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# *International human rights law as a catalyst for the recognition and evolution of non-state law*

*Helen Quane\**

## *I. Introduction*

All legal systems are moulded by the particular context in which they operate. Non-state law is no different in this regard. The impact of historical, political, economic and cultural factors on the existence and operation of non-state law is well documented.<sup>1</sup>

When analysing non-state law, it is clear that it cannot be viewed in isolation from state law with which it coexists or from the broader context in which it operates. There is true particularly of religious and customary law which is the focus of the present enquiry.

The tendency to date has been to focus on the range of factors that exist within the state that can influence the evolution of these types of non-state law. This approach is unduly limiting, however, and needs to be expanded so as to include an explicitly international law dimension.

The objective of the present chapter is to analyse the impact of international law on the development of non-state law. This may seem a little unorthodox particularly when international law is concerned primarily, albeit not exclusively, with states. This focus becomes more understandable if the state is seen as mediating the relationship between international law and non-state law. Irrespective of the state's willingness to do so, it is a role that it cannot evade completely. It is well established that non-state law

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<sup>1</sup> See, eg, International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 7-14; K Akuffo, 'The conception of land ownership in African customary law and its implications for development' (2009) *African Journal of International and Comparative Law* 57, 63-65; A Bedner & S van Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism' (2010) *6 Utrecht Law Review* 175, 177-183.

can give rise to state responsibility under international law. Where this occurs, the state can be held accountable for any violation of its international obligations and can be required to undertake a range of measures to remedy the violation. These measures can have important implications in terms of the recognition, continued existence and/or reform of non-state law. In effect, state responsibility becomes the gateway for an interesting dynamic to emerge between international and non-state law.

Admittedly, the prospect of any positive engagement between international and non-state law does call into question the common perception that these two bodies of law are mutually incompatible.<sup>2</sup> This is true particularly of international human rights law and non-state law.<sup>3</sup> One can think of numerous instances where the treatment of women under religious or customary law in relation to inheritance rights, marriage, divorce, custody of minors and the taking of evidence in trial proceedings conflicts with the right to equality and non-discrimination under international human rights law.<sup>4</sup> One can also think of certain punishments that may be administered under religious or customary law, such as amputations, floggings and stonings, which conflict with the international

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<sup>2</sup> See, eg, the discussion in L Hajjar, 'Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis' (2004) 29 *Law & Soc Inquiry* 1, 16-19; A Mashhour, 'Islamic Law and Gender Equality – Could there be a common ground? A study of divorce and polygamy in Sharia law and contemporary legislation in Tunisia and Egypt' (2005) 27 *HRQ* 562.

<sup>3</sup> Although this is sometimes attributed to a misreading of non-state law. See, eg, I N Sada, F L Adamu & A Ahmad, *Promoting Women's Rights through Sharia in Northern Nigeria* (2006) available via [http://www.ungei.org/resources/files/dfid\\_promoting\\_womens\\_rights.pdf](http://www.ungei.org/resources/files/dfid_promoting_womens_rights.pdf) accessed 28 May 2014.

<sup>4</sup> See, eg, P S Smith, 'Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence' (2003) 11 *Tul J Int'l & Comp L* 21, 30-39, 48-49; M J Calaguas, C M Drost & E R Fluet, 'Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania' (2007) 16 *Colombia Journal of Gender and Law* 471, 472, 518, 520, 522, 527-528, 538; S Farran, 'Is legal pluralism an obstacle to human rights? Considerations from the South Pacific' (2006) 52 *J Legal Pluralism & Unofficial L* 77, 87, 97-99; R Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty' (2011) 24 *Harvard Human Rights Journal* 71, 101.

prohibition on torture, inhuman and degrading treatment or punishment.<sup>5</sup> These examples reflect quite traditional views of gender relations and punishments for transgressing community mores but they do more than that. They also reflect more deep seated beliefs that are not entirely easy to reconcile with the fundamental principles of international human rights law. The emphasis in international human rights law on individual rights grounded in the inherent dignity and worth of every human being does not always sit well with the moral and philosophical underpinnings of religious law<sup>6</sup> or the communitarian focus of customary law. Taken in the round, these considerations may suggest an irreconcilable conflict between international human rights law and non-state law. While acknowledging the potential for considerable conflict between them, it would be overly simplistic to view the relationship in such one dimensional terms particularly when it seems to be based on perceptions of non-state law as a homogenous and static body of law<sup>7</sup> and international human rights law as a series of absolute and unyielding human rights norms.

Any fruitful enquiry into the impact of international human rights law on non-state law must start by recognizing the dynamic nature of the latter<sup>8</sup> and the potential inherent in the former to accommodate national and regional variations without compromising its fundamental tenets.<sup>9</sup> While international human rights law can certainly

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<sup>5</sup> See, eg, Calaguas (n 4) 472; J Afary, 'The Human Rights of Middle Eastern & Muslim Women: A Project for the 21<sup>st</sup> Century' (2004) 26 HRQ 106, 110; *Curtis Francis Doebbler v Sudan* African Commission on Human and Peoples' Rights, Comm no 236/2000 (2003).

<sup>6</sup> See further, J J Shestack, 'The Jurisprudence of Human Rights' in T Meron, *Human Rights in International Law: Legal and Policy Issues* (Oxford University Press, 1984).

<sup>7</sup> In this regard, it is important to bear in mind that it is possible for different interpretations of non-state law to exist. See, eg, the discussion in A Scolnicov, 'Religious law, religious courts and human rights within Israeli constitutional structure' (2006) *International Journal of Constitutional Law* 732, 733; Mashhour (n 2).

<sup>8</sup> See also, in a similar vein, Calaguas (n 4) 534; Perry (n 4) 77-79.

<sup>9</sup> See also, Perry (n 4) 72-73.

act as a constraint on particular aspects of non-state law, it can also act as a catalyst for the more widespread use and evolution of non-state law. It is also important to acknowledge that it is not a one way relationship. Non-state law can inform the interpretation of international human rights law. In doing so, it can heighten the relevance of international human rights law to the everyday lives of a considerable proportion of the world's population and increase its efficacy on the ground. While this perception of the relationship between international and non-state law may seem overly optimistic, recent developments in international practice lend a certain credence to it.

This chapter tracks these developments and draws out their significance primarily for non-state law. It begins with a brief discussion of the concept of non-state law in order to establish some parameters to the present enquiry. It also maps out the role of the state in mediating the relationship between international and non-state law. The chapter then analyses two case-studies that are fairly representative of recent developments concerning this relationship. The first relates to developments within the UN Charter-based system<sup>10</sup> and concerns the rights of indigenous peoples. The second relates to developments within the UN Human Rights Treaty Body System,<sup>11</sup> in particular, the UN

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<sup>10</sup> This is the system which is derived from the UN Charter and includes the work of the UN Human Rights Council and the system of Special Procedures which includes Special Rapporteurs, Special Representatives and Working Groups. The relevant official documents are available via <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> accessed 29 May 2014.

<sup>11</sup> This system is concerned with the implementation of the core international human rights treaties. These are the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195; the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3; the Convention

Convention on the Elimination of All Forms of Discrimination against Women. Both case-studies demonstrate not only the very real tensions that can exist between international and non-state law but, more importantly, the emergence of a coherent conceptual framework for the development of a more constructive relationship between them. The chapter concludes with a series of observations concerning the relationship between international human rights law and non-state law and its significance in terms of the recognition and evolution of non-state law.

## *II. Defining non-state law: The 'Not a Cat' syndrome?*

A preliminary issue that arises is how to define non-state law. This brings to mind Philip Alston's comments about the definition of non-state actors. Drawing on his experience with his eighteen month old daughter who described every rabbit, mouse or kangaroo as 'not a cat', he found that an almost identical technique was pervasive in international law discussions of non-state actors.<sup>12</sup> Essentially, this tendency to define something by reference to what it is not, can, as he observed, obfuscate almost any debate.<sup>13</sup> Similar considerations apply to the definition of non-state law. Defining non-state law by what it is not is unlikely to further our understanding of this phenomenon in any significant or

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on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3; the International Convention for the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) UN Doc A/61/488.

<sup>12</sup> P. Alston, 'The "Not –a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P. Alston, *Non-State Actors and Human Rights* (Oxford University Press, 2005) 3.

<sup>13</sup> *Ibid.*

meaningful way. Indeed, it is highly unlikely that such an approach is sustainable as it is predicated on the existence of a clear dichotomy between state and non-state law.<sup>14</sup>

For the most part, enquiries into the concept of non-state law focus on the nature or characteristics of the norms under consideration. There are various dimensions to this. At one level, there is the preliminary question of what is ‘law’ and how to establish the ‘definitional stop’ between legal norms and norms of a more diffuse social nature.<sup>15</sup> Having established what constitutes law or law-like norms, the enquiry then tends to shift to whether they are ‘state’ or ‘non-state’ legal norms. At this point, attention often focuses on the manner in which these norms are enforced. Where the norms rely on the political authority of the state or its coercive powers for enforcement, there is a tendency to classify them as state rather than non-state legal norms.<sup>16</sup>

This chapter adopts a somewhat different approach. At the outset, it must be said that the present author, like many international lawyers, adopts a fairly pragmatic approach to the definition of a legal norm. According to this approach, if the principal addressees of a norm and the third party decision makers applying that norm view it as a ‘legal’ norm, then the classification of the norm as a legal norm will be accepted.<sup>17</sup> This then raises the question as to whether the norm should be classified as a state or non-state legal norm. Adopting a functional approach to normative legal orders can provide a

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<sup>14</sup> See also, in a similar vein, W Kamau, ‘Law, pluralism and the family in Kenya: beyond bifurcation of formal law and custom’ (2009) *International Journal of Law, Policy and Family* 133; International Council on Human Rights Policy (n 1) 44-49.

<sup>15</sup> See, eg, the discussion in B Z Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Sydney L Rev* 375, 391-396; W Twining, ‘Normative and Legal Pluralism: A Global Perspective’ (2009-2010) 20 *Duke J. Comp. & Int’l L* 473.

<sup>16</sup> See, eg, A A An-Na’im, ‘Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives’ (2008-2009) 57 *Drake L Rev* 829, 83, 840. See also, International Council on Human Rights Policy (n 1) 43.

<sup>17</sup> See, eg, I Brownlie, ‘The Reality and Efficacy of International Law’ (1981) 52 *BYIL* 1, 1-2. See also, in a similar vein, Tamanaha (n 15) 396. The latter refers to law as a “‘folk concept”, that is, law is what people within social groups have come to see and label as “law””.

useful way of thinking about this issue. In the present context, a functional approach means looking at the range of functions that are integral to the operation of the official legal system in a state. Broadly speaking, these functions can be located along a continuum whereby at one end there is the formation of norms, through to the recognition and interpretation of norms, until finally there is the enforcement of norms. At any one time and in relation to any one topic, non-state law may be co-opted into performing or assisting in the performance of one or more functions on this continuum. Where this occurs, it may acquire the mantle of state law in relation to that particular function and for so long as it performs that function while continuing to retain its character as non-state law in all other respects.

While a full exposition of this approach is beyond the remit of the present chapter, this brief overview is intended to highlight the fluidity that can exist in relation to the definition of non-state law in both a temporal and functional sense. Admittedly, it does not avoid completely the ‘not-a-cat’ syndrome. At the very least, however, it should caution against seeing non-state law in overly rigid and unitary terms and raise the possibility of multiple, concurrent classifications. Ultimately, there is a vast array of opportunities for state and non-state law to interact. When they do, the nature and extent of these interactions may be such as to influence the classification of what would otherwise be regarded as non-state law. This is significant not only in terms of how we define non-state law but also in terms of establishing state responsibility. As the following section will establish, state responsibility is the gateway through which international human rights law can influence non-state law.



*III. Mediating the relationship between international human rights law and non-state law: The role of the state*

To understand the potential of international human rights law to influence non-state law, it is necessary to factor in the role of the state. This is because international human rights law still adheres very much to a state-centred approach.<sup>18</sup> For the most part, it imposes direct legal obligations only on states.<sup>19</sup> To the extent that it can impact on non-state law, it can only do so essentially via the state. This means that before international human rights law can require the state to recognize, abolish or instigate reform of non-state law, there must be a preliminary finding that the responsibility of the state is engaged. In the absence of this nexus, it is difficult to discern any basis for a relationship between international human rights law and non-state law. As every state has acceded to at least one international human rights treaty, there is at least a potential gateway for establishing such a relationship.<sup>20</sup>

It is well established in international law that the state can be held responsible for any human rights harm caused by non-state law in a number of instances.<sup>21</sup> The first is where non-state law is co-opted into the state justice system, for example, when religious

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<sup>18</sup> Notwithstanding some recent developments concerning the responsibility of non-state actors for human rights harm. See, eg, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' UN Doc A/HRC/8/5 (7 April 2008).

<sup>19</sup> Although a very small number of international human rights treaties now allow regional intergovernmental organizations to become parties: see, eg, Convention on the Rights of Persons with Disabilities, Art 44. The European Union acceded to the Convention on 23 December 2010 <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en)> accessed 29 May 2014.

<sup>20</sup> For the status of ratifications: see <<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>> accessed 29 May 2014.

<sup>21</sup> See, International Law Commission, 'International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts' (2001) arts 4, 5, 9 <[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)> accessed 29 May 2014.

or customary law is used to regulate certain disputes either within the state as a whole or one of its regions.<sup>22</sup> The second is where decisions of religious or customary courts are enforced in the state courts, for example, as a form of alternative dispute resolution<sup>23</sup> or as a result of a specific agreement between the state and non-state institution in question.<sup>24</sup> The third is where non-state law involves the exercise of elements of governmental authority carried out in the absence of the official authorities. The decisive factor here is that non-state law must involve the exercise of ‘governmental authority in the absence of official authorities, in operations of which the [government] must have had knowledge and to which it did not specifically object.’<sup>25</sup> This third scenario is clearly relevant to the situation where non-state law operates in the absence of any official authorities due, for example, to the remoteness of the geographical terrain or to the limited resources of the state in establishing a presence in the region.<sup>26</sup> In all three situations, the state can be held responsible for any human rights harm caused by the existence or operation of non-state law. In these circumstances it will be difficult for non-state law to evade the impact of international human rights law as the state will be

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<sup>22</sup> See, eg, the concurrent recognition of religious and customary law in parts of the Philippines: J Prill-Brent, ‘Contested Domains: The Indigenous Peoples Rights Act (IPRA) and Legal Pluralism in the Northern Philippines’ (2007) 55 J Legal Pluralism and Unofficial L 11; Republic Act No. 6734 which first created the Autonomous Region of Muslim Mindanao on 1 August 1989.

<sup>23</sup> See, eg, the position in the United Kingdom: D McGoldrick, ‘Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws’ (2009) 9 HRLRev 603, 637-638.

<sup>24</sup> See, eg, the position in Italy concerning the enforcement in state courts of decisions of the ecclesiastical courts of the Catholic Church discussed in *Pellegrini v Italy* (2002) 35 EHRR 2.

<sup>25</sup> See, extract from the *Yeager* case decided by the Iran-United States Claims Tribunal discussed in ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001’ [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) accessed 29 May 2014.

<sup>26</sup> See, eg, the type of situation that arose in *Case of Aloeboetoe et al v Suriname (Reparation and Costs)* Inter-American Court of Human Rights (10 September 1993) where the state failed to establish its laws in a particular territory albeit this was not central to the merits of the case.

required to undertake the necessary measures to render it compatible with its international obligations.<sup>27</sup>

The situation is more complex when non-state law operates in parallel to the state justice system without any form of official recognition. Take, for example, the situation where an individual submits voluntarily to the jurisdiction of a religious court even though the court does not comply with the international requirements of a fair trial and notwithstanding the existence of state courts that are fully rights compliant. If the court is simply operating *de facto* without any official recognition, the state cannot be held directly responsible for its conduct. This raises the question whether international law provides a somewhat perverse incentive to states to avoid engaging with non-state law. This would lead to the curious result that international law could help to insulate non-state law from state intervention notwithstanding the human rights harm that may be caused by non-state law. It is doubtful whether this is correct at least to the extent that it is asserted in unqualified terms. This is because international human rights law imposes obligations on the state not only to respect human rights but also to protect these rights against interferences by private individuals and organisations.<sup>28</sup> In the example given, it is possible that there may be a positive obligation on the state to protect the individual against any interference with her right to a fair trial by the religious court. The difficulty is that the extent of the state's positive obligations to protect human rights is far from clear. According to the international jurisprudence, the scope of these positive

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<sup>27</sup> See, eg, Concluding Observations of the UN Human Rights Committee on the state report submitted by Canada, UN Doc CCPR/C/79/Add.105 (1999) para 19.

<sup>28</sup> See, eg, the approach adopted by the UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women', UN Doc CEDAW/C/GC/28 (2010).

obligations are determined in the light of all the circumstances of the case and, in no case, can they result in the imposition of an impossible or disproportionate burden on the state.<sup>29</sup> With this in mind, the most that can be said is that it is possible that the *de facto* operation of non-state law can engage the responsibility of the state depending on the particular circumstances of the case. Where this occurs, it can open the way for international human rights law to exert some influence on non-state law.

Admittedly, there are several ways that state responsibility can be limited thereby restricting the potential influence of international law on non-state law. The first is that the state can enter a reservation to a human rights treaty, for example, to the effect that a particular provision will be applied only to the extent that it does not affect the prescriptions of religious law. This is not uncommon in international practice. It is interesting in the present context for several reasons. At one level, it demonstrates how a particular form of non-state law can be invoked by the state to justify its selective acceptance of treaty obligations and to block the full implementation of a treaty regime. At another level, it can be seen as a way for the state to insulate non-state law from the full impact of international human rights law. Whether this strategy is a viable one depends on a range of factors not least whether the reservation is valid in terms of being compatible with the object and purpose of the treaty.<sup>30</sup>

The second way is to argue that even though the state is bound by the obligation under international human rights law, it has not violated that obligation. There are various strands to this argument. The state may claim that there is no interference with human

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<sup>29</sup> See, eg, *Osman v United Kingdom* (2000) 29 EHRR 245, para 116; *Case of the Sawhoyamaya Indigenous Community v Paraguay* Inter-American Court of Human rights (29 March 2006) para 155.

<sup>30</sup> See, Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 19(c).

rights on the basis that the individual could have avoided any negative impact on the exercise of her human rights but chose not to do so. For example, it may deny any interference with the right to a fair trial because the individual submitted voluntarily to the jurisdiction of a religious court even though she knew that the court did not comply with this right and notwithstanding the fact that she could have accessed state courts that were rights compliant. In the past, this line of argument has been successful but it is questionable whether it will continue to be.<sup>31</sup> Recent case law suggests that even though the individual could have acted to minimise any negative impact on the exercise of her rights there may still be an interference with her human rights for which the state will be answerable at the international level.<sup>32</sup>

Another strand to this argument is the claim that the individual has waived the exercise of her human rights by submitting to the jurisdiction of the religious court rather than to the state courts. According to the international jurisprudence, it is possible to waive the exercise of a human right but it is subject to several conditions. To the extent that the waiver is ‘permissible’ it ‘must not run counter to any important public interest, must be established in an unequivocal manner and requires minimum guarantees commensurate to the waiver’s importance’.<sup>33</sup> This suggests several factors that must be taken into account when considering the validity and efficacy of a waiver. The waiver must (a) be permissible although there is little guidance in the jurisprudence on when a

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<sup>31</sup> See, eg, the review of the jurisprudence in *Eweida and others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) para 83.

<sup>32</sup> *Ibid*, paras 83, 109. In assessing whether the interference is justified, the Court will take into account the individual’s ability to circumvent the negative impact on the exercise of his rights. Nevertheless, the key point is that the state is held to account even in these circumstances.

<sup>33</sup> See, eg, *Thompson v United Kingdom* (2005) 40 EHRR 11, para 43.

waiver will be prohibited in principle,<sup>34</sup> (b) not be contrary to any important public interest,<sup>35</sup> (c) be established in an ‘unequivocal manner’ with the onus on the state to establish its existence,<sup>36</sup> and (d) be consented to by the individual in a very real and genuine sense.<sup>37</sup> It follows that the state cannot be complacent even where the individual submits voluntarily to the jurisdiction of a religious or customary court and seemingly waives the exercise of her human rights. Depending on the particular circumstances of a case, there is a very real possibility that the state may be held responsible for any human rights harm. It shows that even where non-state law is completely independent of the state, international human rights law may still exert some influence on its existence and operation.

The possibility of justifying an interference with a human right provides another way for the state to deny any violation of its international obligations and to limit the impact of international human rights law on non-state law. Aside from a small number of absolute rights, most human rights can be subject to restrictions provided certain conditions are met. In order to justify a restriction, the state must demonstrate that it (a) is prescribed by law, (b) pursues a legitimate objective, (c) is necessary to achieve that objective, and (d) is not discriminatory. In respect of the latter, it is well established in international human rights law that not every difference in treatment will be discriminatory. Instead, discrimination occurs when the state treats persons in analogous positions differently without objective and reasonable justification or when it fails ‘to

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<sup>34</sup> One possible example is suggested in the case of *Refah Partisi (The Welfare Party) v Turkey* (2003) 37 EHRR 1, para 128 (decision of the Grand Chamber) where the waiver encroaches on ‘the state’s role as the neutral and impartial organiser of the exercise of religions’.

<sup>35</sup> See, eg, *Ozerov v Russia* App no 64962/01 (ECtHR, 18 May 2010) para 57.

<sup>36</sup> See, eg, *Colozza v Italy* (1985) 7 EHRR 516, para 28.

<sup>37</sup> See, eg, *Deweert v Belgium* (1979-80) 2 EHRR 439, paras 49-51, 54; *Pfeifer and Plankl v Austria* (1992) 14 EHRR 692, para 39; *Thompson* (n 33) para 44.

treat differently persons whose positions are significantly different’ without objective and reasonable justification.<sup>38</sup> It follows that while there are some absolutes in international human rights law, there is also considerable potential for it to accommodate a range of competing rights and interests. This has to be factored in to any consideration of its possible impact on non-state law.

What emerges from this brief overview is that there are various ways in which international human rights law can exert some influence on non-state law. Admittedly, the relationship between the two is one that conducted effectively at arms’ length and with the state acting as intermediary. Drawing largely on principles of state responsibility, the state can be cast in the role of mediating the relationship between the two bodies of law. Depending on the range of obligations undertaken by the state, international human rights law may require the state to recognize, restrict or instigate reform of non-state law. The extent to which it actually does so will depend on several factors.

One is the nature and range of international human rights obligations undertaken by the state. The greater the number of human rights obligations undertaken by the state, the greater the prospects for the relationship between international and non-state law taking hold. In recent years, there has been a considerable expansion in the number of ratifications of human rights treaties by states.<sup>39</sup> This suggests that the potential for

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<sup>38</sup> See, eg, UN Human Rights Committee, ‘General Comment No. 18’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ UN Doc HRI/GEN/1/Rev.7 (2004).

<sup>39</sup> See, eg, Report by the United Nations High Commissioner for Human Rights, Navanethem Pillay, ‘Strengthening the United Nations human rights treaty body system’ (2012) <<http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf>> accessed 29 May 2014. According to this report, the six core international human rights treaties in force in 2000 had attracted 927 ratifications. By 2012, this total increased by over 50 % to 1,586 ratifications

international human rights law to influence non-state law will increase rather than diminish in the coming years.

A second factor is the extent to which the state is prepared to comply with its international obligations in good faith. The state may simply refuse to engage with the international human rights bodies or ignore their recommendations. If it does, the impact of international human rights law on non-state law will be minimal, at best. This raises issues concerning the general efficacy of international human rights law. While it is important to appreciate the shortcomings of the law in this respect, it is also important not to be too bleak in one's assessment of its potential efficacy. When considering this issue, it is best to see the situation as a moving image. Even if international human rights law does not deliver immediate results it can still exert an influence over the medium to long term.<sup>40</sup> In exploring the relationship between international human rights law and non-state law, it is necessary to factor in this time component and to stress that what we are witnessing are the very early stages in an evolving relationship.

*IV. The rights of indigenous peoples under international human rights law: A catalyst for the greater recognition and use of non-state law*

Normative developments concerning the rights of indigenous peoples have the potential to exert considerable influence on the recognition and development of their customary laws and juridical systems. This is evident from the UN Declaration on the Rights of Indigenous Peoples which was adopted by the United Nations General Assembly in

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<sup>40</sup> See, eg, P Alston, 'Beyond "them" and "us": Putting treaty body reform into perspective' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000).



2007.<sup>41</sup> According to this Declaration, indigenous peoples have the ‘right to maintain and strengthen their distinct ... legal ... institutions’.<sup>42</sup> Where juridical systems or customs exist, indigenous peoples have the ‘right to promote, develop and maintain’ them.<sup>43</sup> This should afford some protection against any attempts by the state to suppress or eliminate this form of non-state law. The Declaration also requires the state to adopt positive measures to give greater effect to customary law. In particular, it requires the state ‘to give due recognition to’ customary law in adjudicating the rights of indigenous peoples relating to their lands, territories and resources.<sup>44</sup> In addition to this, any decision concerning the resolution of a dispute between an indigenous people and the state or other third party must give ‘due consideration to the ... rules and legal systems of the indigenous peoples concerned’.<sup>45</sup> In this respect, the Declaration should act as an important catalyst for the greater recognition and use of this form of customary law.

The precise implications of these provisions become more apparent from the drafting history of the Declaration. The drafting history shows that the provisions were not intended to create new legal systems.<sup>46</sup> Nor, it seems, were they intended to establish parallel legal systems or to allow indigenous peoples to opt out of the state system.<sup>47</sup> Admittedly, concerns were expressed about the creation of ‘parallel and ...

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<sup>41</sup> The United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007)(adopted by 143 votes to 4: 11 abstentions).

<sup>42</sup> Art 5.

<sup>43</sup> Art 34.

<sup>44</sup> Art 27. The relevance of indigenous peoples’ laws to land rights is also recognized in art 11(2).

<sup>45</sup> Art 40.

<sup>46</sup> Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/2004/81 (7 January 2004) para 91 (2004 Report).

<sup>47</sup> Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/1996/84 (4 January 1996) paras 92, 97 (January 1996 Report). See also, Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/1997/102 (10 December 1996) para 230 (Malaysia) (December 1996 Report).

contradictory legal systems within the state<sup>48</sup> but these concerns seem to have been dispelled.<sup>49</sup> This may be attributed, in part, to some of the amendments made during the drafting process.<sup>50</sup> For example, the original draft referred to the right of indigenous peoples to maintain and strengthen their ‘legal systems’ but this was subsequently changed to ‘legal institutions’, apparently to diminish the risk of creating separate and competing legal systems within the state. There are some references to indigenous peoples’ ‘legal’ or ‘juridical systems’ in the final draft but only in the context of states giving ‘due recognition’ or having ‘due regard’ to them.<sup>51</sup> The duty on the state to take account of these non-state systems was also intended to ensure that state and non-state law ‘operated in a compatible way’.<sup>52</sup> What emerges from the drafting history is that while the Declaration can act as an important catalyst for the greater recognition of non-state law, it does not go so far as to require the recognition of new legal systems or the right to establish parallel and competing legal systems within the state.

The drafting history also provides useful insights into the relationship between this particular form of non-state law and international human rights law. The need for customary law to be consistent with international human rights law was emphasized by several states during the drafting of the Declaration.<sup>53</sup> This was not contested by the representatives of indigenous peoples themselves. Indeed, they pointed out that

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<sup>48</sup> 2004 Report, para 85. See also, December 1996 Report, paras 244, 233 (Ukraine, Brazil).

<sup>49</sup> Although Australia continued to express concerns and voted against the Declaration on this and other grounds: see, UN General Assembly, Sixth-first session, 108<sup>th</sup> plenary meeting, 13 September 2007, UN Doc A/61/PV.107, 12. Australia subsequently accepted the Declaration.

<sup>50</sup> 2004 Report, para 86. See also, Draft Declaration on the Rights of Indigenous Peoples, Amended Text, prepared by Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, UN Doc E/CN.4/WG.15/CRP.1 (6 September 2004) Art 4; Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/2006/79 (22 March 2006) Art 4 (2006 Report).

<sup>51</sup> Arts 34, 40.

<sup>52</sup> 2004 Report, para 89.

<sup>53</sup> See, eg, December 1996 Report, para 232 (Colombia). See also, January 1996 Report, para 92.

compatibility was assured not only by virtue of the wording of the Declaration<sup>54</sup> but also by the ‘dynamic’ character of their customary law and the fact that they considered themselves bound by international human rights law.<sup>55</sup> Aside from this, the drafting history demonstrates how concern for human rights played such an important role in the drafting of the Declaration. There was a general consensus that existing formulations of human rights had proved inadequate in addressing the serious deprivations suffered by indigenous peoples who remain among the poorest and most marginalized in the world. Against this backdrop, the provisions on indigenous peoples’ law can be seen as a way of ensuring greater respect for the rights of indigenous peoples, most notably, their right to respect for their identity<sup>56</sup> and their right to self-determination.<sup>57</sup> It demonstrates a strong justificatory basis for these provisions, one that is firmly rooted in international human rights norms and linked very much to the specific characteristics of indigenous peoples. When combined with the requirement that indigenous peoples’ laws must be compatible with international human rights laws, it shows how non-state law has the potential to reinforce rather than weaken the global system for the protection of human rights.

Of course, it may be argued that as the Declaration is not legally binding, its significance is limited. This is questionable for several reasons. The Declaration is the product of over 20 years of negotiation and represents an important standard setting exercise. As such, it is capable of influencing state behaviour and contributing to the formation of customary international law. It is also important to note that its provisions

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<sup>54</sup> See, eg, Arts 46(2)(3), 40, 1.

<sup>55</sup> See, eg, December 1996 Report, paras 92, 224.

<sup>56</sup> Ibid, para 237 (Aboriginal and Torres Strait Islander Social Justice Commissioner).

<sup>57</sup> See, eg, Indigenous Issues: Working group established in accordance with Commission on Human Rights resolution 1995/32, Chairperson’s summary of proposals, UN Doc E/CN.4/2005/WG.15/CRP.7 (20 December 2005), Art 33.

on indigenous customary law are very much in line with developments concerning the rights of indigenous peoples in numerous global and regional human rights treaties.<sup>58</sup> The International Labour Organisation's Indigenous and Tribal Peoples Convention No. 169 of 1989, for example, requires states to have 'due regard' to customary law when applying national laws to indigenous and tribal peoples.<sup>59</sup> To the extent that they are compatible with human rights, indigenous and tribal peoples have the right to retain their own customs and institutions<sup>60</sup> and specifically to have their customs regarding penal matters respected and taken into consideration by state authorities when dealing with criminal cases.<sup>61</sup> Although the Convention has been ratified by a relatively small number of states, its influence has extended beyond these states and can be linked to developments at the regional and global levels.<sup>62</sup>

It is possible to identify similar trends at the regional level, specifically, within the Inter-American human rights system.<sup>63</sup> In several landmark cases, the Inter-American Court of Human Rights has held that the recognition of customary law in the demarcation and titling of ancestral land is legally required under the American Convention on Human Rights.<sup>64</sup> Admittedly, this may seem discriminatory as it seems to introduce different systems of regulation of land ownership depending on whether or not one is a member of an indigenous people. The better view is that this is an example of where differently

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<sup>58</sup> On the significance of the Declaration, see also, UNHRC, 'Report of the Special Rapporteur on the rights of indigenous peoples' (2012) UN Doc A/HRC/21/47/Add.1, paras 79-82.

<sup>59</sup> Art 8(1).

<sup>60</sup> Art 8(2).

<sup>61</sup> Art 9.

<sup>62</sup> See, eg, the comments at <[http://www.ilo.org/indigenous/Resources/Publications/WCMS\\_100897/lang-en/index.htm](http://www.ilo.org/indigenous/Resources/Publications/WCMS_100897/lang-en/index.htm)>. This is due, in part, to its influence on the funding policies of several development banks.

<sup>63</sup> On this point, see further, L Rodriguez-Pinero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement' in S Allen & A Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011).

<sup>64</sup> See, eg, *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights (31 August 2001) paras 138, 151. See also, Separate Opinion of Judge Sergio Garcia Ramirez, para 6.

situated people must be treated differently.<sup>65</sup> In addition to this, the adoption of a purely civil law concept of ‘property’ would operate to exclude a significant proportion of humanity from the protection of the right to respect for one’s property and this, in itself, would be discriminatory.<sup>66</sup> It is also important to bear in mind that a failure to recognize customary law could undermine or even destroy the ability of indigenous peoples to maintain their traditional relationship with their ancestral lands. This, in turn, could have far reaching implications for their other human rights, notably, their right to life, to food, and to respect for their indigenous identity.<sup>67</sup> Recognizing customary law in these circumstances can be vital to maintaining the physical and cultural wellbeing of indigenous peoples that might not be achievable by other means. While this is a powerful argument for the recognition of the customary law of indigenous peoples, it is doubtful whether this argument can be deployed in support of the more widespread recognition of other forms of non-state law. It will be difficult to establish such a direct link between the failure to recognize non-state law and such grave human rights violations occurring outside an indigenous context. Furthermore, international practice to date reveals that current interpretations of the right to respect for identity and the right to freedom of religion do not compel the state to recognize other forms of customary or religious law.<sup>68</sup>

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<sup>65</sup> See, eg, *Case of the Saramaka People v Suriname*, Inter-American Court of Human Rights (28 November 2007) paras 85, 103; *Case of the Yakye Axa Indigenous Community v Paraguay*, Inter-American Court of Human Rights (17 June 2005) para 63.

<sup>66</sup> *Awas Tingni* (n 64) paras 148-149, 151, 153; especially the Separate Opinion of Judge Sergio Garcia Ramirez, paras 11-14.

<sup>67</sup> See the particular facts in *Sawhoyamaxa* (n 29). Indeed, the Inter-American Court has found that it could threaten the very physical and cultural survival of an indigenous people: see, eg, *Saramaka* (n 65) paras 121-122, 128.

<sup>68</sup> For a review of the practice of regional and global human rights bodies in this area, see further, H Quane, ‘International Human Rights Law and Legal Pluralism: Inherently incompatible, mutually reinforcing or something in between?’ (2013) 33:4 *Oxford Journal of Legal Studies* 675.

V. *The Convention on the Elimination of all Forms of Discrimination Against Women: A catalyst for the reform and evolution of non-state law*

The negative impact of non-state law on the rights of women is well documented.<sup>69</sup> Indeed, it often seems that the principle of gender equality is an insurmountable obstacle to any attempt to reconcile non-state law and international human rights law. This issue is explored in the present section with particular reference to developments relating to the Convention on the Elimination of All Forms of Discrimination against Women. As there are currently 188 state parties to this Convention,<sup>70</sup> it is a useful global benchmark against which to assess the potential impact of international human rights law on non-state law in the particular area of gender equality.

At the outset, it is important to note that a sizeable number of states have made reservations to the Convention based on religious or customary law.<sup>71</sup> For the most part, the reservations are based on religious law, especially Sharia law.<sup>72</sup> They stipulate either that the state is not bound by certain articles of the Convention or that it is bound only insofar as the Convention does not conflict with religious or customary law. They are a concrete illustration of how non-state law can be invoked to limit a state's international obligations. For this reason, these reservations may be seen to cast doubt on the ability of international human rights law to influence religious and customary law. This is doubtful for several reasons.

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<sup>69</sup> See, n 4.

<sup>70</sup> For a complete list of ratifications, reservations and objections to reservations, see <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en)> accessed 28 May 2014.

<sup>71</sup> Namely, Bahrain, Bangladesh, Brunei, Egypt, India, Iraq, Israel, Kuwait, Libya, Malaysia, the Maldives, Mauritania, Morocco, New Zealand, Niger, Pakistan, Oman, Qatar, Saudi Arabia, Singapore, Syria, and the United Arab Emirates.

<sup>72</sup> Reservations based on other forms of religious or customary law have been entered by India, Israel, New Zealand and Niger.

The first is due to what these reservations tell us about non-state law and its capacity to evolve and adapt to the requirements of international human rights law. Take the reservations based on Sharia law as an example. The number and identity of Convention provisions that are subject to reservations on the basis that they may conflict with Sharia law tend to vary.<sup>73</sup> While some states enter a general reservation, others refer only to specific articles and, then, not always to the same ones.<sup>74</sup> At the very least, this suggests that there are different interpretations of Sharia law, some of which are more compatible than others with the requirements of the Convention.<sup>75</sup>

The second is due to the international response to these reservations. A substantial number of states have entered formal objections to them.<sup>76</sup> The Committee on the Elimination of Discrimination against Women, which monitors and promotes compliance with the Convention, has also objected to these reservations.<sup>77</sup> For the most part, these objections are based on the perception that the reservations are incompatible with the object and purpose of the Convention.<sup>78</sup> As such, they call into question the validity of the reservations and the viability of attempts to use non-state law to limit a

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<sup>73</sup> Cf, the reservations entered by Bahrain (Arts 2, 16), Bangladesh (Arts 2 and 16(1)(c)), Brunei (general reservation), Egypt (Arts 2, 16), Iraq (Art 16), Kuwait (Art 16(f)), Libya (Art 2, 16(c)(d)), Malaysia (general reservation), Maldives (Art 16), Mauritania (general reservation), Morocco (Art 2), Pakistan (general reservation), Qatar (Arts 15(1), 16(1)(a)(c)(f)), Saudi Arabia (general reservation), Singapore (Arts 2, 9(2), 15(4), 16(1)(c)(d)(f)(g)(2)) and the United Arab Emirates (Arts 2(f), 15(2), 16).

<sup>74</sup> Ibid.

<sup>75</sup> On the potential to reconcile Sharia law with women's human rights more generally, see, eg, Sada (n 3).

<sup>76</sup> See, the objections entered by Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom.

<sup>77</sup> See, eg, Committee's recommendations to Bangladesh, Iraq, Kuwait, Maldives, Saudi Arabia, Singapore, Syria and the United Arab Emirates: UN Docs A/52/38/Rev.1(SUPP) (1997) para 433; A/55/38(SUPP) (2000) para 186; CEDAW/C/KWT/CO/3-4 (2011); A/56/38(SUPP) (2001) paras 130-131; CEDAW/C/SAU/CO/2 (2008); A/56/38(SUPP)(2001) paras 73-74; CEDAW/C/SYR/CO/1 (2007); CEDAW/C/ARE/CO/1 (2010).

<sup>78</sup> Other reasons given for the objections include (a) that the reservation was of limited scope and undefined character thereby giving rise to questions about the state's commitment to the treaty and the extent of the obligations it was undertaking, (b) that it would cause sex discrimination, and (c) that the state cannot rely on the provisions of internal law to restrict its international obligations.

state's international human rights obligations. This sustained pressure has led to the withdrawal of some of these reservations either in whole or in part.<sup>79</sup> The withdrawal of these reservations is significant as it suggests that religious and customary law is not set in stone but is capable of being interpreted in an evolving manner and in a way that is compatible with international human rights law.

Notwithstanding the existence of the reservations, the Committee reviews each state's compliance with all the provisions of the Convention and makes a number of concluding recommendations. Although these recommendations are not legally binding they provide an authoritative interpretation of the Convention and can influence state behaviour. Several trends emerge from these recommendations. The first is that there are some religious and customary laws that are deemed to be completely incompatible with the Convention. This is true, for example, of laws permitting polygamy and child marriages. In these instances, the state concerned is called upon to eliminate these laws.<sup>80</sup> Several states have already taken measures to do so.<sup>81</sup> It is just one example of how international human rights law can impact on non-state law. However, it is important not to lose sight of the bigger picture. There is no evidence to suggest that the

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<sup>79</sup> See, eg, Bangladesh, Syria, Singapore and Kuwait: UN Docs A/52/38/Rev.1 (SUPP) (1997) para 411; CEDAW/C/SYR/CO/1 (2007) para 11; CEDAW/C/SGP/CO/4 (2011); CEDAW/C/KWT/CO/3-4 (2011). Others made commitments during the first UPR to withdraw or review their reservations to the Convention: see, eg, Oman: UN Doc CEDAW/C/OMN/CO/1 (2011). Several states have signaled their intention to withdraw at least some of their reservations: see, eg, Mauritania, Morocco and Malaysia: UN Docs CEDAW/C/MRT/CO/1 (2007); CEDAW/C/MAR/CO/4 (2008); CEDAW/C/MYS/CO/2 (2006).

<sup>80</sup> See, eg, Committee's recommendations to Iraq, Israel, Kuwait, Mauritania, Morocco, Oman, Saudi Arabia, Syria, Uganda, Kenya, Myanmar, Madagascar and Singapore: UN Docs A/55/38(SUPP) (2000) para 192 ; A/52/38/Rev.1 Pt II (1997) para 178; CEDAW/C/KWT/CO/3-4 (2011); CEDAW/C/MRT/CO/1 (2007); CEDAW/C/MAR/CO/4 (2008); CEDAW/C/OMN/CO/1 (2011); CEDAW/C/SAU/CO/2 (2008); CEDAW/C/SYR/CO/1 (2007); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/KEN/CO/6 (2007); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/MDG/CO/5 (2008); CEDAW/C/SGP/CO/4 (2011).

<sup>81</sup> See, eg, the introduction of a minimum age of marriage in Morocco and Singapore: UN Docs CEDAW/C/MAR/CO/4 (2008); CEDAW/C/SGP/CO/4 (2011).



Convention requires the wholesale abolition of religious or customary law. For the most part, attention is directed to rendering this law compatible with the Convention.

A second trend is that religious and customary law is regarded as having the capacity to evolve in line with international standards.<sup>82</sup> Attempts to portray religious or customary law as incapable of reform are consistently challenged and rejected by the Committee.<sup>83</sup> Instead, the Committee focuses on encouraging a more flexible interpretation of these laws and a sharing of best practice. For example, it has commented positively on one state's 'gradual, greater flexibility in the interpretation of Sharia'<sup>84</sup> and on another state 'leading the way' for other states with similar reservations to lift their reservations.<sup>85</sup> On a number of occasions, the Committee refers to the existence of a 'comparative jurisprudence seeking to interpret Islamic law in harmony with international human rights standards'<sup>86</sup> and frequently calls on states to 'study reforms in other countries with similar legal traditions with a view to reviewing and reforming personal laws' so that they conform to the Convention.<sup>87</sup> These recommendations highlight the Committee's firm belief in the capacity of non-state law to develop in line with international standards but they do more than that. They also demonstrate the potential normative significance of developments taking place at the *national* level. These developments merit further study given their potential to contribute

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<sup>82</sup> See, eg, Committee's recommendations to Morocco, Singapore and Kuwait: UN Docs A/52/38/Rev.1(SUPP) (1997) para 71; CEDAW/C/SGP/CO/4 (2011); CEDAW/C/KWT/CO/3-4 (2011).

<sup>83</sup> See, eg, the Committee's recommendations to Israel and Niger: UN Docs CEDAW/C/ISR/CO/3 (2005); CEDAW/C/NER/CO/2 (2007).

<sup>84</sup> See, eg, Committee's recommendations to the United Arab Emirates and Singapore: UN Docs CEDAW/C/ARE/CO/1 (2010); A/56/38(SUPP)(2001) para 74; CEDAW/C/SGP/CO/4 (2011).

<sup>85</sup> See, Committee's recommendations to Bangladesh: UN Doc A/52/38/Rev.1(SUPP) (1997) para 424.

<sup>86</sup> See, Committee's recommendations to Maldives: UN Doc A/56/38(SUPP) (2001) para 141.

<sup>87</sup> See, Committee's recommendations to Singapore: UN Doc A/56/38(SUPP)(2001) para 74. See, also, its recommendations to Kuwait, Oman, Malaysia, Sri Lanka, Jordan and Djibouti: UN Docs CEDAW/C/KWT/CO/3-4 (2011); CEDAW/C/OMN/CO/1 (2011); CEDAW/C/MYS/CO/2 (2006); (A/57/38(Supp)(2002); CEDAW/C/JOR/CO/5 (2012); CEDAW/C/DJI/CO/1-3 (2011).

to an *international* consensus on how best to develop religious and customary law in line with international human rights law.

A third trend is that states are required to harmonize statutory, religious and customary law with the Convention.<sup>88</sup> States have been called upon to raise awareness of the precedence of international human rights law over religious and customary laws that discriminate against women.<sup>89</sup> They have also been called upon to adopt awareness-raising measures to ensure that customary or religious courts are familiar with the concept of equality under the Convention and adopt decisions consistent with it.<sup>90</sup> On occasion, the Committee has called on the state to ensure that the procedure of customary courts is ‘brought into line with statutory courts,’ to ensure that individuals are aware that they can request the transfer of a case to a state court<sup>91</sup> or to introduce a choice of court where none exists.<sup>92</sup> All these recommendations, if implemented, could have significant implications not only on customary and religious law but on the non-state institutions that interpret and apply it.

More generally, the Committee has called on states to undertake a ‘comprehensive review process’ with a view to ensuring the removal of all discriminatory

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<sup>88</sup> See, eg, the Committee’s recommendations to Niger, Kenya, Myanmar, Ghana, Madagascar and Zambia; Tanzania; Uganda: UN Docs CEDAW/C/NER/CO/2 (2007); CEDAW/C/KEN/CO/6 (2007); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/GHA/CO/5 (2006); CEDAW/C/MDG/CO/5 (2008); CEDAW/C/ZMB/CO/5-6 (2011); CEDAW/C/TZA/CO/6 (2009); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/MYS/CO/2 (2006).

<sup>89</sup> See, eg, Committee’s recommendations to Botswana and Congo; Tanzania: UN Docs CEDAW/C/BOT/CO/3 (2010); CEDAW/C/COG/CO/6 (2012); CEDAW/C/TZA/CO/6 (2009).

<sup>90</sup> See, eg, Committee’s recommendations to Vanuatu: UN Doc CEDAW/C/VUT/CO/3 (2007). See also, its recommendations to Zambia: UN Doc CEDAW/C/ZMB/CO/5-6 (2011).

<sup>91</sup> See, eg, Committee’s recommendations to Botswana: UN Doc CEDAW/C/BOT/CO/3 (2010). See also, its recommendations to Vanuatu: UN Doc CEDAW/C/VUT/CO/3 (2007).

<sup>92</sup> See, Committee’s recommendations to Singapore: UN Doc CEDAW/C/SGP/CO/4 (2011).

provisions against women ‘within customary, religious and modern laws’.<sup>93</sup> Attempts by states to evade this role have been unsuccessful. For example, a state’s policy of non-intervention in the personal laws of any community without the community’s initiative and consent did not insulate it from criticism by the Committee. Noting that ‘steps have not been taken to reform the personal laws of different religious and ethnic groups’ to ensure that they conform to the Convention, the Committee expressed concern that the state’s policy of non-intervention ‘perpetuates ... discrimination against women’ and recommended that it should work with the communities concerned to review and reform these personal laws.<sup>94</sup> It demonstrates how international human rights law can require the state to intervene in the development of non-state law notwithstanding that it may have refrained from doing so in the past. Once again, it highlights the potential significance of international law as one of several factors that can influence the evolution of religious and customary law.

It is clear from the recommendations that the Committee does not expect any transformation of religious or customary law overnight. The Committee acknowledges the need for the population to support any reform of existing laws concerning women’s human rights.<sup>95</sup> This does not mean, however, that the state can stand by and wait until such time as this support materialises. Instead, the state is given the role of generating support for law reform, for example, through ‘partnerships and collaboration with religious and community leaders, lawyers and judges, civil society organizations and

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<sup>93</sup> See, Committee’s recommendations to Chad: UN Doc CEDAW/C/TCD/CO/1-4 (2011). See also, its recommendations to Niger, Botswana and Zimbabwe: UN Docs CEDAW/C/NER/CO/2 (2007); CEDAW/C/BOT/CO/3 (2010); CEDAW/C/ZWE/CO/2-5 (2012).

<sup>94</sup> See, Committee’s recommendations to India: UN Docs A/55/38(SUPP)(2000) paras 60-61; CEDAW/C/IND/CO/3 (2007).

<sup>95</sup> See, eg, Committee’s recommendations to Morocco: UN Doc A/52/38/Rev.1(SUPP) (1997) para 71.

women's' ngos'.<sup>96</sup> States are expected to 'proactively initiate and encourage debate within the relevant communities on ... the human rights of women'<sup>97</sup> and conduct awareness raising campaigns 'among all sections of society, particularly traditional leaders [and] religious clerics' on the importance of gender equality.<sup>98</sup> The law reform process itself must be fully inclusive,<sup>99</sup> with the effective participation of traditional and religious leaders, civil society representatives and women's organisations.<sup>100</sup> Beyond this, the modalities are left to the state and communities concerned to develop religious and customary law in a manner that is consistent with the Convention. This is a pragmatic and conceptually coherent approach. It allows local variations to be factored into the process of reform without compromising the fundamental tenets of the Convention.<sup>101</sup> Further by co-opting traditional and religious leaders into this process, it can heighten the prospects for a greater understanding and more effective implementation of international human rights law on the ground.

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<sup>96</sup> See, Committee's recommendations to Syria: UN Doc CEDAW/C/SYR/CO/1 (2007). See also, its recommendations to Malaysia, Morocco, Jordan, Myanmar and Tunisia; Egypt: UN Docs CEDAW/C/MYS/CO/2 (2006); A/52/38/Rev.1(SUPP) (1997) para 71; CEDAW/C/JOR/CO/4 (2007); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/TUN/CO/6 (2010); CEDAW/C/EGY/CO/7 (2010).

<sup>97</sup> See, Committee's recommendations to India: UN Doc CEDAW/C/IND/CO/3 (2007) para 11.

<sup>98</sup> See, eg, Committee's recommendations to Bahrain, Chad, Lesotho and Kuwait: UN Docs CEDAW/C/BHR/CO/2 (2008); CEDAW/C/TCD/CO/1-4 (2011); CEDAW/C/LSO/CO/1-4 (2011); CEDAW/C/KWT/CO/3-4 (2011).

<sup>99</sup> On the potential challenges to participatory law reform processes as well as possible ways forward, see, eg, Sada (n 3). On the viability of such an approach, see, Perry (n 4) 107-113.

<sup>100</sup> See, eg, Committee's recommendations to Singapore, Papua New Guinea and Sri Lanka: UN Docs CEDAW/C/SGP/CO/4 (2011); CEDAW/C/PNG/CO/3 (2010); CEDAW/C/LKA/CO/7 (2011).

<sup>101</sup> See also, the Committee's *General Recommendation No. 28* (n 28) para 23. The importance of framing reform 'within local traditions' is also recognized in the literature. See, eg, Calaguas (n 4) 539.

## *VI. Conclusion*

The starting point for this chapter was the recognition that non-state law is moulded by the specific context in which it operates. This is commonly recognized but what is not always recognized is that this context now has an international law dimension, specifically, one based on international human rights law. This oversight is understandable given the state-centred approach that still dominates international human rights law and the very nature of non-state law. Through the concept of state responsibility, however, there is a gateway for the emergence of a relationship between the two bodies of law. Admittedly, what we are witnessing are the very early stages in this relationship. Nevertheless, recent developments suggest that the level of engagement between the two is set to increase rather than diminish in the coming years and that international human rights law may exert a growing influence on non-state law.

This raises the question as to how to characterise the relationship between international human rights law and non-state law. It is all too easy to portray it as an inherently hostile one. Examples abound of particular forms of human rights harm caused by non-state law. They seem to offer little grounds for optimism for any constructive engagement between international human rights law and non-state law. This chapter calls into question such a one-dimensional view of this relationship. Certainly, there are aspects of non-state law that cannot be reconciled with international human rights law. To the extent that the state complies with its international obligations in good faith, it will mean that non-state law will come under considerable pressure to change these particular laws. At the same time, focussing exclusively on these particular aspects

of non-state law ignores the potential for positive engagement with international human rights law and presents a somewhat distorted view of the relationship between them.

International human rights law can require the elimination of some non-state laws but it can also act as a catalyst for the recognition and evolution of other aspects of this body of law. As the case-study of indigenous peoples' rights demonstrates, it can lead to the greater recognition and use of their customary laws and juridical systems. In this way, international human rights law can contribute to the growth of the customary law of indigenous peoples. It is doubtful whether it will have a similar impact on other forms of non-state law. In the case of indigenous peoples, there is a strong justificatory basis for recognizing their customary laws and systems. It helps to ensure the more effective exercise of human rights by one of the most marginalized groups of peoples in the world. In these circumstances, the rationale for the recognition of non-state law is one that is rooted firmly in the basic principles of international human rights law. When viewed in combination with the requirement to respect human rights, it demonstrates how non-state law has the potential to strengthen rather than undermine international human rights law.

While the case-study on indigenous peoples focussed on how international human rights law can act as a catalyst for the recognition of non-state law, the case-study on gender equality focussed on how it could lead to its reform. Even though international human rights law can act as the catalyst for reform, it does not attempt to micro-manage the process. Instead, it stipulates the need for a participatory and inclusive reform process and establishes the broad objectives to be achieved by this process. Beyond this, it is left to the relevant stakeholders at the national level to develop non-state law in a way that respects human rights. This enables the law to be developed in a way that is

sensitive to local values while remaining consistent with international human rights standards. This demonstrates the potential normative significance of developments at the national level not only for the population concerned but for the international community as a whole. These developments at the national level can generate an international consensus on how religious and customary law should be interpreted so that it respects human rights. In doing so, they can also inform the interpretation of international human rights law. In this way, they can help international human rights law to move beyond debates about cultural relativism and towards more constructive discussions about how it should be interpreted and implemented.

Clearly, it would be misleading to portray the relationship between international human rights law and non-state law as an entirely harmonious one. There remains considerable scope for tension and conflict between the two. However, recent developments suggest that there is a coherent, conceptual framework for the emergence of a more constructive relationship between them. By harnessing the pull of non-state law and institutions, international human rights law can ensure its own, more widespread acceptance and effective implementation on the ground. By encouraging an inclusive and participatory process of developing religious and customary laws, international human rights law can help ensure that these laws retain their on going relevance and genuine support among all sections of the communities to which they apply. More fundamentally, these developments call into question common perceptions of the impact of international human rights law on non-state law. International human rights law will not lead inevitably to the wholesale decline or demise of non-state law. Instead, in many instances, it can act as a catalyst for the greater recognition of some types of non-state

law and, more generally, for the evolution of non-state law in a manner that is sensitive to local traditions and values while remaining consistent with the fundamental tenets of international human rights law.