, which are more befitting to the nature of the international system.

The absence of a supra-national judiciary responsible for the interpretation and application of the universal human rights treaties means that the principles of auto-interpretation apply. The existence and work of the treaty bodies do modify this position to some extent. However, as noted above, though the Committees or individual States may put forward their own interpretation of the treaty provisions,

¹⁸⁴ Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law*, p. 381.

¹⁸⁵ See, note 151 supra, p. 188.

¹⁸⁶ See, R. Baxter, 'International Law in "Her Infinite Variety,"' (1980) 29 *International and Comparative Law Quarterly* 549.

¹⁸⁷ See, note 137 supra, p. 212.

such interpretations are by no means definitive and may therefore be rejected by other states.¹⁸⁸ In the midst of this potential interpretive "Babel," how is chaos averted? Instead of a system of clashing or competing interpretations, it is useful to conceive of the interpretive process as one primarily performed by communities, engaged in a discursive and deliberative process.

Interpretive Communities

The notion of a "community of interpreters," is one that has been borrowed from literary studies,¹⁸⁹ and applied by lawyers to make sense of the problems of authority and interpretation in the legal sphere.¹⁹⁰ In this sense, it has been used to describe the operation of a professional legal community in the process of interpreting the law. Similar entities have been described by International Relations scholars in the concept of 'epistemic communities'.¹⁹¹

An interpretative community is said to consist of persons and institutions giving meaning to, and applying a particular body of law.¹⁹² Membership is said to be established under two broad conditions. First, members of the community contribute in one way or other to the interpretation of the law. This contribution may consist of, for example, a decision or a judgement, an explanatory statement or an article in a scientific journal etc. Secondly, members of a community endorse in general, the objects which are pursued with the area of law concerned and the way this is done. In other words, the 'social practice of evaluation and criticism'¹⁹³ to which the law gives rise, is valuable to them. Thus it has been said of international legal interpretative communities, that: As participants in the field of practice, they have come to understand its purposes and conventions. Having participated in the techniques and discourse of international law, treaty interpretation and/or the subject matter of the treaty, they have become competent in the field.¹⁹⁴

As a consequence, disputes between interpreters are resolvable according to the 'conventions of description, argument, judgement and persuasion as they operate in the profession or community'.¹⁹⁵ As Minow explains: 'Community means not total agreement, but instead a commitment to share a "communicative framework"'.¹⁹⁶

¹⁸⁸ See note 35 supra.

¹⁸⁹ The term 'interpretive communities' was coined by Stanley Fish. See S. Fish, *Is There A Text In this Class? The Authority of Interpretive Communities* (1980). See also Owen Fiss, 'Objectivity and Interpretation, 34 *Stan. L. Rev.* (1982) 739.

¹⁹⁰ See note 194 infra.

¹⁹¹ See Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Co-ordination' (1992) 46:1 *International Organization*, pp. 1-36. An "epistemic community" is a network of knowledge-based experts or groups with an authoritative claim to policy-relevant knowledge within the domain of their expertise. Members hold a common set of causal beliefs and share notions of validity based on internally defined criteria for evaluation, common policy projects, and shared normative commitments. Haas argues in his article that 'epistemic communities are channels through which new ideas circulate from societies to governments as well as from country to country.' See p. 27.

¹⁹² Bart van Klink and Willem Witteveen, 'Why Is Soft Law really Law?' (1999) *RegelMaat*, pp. 126-140.

¹⁹³ Ronald Dworkin, *Law's Empire*, (Fontana Press, 1991), p. 49.

¹⁹⁴ Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1990-1991) 12 *Mich. J. Int'l L.* p. 371, 390.

¹⁹⁵ *Ibid.*, p. 378.

¹⁹⁶ Martha Minow, *Making all the Difference: Inclusion, Exclusion, and American Law* (Ithaca 1990), p. 294.

Thus, an interpretative community does not necessarily have to be based on shared substantive convictions as long as its members agree on how to cope with differences in convictions.¹⁹⁷

Interpretive Communities in International Law

In the context of international treaty interpretation, two interpretive communities can be identified, those existing within states as well as transnational communities.¹⁹⁸ Johnstone notes that the communities of interpreters existing within states consist of those individuals and institutions directly responsible for the conclusion and implementation of a particular treaty.¹⁹⁹ The exercise of formulating, negotiating, ratifying and implementing a treaty therefore generates an interpretive community of individuals within each contracting party. It forms a community of people and institutions associated with the treaty. These include the institutions and officials within each state who have or had responsibility for any of the various steps involved in treaty production and implementation.

Beyond the immediate interpretive community located in the national context, interpretation is carried out by amorphous communities of individuals and entities regarded as possessing the knowledge of an expert or professional in the relevant field.²⁰⁰ This is a broader international community consisting of all experts and officials engaged in the various professional activities associated with treaty practice.²⁰¹ As Dworkin reminds us, 'legal practice is an exercise in interpretation.'²⁰² Therefore these groups by virtue of their place and function in the international legal process constitute communities of interpreters. In the realm of human rights such communities would include judges of the human rights courts, Special Rapporteurs, members of UN working groups, the office of the UN High Commissioner for human rights, civil society groups, and so on.

The characterization of the UN treaty bodies as an interpretive community inheres in the very nature and function of the enterprise in which they are involved. As we saw in the preceding sections, treaty bodies interpret and construct normative understandings of treaty norms, in their capacity as treaty monitors. Koh has therefore argued that law-declaring fora such as these treaty Committees create an "interpretive community" that is capable of defining, elaborating and testing the definition of human rights norms.²⁰³

The Authority of Interpretive Communities

In recognizing the discursive nature of the international normative landscape, one recognizes that in international human rights law, interpretive authority is in a sense collective, residing in the various actors and communities. In this context, interpretive authority is not an absolute, but relative and contingent in nature. Thus competing

¹⁹⁷ An example of these 'conventions of description and argument' would be the rules laid down in the Vienna Convention on the Law of Treaties. See 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.

¹⁹⁸ See note 194 supra, p. 385.

¹⁹⁹ See note 194 supra.

²⁰⁰ Ibid, p. 389.

²⁰¹ Ibid, p. 390.

²⁰² Ronald Dworkin, 'Law as Interpretation,' (1981-1982) 60 *Texas Law Review*, p. 527

²⁰³ Harold Hongju Koh 'How is International Human Rights Law Enforced?'(1998-1999) 74 *Indiana Law Journal*, p. 1397, 1410.

interpretations proffered by states are both 'authoritative' in their own right, similarly, the interpretations elaborated by treaty committees are also authoritative. In this sense, interpretation is essentially a communicative process, and 'Interpretive authority...resides with the community of professionals engaged in the enterprise of treaty interpretation and implementation.'²⁰⁴ The interpretive process must therefore be understood as part of an ongoing relationship in which the parties generate, elaborate and refine shared understandings and expectation.²⁰⁵

Law, Process and Interpretation

As a matter of course, this view rejects a rigid, state-centric or positivist conception of international law. More importantly, it recognizes that international law cannot be solely understood as a body of rules. As previous sections of this paper have illustrated, there are various limitations in traditional sources doctrine, which renders its account of contemporary normative phenomenon wholly incomplete. The authority of the General Comment therefore cannot be understood within a strictly rules-based construct, but must be viewed as part of a larger normative process.

Indeed, scholars have shown that the enforcement and compliance with international human rights norms is best conceived in the context of a 'transnational legal process.' This idea describes the practice of how public and private actors, nation states, international organizations, multinational enterprises, non-governmental organizations, multi-national enterprises, non-governmental organizations, and individuals in domestic and international fora make, interpret, enforce and ultimately internalise rules of international law.²⁰⁶ It is essentially a process of interaction, whereby new rules of law emerge, which are interpreted, internalised and enforced. Viewed in this way, interpretation and meaning in international law is constructed collectively over-time, through a process of discourse and persuasion. Koh has therefore argued that "interpretive Communities" are key agents in this transnational legal process.²⁰⁷

Interpretive communities and other international actors therefore function as agents of norm diffusion, potentially influencing state behaviour through their interpretation and articulation of human rights norms. There is a vast and sophisticated literature on the various processes by which this kind of normative diffusion takes place. Scholars such as Sikkink and Ropp highlight the role of persuasion, argumentation and conscious deliberation.²⁰⁸ They see international institutions as forums for the engagement between the various actors and communities, and these deliberative processes as the way in which states over time, come to accept the dominant normative framework. Likewise, Chayes and Chayes have observed that compliance in international law is 'an iterative process of discourse among the parties, the treaty organization and the wider public.'²⁰⁹

Goodman and Jinks have further elaborated on the role of these normative instruments and human rights institutions in this discursive environment. They argue

²⁰⁴ See, note 194 supra.

²⁰⁵ Ibid, p. 381.

²⁰⁶ Harold Hongju koh, 'Transnational Legal Process' (1996) 75 *Neb. L. Rev.* 181, 183.

²⁰⁷ See, Harold Hongju koh 'Brining Human Rights Home' (1998) *Hous. L. Rev.* 623.

²⁰⁸ See, C. Ropp, K. Sikkink et al., *The Power of Human Rights: International Norms and Domestic Change*, (Cambridge 1999).

²⁰⁹ Abraham Chayes and Antonia Handler Chayes, *New Sovereignty: Compliance with International Regulatory Agreements* (Harvard 1995), p. 26

that through processes of-- persuasion, acculturation and discursive legitimation -- norms can act directly by affecting those policy-makers who are themselves active participants in a regime, as well as indirectly by working on special interest groups who, in turn, persuade domestic audiences and political leaders to conform to human rights standards.²¹⁰

The General Comment must therefore be assessed not simply in terms of their effects on rules and specific outcomes, but also as part of this diffuse normative process. This is not to claim that they are binding in a positive sense. However, it recognizes their legal significance by virtue of their content and their iterative and persuasive character, rather than privileging considerations of form.

As Chinkin and Boyle have noted in relation to such instruments 'their consistent repetition creates a consensus,' which gives rise to the emergence of a body of persuasive jurisprudence.²¹¹ Indeed, widespread acceptance of these instruments tends to legitimise conduct and make it harder to sustain the legality of opposing positions. And though States and other actors may potentially contest and reject their content initially, they draw attention to the relevant interpretations and help to establish it as a benchmark against which alternative interpretations will be forced to compete at something of a disadvantage.²¹² These iterative processes are evident throughout the UN human rights regime. This is seen for example, in the growing awareness and acceptance of socio-economic rights within the UN²¹³ and among member states.²¹⁴ Indeed, the General Comments of the various treaty bodies have been integral to this process of interpretation, interaction and normative consensus which has arisen in the area of international human rights law.

Conclusion:

The evolution of the General Comment is a testament to the dynamic nature of international law and its institutions. This instrument has emerged from the obscurity of treaty texts to become an important tool in the development, understanding and practice of international human rights law. But while their important role has been appreciated by scholars, little by way of sustained study has been done to examine their role and status. Indeed, O'Flaherty has noted that 'they have a notable authority, albeit ill-specified.'²¹⁵

The purpose of this paper was to attempt to engage with the idea of the authoritativeness of these instruments. We have seen here that this 'authority' cannot be viewed in traditional legal terms, as General Comments do not bind states, and are not determinative of state's obligations. However, when viewed in the context of the

²¹⁰ Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke L. J.* 621.

²¹¹ See note 137 supra, p. 156.

²¹² See note 7 supra, p. 765.

²¹³ See for example, Report of the Special Rapporteur on the right to food, E/CN.4/2006/44(2006); Report of the Special Rapporteur on adequate housing, E/CN.4/2006/41 (2006); Report submitted by the Special Rapporteur on the right to education, E/CN.4/2005/50 (2004); Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of mental and physical health, E/CN.4/2006/48 (2006).

²¹⁴ See, for example, Question of the realization in all countries of Economic, Social and Cultural Rights: Draft Resolution. E/CN.4/2005/L.24; Report on the workshop on the justiciability of Economic, Social and Cultural Rights, E/CN.4/2001/62/Add.2 (2001); General Assembly Resolution on International Covenants on Human Rights, A/Res/60/149 (2006).

²¹⁵ See note 39 supra, p. 36.

various normative and discursive processes which are central to human rights law, General Comments emerge as an authoritative interpretation, which gives rise to normative consensus on the meaning and scope of particular human rights.