

# NEW PROPOSALS FOR HUMAN RIGHTS TREATY BODY REFORM

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*“As the perceived usefulness of attaching the label ‘human right’ to a given goal or value increases, it can be expected that a determined effort will be made by a wide range of special interest groups to locate their cause under the banner of human rights. Thus, in the course of the next few years, UN organs will be under considerable pressure to proclaim new human rights without first having given adequate consideration to their desirability, viability, scope or form.”*

- Philip Alston, 1984<sup>1</sup>

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1. Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 614 (Jul. 1984) [hereinafter *Conjuring*].

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## I. INTRODUCTION

“Reform” in international human rights law has become a narrow concept. A survey of the literature reveals that nearly any suggestion for reform concerns greater enforcement of international human rights substantive norms.<sup>2</sup> While these first-order concerns are laudable—indeed, they cut to the heart of why we have an international legal regime at all—reformers have failed to address important second-order questions about transparency, accountability, and democratic decision-making in the international legal order itself.<sup>3</sup> Specifically, they have failed to

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2. Indeed, almost all discussion of the subject speaks only of treaty body “strengthening.” See, e.g., U.N. High Commissioner for Human Rights, *The Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System* (Nov. 19, 2009), <http://www2.ohchr.org/english/bodies/HRTD/docs/DublinStatement.pdf> [hereinafter *Dublin Statement I*] (“The purpose of all forms of reform of the treaty body system must be the enhanced protection of human rights at the domestic level.”); U.N. High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: Dublin II Meeting* (Nov. 10-11, 2011), [http://www2.ohchr.org/english/bodies/HRTD/docs/DublinII\\_Outcome\\_Document.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/DublinII_Outcome_Document.pdf) [hereinafter *Dublin Statement II*] (the *Dublin Statements* are discussed at greater length *infra*); Michael O’Flaherty, *Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement, in THE DELIVERY OF HUMAN RIGHTS: ESSAYS IN HONOUR OF PROFESSOR SIR NIGEL RODLEY* 68 (Geoff Gilbert et al. eds., 2011) [hereinafter *Reform*]; Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002).

3. The term “first-order” or “substantive” reform refers to primarily outward-looking reform efforts that seek to reform the international order. This reform presupposes that the

address the proper role of the human rights treaty bodies.<sup>4</sup> Each of the nine major human rights treaties<sup>5</sup> creates a treaty body, or panel of ten to twenty-three experts, tasked with monitoring the self-evaluative periodic compliance reports submitted by States Parties<sup>6</sup> to each treaty.

When these treaty bodies frequently act extralegally, they are rarely called to task. In seeking to improve the enforcement of human rights norms, the international legal community has neglected norms of treaty interpretation and state sovereignty. In practice, treaty bodies have generated acrimony rather than dialogue, and these misguided reform efforts may actually be destructive to the healthy functioning of the human rights treaty body system.

It is the purpose of this article to address the neglected question of treaty body role. Section II provides a nuts-and-bolts guide to the treaty body mandates for United Nations delegates, States Parties, and international lawyers. This section sketches the proper and improper actions for treaty bodies to take. It is our contention that if treaty bodies were limited to their proper role, they could more effectively use their already scant resources to promote human rights.<sup>7</sup> Section III provides an in-depth analysis of three treaty bodies, showing how their practices have strayed

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treaty body understands and can apply its mandate. The term “second-order” or “procedural” reform refers primarily to inward-looking reform efforts that seek to address the functioning of the treaty body itself, with the ultimate goal of better implementation of its first-order mandate.

4. Each of the nine international human rights treaties created its own treaty body, which is a group of ten to twenty-three human rights experts focusing specifically on the rights and obligations to which states agreed in the particular treaty.

5. The major international human rights treaties discussed in this article are: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), the Convention on the Rights of the Child (1989) and its optional protocols (2000), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), and the International Convention on the Rights of Persons with Disabilities (2006), and the Committee on Enforced Disappearances monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

6. “States Parties” refers to nations that have agreed to be bound by a particular treaty.

7. The point seems obvious, but in a recent discussion of treaty body reform, a continued refrain was that “some of the questions [posed during review of States Parties’ treaty reports] seem to be driven by the area of expertise of the Committee member rather than the treaty provisions and the situation in the country.” U.N. High Commissioner for Human Rights, Informal Technical Consultation for States Parties on Treaty Body Strengthening, at 9 (May 12-13, 2011), [http://www2.ohchr.org/english/bodies/HRTD/docs/Sion\\_report\\_final.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/Sion_report_final.pdf) [hereinafter Technical Consultation]. When treaty body experts are more concerned with their personal academic interests than discharging their treaty mandate, it is of little wonder that time and money are wasted.

far from their limited mandates, and proposing explanations for how and why treaty bodies have overstepped their mandates. Section VI identifies the inaction of States Parties as enabling a host of problems that have distorted the treaty body system. Section V provides specific suggestions for internal reform of the international human rights legal apparatus.

## II. TREATY BODY AUTHORITY: A NUTS-AND-BOLTS GUIDE FOR STATES PARTIES

### *A. Treaty Body Development*

As states began making international commitments to uphold human rights, the need to monitor nations' compliance with their treaty obligations became apparent. The seeds of the treaty body system originated in 1951, when the United Nations Economic Social Council first discussed the idea of having nations submit periodic reports detailing their progress in the field of human rights with respect to the Universal Declaration of Human Rights.<sup>8</sup> This reporting system was more fully fleshed out in 1956, and the Commission on Human Rights received and monitored these reports.<sup>9</sup>

States subsequently began entering binding international treaties that incorporated the self-reporting model,<sup>10</sup> this time creating a treaty-specific organ to facilitate States Parties in their reporting obligations: the treaty body. Each of the nine international human rights treaties created their own treaty body,<sup>11</sup> focusing on the rights and obligations to which States Parties

8. U.N. Secretary-General, *Annual Report on Human Rights*, ¶ 1, U.N. Doc. E/CN.4/517, (Mar. 7, 1951).

9. E.S.C. Res. 624 B, U.N. ESCOR, 22d Sess., Supp. No. 1, U.N. Doc. E/2929 (Aug. 17, 1956). The Commission on Human Rights continued to receive periodic reports from states for the next couple of decades, and it issued its last report on these periodic reports in 1979. See Philip Alston, *The Historical Origin of 'General Comments' in Human Rights Law*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY 763, 772 (Lawrence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001) (hereinafter *Historical Origin*).

10. U.N. High Commissioner for Human Rights, *The United Nations Human Rights Treaty Body System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30, at 25-26 (2005), <http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf> [hereinafter Fact Sheet No. 30].

11. The nine human rights treaty bodies are as follows: The Committee on the Elimination of Racial Discrimination ("CERD") monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); The Human Rights Committee ("HRC") monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols.

The Committee on Economic, Social and Cultural Rights ("CESCR") monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966). It should be noted that the CESCR is technically not a treaty body because it was created in

agreed in the particular treaty. Each treaty body has a specific mandate laid out in the treaty, which all entail monitoring the self-evaluative periodic reports submitted by States Parties. The first treaty body was created in the late 1960s, while the last two were created in 2006.

### *B. Functions of the Treaty Bodies*

Typical recent legal scholarship<sup>12</sup> suggests the following functions of treaty bodies, highlighting the broad role these bodies now play: (1) monitoring the periodic reports submitted by States Parties; (2) issuing concluding observations, with criticisms, on the States Party periodic reports; (3) issuing interpretive general comments on treaty provisions; (4) hosting days of general discussion on thematic issues; and (5) where authorized by the treaty or optional protocol to the treaty, considering individual communications or complaints against States Parties regarding treaty violations.<sup>13</sup>

Yet these recent assertions of treaty body power require further critical review. This section analyzes several functions treaty bodies currently serve in order to determine whether treaty bodies have been granted such authority in their mandates. The following discussion examines the scope of treaty body powers more closely, from the perspective of both the mandate text and the treaty bodies' immediate understanding of the mandate, evinced by early practices. This inquiry shows that nations intended treaty bodies to stimulate ongoing informal examination

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1987 by resolution of the Economic and Social Council ("ECOSOC"), instead of by the treaty it monitors. See E.S.C. Res. 1985/17, U.N. Doc. E/RES/1985/85, at 15-16 (May 28, 1985); Fact Sheet No. 30, *supra* note 10, at 7 n.2.

The Committee on the Elimination of Discrimination Against Women ("CEDAW") monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); the Committee Against Torture ("CAT") monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); the Committee on the Rights of the Child ("CRC") monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000); the Committee on Migrant Workers ("CMW") monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); the Committee on the Right of Persons with Disabilities ("CRPD") monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006); and the Committee on Enforced Disappearance ("CED") monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

12. See, e.g., Dinusha Panditaratne, *Reporting on Hong Kong to UN Human Rights Treaty Bodies: For Better or Worse Since 1997?*, 8 HUMAN RIGHTS L. REV. 295, 297-322 (2008) (discussing the reporting requirements of Hong Kong to the HRC and CESCR, and assuming the legitimacy of treaty body general comments, concluding observations, and dialogue with delegations).

13. See, e.g., Fact Sheet No. 30, *supra* note 10, at 16-17.

of human rights, spurring a non-coercive “kind of examination of conscience” by the international community.<sup>14</sup>

### 1. Proper Role of Treaty Bodies: Back to Basics

A review of the treaty body mandates, and the treaty bodies’ early exercise of those mandates, shows they have the following limited powers:

1. Monitor the periodic reports of States Parties;
2. Honor States Parties’ requests to send a delegation during the consideration of their State Party’s periodic report;
3. Issue summaries of States Parties’ compliance in treaty body annual reports; and
4. Issue collective,<sup>15</sup> non-binding, and non-critical<sup>16</sup> comments, suggestions, and recommendations on States Parties’ periodic reports.

These limited powers reflect the meaning of the human rights treaties derived, at root, from the text of the treaties themselves.

This textual approach does not seek to take a side in any legal philosophical debate about interpretive theory, but rather follows customary international law reflected in the Vienna Convention on the Law of Treaties (“VCLT”).<sup>17</sup> Under the VCLT, the authority of a treaty stems from obtaining the consent of the states over which it will be binding.<sup>18</sup> Essentially, all of international treaty law, including international human rights treaty law, rests at least to some degree upon the free contracting of sovereign Westphalian nation-state entities.<sup>19</sup> These freely contracting agents, out of self-

14. Rep. of the Human Rights Comm., ¶ 486, U.N. Doc. A/43/40; GAOR, 43d Sess., Supp. No. 40, (Sept. 28, 1988); *see also* U.N. Secretary-General, Note by the Secretary-General, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights, ¶ 123, U.N. Doc. A/44/668 (Nov. 8, 1989) [hereinafter Independent Expert] (“In order to maintain a constructive emphasis on the nature of the work of the Committees and in order to facilitate a consensus-based approach, the treaty bodies have [correctly, in my view] sought to avoid any inference that they are passing judgment on the performance of a given State party on the basis of an examination of its report.”).

15. *See infra* Section II.B.iii on the split between the four older treaty bodies and the five newer treaty bodies.

16. Torkel Opsahl, *The Human Rights Committee, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 369, 407-08 (Philip Alston ed., 1992) (arguing that many HRC members understood their role as cooperating with States Parties, and they “strongly oppose[d] the idea that the [HRC] should criticize individual States Parties or determine that they do not fulfill their obligations to implement the [International Covenant on Civil and Political Rights].”).

17. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Article 31 lays out the general norms of interpretation.

18. This is evidenced by the contractual language used to describe states in Article 2 of the VCLT. *See id.* at 133.

19. Some commentators see *jus cogens* as a concept developed as a limitation on this freedom of contract. *See, e.g.,* Dinah Shelton, *Normative Hierarchy in International Law*,

interest or altruistic motive, come together and make an agreement that they enshrine in a written, ratified document. This written document, the VCLT notes, is the focal point in assessing States Parties' agreements.<sup>20</sup> This document is to be read "in good faith" and "in accordance with the ordinary meaning" of the terms of the treaty.<sup>21</sup>

These terms, as well as the VCLT reference to "context" and the fail-safe interpretive rules in Article 32<sup>22</sup>, point to the fact that interpretation is a dynamic process, and that textual documents never provide airtight terms. Generally, however, parties acting in good faith know the scope of their obligations. As further examination of the genesis of the nine human rights treaty bodies will show, it is manifestly clear from the text that the treaty bodies do not have the authority to do the following:

1. Issue binding legal interpretations of treaties;<sup>23</sup>
2. Create new obligations under their respective treaties;
3. Enforce their suggestions or comments;<sup>24</sup>

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100 AM. J. INT'L L. 291, 297 (2006). However, even where commentators envision a thicket of peremptory norms or robust international governance, this occurs against a background of contract. *See, e.g.*, Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 365 (2008) (note especially that even where robust international institutions are envisaged, the author still presupposes the need for a "transfer" of power, implying that such power resides naturally in states themselves).

20. VCLT, *supra* note 17, at 340.

21. *Id.* In accordance with the VCLT, the primary goal in making a good faith interpretation of treaty terms entails understanding what the States Parties to a given treaty intended collectively, which is evidenced by the treaty text and by state practice and statements. *See also* Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 380-403 (1991). Johnstone notes that when states enter a treaty, "the interpretive task is to ascertain what the text means to the parties collectively rather than to each individually." *Id.* at 380-81.

22. Article 32 of the VCLT reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

23. In fact, States Parties have made numerous statements regarding their stance that general comments are not legally binding, and were not contemplated to be legally binding when treaties were negotiated. Per Article 31(3)(b) of the VCLT, this subsequent unanimous practice informs the context of the treaty. *See e.g.*, Rep. of the Human Rights Comm., U.N. Doc. A/50/40; GAOR, 50th Sess., Supp. No. 40, at 135, (Oct. 3, 1995) ("The United Kingdom is of course aware that the General Comments adopted by the [Human Rights] Committee are not legally binding.") *See also* the United States' statements that the ICCPR "does not impose on States Parties an obligation to give effect to the [Human Rights] Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations" of the ICCPR. *Id.* at 131. ("[T]he Committee lacks the authority to render binding interpretations or judgments," and "[t]he drafters of the Covenant could have given the Committee this role but deliberately chose not to do so." *Id.*

24. *See, e.g.*, Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251, 252 (2007) (noting that treaty bodies issue "non-binding decisions on individual complaints as well as . . . concluding observations and recommendations relating to

4. Require States Parties to appear before the treaty body;<sup>25</sup>
5. Pressure States Parties to change their domestic laws, especially on areas not covered by the treaty;
6. Enforce and / or monitor States Parties' compliance with other conferences, treaties, or resolutions; and
7. Host days of general discussion on thematic issues.<sup>26</sup>

While the mandated powers of the treaty bodies are not necessarily self-explanatory, treaty bodies are still constrained by the norms of treaty interpretation in interpreting their own mandates. In a pragmatic manner, the treaty body-monitoring role often requires treaty bodies to make a judgment about the meaning of treaty provisions, including their own mandate, even though they are prohibited from issuing authoritative legal interpretations of those same treaties. To some, this fact of dynamic self-assessment by treaty bodies indicates that the treaty bodies are not bound at all by treaties, and that they may, in practice, do whatever they wish. To others, this fact would demand the abolition of treaty bodies to ensure proper treaty implementation. However, these extreme views forget the lesson of the VCLT: demanding “good faith” in applying the “ordinary meaning” of treaty provisions provides concrete guidance to treaty body members. Thus, treaty bodies that *try* to faithfully execute their mandate will generally succeed.<sup>27</sup>

However, it is obvious that on occasion a treaty body acting in good faith will make a mistake, perhaps misinterpreting the scope of a treaty commitment or, perhaps worse, misinterpreting its jurisdiction. In these cases, the VCLT indicates that the States Parties retain the ultimate interpretive authority.<sup>28</sup> States Parties have recourse to the internal treaty processes, but as sovereign

the State reporting and inquiry procedures”); Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 215 (2008) (“Concluding Observations have a non-binding and flexible nature.”); Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 253 (2008) (noting that treaty bodies “are not judicial bodies and their Concluding Observations are not legally binding”).

25. Nonetheless, some treaty bodies require delegations to be present during its consideration of a state’s periodic report. *See, e.g.*, Fact Sheet No. 30, *supra* note 10, at 22 (“Some treaty bodies may proceed with consideration of a State party’s report in the absence of a delegation; others require a delegation to be present.”).

26. *See infra* Appendix.

27. Our proposals take this for granted. Full-on semantic skepticism does not just call into question our proposals, but calls into question the very notion of “treaty making” in general.

28. Some have criticized the so-called “consent theory” of international law. *See, e.g.*, John A. Perkins, *Essay: The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT’L L.J. 433, 435 n.2 (1997) (invectively criticizing the “consent thesis,” but also noting that the International Court of Justice remains committed to the theory).



contracting entities they retain the right to discuss, interpret, and modify their treaties.<sup>29</sup> While there are serious questions regarding the good faith of States Parties in assessing treaty commitments, it is important to recognize that the question of good faith pervades the life and application of the treaty. Put another way, if the States Parties are not to be trusted with human rights treaty obligations at the back end, how can we trust the system that these same States Parties created? The international human rights treaty system is built on trust and cooperation, including the understanding that “good faith” interpretation of treaties is a realizable goal for treaty bodies and States Parties.

Upon examining the mandates and practices of all nine human rights treaty bodies, we have identified the common functions of this institution. All the treaty body mandates include the primary function of reviewing the self-reports of nations. The review process typically starts with each State Party submitting its periodic report to the treaty body through the Secretary-General of the United Nations,<sup>30</sup> after which the treaty body may request<sup>31</sup> additional information from States Parties. States either submit written responses or orally discuss these issues when the treaty body formally takes up review of their report.

Periodically, treaty bodies are obligated to report back to the General Assembly. Included in the report of the treaty bodies is a summary of all the reports of the States Parties. The goal of this process is to help States Parties self-monitor their implementation

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29. The third preambular paragraph to the VCLT affirms that “the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.” VCLT, *supra* note 17, at 332. See also Michael Bowman, *Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform*, 7 HUM. RTS. L. REV. 225, 229 n.25 (2007). The VCLT, therefore, places the locus of control for treaty interpretation in States Parties. This is a “foundational” principle, and it essentially means that “no state can ultimately be compelled to participate in any [treaty re-interpretations] against its will.” *Id.* at 229. According to Michael Bowman, “[t]his critical constraint upon the establishment of legal commitment, which is an inescapable concomitant of the concept of national sovereignty, naturally applies no less to the modification and amendment of treaties than to their original conclusion.” *Id.*

30. The U.N. Secretary-General serves a unique and limited role in the treaty body system, serving as an intermediary between the States Parties and the treaty bodies. The Secretary-General is also responsible in each treaty for providing staff and facilities for the treaty bodies. In practice, however, the Secretary-General is either sidestepped when States Parties speak directly to treaty bodies, or given too much authority, as when the Office of the High Commissioner for Human Rights (“OHCHR”) itself seeks to unify the treaty body system. The CEDAW Committee was being serviced under the Division for the Advancement of Women rather than the OHCHR until 2008.

31. It is important to note that while there are a number of Optional Protocols that authorize independent fact-finding on the part of the treaty bodies, neither in the treaties nor the Optional Protocols are there any mechanisms to force a State Party to furnish information or permit investigation. This point is often raised by States Parties when *in situ* investigation is discussed. See Technical Consultation, *supra* note 7, at 14 (“[S]ome States also questioned the fact that treaty obligations did not provide for *in situ* visits.”).

of the substantive treaty obligations in their cultural, administrative, legislative, and judicial systems.<sup>32</sup>

The following discussion considers particular practices treaty bodies have adopted, and it examines them in the historical context from which treaty bodies arose, giving particular consideration to the support for these practices in the textual mandates.

*a. Scope of Authority to Issue Concluding Observations*

When used in recent parlance, “concluding observations” refers to a State Party-specific evaluation issued by a treaty body after it reviews the States Party’s periodic report. These typically include the treaty body criticisms of the State Party, along with steps to be taken to remedy the treaty body’s concerns. However, the authority for issuing concluding observations is almost nonexistent. In fact, this phrase does not appear in *any* of the treaties.

Instead, many treaties use the words “suggestions,” “general recommendations,” and “comments” to describe the realm of authority treaty bodies have when monitoring States Parties periodic reports. The ad hoc construction “concluding observation” originates neither from the international human rights treaties nor from early treaty body understandings of their mandates.<sup>33</sup> In the earliest version of the periodic reporting system on the Universal Declaration of Human Rights, monitored by the Commission on Human Rights, it was agreed that the Commission could make comments, conclusions, or recommendations on the reports so long as they were “of an objective and general nature.”<sup>34</sup> According to Philip Alston, the word “objective” was diplomatic jargon for “non-country specific” and the word “general” meant that “no comments should deal with particular situations.”<sup>35</sup> Instead of criticizing particular states on particular circumstances, the reporting process was viewed as “a channel through which

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32. Fact Sheet No. 30, *supra* note 10, at 19.

33. For example, the CERD Committee, which was the first treaty body and had been functioning since 1970, simply agreed in 1991 that it would, for practical reasons, in the future begin issuing comments on States Parties’ reports as “concluding observations,” which would express the “collective view of the whole Committee.” Michael Banton, *Decision-taking in the Committee on the Elimination of Racial Discrimination*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 55, 67 (Philip Alston & James Crawford eds., 2000).

34. *Historical Origin*, *supra* note 9, at 771 (quoting Comm’n on Human Rights, Rep. of the 12th Sess., Mar. 5-29, 1956, U.N. Doc. E/CN.4/731; ESCOR, 22d Sess., Supp. No. 3, at 4 (Apr. 1956)).

35. *Id.* at 771 (citing Comm’n on Human Rights, Rep. of the 12th Sess., Mar. 5-29, 1956, U.N. Doc. E/CN.4/731; ESCOR, 22d Sess., Supp. No. 3, at 7 (Apr. 1956)).

experience might be exchanged”<sup>36</sup> in a constructive and general manner.

Likewise, for much of the over forty year history of the treaty body system, treaty bodies did not issue comments on any State Party in particular, with many members concluding they lacked the authority to do so.<sup>37</sup> Before treaty bodies began issuing concluding observations, many understood the words “suggestion,” “general recommendation,” and “comment” to authorize them to issue collective remarks upon review of all States Parties’ reports in the annual reports that treaty bodies must give to the United Nations General Assembly.<sup>38</sup> In an effort to avoid taking on a critical and authoritative role that could discourage nations, treaty bodies initially filled their annual reports with summaries from their reviews,<sup>39</sup> including reports on their oral dialogues with nations.<sup>40</sup>

Many believed the objective of treaty bodies was to “avoid evaluation at all costs.”<sup>41</sup> The Human Rights Committee (“HRC”), created in 1976, viewed recommendations related to specific nations as outside its mandate.<sup>42</sup> Many HRC members understood their role as cooperating with States Parties, and they “strongly oppose[d] the idea that the [HRC] should criticize individual States

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36. *Id.* The report shows that states viewed the comments by the Commission on Human Rights on the periodic reports in the following way:

[The] annual reports were to be a channel through which experiences might be exchanged, but not an instrument by means of which individual Governments might be criticized . . . in studying annual reports the Commission sometimes might not have any recommendations to make, but might wish to make “general comments” or draw “general conclusions” on successes and achievements of “general significance.”

*Id.*; see also *Historical Origin*, *supra* note 9, at 771.

37. See Michael O’Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 28 (2006) [hereinafter *Concluding Observations*]. The treaty body system began functioning in the early 1970s, shortly after the first treaty body, the Committee on the Elimination of Racial Discrimination, was formed by the International Convention on the Elimination of All Forms of Racial Discrimination (1965). The first collective concluding observations appeared in 1990 with the CESCR issuing State Party-specific comments on States Parties reports. See Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 473, 494-95 (Philip Alston ed., 1992) [hereinafter *The Committee*].

38. The Committee on the Rights of the Child (“CRC”) is the one exception, which has been issuing concluding observations since it commenced its activities. *Concluding Observations*, *supra* note 37, at 30; see also, e.g., Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: Peru, U.N. Doc. CRC/C/15/Add.8 (Oct. 18 1993).

39. Effective Implementation, *supra* note 14, ¶ 18.

40. The HRC began reporting on its dialogues with nations in 1985. *Concluding Observations*, *supra* note 37, at 29.

41. *The Committee*, *supra* note 37, at 473.

42. Opsahl, *supra* note 16, at 407-08.

Parties or determine that they do not fulfill their obligations to implement the [ICCPR].”<sup>43</sup> The HRC did not issue its first concluding observation until 1992, which was also the first time *any* treaty body issued a “full-fledged”<sup>44</sup> concluding observation for each State Party.<sup>45</sup>

Despite this early history, the process of treaty bodies issuing State-Party specific concluding observations has developed and become more extensive over time. Some treaty bodies have begun issuing interpretations of the treaties they monitor (called “general comments”) and then holding States Parties to these new standards, harshly criticizing those that have not changed their laws to reflect the treaty body’s understanding of human rights.<sup>46</sup> There are two possible explanations for this: (1) the four earliest treaty bodies<sup>47</sup> have been subject to external pressure to expand their roles in spite of their mandates and (2) the five later treaty bodies<sup>48</sup> have been influenced by this practice in their interpretation of their mandates.

Scholars—and not States Parties—have been pushing the earliest four treaty bodies to take a more aggressive role. Scholars make such calls for the expansion of power in the abstract, based on how they think a treaty body ideally could be most effective, and they rarely mention the treaty body’s mandate.<sup>49</sup> For example, Philip Alston, a prominent human rights scholar, served as the Independent Expert on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System from 1989 to 1997. He suggested treaty bodies move away from the summaries in their annual reports.<sup>50</sup> Instead, treaty bodies should “consider encouraging the recording of more clearly focused concluding observations by individual experts, particularly in situations where the responses provided are seen to be less than

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43. *Id.*

44. *Historical Origin*, *supra* note 9, at 775.

45. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee: Algeria, U.N. Doc. CCPR/C/79/Add.1 (Sept. 25, 1992). Although in rudimentary form, these comments were issued separately for each State Party. The first State Party-specific comments issued collectively appeared in 1990 from the CESCR. *See The Committee*, *supra* note 37, at 473.

46. *See infra* Section III.A.

47. CERD, HRC, CESCR, and CEDAW.

48. CAT, CRC, CMW, CRPD, and CED.

49. *See, e.g.*, Martin Scheinin, *The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform—Without Amending the Existing Treaties*, 6 HUM. RTS. L. REV. 131, 133-34 (2006) (proposing the HRC be granted the power to monitor both the ICCPR and the ICESCR via a new resolution by ECOSOC, with the eventual goal of having only one treaty body without needing to amend any of the treaties).

50. Independent Expert, *supra* note 14, at ¶ 18.

satisfactory,” and these concluding observations would be State Party-specific and more critical.<sup>51</sup>

While this proposal may or may not be a role treaty bodies could perform effectively, the fact remains that States Parties created treaty bodies, and they did not approve the issuance of “concluding observations” in any treaties. Furthermore, as even experts like Alston admit, giving treaty bodies the power to pressure States Parties to take a certain course of action fundamentally changes their role.<sup>52</sup>

The later treaty bodies do have mandates that appear to contemplate some contact between the treaty bodies and the States Parties individually. For example, the mandate for the Committee Against Torture (“CAT”) allows it to make “general comments on a [State Party] report as it may consider appropriate[,] and it shall forward these to the State Party concerned.”<sup>53</sup> While it is unclear precisely what “general comments” entails, it should be noted that the earlier CAT Committee concluding observations commented on States Parties’ reports by summarizing exchanges with the nation’s representatives and drafting one or two paragraphs offering its conclusions and recommendations.<sup>54</sup> Its more recent concluding observations tend to be over ten pages for each State Party, and they push the scope of its authority to questionable extremes.<sup>55</sup> These concluding observations presume to authoritatively instruct each State Party to make detailed changes to its domestic laws and international obligations. For example, the 2010 concluding observation for Liechtenstein instructs it to renegotiate a treaty it entered with Austria in 1982.<sup>56</sup>

Likewise, concluding observations in many instances make reference to “matters extraneous to the actual treaty obligations”<sup>57</sup> of States Parties, including other treaties, declarations, and outcome documents at conferences. Michael O’Flaherty,<sup>58</sup> a

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51. *Id.* ¶¶ 19, 124.

52. *Id.* ¶¶ 123-24.

53. Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19(3), Dec. 10 1984, 1465 U.N.T.S. 113 [hereinafter CAT]. Ironically, the CAT Committee has issued numerous “concluding observations,” while it has issued only two “general comments.” See *supra* Section II.b.iv for a discussion on the practice of issuing “general comments.”

54. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶¶ 42-458, U.N. Doc. A/48/44(SUPP) (June 24, 1993).

55. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding Observations of the Committee Against Torture, Yemen, U.N. Doc. CAT/C/YEM/CO/2/Rev.1 (May 25, 2010).

56. Committee Against Torture, *Concluding Observations of the Committee Against Torture: Liechtenstein*, ¶ 19, 44th Sess., U.N. Doc. CAT/C/LIE/CO/3 (May 25, 2010).

57. *Concluding Observations*, *supra* note 37, at 33.

58. Michael O’Flaherty has recently seemed to take a different stance on the limits of treaty body power. As the driving force behind the Dublin Statement, described in Section

prominent figure in international law, criticizes CEDAW's incessant practice of referencing extraneous sources and non-treaty related issues, which he claims "rais[es], at a minimum, issues of mandate and competency."<sup>59</sup> This overreach shows another problem with treaty body concluding observations: if treaty bodies ignore their mandate's limitations on issuing such statements in the first place, certainly no reason exists for treaty bodies to constrain the substance of the concluding observations.

*b. Scope of Authority to Issue General Comments*

In contrast to concluding observations, which are State Party-specific, treaty bodies have been issuing general comments,<sup>60</sup> which are non-State Party specific. In contemporary jargon, the term "general comment" refers to treaty interpretation performed by treaty bodies. For example, the Committee on the Rights of the Child has issued twelve general comments, including elaborating on treaty provisions such as the right to education for children.<sup>61</sup> However, the practice of issuing "general comments" has undergone a dramatic transformation.

First, it should be noted that only two treaties use the phrase "general comment," although all treaty bodies have begun issuing non-State Party specific statements that they call "general comments" or "general recommendations."<sup>62</sup> Second, the treaty body mandates typically give the treaty body the power to make comments, suggestions, or recommendations after reviewing a

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V.I.A., he is a proponent of creating a unified treaty body that would potentially have authority to consider and enforce rights against States Parties in treaties to which they have never ratified. One goal of the Dublin Statement is to avoid having to involve States Parties in the renegotiation of treaties; O'Flaherty believes this universal treaty body can likely be created without the need to amend treaties, noting that reform goals absolutely requiring a change to treaties "must be of such an importance as to justify the protracted and sometimes unpredictable process of amendment." *Reform*, *supra* note 2, at 322 (quoting Dublin Statement I, *supra* note 2, ¶ 16).

59. *Concluding Observations*, *supra* note 37, at 42.

60. The CEDAW Committee's version of the general comment is termed "general recommendation."

61. *General Comment No. 1, Article 29(1): The Aims of Education*, Annex IX, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001).

62. See CAT, *supra* note 53, at art. 19(3) ("Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned."); International Covenant on Civil and Political Rights, art. 40(4), Dec. 16, 1966, 999 U.N.T.S. 171, [hereinafter IC-CPR] ("The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.")

State Party's report. In the mandates, the relevant language is *always* anchored to the consideration of a State Party's report.<sup>63</sup>

From the same provision in their mandates, treaty bodies have been finding their authority to issue both concluding observations and general comments; that is, there are not separate treaty provisions supporting the issuance of concluding observations and general comments. A good faith read of the mandates could result in a spectrum of powers between neutrally summarizing the reports, making collective suggestions in consideration of the reports, issuing non-State Party specific comments on procedural matters, and issuing suggestions and recommendations for specific States Parties. However, the language clearly does not authorize freestanding legal interpretations divorced from the consideration of States Parties' reports. It also strains credulity that a good faith read of the same treaty provision authorizes *both* nation-specific critical commentary as well as legal interpretations of treaty provisions in the abstract.

Historically, treaty bodies began issuing general comments before they began issuing concluding observations.<sup>64</sup> Following the

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63. See International Convention for the Protection of All Persons from Enforced Disappearance, art. 29(3), Dec. 20, 2006, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 [hereinafter ICPEP] ("Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate."); International Convention on the Rights of Persons with Disabilities, art. 36(4), Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 [hereinafter CRPD] ("Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned."); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 74(1), Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter ICRMW] ("The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned."); Convention on the Rights of the Child, art. 45(d), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] ("The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45," where article 44 requires States Parties to report on their implementation of the treaty, and article 45 allows the committee to receive reports on the implementation of the treaty from relevant United Nations organs and the Secretary-General); CAT, *supra* note 53, at art. 19(3) ("Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate"); Convention on the Elimination of All Forms of Discrimination Against Women, art. 21(1), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] ("The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties."); E.S.C. Res. 1985/17, *supra* note 11, at 16 ("The Committee shall submit to the Council a report on its activities, including a summary of its consideration of the reports submitted by States parties to the Covenant, and shall make suggestions and recommendations of a general nature on the basis of its consideration of those reports . . ."); International Convention on the Elimination of All Forms of Racial Discrimination, art. 9(2), Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD] ("The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties.").

early tradition of the Commission on Human Rights in monitoring periodic reports on the Universal Declaration of Human Rights, treaty body comments on States Parties' reports were not country-specific.<sup>65</sup> But the substance of these early general comments hardly resembles the legal exegeses these comments have become.<sup>66</sup> For example, in 1979, almost ten years after the first treaty body began its work, none of the treaty bodies had issued any general comments interpreting substantive treaty provisions.<sup>67</sup> The HRC, which actually has a mandate containing the words "general comment," did not start issuing any form of general comments until 1981, and before this point the committee disagreed on whether it could do this and on what method to follow if it was so mandated.<sup>68</sup>

The modern general comment, which emerged in the early 1990s,<sup>69</sup> vastly exceeds treaty body mandates and unreservedly repudiates earlier cautious practices. Most of the general comments read like a judicial opinion interpreting a statute. They incorporate other treaties,<sup>70</sup> conventions, and statements

64. The one exception is that the CRC, which was formed in 1990, began issuing concluding observations in 1993, and issued its first general comment in 2001.

65. *Historical Origin*, *supra* note 9, at 771-76.

66. The intricacy of these comments can be seen by the practice of the CRC, which often issues general comments in excess of twenty pages, complete with tables of contents. *See, e.g.*, Committee on the Rights of the Child, *General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 39th Sess., U.N. Doc. C/GC/2005/6 (Sept. 1, 2005).

67. Independent Expert, *supra* note 14, ¶¶ 14, 17.

68. *Id.* ¶ 13. *See Historical Origin*, *supra* note 9, at 772-76. The narrower approach carried the day, requiring comments to be of a general nature to "summarize the experience the Committee has gained in considering States reports." *Id.* at 775 (quoting ¶ 1 U.N. Doc. CCPR/C/SR.260 (1980)). Although the compromise achieved on the scope of general comments is not completely clear, at the very least these debates indicate that the development of country-specific "concluding observations" should have been precluded.

69. For example, in 1991 the CEDAW Committee decided to embark on a long-term program to issue general comments on substantive matters in the treaty. Mara R. Bustelo, *The Committee on the Elimination of Discrimination Against Women at the Crossroads, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 79, 96 (Alston et. al. eds., 2000). The CEDAW Committee issued its first such revolutionary general comment in 1992, General Recommendation No. 19 concerning violence against women.

70. *See*, for example, general comment number 15 issued by the CERD Committee:

In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or reli-



extraneous to the treaty, and their opinions often go far beyond the text of the treaty.

General comments have assumed the guise of binding legal interpretations of treaty provisions, which triggers a snowball effect. Treaty bodies have been overstepping their mandates to issue these general comments, and then courts and bodies in a position to make binding decisions rely on these pronouncements, often imposing them on nations.<sup>71</sup> With the advent of the interpretive general comment, the danger is that States Parties ratifying a treaty may not actually know what the treaty means. Increasingly, vital interpretive questions have been stealthily claimed by a handful of treaty body members, essentially acting unconstrained.

A good faith interpretation of these mandates can accommodate a range of methods for issuing suggestions and recommendations, but treaty bodies simply have not been given the power to make freestanding authoritative interpretations of treaty provisions.

### *c. Scope of Authority to Dialogue with State Representatives*

Although most treaties provide for only limited discussion between States Parties and treaty bodies, treaty body communications with individual state representatives have increased over time. The first treaty body, the Committee on the Elimination of Racial Discrimination (“CERD Committee”), monitors the International Convention on the Elimination of All Forms of Racial Discrimination (1965). It met for the first time in January 1970, and it considered mostly procedural matters.<sup>72</sup> As it began receiving periodic reports from States Parties, the CERD Committee pioneered the practice of inviting States Parties to send a delegation for the formal discussion of its report, a practice now followed by all treaty bodies.<sup>73</sup> The CERD Committee entered into

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gious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

*Report of the Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention*, delivered to the General Assembly, 48th Sess., Supp. No. 18, U.N. Doc. A/48/18 (Mar. 17, 1993).

71. For example, in 2006, the Constitutional Court of Colombia legalized abortion by referencing the CEDAW Committee’s views. Sentencia C-355/06 [2006], Corte Constitucional [Constitutional Court], (Colom.).

72. Independent Expert, *supra* note 14, at ¶ 11.

73. Fact Sheet No. 30, *supra* note 10, at 31. Not all treaty bodies necessarily have this power, but Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) notes that reports made to the General Assembly are based upon “the reports *and* information received from the States Parties.” CERD, *supra* note 63, at art. 9(2) (emphasis added).

dialogues with States Parties about these reports, and it summarized these discussions in the annual report it submits to the General Assembly.<sup>74</sup> The purpose for the discussions is to foster a cooperative, collaborative setting to bring about a “constructive dialogue [that] should have no conclusion.”<sup>75</sup> States Parties do not come before the treaty body as one would come before a judge; treaty bodies viewed pressuring, and even just evaluating states, as beyond their mandates.<sup>76</sup>

Contrary to some current practices,<sup>77</sup> oral dialogues between treaty bodies and States Parties, to the extent treaty body mandates permit them, are voluntary.<sup>78</sup> None of the treaty body mandates require States Parties to submit to treaty body demands to appear before them or to justify their laws or policies. Accordingly, some States Parties have pushed-back against treaty bodies acting beyond the scope of their mandates.<sup>79</sup>

74. See, e.g., Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/42/18; GAOR 42d Sess., Supp. No. 18, at 10-158 (1987). The HRC was the first treaty body to begin summarizing and publishing these dialogues in its annual report, starting in 1984. *Concluding Observations*, *supra* note 37, at 29. This is a practice that all treaty bodies have abandoned, except for the CEDAW Committee, which still publishes summaries of the dialogues. *Id.* at 30-31.

75. *The Committee*, *supra* note 37, at 473.

76. *Id.*

77. For example, the working methods of the CEDAW Committee the “presence and participation” of a States Parties “are *necessary* at the meetings of the Committee when their countries’ reports are examined.” U.N. Secretariat, Ways and Means of Expediting the Work of the Committee on the Elimination of Discrimination Against Women, Note by the Secretariat, Annex III, ¶ 10, Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/2009/II/4 (Jun. 4 2009) (emphasis added).

78. The narrowest mandate on this point is the one that created the CEDAW Committee, which monitors the Convention on the Elimination of All Forms of Discrimination Against Women (1979). The mandate does not expressly or, arguably, even implicitly authorize any contact, face-to-face or otherwise, between the CEDAW Committee members and States Parties, and in fact the CEDAW Committee, limited to meet only two weeks in any year, would normally not have the time to dialogue. The practices of the CEDAW Committee are particularly troubling because it also takes one of the most aggressive approaches, oftentimes bullying and chastising States Parties that have not taken the actions it recommends. See Section III.A. See also Bustelo, *supra* note 69, at 79, 80 (noting “it is important to keep in mind that the Convention itself made no provision for a communications procedure.”). While the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women does provide more powers for CEDAW, only ninety-nine of the 186 nations that are parties to the treaty have adopted the Optional Protocol, or about half of the countries.

79. Dr. Krisztina Morvai, a former CEDAW Committee member, noted that poorer countries “are regularly challenged about their human rights obligations and are often dependent on aid,” which leaves them “particularly vulnerable” to treaty body pressure to change their cultural norms. Krisztina Morvai, *Respecting National Sovereignty and Restoring International Law: The Need to Reform UN Treaty Monitoring Committees*, Briefing at the U.N. Headquarters, (Sept. 6, 2006), <http://fota.cdnetworks.net/pdfs/Krisztina-Morvai-statement-final.pdf>. The CEDAW Committee, for example, has been forceful in pressuring states to liberalize their laws on abortion, which contradicts the deeply held cultural beliefs of some states. The Pakistani delegate told the CEDAW committee in their 2007 review that “killing a fetus was regarded as murder.” Comm. on the Elimination of All Forms of Discrimination Against Women, Consideration of Reports Submitted by State Parties Under

Additionally, most treaty bodies have been holding days of general discussion, during which the treaty body invites outside participants, such as NGOs, experts, United Nations agencies, professional associations, and delegations from States Parties, to discuss a particular theme or issue of concern. These discussions have often been geared toward composing a new general comment interpreting the treaty provisions.<sup>80</sup> The CRC began this practice in 1992, and most of the treaty bodies have followed suit more recently.

However, none of the treaties clearly allow treaty bodies to assume this function. Instead, three of the treaty bodies have added hosting days of general discussion to their rules of procedure, not citing any treaty provision for authority.<sup>81</sup> The other three treaty bodies that have hosted these discussions do not even have support from their own rules of procedure.<sup>82</sup>

A review of the scholarship reveals an absence of discussion on the grounding for this treaty body practice. General days of discussion present at least two serious problems. In the context of the Convention on the Rights of the Child, States Parties contemplated this discussion-generating role for the Secretary-General—not the CRC. Article 45 states that the CRC can “recommend” that the General Assembly request the Secretary-General undertake “studies on specific issues relating to the rights of the child.”<sup>83</sup> The CRC practice has been contravening the procedure set out by the States Parties.

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Article 18 of the Convention, Summary Record of the 782d Meeting, ¶ 33, U.N. Doc. CEDAW/C/SR.782 (July 18 2007); *see also* Samantha Singson, *Pakistan Tells Pro-Abortion UN Committee that “Abortion is Murder,” Friday Fax*, CATHOLIC FAM. & HUM. RTS. INST. (May 31, 2007), <http://www.c-fam.org/fridayfax/volume-10/pakistan-tells-proabortion-un-committee-that-abortion-is-murder.html>. Cameroon, in a written response to CEDAW’s pressure to liberalize abortion laws, powerfully objected to the treaty body’s disregard for its culture and values:

It should be noted that, in our society, motherhood is extremely sacred. The desire to have children is linked to the desire for renewal and continuity of one’s race, family line, or sociological group. Children thus serve as a sort of bridge between generations past and present, while representing future prospects for communities. . . . Therefore, any abortion performed for non-medical or non-therapeutic reasons, i.e. other than to save the life of the mother or child, impedes the expression of this vital social dynamic.

Comm. on the Elimination of Discrimination Against Women, Responses to the List of Issues and Questions with Regard to the Consideration of the Combined Second and Third Periodic Reports, Cameroon, ¶ 17, U.N. Doc. CEDAW/C/CMR/Q/3/Add.1 (Nov. 10, 2008).

80. OFFICE OF THE HIGH COMMISSIONER FOR HUM. RTS., WORKING WITH THE UNITED NATIONS HUMAN RIGHTS PROGRAMME: A HANDBOOK FOR CIVIL SOCIETY 44 (2008), *available at* <http://www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook4.pdf>.

81. The CRC, the CRPD and the CEDAW Committees.

82. The CESC, the CERD, and the CMW Committees.

83. CRC, *supra* note 63, at art. 45(c).

Additionally, days of general discussion place treaty bodies at the center of treaty interpretation, presuming to relegate States Parties to just one set of participants among many that can elaborate the meaning of treaty provisions. The treaties do not give treaty bodies this interpretive power, and given their institutional limitations,<sup>84</sup> they are particularly vulnerable to straying from the good faith interpretations required by the VCLT.<sup>85</sup>

### III. TREATY BODY MANDATE CREEP<sup>86</sup>

Having laid out the proper role of treaty bodies, the following section zeroes in on three particular treaty bodies to show how they have been operating far beyond their proper scope of authority. After laying out the mandate for each treaty body, key actions will be highlighted to examine how each treaty body operates in practice. This section will show how the dynamic combination of institutional self-promotion and powerful lobbying factions at the United Nations has enabled NGOs and treaty bodies to, as predicted by Philip Alston, “locate their cause under the banner of human rights.”

#### A. CEDAW: Treaty Bodies and Regulatory Capture

##### 1. The CEDAW Committee Mandate

The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), adopted in 1979 by the U.N. General Assembly, is a comprehensive treaty dealing with the various forms of discrimination against women. Articles 17 through 22 create and circumscribe the CEDAW Committee, charged with monitoring States Parties’ periodic reports on their compliance with the treaty. According to Article 17, the CEDAW Committee consists of twenty-three “experts of high moral

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84. See *infra* Section IV.C.

85. For example, the CESCR in November 2010 hosted a day of general discussion on the right to sexual and reproductive health. Comm. on Economic, Social, and Cultural Rights, Day of General Discussion on “the Right to Sexual and Reproductive Health” (Nov. 15, 2010), <http://www2.ohchr.org/english/bodies/cescr/discussion15112010.htm>. However, the International Covenant on Economic, Social and Cultural Rights makes no mention of this right, nor does it include any language pertaining to similar rights.

86. By “mandate creep,” we refer to the progressive assumption of power beyond that which is stated in the respective treaty body mandates. In modern democratic systems, the judicial check on the legislative function is designed to prevent even the most well-intentioned legislator from exceeding his or her bounds. In practice, the treaty bodies have no such restraint, and their history has been one of continual jurisdictional expansion.

standing and competence.”<sup>87</sup> The CEDAW Committee is granted only three powers by the treaty:

1. Making suggestions and general recommendations based upon the examination of reports and information received from the States Parties;<sup>88</sup>

2. Inviting specialized agencies to submit reports on the implementation of the CEDAW treaty in areas falling within the scope of their activities;<sup>89</sup>

3. Reporting annually to the General Assembly of the United Nations on its activities.<sup>90</sup>

It should be noted that the mandate does not authorize “concluding observations.” It also requires any suggestions or recommendations to be “based” on the CEDAW Committee’s review of the periodic reports. The treaty body’s highly constricted mandate shows that States Parties envisioned it playing a relatively minor role.

In further support of this conclusion, the CEDAW Committee has its meeting time limited by the treaty to a two-week period, and States Parties have refused to accept an amendment to the treaty to extend this timeframe.<sup>91</sup> The CEDAW Committee’s limited mandate does not even clearly authorize *any* contact between the CEDAW members and States Parties—face to face contact or otherwise.<sup>92</sup> The treaty body is required to send its reviews of the reports to the Secretary General of the United Nations, and is not authorized to communicate with a State Party.<sup>93</sup> The narrow mandate likewise does not include any provisions for convening days of general discussions.

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87. CEDAW, *supra* note 63, at art. 17.

88. *Id.* at art. 21.

89. *Id.* at art. 22.

90. *Id.* at art. 21.

91. *Id.* at art. 20(1). Bustelo, *supra* note 69, at 82 (explaining that the United Nations General Assembly has had to approve extensions on an exceptional basis because states would not accept a 1995 amendment to the treaty to extend the duration of the CEDAW meetings; the amendment needed to be accepted by a two-thirds majority of states, but by the fifty-first session of the General Assembly, less than ten states had accepted the amendment). Most recently, the General Assembly once again agreed to temporarily extend the CEDAW Committee’s meeting time, in the absence of the approval of States Parties for an amendment to the treaty, to three annual sessions of three weeks each, with a one-week pre-session working group for each session. G.A. Res. 62/218, ¶¶ 14, U.N. Doc. A/RES/62/218 (Feb. 12, 2008).

92. See CEDAW, *supra* note 63, at arts. 17-22. It directs all communications to be mediated by either the United Nations Secretary General or the Economic and Social Council. See also Bustelo, *supra* note 69, at 80 (“it is important to keep in mind that the Convention itself made no provision for a communications procedure.”). While the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women does provide more powers for the CEDAW Committee, only 99 of the 186 nations that are parties to the treaty have adopted the Optional Protocol, or about half of the countries.

93. CEDAW, *supra* note 63, at art. 21.

## 2. Substantive CEDAW Provisions and Their Implementation by the CEDAW Committee

Despite these limits on the CEDAW Committee's authority, it has assumed an aggressive role in both policing states and interpreting the CEDAW treaty. The treaty body has gone beyond the good faith interpretations necessary to carry out its mandate when monitoring treaty compliance, in contravention of the VCLT. Instead, the CEDAW Committee had been expanding treaty provisions to incorporate new rights not contemplated by states.

The clearest example of this overstepping can be seen in the context of abortion. International consensus on the topic has proven impossible because countries hold widely divergent views. Consequently, the negotiation of many international human rights treaties that could address abortion, even tangentially, has resulted in an agreement to reserve the issue for states to resolve individually.<sup>94</sup>

However, in 1999, twenty years after the CEDAW treaty was adopted, the CEDAW Committee determined that Article 12 of the treaty contained a right to abortion. Article 12, which addresses women's health care, is textually silent on abortion:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.<sup>95</sup>

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94. For example, the Convention on the Rights of the Child also does not mention abortion. The drafting history shows some delegations believed differences in domestic laws on abortion required the treaty to essentially remain silent on the issue before it could be ratified. Sharon Detrick, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 102 (1999); Commission on Human Rights, *Report of the Open-Ended Working Group Established by the Commission to Consider the Question of a Convention on the Rights of the Child*, ¶¶ 10, 18, U.N. Doc. E/CN.4/L.1542 (1980).

95. Article 12, in full, reads as follows:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Because the treaty does not reference abortion, even proponents of abortion rights have flatly acknowledged that the treaty simply leaves the question of abortion for states to decide individually.<sup>96</sup>

Article 12 contains the phrase “family planning,” and two international conferences in 1994 and 1995 expressly confirmed that states did not understand “family planning” to include abortion rights.<sup>97</sup> Nonetheless, just four years later in 1999, the CEDAW Committee issued General Recommendation 24, asserting “family planning” includes a right to abortion.<sup>98</sup> It cited to no authority for this proposition. General Recommendation 24 stated that domestic legislation criminalizing abortion should be amended so women can undergo abortion without being subject to any punitive measures.<sup>99</sup> Regardless of the wisdom of this policy, the text and the background of Article 12 show abortion is simply outside the jurisdiction of the treaty. It defies credulity that the CEDAW Committee made a good faith interpretation of its mandate and of Article 12, consistent with the requirements of the VCLT. Because abortion is not in the treaty text, and states have

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96. See Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 272 (2002) (“There is absolutely no provision in CEDAW that mandates abortion or contraceptives on demand, sex education without parental involvement, or other controversial reproductive rights issues. CEDAW does not create any international right to abortion. To the contrary, on its face, the CEDAW treaty itself is neutral on abortion, allowing policies in this area to be set by signatory states and seeking to ensure equal access for men and women to health care services and family planning information. In fact, several countries in which abortion is illegal—among them Ireland, Rwanda, and Burkina Faso—have ratified CEDAW.”)

97. The two outcome documents from these conferences expressly stated that abortion is not a means of family planning. See Int'l Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Programme of Action of the United Nations International Conference on Population & Development, ¶ 7.24, U.N. Doc. A/CONF.171/13 [hereinafter Cairo] (“Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning. . . .”). This document also stated that “[i]n no case should abortion be promoted as a method of family planning.” *Id.* at ¶ 8.25; see also Fourth World Conference on Women, Beijing, P.R.C., Sept. 4-15, 1995, Beijing Declaration and Platform for Action, ¶ 106(j)-(k), U.N. Doc. A/CONF.177/20 [hereinafter Beijing] (echoing the 1994 document's conclusion that abortion should not “be promoted as a method of family planning.”).

98. See Rep. of the Comm. on the Elimination of Discrimination against Women, 20th sess, Jan. 19- Feb. 5, 1999, ¶ 31(c), U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38 (1999) (“Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive provisions imposed on women who undergo abortion[.]”).

99. *Id.* ¶ 14 (“The obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals . . . [B]arriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”).

explicitly rejected this interpretation of family planning, General Recommendation 24 cannot be surmised from a good faith read.<sup>100</sup>

Compounding the violation of its mandate, the CEDAW then forced this fabricated right on states via its concluding observations. In 1979, many states had laws criminalizing abortion, and they did not change these laws following ratification of the CEDAW treaty.<sup>101</sup> Nonetheless, copious examples of coercive concluding observations exist, as the CEDAW Committee has now criticized well over eighty nations for having restrictions on abortion, based on the authority of its very own General Recommendation Number 24.<sup>102</sup>

The concluding observations also cite the non-binding outcome documents from the aforementioned 1994 and 1995 conferences as authority.<sup>103</sup> This is all the more perplexing because, not only is the CEDAW Committee not authorized to monitor States Parties' compliance with extra-treaty documents, but these documents also did not create an international right to abortion either.<sup>104</sup>

100. Evidence exists that treaty body members have been influenced by the meeting at Glen Cove to create an international right to abortion, driven by international non-governmental organizations ("NGOs"), which knew they were advocating for this right by "stealth." See Section III.A.c.

101. See Alisa Harris, *Stealth Treaty*, WORLD (Feb. 23, 2008), available at <http://www.worldmag.com/articles/13766> (noting that "[w]hen the UN adopted CEDAW in 1979, most countries still criminalized abortion. Some of the 185 states to ratify the treaty still do." According to Amnesty International, CEDAW does not require the legalization of abortion, and this is evident because "[m]any countries in which abortion is illegal—such as Ireland, Burkina Faso, and Rwanda—have ratified the Convention." *A FACT SHEET ON CEDAW: TREATY FOR THE RIGHTS OF WOMEN*, AMNESTY INTERNATIONAL, available at [http://www.amnestyusa.org/sites/default/files/pdfs/cedaw\\_fact\\_sheet.pdf](http://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf).

102. Thomas W. Jacobson, *CEDAW Committee Rulings Pressuring 83 Party Nations to Legalize Abortion 1995-2010*, FOCUS ON THE FAMILY (June 4, 2010), [http://www.c-fam.org/docLib/20101022\\_CEDAWAbortionRulings95-2010.pdf](http://www.c-fam.org/docLib/20101022_CEDAWAbortionRulings95-2010.pdf). This number has since increased as the concluding observations for the 47<sup>th</sup> Session, October 4-22, 2010, have been released.

103. The CEDAW Committee also took this tactic based on the advice of the meeting at Glen Cove, which asserted a "consensus" on sexual and reproductive health at these two conferences and encouraged treaty bodies to update treaties by changing the "treaty implementation and monitoring process" to reflect this new understanding. *Round Table of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Sexual and Reproductive Health Rights*, available at [http://www.centerforundocs.org/downloads/glencove/glencove\\_roundtable\\_SRHR.pdf](http://www.centerforundocs.org/downloads/glencove/glencove_roundtable_SRHR.pdf) [hereinafter *Roundtable*].

However, the only consensus reached on this topic at these two conferences was that abortion was not a method of family planning. In fact, opposition to international abortion rights was so fierce that an organizer of the 1994 conference at Cairo noted, "It was clear to us that given the diametrically opposite views on the subject held by different member states, the Conference would not be in a position to endorse, on a global basis, the concept of legal abortion, even in the case of rape or incest." Jyoti Shankar Singh, *CREATING A NEW CONSENSUS ON POPULATION 55* (1998). The Glen Cove meeting was held just two years later.

104. The outcome documents mention abortion only insofar as to limit it: abortion should not be used for sex-selection, and States Parties should help women "avoid abortion," "eliminate the need for abortion," and focus on the "prevention of abortion." Cairo, *supra* note 97, ¶¶ 4.15, 7.24, 8.25, 7.6. See also Beijing, *supra* note 97, ¶¶ 38-39, 106(j)-(k), 107(a), 115, 124(i), 259, 277(c), 283(d).



For example, one CEDAW member accused Rwanda of not following its treaty obligations because of its “criminalization of adultery, *concubinage*, abortion and prostitution.”<sup>105</sup> The Rwandan representative tried to justify her country’s laws by explaining these laws were in place to help women, whose rights, for example, are often abused in the practice of concubinage or prostitution, and that their Constitution holds that life begins at the moment of conception.<sup>106</sup>

However, the treaty body has no jurisdiction to question Rwanda on its abortion laws in the first place. In addition to its lack of authority on domestic abortion laws, Article 6 of the treaty holds that states should enact laws “to suppress all forms of traffic in women and exploitation of prostitution of women.”<sup>107</sup> It is difficult to see how a state’s laws criminalizing prostitution can, in good faith, be read as violating its treaty obligation to enact laws to “suppress” prostitution. Nonetheless, the 2009 concluding observation for Rwanda continues to criticize its laws in these areas, once again citing for authority non-binding conference outcome documents (inaccurately), its own general recommendations, or nothing at all.<sup>108</sup> Such CEDAW Committee actions are far removed from the treaty, since the mandate creates no powers to issue concluding observations or general comments, and the treaty creates no right to legalized abortion or prostitution.

### 3. Regulatory Capture of the CEDAW Committee: The Example of Glen Cove<sup>109</sup>

While part of the explanation for the drastic overreaching of treaty bodies such as the CEDAW Committee can be attributed to institutional self-promotion, treaty bodies also have external forces actively lobbying them. In December 1996, treaty bodies became the targeted mechanism for many lobbyists to “locate their cause under the banner of human rights.” With immense financial

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105. U.N. CEDAW, 43d Sess., 885th mtg. at 38, U.N. Doc. CEDAW/C/SR.884 (Feb. 4, 2009) [hereinafter *Summary Record*].

106. *Id.* at 44.

107. CEDAW, *supra* note 63, at art. 6.

108. U.N. CEDAW, 43d Sess., at 36, U.N. Doc. CEDAW/C/RWA/CO/6\* (Jan. 19 – Feb. 6, 2009) B.B.21.7.1 (“The Committee recommends that the State party review its legislation relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion in accordance with the Committee’s general recommendation No. 24, on women and health, and the Beijing Platform for Action.”).

109. For a fuller discussion of the Glen Cove meeting, see Douglas Syla & Susan Yoshihara, *Rights by Stealth: The Role of the UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion*, 7 NAT’L CATH. BIOETHICS Q. 97 (2007).

resources,<sup>110</sup> lobbyists conceived and ran a conference in Glen Cove, New York, to “dialogue” with representatives of six major human rights treaty bodies,<sup>111</sup> seeking to expand the activity of these treaty bodies in the field of women’s health—specifically reproductive and sexual health. Not only was this meeting avowedly the “first occasion on which members of the [then six] human rights treaty bodies met to focus on . . . a specific thematic issue,”<sup>112</sup> but the theme they discussed was unrelated to the mandates of any of the treaties in question.<sup>113</sup>

The report<sup>114</sup> of that meeting specifically indicates that treaty body members were encouraged by event organizers to collaborate and to expand their operations into the area of reproductive health, with little discussion of the extralegality of such actions.<sup>115</sup> The report instructed the CEDAW Committee, for example, to “apply the right to non-discrimination on the ground of gender, in relation to the criminalization of medical procedures which are only needed by women, such as abortion (article 1 and article 12, Women’s Convention).”<sup>116</sup> In this light, it is little wonder why the CEDAW Committee found the right to abortion in Article 12 just three years later. Not only was the treaty body being pressured to interpret the treaty on matters outside the treaty’s jurisdiction,

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110. The Glen Cove Roundtable was sponsored by the UN Population Fund, the UN Office of the High Commissioner for Human Rights (which has oversight of the treaty bodies), and the UN Division for the Advancement of Women. Participants included officials from most of the major UN agencies, members of all the human rights treaty bodies, and pro-abortion nongovernmental organizations, including International Planned Parenthood Federation. *Roundtable*, supra note 103, at 1.

111. Attending the meeting in their official capacity were the following: two representatives of the Committee on the Rights of the Child, two representatives of the Human Rights Committee (responsible for the ICCPR), two representatives of the Committee on the Elimination of Discrimination against Women, six representatives of the Committee against Torture, two representatives of the Committee on the Elimination of All Forms of Racial Discrimination, and two representatives of the Committee on Economic, Social, and Cultural Rights. Also present were a number of representatives of other United Nations and NGO groups. *Roundtable*, supra note 103, at 1-2.

112. *Roundtable*, supra note 103, at 4.

113. Only the recent convention on disability rights uses the phrase “sexual and reproductive health,” and even this phrase explicitly excludes abortion, which was also discussed at the meeting. CRPD, supra note 63, at art. 10. None of the treaties discussed at Glen Cove have any relation whatsoever to “sexual and reproductive health.”

114. *Roundtable*, supra note 103. In its eighteenth and nineteenth sessions, the CEDAW Committee officially “welcomed” findings in the Roundtable Report. Rep. of the Comm. on the Elimination of Discrimination against Women, 18th & 19th Sess., ¶ 442, U.N. Doc. A/53/38/Rev.1; GAOR, 53d Sess., Supp. No. 38 (1998).

115. Specifically, without referencing the treaty body’s mandate, a member of the Human Rights Committee detailed the process to use the right to life (Article 6), the right to equality before the courts and before the law (Articles 14 and 26), the right to freedom of movement (Article 12), the right to protection of privacy and home (Article 17), and the right to freedom of expression (Article 19) of the ICCPR to advance the right to abortion. *Roundtable*, supra note 103, at 22-23.

116. *Id.* at 36-37.

but it was also being pushed into making authoritative treaty interpretations beyond the scope of its limited mandate.

In addition, many of the U.N. functionaries were moonlighting on the boards of the lobbying organizations themselves.<sup>117</sup> Tellingly, at the time of the meeting half the members of the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) were simultaneously serving on the boards of one or more of the NGOs seeking to change the operation of the treaty bodies.<sup>118</sup> When the treaty bodies were presented with a list of “recommendations,”<sup>119</sup> which included specific demands for greater NGO power, it is easy to see why only one Committee pushed back, admonishing those present to be “wary of exceeding their mandates.”<sup>120</sup>

This lobbying is to be expected in the current human rights treaty body system: it is analogous to the well-documented concept of “regulatory capture.”<sup>121</sup> Public choice economics informs us that where there is a regulatory body, such as a treaty body, charged with acting in the public interest, there will be winners and losers in any decision that body makes. Groups with high-stakes interests in the outcome will lobby hard to control the regulatory body: this phenomenon is called “rent seeking.”<sup>122</sup> The general public, on the other hand, will have only a diffuse interest in maintaining the integrity of the system. Consequently, without constant vigilance, these interested groups can “capture” the regulatory body.

In the context of treaty bodies, NGOs with specific agendas represent rent-seekers, while the States Parties to treaties represent the general public. Because States Parties have diffuse interests, they do not expend resources maintaining the integrity of the treaty body system. On the other hand, rent-seeking behavior on the part of reproductive health NGOs has led them to identify human rights treaty bodies as a target for lobbying

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117. For example, Nafis Sadik was simultaneously the executive director of the United Nations Population Fund (“UNFPA”), the chair of the 1994 United Nations International Conference on Population and Development, as well as a board member of the board of directors of the abortion rights lobbying group, the Center for Reproductive Rights.

118. Susan Yoshihara, *The Quest for Happiness: How the U.N.’s Advocacy of Economic, Social, and Cultural Rights Undermines Liberty and Opportunity*, in CONUNDRUM: THE LIMITS OF THE UNITED NATIONS AND THE SEARCH FOR ALTERNATIVES 182 (Brett D. Schaefer, ed., 2009).

119. *Roundtable*, *supra* note 103, at 8.

120. *Id.* at 25-26 (CERD Chairperson Michael Banton noted that “treaty bodies should respect the limits of their competence . . . [and] be wary of exceeding their mandates or of overlapping their functions.”).

121. For a good overview, see Michael Levine, *Regulatory Capture*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 267 (Peter Newman ed., 3d ed. 1999).

122. See Gordon Tullock, *Rent Seeking*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 147 (Peter Newman ed., 3d ed. 1999).

efforts.<sup>123</sup> The approach adopted by the Glen Cove Roundtable does not accord with proper procedure by which international law is made, as there was no participation by or consensus among member states. Nonetheless, these efforts have largely been successful: we have moved from public acknowledgement that no human rights treaty creates jurisdiction over sexual and reproductive health prior to the Roundtable,<sup>124</sup> to position papers finding a right to abortion in *every* major human rights treaty,<sup>125</sup> and now to the contention that there is a background *jus cogens* providing a non-derogable international right to abortion.<sup>126</sup> This shift can be explained as a function of the capture of treaty bodies by interested parties. Such a phenomenon has long been in the back of the minds of some of the leading human rights scholars; as Philip Alston warned, “in the course of the next few years, UN organs will be under considerable pressure to proclaim new human rights without first having given adequate consideration to their desirability, viability, scope, or form.”<sup>127</sup>

### *B. The CERD Committee: Institutional Self-Promotion and Pressuring States Parties*

#### 1. The CERD Committee Mandate

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), adopted by the U.N. General Assembly on December 21, 1965, was the first of the binding international human rights treaties. States Parties condemned racial discrimination and agreed to actively eliminate such discrimination. The treaty created the Committee on the Elimination of Racial Discrimination (“CERD Committee”), which

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123. See, e.g., CENTER FOR REPRODUCTIVE RIGHTS, STEP-BY-STEP GUIDE: USING THE UN TREATY MONITORING BODIES TO PROMOTE REPRODUCTIVE RIGHTS (2004), available at [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_bp\\_stepbystep.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_stepbystep.pdf). Interestingly, this behavior goes beyond “rent-seeking” because it sought to expand the jurisdiction of the captured bodies, rather than simply exploiting existing jurisdiction. In effect, this is “rent-creating.”

124. See, e.g., Liesbeth Lijnzaad, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 319 (1995) (noting that a reservation by Malta to the CEDAW treaty “is over-cautious, as the Women’s Convention is generally considered not to contain a right to abortion”).

125. Zampas & Gher, *supra* note 24, at 251 (arguing that abortion is a human right that can be found in various treaty “rights to privacy, liberty, physical integrity and non-discrimination.”).

126. LAW STUDENTS FOR REPRODUCTIVE JUSTICE, HUMAN RIGHTS LAW PRIMER, 13 (2d ed. 2011), available at [http://lsrj.org/documents/resources/LSRJ\\_HR\\_Primer\\_2nd\\_Ed.pdf](http://lsrj.org/documents/resources/LSRJ_HR_Primer_2nd_Ed.pdf) (arguing that the right to life has been considered *jus cogens*, and women’s right to life entails rights to abortion because, it is argued, laws against abortion lead to higher rates of maternal mortality).

127. *Conjuring*, *supra* note 1, at 614.

consists of eighteen “experts of high moral standing and acknowledged impartiality” to monitor the reports of States Parties on treaty implementation.<sup>128</sup> The CERD Committee has four basic functions:

1. Reviewing States Parties’ reports and request further information from the States Parties as necessary;<sup>129</sup>

2. Submitting an annual report to the United Nations General Assembly on its activities, including any suggestions and general recommendations based on the examination of States Parties’ reports;<sup>130</sup>

3. Facilitating resolution of State Party complaints regarding the alleged treaty violations of other States Parties.<sup>131</sup>

4. After explicit consent from the subject State Party, receiving and considering communications from individuals or groups of individuals within its jurisdiction claiming to be victims of treaty violations by that State Party.<sup>132</sup>

This section focuses on the Article 9 powers to review the States Parties’ reports, which is the central function of the CERD Committee.<sup>133</sup> Clearly, the limited mandate to review these periodic reports does *not* expressly include the power to issue concluding observations on each State Party, to dialogue with States Parties regarding their reports, to issue general comments interpreting treaty provisions, or to host days of general discussion—although the treaty body has undertaken all these practices.<sup>134</sup> Yet the greater problem has not been the practices themselves, but rather the authority with which the CERD Committee presumes to act. For example, a good faith read of this mandate might include some procedural form of concluding observations or general comments, but these formats cannot be read to authorize authoritative interpretations of the CERD or to enforce non-treaty commitments (for example, non-binding declarations) on States Parties. The CERD Committee’s narrow mandate simply does not provide it with such powers.

## 2. Substantive CERD Provisions and Their Implementation by the

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128. CERD, *supra* note 63, at art. 8(1).

129. *Id.* at art. 9.

130. *Id.*

131. *Id.* at arts.11-13.

132. *Id.* at art. 14.

133. Banton, *supra* note 33, at 56 (noting that most of the CERD Committee’s time is spent on monitoring reports under Article 9). The procedures in Articles 11 through 13 for complaints by States Parties against other States Parties have never been utilized.

134. In fact, giving the CERD Committee the power to provide suggestions and general recommendations at all was added at the last minute, first proposed just less than one month before the treaty was adopted in 1965. See *Historical Origin*, *supra* note 9, at 770.

## CERD Committee

The CERD Committee's role has drastically expanded since it first began operating in 1970. Unique to this treaty, the concept of racial discrimination has evolved from States Parties' understanding in 1965, and with it, the treaty body has tried to grab power to remain relevant. Article 1 of the treaty defines "racial discrimination" in the following way:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>135</sup>

Perhaps shedding light on the kind of discrimination states then had in mind, Article 3 notes that States Parties "particularly condemn racial segregation and apartheid."<sup>136</sup> According to the CERD Chairperson, States Parties were almost exclusively focused on ending the apartheid, and they had a relatively narrow idea of racial discrimination, assuming that racism was "a social pathology caused by either colonialism or the dissemination of doctrines of racial superiority."<sup>137</sup> This historical context raises several interpretive questions regarding the application of the treaty today.

However, what is clear from examination of the CERD Committee's mandate is that States Parties did not give the treaty body the authority to tackle these serious interpretive questions.<sup>138</sup> Even taking a broad read of the mandate and assuming that some form of concluding observations and general comments are permissible, the CERD Committee's practices have nonetheless overstepped its mandate in the following ways: (1) instructing States Parties on rights and duties irrelevant to the treaty, (2) stretching the definition of racial discrimination beyond that contemplated by States Parties, and 3) failing to anchor its general comments to the review process of States Parties' reports.

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135. CERD, *supra* note 63, at art. 1.

136. *Id.* at art. 3.

137. Banton, *supra* note 33, at 58.

138. See also *Historical Origin*, *supra* note 9, at 770 (noting the last-minute creation of the CERD Committee). It is highly unlikely that the States Parties envisioned this body having such important interpretive powers when they considered its very existence for less than one month.

*a. Extratreaty Focus*

In 1972, the CERD Committee first “stretched its mandate,” according to the CERD Chairman Michael Banton, when it was zealously trying to eliminate the apartheid.<sup>139</sup> It issued General Recommendation Number 3, which, without citing to any authority in the treaty, invited States Parties to submit information regarding the status of their “diplomatic, economic and other relations with the racist regimes in southern Africa.”<sup>140</sup> The treaty focuses exclusively on States Parties respecting the prescribed rights of individuals within their jurisdiction. Thus, the CERD Committee has no basis for instructing States Parties to reveal their relationships to particular regimes, especially those not even party to the treaty.<sup>141</sup> Instead of focusing on the rights and duties actually outlined in the treaty, the CERD Committee stretched its mandate to accommodate its policy goals.

Likewise, the CERD Committee has continued to focus on matters “irrelevant to the implementation of [CERD] obligations,” which the CERD Chairman has described as a “major problem.”<sup>142</sup> As a prime example, the Chairman pointed to the past concluding observations on Iraq. The 1997 Concluding Observation references Iraq’s commitments in other human rights instruments unrelated to the CERD treaty.<sup>143</sup> It recommended that Iraq comply with Security Council resolutions “calling for the release of all Kuwaiti nationals and nationals of other States who might still be held in detention” and “provide all information available on missing individuals of such States.”<sup>144</sup> It remains unclear what relation detaining citizens of other nations has to “racial discrimination” in the treaty. Nevertheless, treaty body members justified this recommendation by arguing that the preamble to the CERD “places it within the broader framework of human rights instruments.”<sup>145</sup> The CERD preamble, like all other preambles to the international human rights treaties, references preceding important treaties, declarations, and resolutions. Apparently the CERD Committee believes this empowers it (and presumably all

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139. Banton, *supra* note 33, at 59.

140. General Recommendation III Concerning Reporting by States Parties, in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 6th Sess. (1972), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II), at 270 (May 27, 2008).

141. South Africa ratified the CERD in 1998.

142. Banton, *supra* note 33, at 62.

143. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Addendum: Iraq, U.N. CERD, 51st Sess., U.N. Doc. CERD/C/304/Add. 28 (Sept. 17, 1997).

144. *Id.* ¶ 14.

145. Banton, *supra* note 33, at 63.

other treaty bodies) to address any and all human rights violations. While a novel theory, international treaty law certainly does not support this approach. It also undermines the entire human rights treaty body system, which has allocated different treaty bodies to focus on a distinct set of rights.

*b. Disregard for States Parties' Intent*

The second major practice overstepping the CERD Committee's mandate has been expanding the definition of "racial discrimination" well beyond what States Parties contemplated. Regardless of the necessity for an evolving understanding of the phrase, States Parties—and not the treaty body—must be the driving force behind these new concepts. Yet the roles have been exactly reversed. For example, the CERD Chairman acknowledged that the treaty body provided the stimulus for expanding "racial discrimination" beyond its original focus on the apartheid and legal segregation.<sup>146</sup> He admitted that without the treaty body's general recommendations numbers nineteen<sup>147</sup> and twenty-three<sup>148</sup> in the 1990s, pulling unintended de facto discrimination and discrimination against indigenous peoples into the definition of racial discrimination, "states might not have perceived the relevance to the [CERD]" of these issues.<sup>149</sup> Regardless of the merit of their policy decisions, this approach contravenes the good faith interpretation required under the VCLT and displaces the role of States Parties in formulating the meaning of their international agreements.

These new "rights" have often come at the expense of encroaching on the jurisdiction of other international human rights treaties. In 2000 the CERD Committee declared the "gender related dimensions of racial discrimination" within its jurisdiction.<sup>150</sup> It asserted, for example, that instances of "gender bias in the legal system" should fall under the CERD because it may prevent women from bringing legal action against instances of racial discrimination.<sup>151</sup> But the CERD Committee completely disregarded the scope of the CEDAW treaty, particularly Article 15, which gives women equal legal capacity with men at "all stages

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146. *Id.* at 70.

147. Rep. of the Comm. on the Elimination of Racial Discrimination, 50th sess, Sept. 22, 1995, at 150, U.N. Doc. A/50/18; GAOR, 50th Sess., Supp. No. 18 (1995).

148. Rep. of the Comm. on the Elimination of Racial Discrimination, 52d sess, Sept. 26, 1997, at 122-23, U.N. Doc. A/52/18; GAOR, 52d Sess., Supp. No. 18 (1997).

149. Banton, *supra* note 33, at 70.

150. Rep. of the Comm. on the Elimination of Racial Discrimination, 56th sess, Mar. 6-24, 2000, at 152, U.N. Doc. A/55/18; GAOR, 56th Sess., Supp. No. 18 (2000).

151. *Id.*



of procedure in courts and tribunals.”<sup>152</sup> This reinterpretation makes the CERD Committee more powerful and relevant, but it goes far beyond its mandate and it fails to consider its role within the larger treaty body system. These examples of institutional self-promotion also show the treaty body’s near blatant disregard for the intent of States Parties in its quest to broaden the scope of racial discrimination.

*c. Imposing Non-treaty Obligations*

The third major abuse of its treaty body mandate involves the issuance of general comments. The CERD Committee has also recently started the unprecedented practice of issuing general comments adopting and promoting non-binding outcome documents from conferences. In 1997, the United Nations General Assembly decided to hold the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and it directed the Commission on Human Rights to act as the preparatory committee.<sup>153</sup> The resulting World Conference took place in 2001 in Durban, South Africa, and it produced an outcome document entitled the Durban Declaration and Programme of Action.<sup>154</sup> The CERD Committee had no formal role in either organizing or hosting the conference.<sup>155</sup> This conference generated an immense amount of controversy, especially regarding the relationship between Israel and Palestine, and as a result many countries did not support the outcome document.<sup>156</sup>

The second World Conference, or the Durban Review Conference, held in 2009, examined the progress made since the first conference.<sup>157</sup> Once again, the CERD Committee neither organized nor hosted the conference, and instead the Human

152. CEDAW, *supra* note 63, at art. 15.

153. G.A. Res. 52/111, ¶ 29, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/111 (Feb. 18, 1998).

154. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31- Sept. 8, 2001, U.N. Doc. A/CONF.189/12.

155. The General Assembly did instruct the CERD Committee, along with “[g]overnments, the specialized agencies, other international organizations, concerned United Nations bodies, regional organizations, non-governmental organizations. . . the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and other human rights mechanisms” to “assist” the Commission on Human Rights as necessary. G.A. Res. 52/111, *supra* note 153, ¶ at 30.

156. *Mixed Emotions as Durban Winds Up*, BBC NEWS, Sept. 8, 2001, <http://news.bbc.co.uk/2/hi/africa/1530976.stm>; Ofeibe Quist-Arcton, *Africa: The United States and Israel Pull Out of the Durban Racism Conference*, ALLAFRICA, Sept. 3, 2001, <http://allafrica.com./stories/200109030134.html>.

157. The General Assembly created this conference in 2006. G.A. Res. 61/149, ¶ 33, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/149 (Feb. 7, 2007).

Rights Council<sup>158</sup> occupied this role. Also creating intense controversy, many countries—including the United States—boycotted the event entirely.<sup>159</sup> The Outcome Document of the Durban Review Conference both reaffirmed the commitments made during the first conference and assessed their implementation, although it suffered from the same reduced participation due to its controversial nature.<sup>160</sup>

Despite the polemical positions that emerged from these two conferences, the CERD Committee began urging all States Parties, regardless of their participation in the two Durban conferences, to comply with the outcome documents. After each conference, the treaty body issued an unprecedented “follow-up” general comment. These general comments did not even presume to be rooted in a provision of the CERD treaty. The CERD Committee simply declared that it was incorporating the provisions of these outcome documents into its mandate,<sup>161</sup> and it recommended States Parties comply with them<sup>162</sup> and instructed States Parties to begin reporting on their compliance in their next periodic reports.<sup>163</sup>

These general comments essentially take the non-binding conference documents, which were not even endorsed by all States Parties, and then imposed them as additional obligations, having the same legal status as a binding treaty commitment. For a treaty body that historically questioned its ability to even issue general comments, these two general comments in particular show the CERD Committee’s increasing disregard for its mandate. One thing is clear from a good faith read of the CERD Committee’s mandate: the treaty body monitors the CERD treaty obligations. Yet the conferences were not focused on the CERD treaty, and most of the declarations refer to matters outside the scope of the treaty. Nonetheless, these general comments discuss the treaty body’s approval of the outcome documents produced following two

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158. The Human Rights Council replaced the Commission on Human Rights in 2006. G.A. Res. 60/251, U.N. GAOR, 60th Sess., U.N. Doc. A/Res/60/251 (Apr. 3, 2006).

159. Julian Borger, *UN Racism Conference Boycotted by More Countries*, THE GUARDIAN, Apr. 19, 2009, <http://www.guardian.co.uk/world/2009/apr/20/un-race-conference>; Laura Trevelyan, *UN Racism Event Highlights Divisions*, BBC NEWS, Apr. 24, 2009, <http://news.bbc.co.uk/2/hi/americas/8017710.stm>; Bruno Waterfield, *Britain Isolated amid UN Racism Summit Boycott*, THE TELEGRAPH, Apr. 19, 2009, <http://www.telegraph.co.uk/news/5182662/Britain-isolated-amid-UN-racism-summit-boycott.html>.

160. See Durban Review Conference, Geneva, Switz., Apr. 20-24, 2009, *Rep. of the Durban Review Conference*, U.N. Doc. A/CONF.211.8.

161. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 33, Follow-up to the Durban Review Conference, U.N. CERD, 75th Sess., U.N. Doc. CERD/C/GC/33 (Sept. 29, 2009) [hereinafter Gen. Rec. 33]; Rep. of the Comm. on the Elimination of Racial Discrimination, 60th & 61st sess, Mar. 4-22, Aug. 5-23, 2002, at 111, U.N. Doc. A/57/18; GAOR, 57th Sess., Supp. No. 18 (2002) [hereinafter Gen. Rec. 29]. B.B. 21.7.3

162. Gen. Rec. 33, *supra* note 161, at 3; Gen. Rec. 29, *supra* note 161, at 110.

163. *Id.*

controversial conferences. Because these outcome documents are extraneous to the treaty, they are wholly irrelevant for treaty monitoring purposes.

The CERD Committee has been, in the words of Professor Alston, “attaching the label ‘human right’ to a given goal or value,” which in this context means ignoring the proper scope of the treaty in order to be at the forefront of other important but unrelated human rights issues. It is understandable that this small group of experts would passionately pursue their ideals and take the opportunity to change the scope of a binding treaty, thereby giving themselves more power in the process. In its effort to remain relevant and to respond to changing ideas on racial discrimination, it has risked ostracizing some States Parties and undermining its legitimacy by casting itself into unchartered territory. A greater respect for its limited mandate would let States Parties negotiate the difficult questions raised by implementing the treaty, and this process would help ensure that the treaty provisions are interpreted in good faith without forcing contentious terms on nations.

### *C. Committee on the Rights of the Child*

#### 1. CRC Committee Mandate

The Convention on the Rights of the Child (“CRC”) came into force on September 2, 1990, and currently has 140 signatories, which include every member of the United Nations except Somalia and the United States.<sup>164</sup> By this treaty, States Parties have recognized a number of rights for children, which term is defined in Article 1 as all persons under the age of majority—eighteen—unless “majority” is defined by a State Party as having been attained earlier. There is no textual lower bound for the age of a “child;” this is left to States Parties. For example, the ratification declaration by Guatemala that has been accepted by the Secretary General notes that “with the aim of giving legal definition to its signing of the Convention, the Government of Guatemala declares that article 3 of its Political Constitution establishes that: “The State guarantees and protects human life from the time of its conception.”

The Committee on the Rights of the Child (the “Committee”) was established “for the purpose of examining the progress made

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164. *Status of the Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION (Oct. 21, 2012, 10:04 AM) available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

by States Parties in achieving the realization of the obligations undertaken” in the CRC<sup>165</sup>, and consists of ten experts elected to four-year terms.<sup>166</sup> The Committee reviews the voluntary reports submitted by States Parties every five years<sup>167</sup> and is required to submit biennial reports on its activities to the General Assembly, through ECOSOC.<sup>168</sup>

As with other human rights treaties, there are explicit mechanisms for changing the legal obligations under the treaty. First, Article 50 delineates the amendment process, which requires approval of any amendment by both the General Assembly and two-thirds of all States Parties to the CRC to be effective. In addition, Article 51 notes that reservations may be made to the CRC. Finally, Article 52 permits any States Party to denounce the CRC by notifying the Secretary General: such denunciation becomes effective one year later.

## 2. A Broad Textual Mandate

Interestingly, the Committee has a broader textual mandate than any of the other human rights treaty bodies in three important respects. First, third party specialized United Nations agencies are “entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate.”<sup>169</sup> The scope of the representation *as a matter of right* is quite limited, however, because it is up to the Committee’s discretion whether to “invite” the specialized agency to either actually provide expert advice, or provide formal reports to the Committee. Further, such right is limited to the mandate of the specialized agency in question, and this jurisdictional limitation is likely up to the Committee itself to determine. Still, such participation is not in any other human rights treaty body mandate, and seems related to the broad, interdisciplinary nature of the subject matter of the CRC.

A second way in which the CRC treaty body mandate is broader than any other human rights treaty is that when a States Party submits a five-year compliance report to the Committee and the States Party indicates a need for technical assistance or advice from a third-party specialized United Nations agency, the Committee is authorized to forward the report and any comments

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165. CRC, *supra* note 63, at art. 43.

166. *Id.* at art. 43(2), (6).

167. *Id.* at art. 44(1).

168. *Id.* at art. 44(5).

169. *Id.* at art. 45(a).

the Committee has related to the request.<sup>170</sup> This is important, because it represents the only textual authorization of a treaty body to forward materials to third parties, and even then *only where the State Party so requests or indicates*. Also, there is no mention of a dialogue process between the Committee and the third party agency: this rules out days of “thematic discussion” and implies that the State Party will dialogue directly with the third party agency. As with other treaty bodies, the CRC Committee is very limited in *ex parte* contact with States Parties.

The final way in which the CRC treaty body mandate is broader than other human rights treaties is the most important. The Committee is directly authorized to make “suggestions and general recommendations” and transmit such reports directly any States Party concerned and the General Assembly. Again, there is no contact with States Parties that is not also copied to the General Assembly. In addition, the language “any States Party concerned” encourages general recommendations applicable to more than one States Party, and discourages singling out States Parties), *but only related to information received pursuant to Articles 44 and 45*.

In fact, the legal requirement for a relation between materials submitted at one stage and the subsequent statements by the CRC explains the choice of word “recommendation” rather than “comment.” To make a “comment” does not imply relation back to a previous state of affairs. To make a “recommendation,” however, implies constraining oneself to a specific pre-defined issue. Thus, the suggestion and general recommendation power of the CRC Committee is strictly limited to voluntarily submitted reports by States Parties. The Committee does not make its own reports, or investigate States Parties, nor does the Committee make comments on areas outside the scope of its mandate. If a State Party fails to submit a report, in theory the only suggestion the Committee may make is the suggestion that the State Party submit a report.

Each of the three areas in which the CRC treaty body mandate goes far beyond the textual mandate of other human rights treaty bodies is an area where other treaty bodies, such as the CEDAW Committee, have simply acted as if they had such a textual mandate, reading the power to make general recommendations, for example, as an “implicit” power of that treaty body. However, States Parties were perfectly capable of saying that the CRC provides for “suggestions and general recommendations,” and there is no reason that they should have failed to make such a

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170. *Id.* at art. 45(b).

power explicit in the case of the CEDAW Committee. In other words, the absence of such provisions in other treaties is strong evidence that Committees without such textual authorization cannot do the same as the CRC Committee.

### 3. CRC Overreach

#### *a. General Comments*

To date, the CRC has issued thirteen general comments: the first, issued in 2001, clarified a treaty obligation relating to children's educational rights.<sup>171</sup> General recommendations, as noted *supra*, are permissible under the CRC textual mandate insofar as they pertain to information gathered from the voluntarily submitted oversight materials from States Parties. By conducting general "comments" rather than "recommendations," the CRC has subtly overstepped its mandate. Reading any one of first twelve General Comments in light of the textual mandate, it is apparent that until recently the CRC did not feel the need to explicitly make this relation back.

Nevertheless, the most recent General Comment includes a welcome section entitled "Rationale for the present general comment."<sup>172</sup> This section, while referring vaguely to the fact that "the extent and intensity of violence exerted on children is alarming", is a step in the right direction, at least attempting to tether the General Comment to a specific provision (Article 19 of the CRC), a specific factual circumstance (violence against children), and a specific audience (States Parties). Indeed, the General Comment repeatedly mentions that the job of the international community is to "assist States Parties" with compliance. This stands in stark contrast to the behavior of other human rights treaty bodies (with no textual authority to issue general recommendations at all) which start with a vague "right" and then *post hoc* seek to attach that right to four or five separate, unrelated treaty provisions, and direct States Parties, NGOs, other UN agencies, and private individuals collectively.

No matter how these comments might incidentally comport with the mandate of the CRC, however, the bottom line is that it

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171. See Comm. on the Rights of the Child, General Comment No. 1, Article 29(1): The Aims of Education, Annex IX, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001).

172. Comm. on the Rights of the Child, The Right of the Child to Freedom from All Forms of Violence, at 3, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011).

sees itself as issuing “general comments on thematic issues,”<sup>173</sup> which goes beyond its treaty mandate and risks creating an institutional culture of legal noncompliance. A critical reevaluation is necessary.

*b. Days of Thematic Discussion*

As noted *supra*, the CRC has certainly overstepped its mandate with its own organization and execution of “days of thematic discussion.” While it is permitted to request the General Assembly to recommend to the U.N. Secretary General that the Secretariat conduct “studies on specific issues relating to the rights of the child,” the CRC itself has held days of thematic discussion on eighteen occasions. In further contravention of its mandate, the CRC has “adopted recommendations” following the conclusion of each annual conference.

The purported authority for these days of thematic discussion is Article 75 of the Rules of Procedure for the CRC,<sup>174</sup> which is in turn derived from Article 45(c) of the CRC.<sup>175</sup> As noted above, provision 45(c) deals with the general recommendation power, and requires a relation back to a specific material submitted by States Parties. Purporting to derive the authority to hold such “days of thematic discussion” from section 45(c) is, at best, negligent legal analysis. While section 45(a) permits competent United Nations bodies to be consulted for expert advice during consideration of the reports of States Parties, this is divorced from CRC practice insofar as the CRC continues to include NGOs, and insofar as these days of discussion are untethered from specific reports.

The adoption of “recommendations” from these discussions doubly oversteps the CRC’s mandate, and could call into question its independence from lobbying groups. To date, these recommendations have not been used as binding legal authority in any sense. However, as with the General Comments issued by the CRC, these actions, currently toothless, create dangerous precedent and can help foster a culture of legal noncompliance, devolving the CRC into another runaway treaty body.

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173. See Comm. on the Rights of the Child, *Monitoring Children’s Rights*, OFFICE OF THE U.N. HIGH COMM’N FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/crc/> (last visited Oct. 24, 2012).

174. See Comm. on the Rights of the Child, Rules of Procedure, U.N. Doc. CRC/C/4/Rev.2 (Dec. 2, 2010).

175. See, e.g., Comm. on the Rights of the Child, Day of General Discussion: Children without Prenatal Care, 40th sess, Sept. 12-30, 2005, U.N. Doc. CRC/C/153 (2005).

### *c. Concluding Observations*

Since commencing its activities, the CRC Committee has issued concluding observations, in accordance with the activities of other human rights treaty bodies, but in contravention of its mandate.<sup>176</sup> From a contractual standpoint, this overreach might appear to be less problematic than that of other treaty bodies, because States Parties contracted in an environment rife with overreach by other treaty bodies. Nevertheless, there is no VCLT provision providing for such an interpretation, and, as noted above, the overriding concern of the VCLT is the text of any agreement. These concluding observations, singling out States Parties as they do, butts up against the clear direction of the textual mandate of the CRC, which demands “general” comments. As with other treaty bodies, this practice of the CRC invents an adjudicatory function for the CRC not anticipated by States Parties.

## 4. Overview

The case study of the CRC is illustrative for several reasons. First, it provides an example of a broad (but not unlimited) textual mandate, proving that States Parties can write a broad mandate when they want to do so. Second, it showcases institutional improvement and a stronger respect for States Parties. This might in fact be *due* to a broader, but tangible, textual mandate. Finally, it highlights that even a better-functioning treaty body is routinely at risk for expanding its mandate. This should make clear the necessity for periodic “house cleaning” by States Parties.

## IV. VACUUM OF AUTHORITY: STATES PARTIES’ NEGLIGENCE AND THE IMPACT ON THE TREATY BODY SYSTEM

Overstepping treaty body mandates is not always correlative with institutional self-promotion and regulatory capture. States Parties share some of the blame: they have not policed the treaty bodies when they have acted beyond their mandates, and they have not taken on an active role in resolving questions on treaty interpretation. The resulting vacuum of power has created opportunities for reformers to manipulate the treaty body system. It has also allowed treaty bodies to assume the role of treaty interpreters. This section examines how the hands-off approach

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176. *Concluding Observations*, *supra* note 37, at 30; *see, e.g.*, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: Peru, 4th Sess., U.N. Doc. CRC/C/15/Add.8 (Oct. 18, 1993).



taken by States Parties has led to disregard for treaty body mandates, opening the floodgates for drastic reforms and leaving States Parties vulnerable to treaty body assertions of power. As will be shown, the absence of State Party influence ultimately undermines the legitimacy of the treaty body system because treaty bodies are not institutionally equipped to fill the vacuum of authority.

*A. Misfeasance of Treaty Body Members:  
Universal Standing Treaty Body Reform*

The call for a unified treaty body, or “The Dublin Statement on the Process of Strengthening of the United Nation Human Rights Treaty Body System,” is a major reform effort that is more concerned with the “efficient and effective” operations of treaty bodies than the consent of the States Parties that created them.<sup>177</sup> Drafted and published by a number of “current or former United Nations human rights treaty body members acting in a personal capacity,” the Dublin Statement has neglected to consider the legality or democratic legitimacy of reform efforts.<sup>178</sup> As the international human rights legal framework has expanded to include nine major international treaties, commentators have begun to question how the system might be “universalized.”<sup>179</sup> The goal of such a universalization would be to more effectively implement the human rights treaties. Even the Office of the High Commissioner for Human Rights (OHCHR) itself has outlined a vision for a unified treaty body.<sup>180</sup> Whether or not effective human rights norm implementation demands a single, universal treaty body is a question of the first order that reformers take very seriously: they neglect to discuss whether such reform can legally be arrived at through the fiat of the OHCHR or whether it requires a new treaty negotiation process involving States Parties.

In fact, Michael O’Flaherty, a member of the Human Rights Committee, signatory of the Dublin statement, and as a longtime proponent of a unified treaty body, criticized the OHCHR Concept Paper, noting that it only “either postpones . . . or . . . only lightly touches” a “wide range” of issues, including the legal authority for

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177. Dublin Statement I, *supra* note 2, ¶ 4.

178. *Id.* ¶ 1.

179. See, e.g., ANNE F. BAYEFSKY, *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* (2001).

180. See U.N. Secretariat, *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/CRP.1 (Mar. 22, 2006) [hereinafter *Concept Paper*]

Dublinese reform.”<sup>181</sup> The Dublin statement devotes just a few sentences to legal authority, noting glibly that “[t]he creation of a unified standing treaty body raises significant legal issues.”<sup>182</sup> Unfortunately, in addition to correctly suggesting the legal possibility of amendments to the treaties, the OHCHR document incorrectly envisions as legal possibilities (1) “an overarching amending procedural protocol,” (2) a “gradual transfer of competencies,” and (3) a General Assembly resolution. None of these three possibilities are amendment procedures internal to the nine treaties themselves, and would therefore be extralegal.<sup>183</sup>

This is not to call into question the motivations of the OHCHR or of human rights experts: it is simply to highlight the fact that these non-legal experts often envision grand schemes for social change without considering the corresponding legal authority for such change. For example, those who signed the Dublin Statement were mostly sociologists, professional feminists, political scientists, and politicians. While there were a few lawyers involved in signing the Dublin Statement, these lawyers were acting primarily as *advocates*, postponing the legal heavy lifting. Unfortunately, however, the legal issues have not been addressed elsewhere. Whether one believes that a unified standing treaty body is good or bad, one cannot deny that a dialogue must occur as to the legal authority to create such a system, and the States Parties that created the treaty bodies must themselves be involved.

### B. Negligence of States Parties

This overreach of human rights treaty bodies cannot occur, however, without the negligence of States Parties. Longtime CERD member, Michael Banton, commented on the surprising indifference exhibited by States Parties: “Should they not, as a collective, take more interest in the body they have established to work on their behalf?”<sup>184</sup> Rather than asserting proper procedure, States Parties often comply with extralegal demands of treaty bodies. In the case of powerful nations who fund the United

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181. Michael O’Flaherty & Claire O’Brien, *Reform of the UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*, 7 HUM. RTS. L. REV. 141, 172 (2007). This is not an understatement: the Concept Paper devotes only one short paragraph to questioning whether its recommendations be legal, and concludes that “[t]he creation of a unified standing treaty body raises significant legal issues.” See *Concept Paper*, *supra* note 180, ¶ 64.

182. See *Concept Paper*, *supra* note 180, ¶ 64.

183. In fact, these three possibilities sidestep a difficult question of legitimacy: would a States Party to one treaty but not another become bound to both? It would seem clearly illegitimate, not to mention illegal, for the United States, as party to the CAT but not the CEDAW, to find itself bound to the CEDAW *because* of its ratification of the CAT.

184. Banton, *supra* note 33, at 72.

Nations (such as the United States), such compliance might be motivated by self-interest.<sup>185</sup> In the case of nations with less clout, compliance can be compelled with soft-power: for example, referring to the possible withdrawal of economic aid or support for candidates to the human rights body itself.

Finally, some mistaken compliance by States is entirely innocent, as when Rwanda came before the CEDAW Committee in 2009, described in section III.A.b.<sup>186</sup> When the CEDAW Committee berated Rwanda for its “criminalization of adultery, *concubinage*, abortion and prostitution,” the Rwandan representative quite understandably began to object in first-order terms, explaining how, for example, its laws were intended to protect women.<sup>187</sup> The Rwandan delegate sought to answer the CEDAW Committee’s questions, not challenge the basis for asking questions in the first place. Yet perpetual awareness of the role of the treaty body is important to ensure its proper functioning. In the case of Rwanda, not only could the delegate have pointed out that the CEDAW Committee has no authority to demand revising domestic laws<sup>188</sup> and has no jurisdiction over abortion,<sup>189</sup> but also that the criminalization of prostitution is explicitly envisioned by the CEDAW treaty itself.<sup>190</sup>

When a State Party representative is told that it must decriminalize prostitution, the gut inclination of that representative is to justify the law itself, and not to question the jurisdiction of the Committee. This breeds ill will and makes the State Party look as if it does not take human rights seriously. However, there is no reason why this should be the case. If States Parties collectively began reasserting their rights, questioning the jurisdiction of the treaty bodies would become as mundane as questioning jurisdiction in a private law court—this latter action is rightly seen as perfectly reasonable and in furtherance of systemic integrity.

### *C. Harm Caused to the Human Rights Treaty Body System*

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185. A State Party on equal formal footing with other States Parties may nevertheless have greater power based upon its ability to withhold funding from the United Nations, and thus influence substantive decisions. In this regard a state such as the United States may seek greater formal commitment as a way to exercise indirect authority over other states.

186. *Summary Record*, *supra* note 105, ¶ 38.

187. *Id.* ¶ 44.

188. *See* Section III.A.

189. *See* Section III.A.

190. Article 6 of the CEDAW treaty holds that States Parties should enact laws “to suppress all forms of traffic in women and exploitation of prostitution of women.” CEDAW, *supra* note 63, at art. 6.

At first glance, overactive treaty bodies may seem to be an asset in the effort to protect human rights. The more aggressively treaty bodies monitor States Parties, theoretically the more likely States Parties will uphold human rights. However, this facile, ever-expanding conception of treaty bodies overestimates their capacity and competence and, more fundamentally, confuses their role in the human rights system by placing them in a coercive position never contemplated by States Parties.<sup>191</sup> Instead, their history bears out a more limited, unique place for treaty bodies as facilitators of human rights, collaborating with States Parties to help them achieve their human rights obligations. They are not equipped to fill this vacuum of authority. Not only is this more effective, it is more legitimate.

### 1. Competency: Monitoring Periodic Reports vs. Making Law

Scholars commonly note that treaty body concluding observations have no binding legal status.<sup>192</sup> While this has become a truism, treaty bodies have assumed the aura of binding legal authority as concluding observations have become more extensive. For this reason, some in the treaty body system see concluding observations as a “crucial tool.”<sup>193</sup> Treaty bodies cite to their own authority, and they repeat their treaty interpretations boldly and frequently as they hold States Parties accountable. While their “soft power” has increased their institutional legitimacy in the eyes of some international law scholars, this has come at the cost of the rule of law and democratic representation.<sup>194</sup>

Law, in order for it to be effective, needs to be coherent, consistent, and predictable. Unfortunately, pronouncements coming out of treaty bodies are usually defective in these regards. Treaty bodies’ functions often overlap, which leads to differing and conflicting demands on States Parties for similar topics in

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191. For example, a member of the Committee Against Torture noted that the treaty body review system has “grown and developed in ways unforeseen by the drafters.” Felicia D. Gear, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUM. RTS. L. REV. 109, 116 (2007).

192. See, e.g., *Concluding Observations*, *supra* note 37, at 33 (noting that “it is clear that concluding observations, per se, impose no legal obligation on State[s] Parties”).

193. *Closing Remarks by the High Commissioner*, INFORMAL TECHNICAL CONSULTATION FOR STATES PARTIES ON TREATY BODY STRENGTHENING, Sion, Switzerland (May 12-13, 2011), available at <http://www2.ohchr.org/english/bodies/HRTD/docs/consultation/Sion/ClosingRemarksHC.pdf>.

194. At the same meeting where the High Commissioner was contending that concluding observations were a “crucial tool,” some States Parties were concerned about the legitimacy of such “crucial tools.” See Technical Consultation, *supra* note 7, at 14 (“recommendations should focus strictly on the provisions of the concerned Treaty”).

concluding observations.<sup>195</sup> The authority treaty bodies have been assuming contravenes “basic principles of due process of law” because concluding observations result from “necessarily cursory” interactions between the members and States Parties.<sup>196</sup> States Parties do not have rights to formal representation before the treaty bodies, and oral exchanges often occur in less than one day.<sup>197</sup> These short exchanges, typically between three to ten and a half hours per State Party report, are repeated only once every four to five years.<sup>198</sup> Concluding observations vary in their sophistication, and many simply fail to ground their recommendations to States Parties on any authority. In addition, as we have shown, not only does this increase their unpredictability, but it unhinges any obligation for treaty bodies to offer rational justifications for their determinations.

Treaty bodies were not established to perform legal interpretations, and so they lack such institutional support. The members are not necessarily trained in legal analysis, which is not a role described in the mandate. In fact, many of the treaty body members also lack any legislative or legal backgrounds.<sup>199</sup> Additionally, unlike a court, or even an administrative agency, treaty bodies lack transparency and legislative or political accountability to States Parties. According to Amnesty International, “[v]acancies for seats on treaty bodies are seldom publicized,” and no procedures exist for “formal consultation at the national level with civil society.”<sup>200</sup> The illusion of authority becomes all the more problematic when States Parties fail to subject treaty bodies to meaningful oversight.

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195. For example, while the CRC has requested States Parties, such as India, to end the practice of sex selection abortion as discriminatory against unborn female children, the CEDAW Committee has framed the issue of abortion entirely in terms of women’s rights. The CEDAW Committee has encouraged States Parties to remove all restrictions on abortion because women have the right to determine the number/spacing of their children, and they should not be forced to undergo an illegal and unsafe abortion for any reason. Sex-selection abortion cannot be an exception under the CEDAW Committee’s formulation of the right. See Comm. on the Elimination of the Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cape Verde*, ¶ 30, U.N. Doc. CEDAW/C/CPV/CO/6 (Aug. 25, 2006); Comm. on the Rights of the Child, *Consideration of Reports Submitted by State Parties Under Article Concluding Observations: India*, ¶ 34, U.N. Doc. CRC/C/15/Add.228 (Feb. 26, 2004).

196. *Concluding Observations*, *supra* note 37, at 36-37.

197. *Id.* at 37.

198. Anne F. Bayefsky, *Committee on International Human Rights Law and Practice: Report on the UN Human Rights Treaties: Facing the Implementation Crisis*, BAYEF-SKY.COM, available at <http://www.bayefsky.com/reform/ila.php> [hereinafter *First Report*].

199. While the ICCPR states that consideration should be “given to the usefulness of the participation of some persons having legal of *Discrimination against Women – Membership*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cedaw/membership.htm> (last visited Nov. 16, 2012).

200. *Membership of Treaty Bodies*, AMNESTY INT’L, <http://www.amnesty.org/en/united-nations/treaty-bodies/membership> (last visited Oct. 27, 2012).

If treaty bodies reassumed the role as non-adversarial facilitator to help States Parties examine their human rights records, then they would be acting within their competence. Mandates generally describe ideal members as having extensive human rights backgrounds.<sup>201</sup> While candidates may or may not also have legal backgrounds, the mandate makes them best suited to advise States Parties on human rights issues specific to the treaty they monitor. Instead of performing legal interpretations of treaty provisions, treaty bodies are best suited to engage States Parties in a constructive dialogue on human rights issues pertinent to the treaty.

## 2. Independence: Who's Really Running the Show?

While initially nominated by States Parties, treaty body members are encouraged to perform their roles without consideration of the interests of their native countries.<sup>202</sup> The mandates for treaty bodies direct the members to act in their "personal capacities,"<sup>203</sup> and so their allegiance should be to the treaties they monitor. Unlike other entities that may have political agendas, treaty bodies occupy a uniquely independent role as non-adversarial and non-political resources for States Parties. Many mandates also expressly require treaty bodies to act independently and impartially.<sup>204</sup>

However, treaty bodies have bitten off more than they were mandated to chew, and consequently, they need more manpower to accomplish their ambitions. Even though treaties have given

201. See, e.g., CRPD, *supra* note 63, at art. 34(3) (treaty body members "shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. . .").

202. According to Louise Arbor, the former UN High Commissioner for Human Rights, "[t]he ultimate success of any monitoring system . . . depends on the calibre and independence of the experts monitoring implementation of treaty standards." Concept Paper, *supra* note 180, ¶ 61. The Office of the High Commissioner for Human Rights describes treaty bodies as "committees of independent experts that monitor implementation of the core international human rights treaties." *Monitoring the Core Int'l Human Rights Treaties*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited February 11, 2013).

However, in practice, it is difficult for treaty body members to remain completely neutral and abandon their national allegiances. As treaty body member Michael Banton noted, members cannot simply "slough their national identities as snakes slough their skins." Banton, *supra* note 33, at 57.

203. ICPED, *supra* note 63, at art. 26; CRPD, *supra* note 63, at art. 34(3); ICRMW, *supra* note 63, at art. 72(2)(b); CRC, *supra* note 63, at art. 43; CAT, *supra* note 53, at art. 17; CEDAW, *supra* note 63, at art. 17; ECOSOC Res. 1985/17, *supra* note 11; ICCPR, *supra* note 62, at art. 28(3); CERD, *supra* note 63, at art. 8(1).

204. ICCPR, *supra* note 62, at art. 38 ("Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.")

NGOs no formal role, treaty bodies have enlisted their help.<sup>205</sup> They assist treaty bodies by submitting “shadow reports,” which NGOs prepare to “shadow” the periodic reports submitted by States Parties, they appear at days of general discussion, they influence the drafting of general comments, they are authorized to present country-specific information before the treaty body at meetings to review States Parties’ reports,<sup>206</sup> and they influence the follow-up procedures to implement treaty body recommendations.<sup>207</sup>

NGOs, given their position to consider just a handful of strongly held interests, represent rent-seekers trying to capture treaty bodies to promote their lobbying agendas. While NGOs can passionately defend human rights, their interested approach stands in marked contrast to the independence mandated from treaty bodies.<sup>208</sup> Nonetheless, treaty body members are often simultaneously acting as representatives for NGOs. This can be especially problematic for developing countries where, as often happens, their dialogues with treaty bodies are poorly attended by the public and the media, leaving only one or two NGO representatives in the room.<sup>209</sup> While this fact alone does not immediately mean a treaty body member’s allegiance is to her policy agenda rather than the treaty she monitors, it does create the appearance of impropriety and give potential undue influence to the NGO.

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205. See, e.g., Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 307-313 (2004) (arguing that human rights treaties envisioned no role for NGOs—with the exception of the Convention on the Rights of the Child—because all the monitoring tasks were explicitly reserved to treaty bodies, which are “made up of nonpartisan experts selected to serve based on their expertise . . .”). Treaty bodies began looking to NGOs in the mid-1980s, although the legitimacy of seeking their input was controversial. *Id.* at 307. Consequently, some HRC members would “surreptitiously glance at documents submitted to them by NGOs, hiding them under their desks.” Peter R. Behr, *Mobilization of the Conscience of Mankind: Conditions of Effectiveness of Human Rights NGOs*, available at <http://unu.edu/unupress/lecture14-15.html> (last visited Feb. 11, 2013). By the mid-1990s, the use of NGO-produced information was “no longer subject to debate . . .” *Id.*

206. For example, the practice of the CEDAW has allowed NGOs to present country-specific information to the CEDAW at both its pre-sessional working group and during a plenary informal meeting. Rep. of the Comm. on the Elimination of Discrimination against Women, 20th sess., Jan. 19-Feb.5, 1999 & 21st sess., June 7-25, 1999, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38; see also Bustelo, *supra* note 69, at 107.

207. Blitt, *supra* note 204, at 301 (quoting World Conference on Human Rights, June 15-16, 1993, *Recommendations for Enhancing the Effectiveness of United Nations Activities and Mechanisms: Vienna Statement of the International Human Rights Treaty Bodies*, ¶ 16, U.N. Doc. A/CONF.157/TBB/4 (June 16, 1993)).

208. Since NGOs are not subject to professional standards of independence, one commentator has argued they form “a representative consortium of leading” human rights NGOs “working together with independent academic and judicial figures having expertise in international law, human rights and regulatory systems” for the purpose of self-regulation. Blitt, *supra* note 205, at 307. Such standards of professionalism have yet to be created.

209. *First Report*, *supra* note 198.

Devoted NGO advocates can become so enamored by the possibility of creating substantive rights that they can lose respect for the procedural limits placed on treaty bodies. As noted above, at the time of the 1996 Roundtable at Glen Cove, half of the CEDAW Committee was also simultaneously serving on powerful women's rights lobbying groups.<sup>210</sup> One such group, the Center for Reproductive Rights ("CRR"), has actively promoted the recommendations made at the Glen Cove meeting. Even years afterward, CRR acknowledged that "there is no binding hard norm that recognizes women's right to terminate a pregnancy" in international law.<sup>211</sup> Nonetheless, the Glen Cove meeting explicitly instructed treaty bodies on how they could read abortion into the various provisions in the treaties they monitor, even over the objection of the CERD chairperson who was concerned about exceeding his mandate.<sup>212</sup> Showing that CRR is aware that it is illegitimately pushing treaty bodies into changing international law, it remarks on the need to keep this approach secretive in an internal memo:

[T]here is a stealth quality to the work: we are achieving incremental recognition of values without a huge amount of scrutiny from the opposition. These lower profile victories will gradually put us in a strong position to assert a broad consensus around our assertions.<sup>213</sup>

NGOs have been using treaty bodies as the backdoor to furthering their interests when domestic political efforts have met insurmountable resistance.

States Parties have not taken an active role in holding treaty bodies to their mandates, so the risk of treaty body capture remains especially serious. In addition to the unrepresentative effect this will have on international law, primarily it takes a key resource away from States Parties. The self-reporting human rights approach envisioned treaty bodies as independent partners to help States Parties examine their "conscience" on human rights. Treaty bodies have increasingly become just another lobbying organ making demands on States Parties.

## V. PROPOSALS

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210. Yoshihara, *supra* note 112, at 182.

211. *Documents Reveal Deceptive Practices by Abortion Lobby*, Extensions of Remarks, 108th Cong., 1st sess., 149 CONG. REC. E2534-E2547 (daily ed.) (Dec. 8, 2003) (statement of Hon. Christopher H. Smith) [hereinafter *Deceptive Practices*].

212. Roundtable, *supra* note 103, at 25-26.

213. *Deceptive Practices*, *supra* note 211, at E2538.



The foregoing has demonstrated the necessity for house-cleaning in the international human rights treaty system: the following provides some concrete proposals for reform for the benefit of States Parties and treaty body members alike.

*A. Proposal: Greater States Parties' Involvement*

Perhaps the most important change that could be brought to the current human rights treaty system would be a reassertion of the rights of States Parties. In fact, such a program has been recently proposed by a number of States Parties led by the Russian Federation.<sup>214</sup> In the abstract, this proposal is entirely uncontroversial: it has no formal element, as it is already written into the fabric of the treaty body system itself. Yet interested third parties involved in the treaty body capture described above oppose such efforts. What are the rights of States Parties, and how might their reassertion help to reform the treaty body system?

1. States Parties may amend treaties

Six of the nine human rights treaties include an explicit amendment process.<sup>215</sup> The procedure is identical for each: any State Party proposes an amendment and files it with the Secretary-General's office, which then communicates to each States Party that an amendment has been filed and determines if there is support for an amendment conference of States Parties. Upon ratification, depending on the treaty, by two-thirds or a majority of States Parties, the amendment is sent to the General Assembly for approval, and then back to States Parties for signature. If any State Party disagrees with the amendment, it may vote against it, and if the amendment passes, it may choose not to be bound by the amendment. In practice, therefore, this procedure requires unanimity. States Parties serious about

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214. See G.A. Res. 66/124, U.N. GAOR, 66th Sess., U.N. Doc. A/66/L.37 (Feb. 16, 2012). The proposal was supported by Belarus, Bolivia, China, Cuba, Indonesia, Iran, Nicaragua, Pakistan, Russia, Syria, Tajikistan, Venezuela, and Zimbabwe.

215. See CRPD, *supra* note 63, at art. 47; ICRMW, *supra* note 63, at art. 90; CRC, *supra* note 63, at art. 50; CAT, *supra* note 53, at art. 29; International Covenant on Economic, Social and Cultural Rights, at art. 29, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; ICCPR, *supra* note 62, at art. 29. In addition to these six explicit amendment processes, the remaining CEDAW treaty (Art. 26) and CERD (Art. 23) treaty contain "revision" procedures whereby a States Party indicates a desire for revision, and the General Assembly decides upon the action to take. It is unclear if the scope of the revision power is as great as that of amendment, however, but the ability of any member of the General Assembly to block language in principle should indicate that the two mechanisms be interchangeable, both requiring unanimous consent of the States Parties.

reasserting their rights would do well to consider making use of the amendment process.

## 2. States Parties may denounce treaties

Many of the nine human rights treaties includes not only a reservation provision to ensure that States Parties can unilaterally guarantee that they will not be bound by more than they agreed to,<sup>216</sup> but also a denunciation mechanism.<sup>217</sup> A denunciation terminates all future obligations under a treaty going forward, and is described in the VCLT Article 56. A denunciation is a unilateral right in contract: there is no review of the legality of a denunciation, and parties have license to denounce a treaty for any reason.

However, States Parties are still bound by their obligations up until the effective date of a denunciation. Thus, the picture of a rogue state seeking to retroactively avoid treaty obligations is simply false: denunciation is a forward-looking instrument.<sup>218</sup> Because of this, denunciation is a legitimate tool for reigning in wayward treaty bodies: if treaty implementation begins to exceed the bounds of reasonable interpretation, threats may be made warning of possible denunciation. If the treaty as applied begins to differ greatly from the treaty as negotiated, States Parties may seek to denounce future treaty obligations, while remaining faithful to previous obligations. In fact, this is exactly what States Parties on occasion do,<sup>219</sup> and a more widespread practice would help maintain the integrity of the human rights system.

## 3. States Parties may meet to discuss their treaty obligations

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216. Treaty bodies continually issue reports lamenting the scope and number of reservation by States Parties. This practice is questionable, but they rightly recognize that progress in this area is a matter of convincing States Parties to voluntarily withdraw their reservations. *See, e.g.*, Lijnzaad, *supra* note 124, at 367 (claiming that the discussion of the progressive elimination of reservations is within the scope of the CEDAW Committee mandate to monitor periodic reports of States Parties). In addition, treaties often bar reservations incompatible with the treaty as a whole: were a treaty body or a gathering of States Parties to determine a reservation so anathema to the treaty itself as to be rendered null in this way, the question becomes whether the States Party is or has ever been bound by the treaty or not.

217. CRPD, *supra* note 63, at art. 48; ICRMW, *supra* note 63, at art. 89; CRC, *supra* note 63, t art. 52; CAT, *supra* note 53, at art. 31; CERD, *supra* note 63, at art. 21.

218. "A state that withdraws in accordance with an exit provision does so lawfully and thus does not, in theory, suffer a reduction in its reputation for complying with international agreements." Timothy Meyer, *Power, Exit Costs, and Renegotiation in Int'l Law*, 51 HARV. INT'L. L.J. 379, 394-95 (2010).

219. *See* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005). Helfer finds over 1500 treaty denunciations from 1945-2004. He rightly notes that there are costs to exiting treaties, and to threats of exiting treaties, but these are practical considerations concerning a perfectly legal mechanism.

The third and perhaps most important way a State Party might seek to reassert its rights is in constructive dialogue with other States Parties. Many treaties, for example, contain provisions for negotiation and arbitration of inter-State interpretive disputes, yet none have taken advantage of this process.<sup>220</sup> More importantly, the CRPD contains a regular meeting of States Parties to “consider any matter with regard to the implementation” of it.<sup>221</sup> Other conventions contain no such explicit requirement, but States Parties, as the operative force behind the treaties, retain the right to meet when they choose. Nevertheless, it would be beneficial to amend the remaining treaties to include such an explicit *requirement*. As has been seen throughout this article, where States Parties abdicate their interpretive duties, they create a legal vacuum, which invites third parties to unduly influence the development of international human rights law.

In practice, however, there is greater controversy. As with any vested interests, there is a thicket of cocktail party opposition to overcome: jobs and informal networks built upon the illegitimate system are at risk. In fact, when the Russian Federation organized a bloc of States Parties to pass a resolution calling for reform of the treaty body system, the effort was resisted by a number of NGOs who drafted a response letter, demanding that the proposal by Russia not be brought to the General Assembly until the NGOs had their say.<sup>222</sup> Yet aside from self-motivated criticism, there is a real concern that States Parties, given too much leeway, will perpetually avoid binding international commitments.

This controversy should not dissuade reformers. Rather, it should imbue them with a greater sense of purpose. Balancing the need for a robust human rights treaty system with the rights of States Parties and fidelity to the textual mandates of treaty bodies is an ongoing process that States Parties should be involved with

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220. Banton, *supra* note 33, at at 73.

221. CRPD, *supra* note 63, at art. 40. The United Nations General Assembly has also urged States Parties to meet to address meeting their reporting obligations. G.A. Res. 49/178, ¶ 6, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/178 (Mar. 5, 1995). However, according to the CERD Chairperson, the States Parties have not effectively addressed their treaty obligations as these regular meetings. Banton, *supra* note 33, at 72-73. In order to prevent inter-state politics from taking over at such meetings, States Parties will need to explicitly set aside time and procedures to examine questions of treaty interpretation and implementation.

222. See Letter from Bjorn Pettersson, Dir., Int'l Service for Human Rights, to General Assembly (Jan. 18, 2012), *available at* <http://www.amnesty.org/es/library/asset/IOR40/001/2012/en/2268befd-db18-4a72-9180-82a27ad9481d/ior400012012en.pdf> (last visited Feb. 11, 2013).

regularly. Thus, we propose that States Parties should consider devoting more resources to active participation in the human rights dialogue, including by seriously assessing their interpretive role through dialogue with other States Parties and the amendment process.

*B. Proposal: Ethics Rules for Treaty Body Membership*

The community of experts available for nomination to human rights treaty bodies is remarkably insular: the same names come up again and again. As noted above, States Parties, particularly States Parties with less financial power, often rubber-stamp the reelection of experts.<sup>223</sup> Furthermore, the pool of experts on which to draw is rather small. As noted above, there is substantial cross-pollination between treaty body membership and the membership of lobbying groups and other major economic interests. Some of this is to be expected, even laudable, given the self-selection of interested experts: it takes a certain quality of spirit to devote one's life to protecting the innocent.

As treaty bodies have expanded beyond their mandates, they have become increasingly susceptible to powerful activists eager to promote their agendas. For example, while treaty body members hold four-year terms, Hanna Beate Schopp-Schilling was a member of CEDAW for almost twenty years.<sup>224</sup> In the quest to increase CEDAW's power, she called for "creative approaches" to treaty interpretation.<sup>225</sup> She identified such interpretation as the process of changing "norms," instead of doing a legal interpretation on the treaty text, as required by the VCLT.<sup>226</sup>

No treaty body has mandated ethics rules; however, the ICCPR does require that each member perform his or her functions "impartially and conscientiously,"<sup>227</sup> and the CMW and the CERD require their treaty body members to act with "impartiality."<sup>228</sup> The treaties also all require the treaty body members to be of high moral character or standing. Given the lobbying pressures on treaty body members, and the likelihood that these experts have affiliations with organizations advancing a particular agenda, treaty bodies could require their members to take an oath or to adhere to a code of ethics laid out in the rules of procedure. No

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223. See Morvai, *supra* note 38.

224. 1989-2008

225. Hanna Beate Schopp-Schilling, *Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination Against Women*, 7 HUMAN RIGHTS L. REV. 220 (2007).

226. *Id.*

227. ICCPR, *supra* note 62, at art. 38.

228. ICRMW, *supra* note 63, at art. 72(1)(b); CERD, *supra* note 63, at art. 8.

formal procedures exist to remove or discipline errant treaty body members. Having clear ethical requirements, perhaps also identifying conflicts of interest that would require recusal, could be a way to hold treaty body members morally accountable to their commitments in the treaty.<sup>229</sup>

### *C. Proposal: Treaty Bodies Follow Treaty Mandates*

To propose that treaty bodies remain faithful to their mandates seems circular and ineffectual. But treaty body members are professionals—moral agents who should be a real part of any reform effort. In addition to seeking greater legal acumen and democratic accountability, and in addition to suggesting a promise or oath of office, when treaty body members see the benefits of fidelity to their mandates, we are confident that they will be more inclined to cooperate. Listed here are some benefits that treaty body members should consider.

First, several nations have refused to sign onto human rights documents, and many of those that have done so also include reservations to the instruments. The OCHCR and other actors have lamented both facts. These same nations have often lamented the “imperialism” or “progressive” overreach of the treaty bodies.<sup>230</sup> By sticking to their mandates, treaty body members encourage greater support for the human rights system. States could have more confidence in the system if they knew novel interpretations would not be later imposed on them. Second, many have lamented the limited resources available to treaty bodies, and their insurmountable workload. Yet these concerns were addressed during the drafting process: the limited textual mandates of treaty bodies are designed to maintain a reasonable workload.<sup>231</sup> Third, as has been documented, the direct attacks on States Parties by treaty bodies—including pressure behind closed doors and specific comments—have created acrimony in a system that ought to be

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229. Recently, some States Parties have made similar recommendations. See Technical Consultation, *supra* note 7, at 18.

230. See, e.g., Christof Heyns & Frans Viljoen, *THE IMPACT OF UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* 43 (2002). Indeed, the very title of the book, implying that the multilateral human rights treaties are propriety to the “United Nations” helps to stymie a sense of ownership on the part of marginalized nations. Reinvigorated human rights practice by States Parties might have the additional benefit of human rights “buy-in.”

231. The chairperson of CEDAW has recommended limiting the page count of States Parties’ submissions. This suggestion does reduce workload, but it does nothing to address underlying structural problems, and in fact exacerbates mandate creep by forcing States Parties to squeeze first-order information into forms determined by the treaty body and preventing second-order objection on jurisdictional or other grounds. If a States Party has only five pages to talk about its CEDAW compliance, it has no room to object to illegitimate actions by the treaty body itself. See Technical Consultation, *supra* note 7, at 20.

collaborative and congenial. Treaty body members who remain faithful to their treaty mandates will likely find their recommendations treated with greater respect if they cooperate with States Parties to help them examine their human rights records.

## V. CONCLUSION

In ratifying each of the nine human rights treaties, States Parties agreed to a much narrower role for treaty bodies than treaty bodies occupy today. Broadly, treaty bodies were meant to review and comment upon the periodic compliance reports submitted voluntarily by States Parties and issue a summary of all the reports to the United Nations General Assembly. Subsequent Optional Protocols provided for certain adjudicative procedures, but the interpretive scope of decisions was essentially limited to the parties in dispute, and in no case was seen as authoritative or universal.

We have identified a number of reasons for why, as a descriptive matter, this might have happened. Since States Parties took a lax approach to interpreting treaties, the ideological and economic interests of a small group of self-selected experts captured the treaty bodies, and these bodies then expanded their activity to create rents. After explaining the resulting harms from this distortion of the treaty body system, we have provided some examples of how this might be remedied. Ultimately, the greater involvement of States Parties in bringing new blood into treaty bodies, and policing the interests of current panels, is essential. Additionally, ethics rules are particularly important because breaches of ethics rules provide flash points for public debate, shining light on practices that currently go on in the dark. Finally, treaty bodies themselves need to become aware of their limited mandates and must respect those limits to ensure the proper functioning of the treaty system.

While a comprehensive assessment of the role of treaty bodies will not occur overnight, we hope that we have contributed to the necessary dialogue. The need for reform is undeniable, not only because of illegal actions taken by treaty bodies, but also because the proper functioning of human rights treaty bodies is important for the health of the norms themselves. We are convinced that more active participation by States Parties in treaty interpretation, treaty body ethics rules, and greater respect for treaty body mandates, would strengthen the international human rights framework by legitimating the human rights norms

themselves and helping world peoples internalize their commitment thereto. Whatever one's position on the proper role of treaty bodies, these proposals, in principle, should be uncontroversial. As with any reform effort in international law, the devil is in the details:<sup>232</sup> nevertheless, the internal reform of the treaty body system is a critical subject, and worthy of future debate.

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232. It is true, for example, that the reassertion of the rights of States Parties runs up against the soft power of the treaty bodies themselves, that may stifle efforts with threats of funding removal and other adverse action taken in concert with the international legal regime.

<u>Treaty Body Overview</u>						
<u>Treaty</u>	<u>Entered into Force</u>	<u>Number of Members</u>	<u>Reports due every</u>	<u>General Comments?</u>	<u>States Parties May Denounce?</u>	<u>Interpretive Disputes Settled By</u> <sup>233</sup>
CERD	Jan. 4, 1969	18	2 years	No	Yes	Negotiation or referral to the ICJ (Art. 22)
ICCPR	Mar. 23, 1976	18	4 years	No	Yes	Unaddressed (reserved to States Parties)
ICESCR	Jan. 3, 1976	18	5 years	No	Yes	Unaddressed (reserved to States Parties)
CEDAW	Sept. 3, 1981	23	4 years	No	Yes	Negotiation, arbitration, or referral to the ICJ (Art. 29)
CAT	June 26, 1987	10	4 years	Yes, may make general comments "on the report"	Yes	Negotiation, arbitration, or referral to the ICJ (Art. 30)
CRC	Sept. 2, 1990	18	5 years	Yes, based upon Art. 44 and Art. 45 information	Yes	Unaddressed (reserved to States Parties)
CMW	July 1, 2003	14	5 years	No	Yes	Negotiation or arbitration (Art. 92)
CRPD	n/a	18	4 years	No	Yes	

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233. As a theoretical matter, all disputes must be settled with the unanimous consent of States Parties. In practice, States Parties manifest this unanimous consent with mechanisms internal to the treaty (amendment, arbitration, or referral to the ICJ here), or the ever-present right of freely contracting States Parties to withdraw or renegotiate