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What Went Wrong with the Human Rights System?

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INTRODUCTION

The recent formation of the U.S. Commission on Unalienable Rights is a positive sign in the United States. It shows that there is an increasing awareness that the UN human rights system has gone badly awry. Indeed, something has gone awfully wrong in international human rights discourse.

The Human Rights Committee, the oldest and most respected of the UN human rights treaty bodies, published a legal commentary this year that says women have a right to obtain an abortion based on the right to life in international law.[1] The UN special rapporteur on the sale of children published a report last year that says commercial surrogacy can be done in ways that does not constitute the sale of children.[2] UN officials routinely say that international law does not define the family and that every country can define the family for themselves.[3] These are just a few of the recent distortions of the understanding of human rights within multilateral institutions.

How did we get to this point and what can governments do to reform the human rights system? This Definitions paper is intended to give a brief analytical introduction and overview of the UN human rights system and how it functions to answer that question.

THE FORMATION OF THE UN HUMAN RIGHTS SYSTEM

The UN system has been an indispensable forum for the recognition and promotion of human rights since the end of World War II. After the war, sovereign States undertook painstaking and decades-long international negotiations of binding and non-binding international agreements about human rights, beginning with the Universal Declaration of Human Rights and continuing with the International Covenant on Civil and Political Rights and nine other human rights treaties addressing economic and social rights, protection from torture, and the rights of vulnerable or marginalized groups.

During the Cold War, the dominant debate about human rights was about the very nature of human rights and their origins. On one side, the United States promoted civil and political rights. On the other, the Soviet Union promoted economic and social rights. Each side was adamant about the priority of the rights they championed as a precondition for achieving all other human rights. As a result of this disagreement, UN treaties and negotiated political agreements to this day generally fuse together the civil rights tradition of the United States with the socialist tradition embraced by communist countries. The UN system has settled on the formulation that "all human rights are universal, indivisible and interdependent and interrelated."[4]

Two key pillars of the UN human rights system that emerged from the debates during the Cold War Period were UN treaty bodies that monitored the implementation of UN human rights treaties by States that had ratified them, and UN-appointed experts and other mandate holders who are assigned thematic or country-based human rights topics. The reports and interactions of UN member States with these two pillars of the human rights system became the fertile ground for debating new human rights concepts and expanding existing ones during the 1980s and 1990s. But these mechanisms still played a secondary role to the normative debates carried on by diplomats in intergovernmental negotiations that resulted in UN resolutions and treaties.

The work of States to build the UN human rights system reached a pivotal moment in the 1993 Vienna Conference on Human Rights, with the creation of the Office of the High Commissioner for Human Rights (OHCHR), that is, a permanent UN human rights bureaucracy to facilitate the work of treaty bodies and mandate holders, and facilitate their interaction with States.[5] Until then the main debate on human rights was about norms themselves, and what rights should

be promoted by the UN system. In 1993, States decided a permanent UN bureaucracy was needed to promote human rights and facilitate dialogue on human rights between States. The role and influence of the OHCHR has gradually expanded in the decades since that conference.

In 2006, the UN system founded the UN Human Rights Council.[6] The council continues the work of its predecessor body, the UN Human Rights Commission, as an important intergovernmental subsidiary of the General Assembly for discussions about human rights and for the establishment of UN human rights mandates. It also oversees the Universal Periodic Review, a rolling review of the human rights records of all UN member States. The Universal Periodic Review will be the subject of another Definitions paper. It is sufficient to stress here that the OHCHR is the essential actor in all these processes, setting the agenda and preserving institutional memory.

THE CORRUPTION OF THE HUMAN RIGHTS SYSTEM

It is a fundamental tenet of international law and foreign relations that it is ultimately Sovereign States themselves, individually and mutually, who are the final interpreters of their obligations and commitments under international law and in 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 in the UN human rights system, where States have been careful not to cede any sovereignty to UN human rights mechanisms.

The gradual expansion of the role of the Office of the High Commissioner for Human Rights (OHCHR), and its increasing influence within the UN system, is rapidly shifting the balance of legal authority within the UN human rights system from States to the UN bureaucracy.

Governments and even international agencies do not give much weight to the work product of UN committees and experts. They are only considered useful in so far as they facilitate reflection about human rights between States. The opinions of UN experts are not considered authoritative in and of themselves unless they are adopted by states. No reports issued by UN treaty bodies or UN mandate holders are normative, in any sense of the word.

This has begun to change in recent years, following the increasing importance that the Office of the High Commissioner for Human Rights has taken within the UN human rights system. The gradual expansion of the role of the OHCHR, and its increasing influence within the UN system, is rapidly shifting the balance of legal authority within the UN human rights

system from States to the UN bureaucracy.

UN treaty bodies and other mandate holders rely heavily on the technical capacity and expertise of the OHCHR staff. While OHCHR staff are paid for their work, the experts that make up the bodies and mandates work on an independent basis without remuneration. The OHCHR annual budget hovers around $500 million every year.[7] Moreover many States themselves are insolvent when it comes to their participation in the UN's human rights system. They rely on the financial support and technical assistance of OHCHR to sustain any involvement with human rights mechanisms at all, including to fulfill their human rights reporting obligations under human rights treaties.[8] They therefore inevitably look to OHCHR and OHCHR officials and staff as authorities on human rights.

More importantly, the OHCHR's work product both through treaty bodies and mandate holders, as well as its own publications, increasingly serves as the guiding authority on human rights for the entire UN system, including UN humanitarian operations and development work, which are worth nearly $50 billion each year combined.[9] Just about every UN normative guidance or programmatic effort relies on the interpretations of international law of the OHCHR, either through direct consultation or by citing the opinions of UN treaty bodies and other UN mandate holders who rely on OHCHR staff.[10]

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The OHCHR, the UN treaty bodies, and the special procedures themselves characterize their opinions as "authoritative."[11] They even call the views expressed in OHCHR publications "jurisprudence" and their views in individual communications "case law."[12]

The use of these terms is especially deceptive because it makes it seem as though the treaty bodies have the authority to make binding rulings on states, as if they were court in the common law tradition. This could not be further from the truth. The treaties that constitute the treaty bodies deliberately steer clear of any language that would suggest that treaty bodies have a quasi-judicial role. Rather, their role is considered more properly understood as an advisory and consultative one.[13]

The methodology underlying the legal interpretations published as official UN documents by the OHCHR does not follow the rigorous standards of academia or even official courts. There is no peer review process and there is no process of validation. The OHCHR and other UN agencies consider the views of

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a treaty body or other UN mandate holders as authoritative in and of themselves and cite them as if they were binding legal precedents. This simplistic methodology results in a constant stream of unverifiable new official publications and a fast-evolving network of legal resources that rely on pure bureaucratic power instead of the meticulous and diligent validation that academics and legal systems are normally characterized by.

THE POLITICIZATION OF HUMAN RIGHTS

The aggrandizement of the OHCHR, especially through the UN treaty bodies, mandate holders, and UN agencies, has been instrumentalized by donor governments and activists to promote discrete political agendas. Governments that fund the OHCHR earmark funds for pet projects and influence the opinions and hiring decisions of the OHCHR in this regard. The fact that nearly half of the OHCHR budget is made up of voluntary contributions by member states, as opposed to funds from the UN regular budget, increases the influence of OHCHR donors.[14] This has resulted in a gross normative imbalance that undermines the legitimacy of the human rights system, that some have criticized as a "neo-colonial" structure.

Nowhere is this more visible than in the case of the capture of UN treaty bodies by the international abortion industry and the governments who support it at UN headquarters. This process has been extensively documented by the Center for Family and Human Rights, and was definitively exposed in the seminal article, "Rights by Stealth" by Susan Yoshihara and Douglas Sylva, of the same institute.[15]

In recent times, a similar capture has taken place with the LGBT lobby. Until recently, the notions of "sexual orientation" and "gender identity" were entirely foreign in UN policy, and UN agencies were cautions in promoting so-called "LGBT rights" for fear of upsetting UN member states. The OHCHR and the treaty bodies began to promote the notion of "sexual orientation" as a category of non-discrimination under international law in the early 1990s under the guidance of the OHCHR. The OHCHR staff have since successfully shepherded this issue in every UN treaty body[16] and have had remarkable success in getting UN agencies to promote these notions through dedicated personnel in every UN agency.[17] This continues apace, even though "sexual orientation and gender identity" is an issue that continues to divide the UN General Assembly.[18] Furthermore no UN treaty can be fairly interpreted

to include any obligations related specifically to such notions.[19]

The opinions of UN committees and experts are not limited to abstract pronouncements. Increasingly, they are direct interventions of the OHCHR and UN agencies in national politics. Perhaps there is no other issue that is more frequently and consistently raised directly with countries as the issue of abortion. They avail themselves of the UN logo and the good will associated with it to exert undue influence in national debates.

In 2019, the UN Deputy High Commissioner for Human Rights, Kate Gilmore, launched a tirade against the United States' domestic abortion laws while attending a conference on Canadian soil, calling U.S. abortion laws "torture."[20] Just months before UN special mandate holders submitted testimony before the New York State legislature in support of New York's controversial Reproductive Health Act, which removed provisions in New York's penal code that protected children from infanticide.[21] In 2017, former High Commissioner for Human Rights, Prince Zeid Hussein of Jordan attacked El Salvador for its laws protecting children in the womb.[22]

In 2019 the UN Deputy High Commissioner for Human Rights, Kate Gilmore, launched a tirade against the United States' domestic abortion laws while attending a conference on Canadian soil, calling U.S. abortion laws "torture."

Even outside the interactions of states with treaty bodies based on the reporting protocols in UN treaties, the OHCHR, UN special procedures, and UN agencies routinely intervene in domestic debates about abortion. Several UN treaty bodies and UN special procedures frequently jointly issue press releases and official statements pressuring governments to change their abortion laws.[23] These are activities that are not mandated by the treaties that constitute UN treaty bodies or by the UN resolutions that govern the conduct of UN special procedures. They are exercises of raw bureaucratic power.

And UN Agencies and the OHCHR increasingly act in a coordinated manner to make such interventions, and it is increasingly high-level UN officials who make these interventions directly. In 2018 the OHCHR, the UN agency for women's issues (UN Women), and the UN agency for population control (UNFPA) intervened in a federal court dispute about abortion in Mexico, praising an activist judge and claiming that decriminalizing abortion was a human rights obligation.[24] This followed the publication of a UN-system wide manual on "access to justice" produced by the UN agency for women (UN Women) and the OHCHR and published as guidance for all UN personnel which cited the legal opinions of UN treaty bodies that government should allow abortion as if it were binding human rights law.[25]

WHAT CAN GOVERNMENTS DO TO REFORM THE HUMAN RIGHTS SYSTEM?

The most important way for governments to reform the human rights system is to hold UN officials and staff accountable to what is agreed in human rights resolutions and binding international law. This will require UN member states to emphasize the importance of respect for sovereignty, including by reigning in interference in internal politics by the UN system and maximizing the normative importance of UN consensual agreements and binding international law—instead of partisan political agendas that divide States—as guidance for the UN. In addition, States must create new political and administrative mechanisms to hold UN entities and officials accountable for overreach and abuse. Three steps can be helpful to conceptualize this task of UN reform.

The most important way for governments to reform the human rights system is to hold UN officials and staff accountable to what is agreed in human rights resolutions and binding international law.

First, States must insist that the UN system may only promote "internationally recognized" human rights. This is a technical term, used in UN agreements and U.S. law to refer to human rights that are recognized by consensus or in binding international law.[26]

Many countries still only accept the normative guidance on human rights issued by the General Assembly by consensus. Any notion that falls outside "internationally recognized human rights"—meaning, something consensually adopted by the UN General Assembly or in a binding internationally treaty—is not considered legitimate. This position has weakened in recent years, and countries who once were insistent on this terminology about "internationally recognized" human rights have been less adamant about it in recent years.[27] It is important to restore the notion of "internationally recognized human rights" in order to limit what can be considered a legitimate human right for purposes of UN policy and programming.

In order to do this, States must only create narrowly tailored new human rights mandates, and refine the existing mandates of the OHCHR, other mandate holders, and UN agencies, so that they exclude any ambiguity that gives OHCHR latitude to interpret international law broadly and to posture as a global authority on human rights independently of Sovereign States.

Secondly, governments must insist that OHCHR, treaty bodies and other mandate holders, only engage in mandate activities that are narrowly construed as per the normative guidance of the General Assembly and the UN Human Rights Council, and refrain from engaging in interference in the internal affairs of

States. This would exclude campaigns that are not authorized by the UN General Assembly, such as the OHCHR's Free and Equal Campaign, a global campaign of the OHCHR funded through earmarked funds to promote LGBT issues.[28]

As controversial as they are, the interventions of the UN system in the internal politics of States are defended by the UN secretariat. In a statement before the third committee of the UN General Assembly, former High Commissioner for Human Rights Prince Zeid Hussein even denied that such actions are interventions in the internal affairs of States.[29]

This is a controversial topic because interventions in the internal affairs of States are a violation of Article 2 of the UN Charter. It is a core principle of the multilateral system. Perhaps disingenuously, Zeid rationalized the interventions of the OHCHR and other human rights entities in internal political debates as merely persuasive and not coercive. He claimed therefore that they do not run afoul of Article 2 of the UN Charter. Ironically, just the week before his appearance before the third committee he had disparaged then-candidate for the U.S. presidency Donald Trump as "dangerous."[30]

Much has been made of foreign interference in the U.S. elections in 2016, but the interference of the UN in the elections and politics of many countries is entirely ignored.

Thirdly, States must expand existing accountability mechanisms and design new ones, both at the political and administrative level. The human rights system, like the UN system more broadly, is plagued by a chronic lack of oversight. There is no effective mechanism to remove UN officials even when they act in outrageous ways. Creating new accountability mechanisms is also essential to foster respect for sovereignty and restore democratic legitimacy in a system that is badly in need of an injection of credibility.

The UN system was once kept on the straight and narrow by the two power blocs of the Soviet Union on one side and the United States and Western Countries on the other. The fear of upsetting either side acted as an accountability mechanism that meant the UN system could never act in an excessively political way. In this way the UN system acted as important buffer in the Cold War period. This bolstered the legitimacy of and fostered good will towards the United Nations.

Since the collapse of the Soviet Union, there has been no accountability mechanism and the UN has simply become a vehicle of the powerful donor countries who keep the UN

system afloat. While this makes life easier for UN officials and staff, it also undermines the legitimacy of the UN system, which is more and more out of touch with the political and democratic realities of many countries.

The vehicle for these reforms would initially be UN resolutions and decisions. In this regard, the withdrawal of the U.S. from the UN Human Rights Council will be an obstacle to effective reform of the UN human rights system. Most of the mandates of the UN human rights system originate there. But it must branch beyond the UN.

One thing is for certain, the only way UN human rights reform can work, is if it respects and builds up sovereignty.

In addition to these measures, UN member states must also analyze incentive structures for UN and their own diplomatic staff, funding, and other aspects of the UN system. It is not uncommon for UN delegates to become “native” once they begin to work at UN headquarters. They no longer are able to represent the interests of their nations, and promote the bureaucratic agenda of the institution instead. It is common knowledge that some delegates will try and “buy” their way into a UN job when their assignment is coming to an end by changing their positions in UN negotiations and not representing their countries’ interest as vigorously as they should.

UN human rights reform is an urgent task. One thing is for certain: the only way UN human rights reform can work, is if it respects and builds up sovereignty. If the system is allowed to continue, as it has in recent years, to undermine sovereignty, and promote a political agenda under the guise of human rights, it will not just undermine human rights, it will undermine the UN system overall.

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