

## Hope for Human Rights: Why the UN General Assembly Must Address Treaty Body Overreach

By Stefano Gennarini, J.D.

### INTRODUCTION

The UN General Assembly has negotiated and approved ten human rights treaties since the UN system was founded seventy-five years ago. Each treaty establishes a “treaty body” or “monitoring committee” of between twelve and twenty-four experts, tasked by the terms of their respective treaty to monitor and report on the efforts of States to implement the treaties. These treaty bodies have been at the forefront of promoting abortion as a human right, LGBTQI+ rights, sexual autonomy for children, and other divisive policies, all under the rubric of human rights.

In 2020, the UN General Assembly will begin a review of the work of the ten treaty bodies—only the second time the General Assembly will have conducted such a review. The first treaty body reform process concluded in 2014, but it did not review the substantive output of UN treaty bodies, and it did not address first-order concerns about the treaty bodies’ working methods. This second round of UN treaty body reform cannot afford to make that same mistake.

Following are an introduction to UN treaty bodies, outlining the urgent need for reform in light of their original mandates, and some suggestions for the General Assembly process.



## Mandates and Influence of Treaty Bodies

The proper scope of treaty body action is governed by international law. Each UN human rights treaty body is established through a treaty negotiated and ratified by sovereign states. The scope of the mandate of each treaty body is defined in the relevant treaty.<sup>1</sup> Customary international law and the Vienna Convention on the Law of Treaties (“VCLT”) recognize that treaties derive their authority from the consent of the states that frame and ratify them.<sup>2</sup> Accordingly, it is the sovereign States that are party to the treaties and have the final authority to interpret treaties.

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The guiding principle of the interpretation of treaties is that they should be read in “good faith” and “in accordance with the ordinary meaning” of the terms contained in the treaty. The creation of treaty bodies did not displace this basic framework for interpreting international treaties. It is a fundamental tenet of international law and foreign relations that sovereign States themselves, individually and mutually, are the final interpreters of their obligations and commitments under international law and other international agreements. The only exception to this is where sovereign States cede their sovereignty to a third-party court or arbitration system to resolve disputes about the interpretation of their obligations. This is not the case with UN treaty bodies, where States have been careful not to cede any sovereignty to them.

Indeed, a plain reading of the treaties that establish human rights treaty bodies reveals that the framers did not intend to establish quasi-judicial bodies with the authority to impose their interpretation of the treaty on States party. The wording of the treaties is careful to avoid legal terms associated with courts such as “ruling” and “jurisprudence” in favor of descriptive terms like “views” and “recommendations,” precisely to avoid giving the impression that treaty bodies have any final authority to interpret treaties.

A textual reading of the human rights treaties reveals that treaty bodies were established with a limited mandate, and not all treaty bodies have identical mandates. The mandates of UN treaty bodies include receiving and recording reports of States party, honoring their requests to send delegations during the consideration of their periodic report, issuing summaries of the compliance of States party in treaty body annual reports, issuing collective, non-binding, and non-critical comments, suggestions, and recommendations based on the periodic reports of States party. This textual reading of the human rights treaties is confirmed by the intention of the States party

when the treaties were originally framed, upon their ratification, and confirmed by the praxis of the treaty bodies. Until the mid-1990s, the treaty bodies were wary of overstepping their mandates.

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The members of UN treaty bodies are appointed by States party to the treaties, according to the modalities established by the treaty, for four- or five-year terms. They are not compensated for their work on treaty bodies in order to preserve their independence. Their work can span anywhere from six to nine weeks per year. Since members of UN treaty bodies are not compensated, they rely heavily on the UN secretariat to carry out the bulk of their monitoring and reporting duties. Each UN treaty body is independent of the others, but all are serviced through the UN secretariat, specifically, the treaty body section of the Office of the High Commissioner for Human Rights (OHCHR).<sup>3</sup> The dependence of the UN treaty body system on the OHCHR is more pronounced when treaty body members are not legal experts but academics or activists, which is not uncommon. States party select members from a pool of candidates put forward by other states. There is no requirement that nations put forward legal experts, and they are free to put forward candidates whose expertise is based in activism, not in international law.

Over the last two decades, the OHCHR treaty body section and UN treaty bodies have frequently promoted their own work as “authoritative.” Throughout their reports and press communiques, they characterized their reports and recommendations as “jurisprudence.” This is a confusing term because in the common law tradition, it is used to describe binding judicial precedent. In fact, none of the recommendations of UN treaty bodies are binding on States or authoritative in and of themselves. However, because the UN secretariat and UN agencies rely on the output of UN treaty bodies to define human rights law for themselves internally, the influence of UN treaty bodies is not insignificant.<sup>4</sup> Moreover, treaty body views and recommendations are often treated by academia and human rights practitioners as authoritative.

Over the last two decades, national and international courts have also weighed in on the authority of treaty bodies. Courts in Mexico, Peru, and Chile have downplayed the authority of UN treaty bodies while discussing abortion in light of international law. In contrast, courts in Colombia, Argentina, and Brazil have cited UN treaty bodies as authoritative or at least persuasive sources of legal interpretation.<sup>5</sup> Significantly, the International Court of Justice is expected to weigh in on the authority of UN treaty bodies sooner rather than later. Some

scholars think the Court is likely to show deference to UN treaty bodies.<sup>6</sup>

## Treaty Body Overreach

The independence of treaty bodies is at the service of an authentic and rigorous interpretation of the treaties they monitor, as for example laid out in the interpretative canons in the Vienna Convention on the Law of Treaties. It is not a license to rewrite treaties that have taken years to negotiate through interpretations that impose new obligations that were never negotiated nor adopted by States.

### *Substantive Output of UN Treaty Bodies*

All too often treaty bodies issue recommendations in which they seek to impose new obligations on states, as in the case of recommendations telling States to permit abortion or liberalize their abortion laws, as well as recommendations to adopt new legislation and policies based on sexual orientation and gender identity. These recommendations are *ultra vires*, going beyond the legitimate scope of authority of UN treaty bodies, because they instruct States to adopt legislation and policies based on purported obligations that have no basis in the text of UN human rights treaties.

Overreach is pervasive in the UN treaty body system. It is well-documented that UN agencies and the UN secretariat are systematically working together with international abortion groups like the Center for Reproductive Rights and International Planned Parenthood Federation to read an obligation to permit abortion on demand as a human right into every UN treaty.<sup>7</sup> Similarly, UN treaty bodies are following the Yogyakarta Principles, a set of interpretative declarations about international human rights law that read specific rights into every UN human rights treaty on the basis of sexual orientation and gender identity. These range from sex education for children, to employment nondiscrimination on the basis of sexual orientation and gender identity, to same-sex marriage and adoption of children by same-sex couples.<sup>8</sup> All of these things are not only absent from the text of the UN human rights treaties themselves, but have also been rejected in the non-binding resolutions negotiated and adopted in the UN General Assembly.

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corruption and self-dealing. Activists and the lobby for these causes are powerful and well-funded. Many experts who sit on UN treaty bodies, moreover, have ties to their sphere of influence both professionally and personally. The General Assembly's UN treaty body reform process should investigate this further in order to ensure the independence and impartiality of the treaty bodies.

Abuses are made possible by expansive interpretations of the text of UN treaties by treaty bodies with the understanding that the treaties are not binding legal documents, but "living instruments." In order to promote a textualist interpretation of human rights in the OHCHR and throughout the UN system, Member States should require that UN experts, special procedures, and new personnel hired by the UN system, especially in the UN legal office and the OHCHR, espouse a text-based reading of human rights law based on the Vienna Convention on the Law of Treaties.

#### *Working Methods of UN Treaty Bodies*

Treaty bodies should be recognized as having authority only within the scope of the treaty mandate they received from the states party to their respective treaties. This is increasingly urgent in light of new activities by UN treaty bodies that are well beyond the scope of activities foreseen in the treaties that establish them.

The working methods of UN treaty bodies are entirely up to the bodies themselves according to the treaties that establish them. However, the working methods chosen by each treaty body must be in furtherance of the mandate of the treaty body.

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Some of the non-mandated activities of UN treaty bodies include issuing "Concluding Observations" on the reports of States party to the treaties whose implementation they monitor. There is nothing in the treaties themselves to suggest that after a state party reports on implementation of the treaty, it is up to the treaty body to issue a concluding sentence on the report. The concluding observations comment intrusively on internal legal and policy matters that are the exclusive province of domestic law.

Moreover, concluding observations are often based on shadow reports received from civil society in addition to the reports of States party. The treaties do not require such inputs. The entire process of the concluding observations, including the "list of questions" that treaty bodies send states ahead of their

reports, are non-mandated activities.

More worrisome, since 2014, several treaty bodies have begun what they call a “follow-up” process on their own recommendations, as if States party had an obligation to implement the “concluding observations” of UN treaty bodies.

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Both the concluding observations and any follow-up thereto are non-mandated activities that artificially aggrandize the authority of UN treaty bodies and should therefore be regarded with caution by States. As a matter of law, States party fulfill their reporting obligations by submitting their reports to the treaty bodies. Any discussion of the State party’s report thereafter through either concluding observations or any follow-up is voluntary and merely supplements the requirement of the treaty.

Treaty bodies have also taken up the custom of issuing lengthy, exhaustive, and abstract interpretations of particular aspects of the treaties they monitor through “general comments.” There is no provision in UN treaties for such general comments; the only general comments foreseen in UN treaties are based-on the report of States party to the treaty. Treaty bodies simply do not have the authority to issue generic legal commentaries applicable to all States. Such general comments usurp the authority of States party as the final interpreters of their own obligations under the treaties.

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It should be noted that the working methods the treaty bodies and the OHCHR have chosen have a large impact on the cost of the UN treaty body system overall and have contributed to both rising costs and the difficulties of UN treaty bodies in carrying out their mandated activities. For example, discussions on the general comments issued by UN treaty bodies are lengthy and costly affairs. They can go on for several sessions and require translations, consuming precious time and resources that could be dedicated to mandated treaty body tasks. The same is true of the concluding observations process.

In addition to these problematic working methods, UN treaty bodies interject unilaterally in UN negotiations through press releases from the OHCHR,<sup>9</sup> and they issue press releases to promote their own views and recommendations through the OHCHR.<sup>10</sup> They have even intervened in the internal affairs of states through the OHCHR in both domestic judicial and legislative controversies.<sup>11</sup>

Finally, there is less transparency surrounding the activities



of UN treaty bodies under the optional protocols of the treaties and the mechanisms they establish for individual communications. The treaty bodies and the OHCHR have complete control of the process of selecting which individual communications they will listen to—while thousands of communications remain unanswered or ignored. There is no accountability in this regard. This is especially concerning in light of the growing professional and personal ties between treaty body members and OHCHR staff with the organizations that bring some of the individual communications that are eventually heard by the treaty bodies. This is also an issue the General Assembly’s treaty body reform process should investigate further in order to ensure the independence and impartiality of the treaty bodies.

### Inadequacy of Previous Treaty Body Reform

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As UN member states begin to prepare for a second round of discussions about treaty body reform, they will have to evaluate all aspects of the work of UN treaty bodies, including their excesses and overreach.

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The General Assembly can decide what treaty body activities are within their mandate and instruct the OHCHR to support only those activities.

In April 2014, the General Assembly adopted a resolution on “strengthening and enhancing the effective functioning of the human rights treaty body system” (UN Document No. A/RES/68/268). The resolution followed a multi-year process of consultations and negotiations on how to address the backlog of UN treaty bodies in reviewing reports of states party. As a result of that first UN treaty body reform process, UN member states essentially bailed out the treaty bodies, without taking any action to rein in their excesses and overreach.

The reforms were largely based on an OHCHR report.<sup>12</sup> Member states expanded the resources available to UN treaty bodies and increased the range of activities of treaty bodies supported by the UN secretariat, including by making funds available for the dissemination of treaty body work products through the OHCHR. They also gave treaty bodies the option of adopting a streamlined common reporting mechanism to reduce the paperwork for states, which has been largely successful.

The 2014 resolution called on the 75<sup>th</sup> session of the General Assembly to revisit the topic of treaty body reform in 2020. As UN member states begin to prepare for a second round of discussions about treaty body reform, they will have to evaluate all aspects of the work of UN treaty bodies, including their excesses and overreach. As in 2013 and 2014, any reform or strengthening of the human rights treaty bodies should be directly overseen by UN member states—the principal stakeholders in the treaty body system. Only an inter-governmental process gives the treaty bodies’ work legitimacy.

During the first round of treaty body reform talks, States

objected to the General Assembly's scrutiny of the work of treaty bodies on the grounds that it would interfere with their independence. However, the General Assembly need not interfere with the independence of UN treaty bodies regarding their own working methods or substantive views and recommendations in order to reform UN treaty bodies. And the General Assembly can decide what treaty body activities are within their mandate and instruct the OHCHR to support only those activities.

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter," according to Article 10 of the UN Charter. Since the OHCHR treaty body section is a part of the secretariat, one of the organs established in the UN Charter, the General Assembly may set the parameters within which the UN secretariat may service the treaty bodies and establish mechanisms to protect the impartiality and independence of treaty bodies.

Here it must be emphasized that there is no inherent conflict between independence and accountability. It would be entirely consistent with the independence of UN treaty bodies to establish a mechanism whereby States might externally raise questions of—and even impugn—UN treaty body members to the Conference of States Party to the treaty they monitor, and the treaty bodies themselves, both individually and collectively. Far from undermining the independence of UN treaty bodies, such a mechanism, based on a code of conduct adopted by States, would enhance the independence and impartiality of the treaty bodies.

One thing is clear: another round of UN treaty body reforms that does not address the overreach of UN treaty bodies is a poor option. There should be no more increases of resources available to treaty bodies until such first-order concerns are addressed. It makes no sense to keep increasing the budget of UN treaty bodies without first reviewing their working methods in light of the treaties that establish them.

## Recommendations

The best means of protecting human rights is for sovereign states to have strong, responsive, and politically legitimate governments. An essential aspect of this sovereign power is the capacity to contract international obligations, as well as the power to interpret and to resolve disputes surrounding the interpretation of treaty obligations. To ascribe this power wholly

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to a politically unaccountable human rights system, dependent on the donations of powerful wealthy governments, erodes this essential aspect of sovereignty and can only harm the universal realization of authentic human rights.

The following are recommendations to States based on the mandate of UN treaty bodies and past UN treaty body reform efforts, with the goal of restoring legitimacy to the human rights treaty project:

- Adopt a treaty body code of conduct to hold experts accountable, including for political bias, conflict of interests, and other unethical practices, and institute a mechanism whereby States, UN agencies, civil society organizations, and individuals may raise questions and concerns about UN treaty body members based on the code of conduct, so that UN treaty bodies and the Conferences of States party may take action on such reports.
- Reform the OHCHR treaty body section to remove support and resources for “general comments” and “concluding observations.” Limit OHCHR support to communications between individual governments and the treaty body experts and logistical and technical support for the mandated activities of the committee under the treaties, including support for webcasts of treaty body sessions. But press releases from treaty body experts, and other non-mandated activities outside of the required activities of the treaty bodies under each UN treaty, should not be supported by the OHCHR. Consider other measures to limit OHCHR overreach.
- Promote a textualist interpretation of human rights in the OHCHR and throughout the UN system, moving the system away from the notion of UN treaties as “living instruments.” Require that UN experts, special procedures, and new personnel hired by the UN system, especially the UN legal office and the OHCHR, espouse a textualist understanding of human rights law based on the Vienna Convention on the Law of Treaties.

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When powerful governments and non-governmental organizations engage in coordinated efforts to manipulate internationally binding treaties, they reduce human rights to a zero-sum game.

When powerful governments and non-governmental organizations engage in coordinated efforts to manipulate internationally binding treaties, they reduce human rights to a zero-sum game, where political influence and power ultimately results in partisan gains. By increasing transparency and accountability, nations can help regain the legitimacy

of the UN human rights framework as a whole, which was set up not to serve the narrow interests of a few powerful countries. By engaging in reform that does not turn a blind eye to bureaucratic overreach, nations can return the UN human rights system to its purpose of upholding the dignity and worth of every human being.

## Endnotes

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- 4 See UN-Women, UNDP, UNODOC, and OHCHR, A Practitioner's Toolkit on Women's Access to Justice Programming (2018), a UN systemwide manual that instructs UN staff working to reform legal systems to lobby countries to "decriminalize" abortion and repeatedly cites UN treaty bodies' opinions that states must "ensure that sexual and reproductive health care" includes "safe abortion services" to achieve the Sustainable Development Goals, available at: <https://www.unwomen.org/en/digital-library/publications/2018/5/a-practitioners-toolkit-on-womens-access-to-justice-programming>. See also the use of treaty body General Comments by OHCHR to interpret the "SDG indicators under OHCHR's custodianship", available at <https://www.ohchr.org/EN/Issues/Indicators/Pages/SDGindicators.aspx>.
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- 10 OHCHR Press Releases can be accessed and researched at: <https://www.ohchr.org/EN/Issues/Pages/StatementsAndPR.aspx>.

- 11 See Joint UN Agency Press Release, UNODC, ONU Mujeres, UNFPA y ONU-DH México saludan decisión de la SCJN por la que se otorga el amparo a una mujer a quien le fue negado el servicio de salud para la interrupción del embarazo producto de una violación sexual, April 20, 2018, available at: <https://www.unodc.org/mexicoandcentralamerica/es/webstories/2018/unodc-onu-mujeres-unfpa-y-onudhmexico.html>; See also UN News, “Wrapping up visit, UN Rights Chief Urges El Salvador to Address Femicide and Abortion Ban,” 17 November 2017, available at: <https://news.un.org/en/story/2017/11/636552-wrapping-visit-un-rights-chief-urges-el-salvador-address-femicide-and-abortion>.
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