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## Treaty Bodies and the Interpretation of Human Rights

Kerstin Mechlem

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# Treaty Bodies and the Interpretation of Human Rights

*Kerstin Mechlem\**

## ABSTRACT

*The eight United Nations human rights treaty bodies play an important role in establishing the normative content of human rights and in giving concrete meaning to individual rights and state obligations. Unfortunately, their output often suffers from methodological weaknesses and lack of coherence and analytical rigor, which compromise its legitimacy.*

*This Article suggests that these deficits could in large part be addressed if the committees applied the customary legal rules of interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention), which requires attention to the text, context, and object and purpose of a treaty, in a much more systematic manner than currently practiced.*

*The argument will be made in three steps. After an Introduction (Part I), Part II provides the necessary background. It sets out the Vienna Convention rules of interpretation and provides an overview of the treaty bodies. It shows that despite their various functions, the treaty bodies are legal bodies that are well equipped to apply legal rules of interpretation. Part III suggests that the application of legal rules of interpretation is an obligation as much as a necessity. It makes two main arguments: The first is that the treaty bodies are bound to apply Articles 31 and 32 because of a formal reason—namely, because they interpret human rights treaties largely in lieu of states. As states would be bound by the Vienna Convention rules, the treaty bodies have to adhere to them as well. The second argument is a substantive one. As the treaty*

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bodies' output is nonbinding, its de facto legal force and impact depends on how convincingly and persuasively it is argued, which in turn is significantly shaped by the consistent use of an accepted and appropriate method. This sub-part will discuss the legal dimension of each of the treaty bodies' main activities and the role legal interpretation plays for each. It argues that when treaty bodies interpret rights and obligations under a treaty, the use of a legal method of interpretation is necessary to make their work comprehensible, rational, predictable, legitimate, reproducible, and faithful to the principles of legal certainty and the rule of law. Part IV serves to illustrate the relevance of the abstract argument made before by discussing in detail three examples from the work of the Committee on Economic, Social and Cultural Rights (CESCR): the CESCR's views on (1) the obligations of international organizations under the International Covenant on Economic, Social and Cultural Rights (ICESCR); (2) direct extraterritorial obligations; and (3) core obligations. In each example, one of the three requirements of Article 31 of the Vienna Convention—text, context, or object and purpose—has been neglected. Part IV demonstrates how such neglect has led to unconvincing results that have undermined the value, credibility, and usefulness of the work of the treaty bodies, thereby causing a possible weakening rather than strengthening of the human rights system. The Article closes with conclusions and recommendations developed from the analysis (Part V).

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## I. INTRODUCTION

The eight human rights treaty bodies or committees<sup>1</sup> fulfill a number of vital functions in the human rights system.<sup>2</sup> They supervise states parties' compliance with their obligations under a treaty, monitor progress, and provide public scrutiny on realization efforts. They assist states in assessing achievements and in identifying implementation gaps. They try to induce changes to the law, policy, and practice in member states and provide guidance on

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1. Committee on the Elimination of All Forms of Racial Discrimination (CERD), Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), and Committee on the Rights of Persons with Disabilities (CRPD). United Nations Office of the High Commissioner for Human Rights, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Feb. 23, 2009). There is also a Subcommittee on Prevention established under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. *Id.* A Committee on Enforced Disappearances (CED) will be established once the Convention on the Protection of All Persons from Enforced Disappearance enters into force. International Convention for the Protection of All Persons from Enforced Disappearance art. 26(1), Dec. 20, 2006, 14 IHRR 582, available at <http://www2.ohchr.org/english/law/disappearance-convention.htm#26> [hereinafter Convention Against Enforced Disappearance].

2. For recent works dealing with the human rights treaty body system, see U.N. Comm'n on Human Rights, *Final Report of the Independent Expert on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, U.N. Doc. E/CN.4/1997/74 (Mar. 27, 1997) (prepared by Philip Alston); THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford eds., 2000); INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER (G. Alfredsson et al. eds., 2001); THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY (Anne Bayefsky ed., 2000); THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS (Anne Bayefsky ed., 2001).

the measures needed to realize rights at the national level. They stimulate and inform national human rights dialogue. Some treaty bodies afford individual redress. The committees' rather technical and legal work complements the more politically driven activities of other human rights actors, notably the Human Rights Council. And finally, the committees interpret the treaties they supervise in order to discharge their mandate of monitoring states parties' implementation.<sup>3</sup> They thereby play an important role in establishing the normative content of human rights and in giving concrete meaning to individual rights and state obligations. This role extends beyond the parties to a treaty, promoting the general understanding of a particular right at the national and international level by states, NGOs, academia, and others.

Given the importance of the treaty bodies' interpretative output for the clarification and development of human rights law, including customary human rights law, it seems self-evident that the bodies' interpretations should be based on the coherent use of an appropriate and accepted method to make them rational and legitimate. The use of such a method distinguishes legitimate determinations of the meaning of a legal rule from arbitrary and random findings. Unfortunately, method does not always play a strong role in the treaty bodies, as recent General Comments by the Committee on Economic, Social and Cultural Rights (CESCR) show.<sup>4</sup> As part of an ongoing debate about the treaty bodies, commentators also regularly criticize a lack of substantial arguments, coherence, and analytical rigor; the absence of a visible concept of interpretations; and the existence of contradictory remarks by different committee members, which are caused by the absence of a principled approach.<sup>5</sup>

These deficits are typically attributed to the facts that the treaty bodies fulfill more varied functions than courts and are composed of multidisciplinary teams of experts instead of only legal practitioners. However, such deficits not only lower the prestige of the committees and make it easier for states and other actors to ignore their output, but also decrease their capacity to effectively carry out their functions. As the number of treaty bodies increases<sup>6</sup> and treaty bodies assume new functions—such as the CESCR, which is likely to

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3. See, e.g., Office of the High Commissioner for Human Rights [OHCHR], *In Larger Freedom: Towards Development, Security and Human Rights for All: Plan of Action Submitted by the United Nations High Commissioner for Human Rights*, Annex, ¶ 95, U.N. Doc A/59/2005/Add.3 (May 26, 2005).

4. See *infra* Part IV.

5. See, e.g., Roland Bank, *International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?*, 8 EUR. J. INT'L L. 613, 631–35 (1997).

6. See *infra* Part II.B.1.

be able to pronounce on violations in individual cases in the future<sup>7</sup>—addressing these challenges becomes more and more pressing.

This Article suggests that concerns could largely be addressed if the committees applied the customary legal rules of interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention), which requires attention to the text, context, and object and purpose of a treaty, in a much more systematic and coherent manner than currently practiced.<sup>8</sup> The Article argues that the application of Articles 31 and 32 of the Vienna Convention by the treaty bodies is both an obligation under international law and a substantive necessity to ensure that the treaty bodies have forceful impact and live up to their specific responsibilities. The Article focuses on the treaty bodies' role in interpreting the *rights* and *obligations* of their respective treaties and distinguishes this role from their wider mandate in policy matters. Adhering to Articles 31 and 32 Vienna Convention does not exclude economic, social, developmental, and other considerations.

The argument will be made in three steps. Part II provides the necessary background, setting out the Vienna Convention rules of interpretation and providing an overview of the treaty bodies. It shows that despite their various functions, the treaty bodies are legal bodies well equipped to apply legal rules of interpretation. Part III suggests that the application of legal rules of interpretation is an obligation as much as a necessity. This Part offers two main arguments. First, the treaty bodies are bound to apply Articles 31 and 32 because of a formal reason, namely because they interpret human rights treaties largely in lieu of states—the states would be bound by the Vienna rules, so the treaty bodies have to adhere to them as well. The second argument is a substantive one. Because the treaty bodies' output is nonbinding, its *de facto* legal force and impact depends on how convincingly and persuasively it is argued, which in turn is largely shaped by the consistent use of an accepted and appropriate method. This sub-part discusses the legal dimension of each of the treaty bodies' main activities and the role of legal interpretation for each. It mainly argues that when treaty bodies

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7. On June 18, 2008 the Human Rights Council adopted by consensus an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and recommended that the General Assembly adopt and open it for signature, ratification and accession in March 2009. U.N. Human Rights Council Res. 8/2, at 2, U.N. Doc. A/HRC/RES/8/2 (June 18, 2008), available at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_8\\_2.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf). On December 10, 2008, the General Assembly adopted the Optional Protocol to the ICESCR and recommended that it be opened for signature at a signing ceremony to be held in 2009. G.A. Res 63/117, U.N. Doc. A/RES/63/117 (Dec. 18, 2008).

8. Vienna Convention on the Law of Treaties, May 23, 1969, S. EXEC. DOC. L, 92-1 (1970), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

interpret *rights* and *obligations* under a treaty, use of a legal method of interpretation is necessary to make their work comprehensible, rational, predictable, legitimate, and reproducible, and to do justice to the principles of legal certainty and of the rule of law. Part IV serves to illustrate the relevance of the abstract argument by discussing in detail three examples from the work of the CESCR: the CESCR's views on (1) the obligations of international organizations under the International Covenant on Economic, Social and Cultural Rights (ICESCR); (2) direct extraterritorial obligations; and (3) core obligations. In each example one of the three requirements of Article 31 of the Vienna Convention—text, context, or object and purpose—has been neglected. Part IV demonstrates how such neglect has led to unconvincing results that have undermined the value, credibility and usefulness of the work of treaty bodies, thereby causing a possible weakening rather than strengthening of the human rights system. The study of the three examples underscores the need for the coherent application of the method prescribed by Articles 31 and 32 of the Vienna Convention. Part IV also suggests how the CESCR could have addressed the same topics in a more legally convincing way without compromising the legitimacy of its interpretations. The Article closes with conclusions and recommendations developed from the analysis (Part V).

## II. BACKGROUND

### A. *Rules of Interpretation Under the Vienna Convention*

The rules of customary international law codified in Articles 31 and 32 of the Vienna Convention<sup>9</sup> provide the starting point for the

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#### 9. *Article 31 General Rule of Interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

interpretation of treaties under international law.<sup>10</sup> Article 31(1) contains the basic rule of interpretation. It establishes that a treaty shall be interpreted in good faith and that the ordinary meaning of its terms, its context,<sup>11</sup> and its object and purpose are the three relevant factors of interpretation. Text, context, and object and purpose must be viewed together, and none may be given greater weight than the others.<sup>12</sup>

The ordinary meaning of a treaty text is the logical starting point for interpretation. The ordinary meaning must be considered together with the context, the object, and the purpose of the treaty.<sup>13</sup> "Context" refers to material related to the conclusion of the treaty, according to Article 31(2).<sup>14</sup> Also, as per Article 31(3), subsequent agreements regarding the interpretation of a treaty or the application of its provisions, subsequent practice in the application, and any relevant rules of international law applicable in the relations between the parties shall be taken into account together with the context.<sup>15</sup>

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32 Supplementary means of interpretation*

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.

Vienna Convention, *supra* note 8, arts. 31–32.

10. Case Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 4, ¶ 41 (Feb. 3); ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 186 (2000); Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention of Human Rights*, 42 *GERMAN Y.B. INT'L L* 11, 13 (1999); Rudolf Bernhardt, *Interpretation in International Law*, in 2 *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* 1416 (Rudolf Bernhardt ed., 1995) (providing an extensive bibliography); *cf.* *Golder v. UK*, 18 *Eur. Ct. H.R. (ser. A)* at 14, § 29 (1975) (stating that articles 31 and 32 provide "generally accepted principles of international law"). All human rights bodies apply articles 31 and 32 of the Vienna Convention. See FLORIAN REINDEL, *AUSLEGUNG MENSCHENRECHTLICHER VERTRÄGE AM BEISPIEL DER SPRUCHPRAXIS DES UN-MENSCHENRECHTSAUSSCHUSSES, DES EUROPÄISCHEN UND DES INTERAMERIKANISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE* [THE INTERPRETATION OF HUMAN RIGHTS TREATIES IN THE JURISPRUDENCE OF THE UN HUMAN RIGHTS COMMITTEE, THE EUROPEAN COURT OF HUMAN RIGHTS, AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS] (1995). On the law of treaties in general, see AUST, *supra*; T.O. ELIAS, *THE MODERN LAW OF TREATIES* (1974).

11. Vienna Convention, *supra* note 8, art. 31(2).

12. AUST, *supra* note 10, at 185.

13. Vienna Convention, *supra* note 8, art. 31(1).

14. *Id.* art. 31(2)(a).

15. *Id.* art. 31(3).

As discussed below, the treaty bodies and states parties jointly generate subsequent practice. The third element is the object and purpose of the treaty. This element requires seeking the interpretation that is most appropriate in order to realize the aims and achieve the object of a treaty, rather than that which would restrict to the greatest possible degree the obligations of the parties.<sup>16</sup> The overarching object and purpose of human rights treaties is the protection of the rights of individuals, although certain other values, such as the security and integrity of the state, are safeguarded through derogation and limitation clauses.<sup>17</sup> Unlike other treaties in international law, human rights treaties are not concluded to accomplish a reciprocal exchange of rights for the mutual benefit of the parties to a convention<sup>18</sup> but are geared toward third-party beneficiaries.<sup>19</sup> This special characteristic requires that these treaties are interpreted in a manner sufficiently favorable to the effective protection of individual rights.<sup>20</sup>

Article 32 adds that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty

16. *Wemhoff v. Federal Republic of Germany*, 1 Eur. Ct. H.R. (ser. A) 55, 75 (1968).

17. See, e.g., International Covenant on Economic, Social and Cultural Rights, pmbl., 993 U.N.T.S. 3 (Dec. 16, 1966) [hereinafter ICESCR] (“[I]n accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”); Fionnuala Ní Aoláin, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT’L L.J. 101, 107 (1995) (describing how human rights conventions recognize threats to stability and order by providing derogation clauses).

18. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, Inter-Am. C.H.R. (ser. A) No. 2, ¶ 29 (Sept. 24, 1982); *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83, Inter-Am. C.H.R. (ser. A), No. 3, ¶ 50 (Sept. 8, 1983).

19. There is, however, also a common interest of states in the contribution that human rights make to freedom, justice and peace in the world as well as to peaceful and friendly relations among nations. U.N. Charter art. 55; International Covenant on Civil and Political Rights, pmbl., S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR]; ICESCR, *supra* note 17, pmbl.; Universal Declaration of Human Rights, pmbl., G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 183rd plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

20. Cf. MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 3 (1995) (noting that terms of a human rights treaty should be interpreted such that they are favorable to the individual, with limitations and restrictions interpreted narrowly). This approach is sometimes called a “teleological approach.” D. MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE—ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 159 (1991); Philip Alston & Gerald Quinn, *The Nature and Scope of States Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 161 (1987). This is somewhat misleading as it is not a separate method of interpretation but the application of the obligation to take the object and purpose of a treaty into account.

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 leaves the meaning ambiguous, obscure, or leads to a result that is manifestly absurd or unreasonable.<sup>21</sup> Article 32 also assigns a supplementary role to the *travaux préparatoires*, although in practice they remain very relevant.<sup>22</sup>

The application of the method of interpretation set out in Articles 31 and 32 provides significant flexibility. Indeed, it has been aptly stated that the interpretation of legal documents is to some extent an art, not an exact science.<sup>23</sup> The method thereby provides a suitable and flexible framework to assess whichever questions the human rights committees are confronted with. At the same time, it provides sufficient guidance to lead to legitimate interpretative results and to enable the development of a coherent body of committee jurisprudence.

### B. Treaty Bodies as Legal Bodies

Compared with the political bodies of the human rights system, on which states are represented, the treaty bodies are, also according to their chairpersons,<sup>24</sup> “legal bodies”<sup>25</sup> staffed by independent and impartial experts<sup>26</sup> who engage in “norm-to-fact decision making” with limited discretion, as they are bound by the terms of the treaty they apply.<sup>27</sup> Members of treaty bodies have characterised their work as “legal examinations.”<sup>28</sup> This fact is underscored by the fact that three treaties—the ICCPR, the Convention Against Torture, and the Convention Against Enforced Disappearances—explicitly require interpreting bodies to give consideration to the “usefulness of the

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21. Vienna Convention, *supra* note 8, art. 32.

22. AUST, *supra* note 10, at 197.

23. *Report of the Int'l Law Comm. on the Work of Its 16th Session*, U.N. GAOR, 19th Sess., Supp. at 200, U.N. Doc. A/CN.4/173 (July 11, 1964), available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_173.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_173.pdf) (“The interpretation of documents is to some extent an art, not an exact science.”).

24. The Secretary-General, *Report of the Chairpersons of the Human Rights Treaty Bodies on Their Nineteenth Meeting*, Annex, ¶ 8, submitted to the General Assembly, UN Doc. A/62/224 (Aug. 13, 2007).

25. Henry Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, *supra* note 2, at 15, 49.

26. *Id.*

27. See *id.* for further differences between the political bodies of the human rights system and the treaty bodies.

28. Rosalyn Higgins, *Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting*, 6 EUR. HUM. RTS. L. REV. 570, 580 (1996).

participation of some persons having legal experience.”<sup>29</sup> As will be shown, the treaty bodies are well equipped to apply legal rules of interpretation.

## 1. Overview of the Treaty Bodies

There are currently eight treaty bodies in the UN human rights system: the Committee on the Elimination of Racial Discrimination (CERD) for the International Convention on the Elimination of Racial Discrimination; the Human Rights Committee (HRC) for the International Covenant on Civil and Political Rights (ICCPR); the CESCR; the Committee on the Elimination of Discrimination Against Women (CEDAW) for the Convention on the Elimination of All Forms of Discrimination Against Women; the Committee Against Torture (CAT) for the Convention Against Torture; the Committee on the Rights of the Child (CRC) for the Convention on the Rights of the Child; the Committee on Migrant Workers (CMW) for the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the recently established Committee on the Rights of Persons with Disabilities (CRPD) for the Convention on the Rights of Persons with Disabilities.<sup>30</sup> Another committee, the Committee on Enforced Disappearances (CED), will be established once the Convention for the Protection of All Persons from Enforced Disappearance enters into force.<sup>31</sup> In addition, there is a Subcommittee on Prevention established under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>32</sup>

Other than the CESCR, all treaty bodies are or will be created in accordance with the provisions of the treaties they monitor. The CESCR was established by ECOSOC, as the ICESCR does not provide for a treaty body to monitor compliance with its provisions.<sup>33</sup>

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29. ICCPR, *supra* note 19, art. 28(2); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 17(1), S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (Dec. 10, 1984), available at <http://www2.ohchr.org/english/law/cat.htm#part2> [hereinafter Convention Against Torture]; Convention Against Enforced Disappearance, *supra* note 1, art. 26(1).

30. See United Nations Office of the High Commissioner for Human Rights, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Feb. 23, 2009).

31. Convention Against Enforced Disappearance, *supra* note 1, art. 26(1).

32. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 18, 2002, G.A. Res. 57/199, U.N. Doc. A/RES/57/199, available at <http://www2.ohchr.org/english/law/cat-one.htm>.

33. For a detailed account of the background to the CESCR's establishment, see CRAVEN, *supra* note 20, at 35; Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social, and Cultural Rights*, 9

As a subsidiary organ of ECOSOC, the CESCR reports to its parent body and is a United Nations organ.<sup>34</sup> It is, however, independent and impartial and has, like the other treaty bodies, experts as members.

Membership of the treaty bodies varies between 10 (CAT, CRC, CMW, and CED) and 23 (CEDAW) members, with the CRPD (12–18 members), the CERD, the HRC, and the CESCR (18 members each) taking a middle position.<sup>35</sup> States nominate their own nationals,<sup>36</sup> and members are elected by the parties to a treaty, except in the case of the CESCR, whose members are elected by ECOSOC.<sup>37</sup> Members serve in their personal capacity; i.e., they are neither representing their states nor following government instructions but serve as independent experts. Nonetheless, some members hold government offices to which they return outside sessions, which may cast a shadow of doubt on their full independence.

The criteria for the composition of the treaty bodies are established by the text of each treaty, and, in the case of the CESCR, by the ECOSOC Resolution. Whereas there are some variations in language, typical requirements are high moral standing and recognized competence in the field of human rights<sup>38</sup> or the specific

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HUM. RTS. Q. 332, 335–49 (1987). When the ICESCR entered into force on January 3, 1976, no supervision system was in place. In arts. 16–22 the ICESCR provides only for a rather obscure reporting procedure that leaves many questions open as to the exact nature, purpose, and manner of the supervision foreseen. ICESCR, *supra* note 17, arts. 16–22. ECOSOC therefore had to develop arrangements to ensure effective supervision. It established first a Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights. U.N. Econ. & Social Council [ECOSOC] Decision 1978/10 (May 3, 1978). It was later renamed the “Sessional Working Group of Governmental Experts” and was replaced by a committee of independent experts (the CESCR) in 1985. U.N. Econ. & Social Council [ECOSOC] Res. 1985/17, at 1, U.N. Doc. E/1985/85 (May 28, 1985), available at <http://ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1985-17.doc>. The Sessional Working Group was renamed the Committee on Economic, Social and Cultural Rights. *Id.* Its procedures and methods of work have remained in force. *Id.* at 3.

34. Alston, *supra* note 33, at 350.

35. On the requirements for membership in the treaty bodies, see Craig Scott, *Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 2, at 403.

36. This is a requirement under all treaties except the ICESCR, where it has nevertheless become practice. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination art. 8(2), Dec. 21, 1965, 660 U.N.T.S. 195, available at <http://www2.ohchr.org/english/law/cerd.htm>.

37. ECOSOC Res. 1985/17, *supra* note 33, at 2.

38. See Convention Against Torture, *supra* note 29, art. 17(1); Convention Against Enforced Disappearance, *supra* note 1, art. 26(1); cf. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 36, art. 8(1) (requiring only high moral standing); ICCPR, *supra* note 19, art. 28(2); ECOSOC Res. 1985/17, *supra* note 33, at 1 (requiring only competence in the field of human rights).

subject-matter of the respective treaty.<sup>39</sup> Other criteria to be taken into account in the election process are equitable geographical distribution<sup>40</sup> and the representation of different forms of civilization<sup>41</sup> and of the principal legal systems.<sup>42</sup> The ECOSOC Resolution also requires different forms of social systems,<sup>43</sup> and the Convention on Persons with Disabilities and the Convention on Enforced Disappearances mention gender balance.<sup>44</sup> In addition, the ICCPR, the Convention Against Torture, and the Convention for the Protection of All Persons from Enforced Disappearance explicitly refer to the participation of legal experts.<sup>45</sup>

39. Convention on the Rights of Persons with Disabilities art. 34(3), Dec. 13, 2006, 46 I.L.M. 443, *available at* <http://www2.ohchr.org/english/law/disabilities-convention.htm>; International Convention on the Protection of All Migrant Workers and Members of Their Families art. 72(1), Dec. 18, 1990, 30 I.L.M. 1517, *available at* <http://www2.ohchr.org/english/law/cmw.htm#p7> [hereinafter CMW]; Convention on the Rights of the Child art. 43(2), Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www2.ohchr.org/english/law/crc.htm>; Convention on the Elimination of All Forms of Discrimination Against Women art. 17(1), Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www2.ohchr.org/english/law/cedaw.htm>.

40. Convention Against Enforced Disappearance, *supra* note 1, art. 26(1); Convention on the Rights of Persons with Disabilities, *supra* note 39, art. 34(4); Convention on the Rights of the Child, *supra* note 39, art. 43(2); Convention Against Torture, *supra* note 29, art. 17(1); Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 39, art. 17(1); ICCPR, *supra* note 19, art. 31(2); International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 36, art. 8(1); ECOSOC Res. 1985/17, *supra* note 33, at 2; *see also* CMW, *supra* note 39, art. 72(2) (“[I]ncluding both States of origin and States of employment.”).

41. Convention on the Rights of Persons with Disabilities, *supra* note 39, art. 34(4); Convention on the Elimination of All Forms of Discrimination Against Women *supra* note 39, art. 17(1); ICCPR, *supra* note 19, art. 31(2); International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 36, art. 8(1).

42. Convention on the Rights of Persons with Disabilities, *supra* note 36, art. 34(4); CMW, *supra* note 36, art. 72(2); Convention on the Rights of the Child, *supra* note 39, art. 43(2); Convention on the Elimination of All Forms of Discrimination Against Women *supra* note 39, art. 17(1); ICCPR, *supra* note 19, art. 31(2); International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 36, art. 8(1); *see also* ECOSOC Res. 1985/17, *supra* note 33, at 2 (taking into account “different forms of legal systems”). The formulations are similar to the one of the Statute of the International Court of Justice, which makes “representation of the main forms of civilisation and of principal legal systems of the world” a criterion in elections to the Court. Statute of the International Court of Justice art. 9, June 26, 1945, 59 Stat. 1060, 3 Bevans 1179.

43. ECOSOC Res. 1985/17, *supra* note 33, at 2.

44. Convention Against Enforced Disappearance, *supra* note 1, art. 26(1); Convention on the Rights of Persons with Disabilities, *supra* note 39, art. 34(4). The Convention on the Rights of Persons with Disabilities adds to involve people with disabilities.

45. Convention Against Enforced Disappearance, *supra* note 1, art. 26(1); Convention Against Torture, *supra* note 26, art. 17(1); ICCPR, *supra* note 19, art. 31(2).

## 2. The Representation of Legal Expertise on the Committees

As a matter of fact, a large number of the members of almost all the treaty bodies have a legal background. Traditionally, the body most dominated by lawyers has been the HRC, and currently all members of the HRC but one have a legal background.<sup>46</sup> Lawyers have also dominated the CAT, where at present 7 out of 10 members are lawyers.<sup>47</sup> In the CESCR there are typically fewer members with a legal background—currently, 12 out of its 18 members fall into that category.<sup>48</sup> Only about half of the members of the CEDAW are lawyers, and, as a result of the first elections to the CERD, lawyers were even in a minority—out of the 18 members, 10 were serving diplomats, one was a retired diplomat, 4 were law professors, and 3 judges.<sup>49</sup> This low representation has since changed: currently 12 out of the 18 members have a legal background.<sup>50</sup>

The singling out of the legal profession and its strong representation on the treaty bodies has met with different responses. Scott suggests that the focus on the need for representation of the legal profession was based on the assumption that law is the most relevant discipline for the treaty bodies and criticizes this practice as elevating one discipline above all others.<sup>51</sup> He adds that although the Convention Against Torture refers only to the need to consider including “some persons having legal experience,”<sup>52</sup> this reference has resulted in priority being given to lawyers in the nomination and election process.<sup>53</sup> Byrnes, referring to CEDAW, welcomes the professional diversity on the Committee as having been valuable in

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46. See Human Rights Committee Members, <http://www2.ohchr.org/english/bodies/hrc/members.htm> (last visited Feb. 23, 2009) (listing the curricula vitae of individual members).

47. See Committee Against Torture—Membership, <http://www2.ohchr.org/english/bodies/cat/members.htm> (last visited Feb. 23, 2009) (listing the curricula vitae of individual members).

48. See Election of the Members of the Committee on Economic, Social and Cultural Rights to Replace Those Whose Terms Are Due to Expire on 31 December 2008, <http://www2.ohchr.org/english/bodies/cescr/elections.htm> (last visited Feb. 23, 2009) (listing the curricula vitae of individual members). No information was available on the background of one member: Mr Yuri Kolovsov.

49. Michael Banton, *Decision-Taking in the Committee on the Elimination of Racial Discrimination*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 2, at 55.

50. See generally Committee on the Elimination of Racial Discrimination—Members, <http://www2.ohchr.org/english/bodies/cerd/members.htm> (last visited Feb. 23, 2009) (listing the curricula vitae of individual members).

51. Scott, *supra* note 35, at 418.

52. Convention Against Torture, *supra* note 29, art. 17(1) (emphasis added).

53. Scott, *supra* note 35, at 418.

the areas of economic and social rights and development.<sup>54</sup> Craven, speaking about one of the early sessions of the CESCR, points out a “need for wider knowledge particularly as regards the rights to food, clothing and housing” and has criticized the (no longer relevant) fact that the vast majority of the members of the CESCR at that time had a legal background.<sup>55</sup> In contrast with Craven’s view on the CESCR, the predominance of lawyers on the HRC has been criticized very little.<sup>56</sup> The stark difference in legal representation among the members of the HRC and the CESCR is noteworthy (17 out of 18 versus 11 out of 18), which may indicate a lingering perception that economic, social, and cultural rights have less of a true legal character than civil and political rights. Likewise, it seems that the monitoring of civil and political rights is regarded as a distinctly legal task, whereas this is less so the case for the supervision of states’ compliance with economic, social, and cultural rights. As the CESCR serves the same legal functions as the HRC, such a distinction cannot be supported rationally.

Given the unique and diverse functions of treaty bodies, their interdisciplinary composition of lawyers, economists, and political and social scientists is beneficial for the understanding of the human rights treaties, since such treaties typically involve an assessment of laws, policies, and administrative practices of states that requires expertise broader than legal knowledge. The fact that some of the treaties nonetheless specifically mention the inclusion of lawyers indicates that the law and legal methods of interpretation have, however, a particularly important role to play in the work of the committees. This is confirmed by the overwhelmingly strong representation of lawyers on the treaty bodies as compared with other professions, which enables those bodies very well to apply legal rules of interpretation. The challenge is to maximize the benefits derived from using different areas of expertise and to combine a distinctly legal approach to the interpretation of *rights* and *obligations* with other approaches when developing *policy recommendations* based on the technical knowledge of committee members in specific areas.

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54. Andrew Byrnes, *The “Other” Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT’L L. 1, 9 (1989).

55. CRAVEN, *supra* note 20, at 46.

56. Scott, *supra* note 35, at 419–20.

### III. THE RELEVANCE OF LEGAL RULES OF INTERPRETATION FOR THE WORK OF THE TREATY BODIES

#### A. *An Obligation: Treaty Bodies Interpreting in lieu of States Parties*

The interpretation rules of customary international law laid down in Articles 31 and 32 of the Vienna Convention apply to human rights treaties as much as they apply to other international law treaties.

Typically, states parties interpret a treaty themselves, since the existence of monitoring mechanisms with interpretative powers is the exception rather than the rule in international law.<sup>57</sup> Relying on the parties alone would, however, be problematic in the case of human rights treaties. Because these instruments impose obligations on states that have to be fulfilled vis-à-vis individuals as third-party beneficiaries, states would have an obvious interest in interpreting them restrictively in order to retain more liberty in domestic policy making and ease the burden imposed upon them. In addition, the lack of inter-state complaints shows that states are reluctant to meddle in the human rights affairs of other parties or to accuse them of human rights violations.<sup>58</sup> A system of interpretation and compliance monitoring *inter se* is hence insufficient for human rights treaties. Therefore, the human rights treaty bodies have been created in order to ensure an independent supervisory process and to build specialized knowledge among a group of independent experts. The responsibility for determining how rights can be realized and whether or not states have fulfilled their obligations rests primarily with the treaty bodies rather than with the states parties.<sup>59</sup> The treaty bodies hence assume to a large extent, among other roles, the interpretative role that is normally played by states. As they act largely in lieu of states, they are bound to the same extent as states by the rules of interpretation by which states would be bound. Regular references to the Vienna Convention by the treaty bodies indicate that they recognize the relevance of this instrument to their work.<sup>60</sup>

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57. See *infra* Part III.B.1 (discussing the monitoring functions performed by the treaty bodies).

58. Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 1, 8 (Rudolf Bernhardt & John Anthony Jolowicz eds., 1985).

59. Alston & Quinn, *supra* note 20, at 163 (referring to the ICESCR). For the ICESCR, Craven points out that states have also only rarely made direct statements regarding the meaning of its provisions. CRAVEN, *supra* note 20, at 91.

60. See U.N. Comm. on the Rights of the Child, *General Comment No. 6*, ¶ 14, CRC/GC/2005/6 (Sept. 1, 2005) (referencing art. 27 of the Vienna Convention); U.N. Comm. on the Rights of the Child, *General Comment No. 5*, ¶¶ 14–15, 20 CRC/GC/2003/5 (Oct. 3, 2003) (referencing arts. 2, 19, 27 of the Vienna Convention);

As the treaty bodies are the main interpreters of human rights treaties, through their output they are also the principal generators of "subsequent practice" in the sense of Article 31(3)(b) of the Vienna Convention, which can be used in interpretation together with the context of a treaty.<sup>61</sup> Given the special role of the committees as compared with other multilateral treaties, it would be inappropriate to limit "practice" to subsequent *state* practice alone.<sup>62</sup>

The role of states cannot, however, be completely ignored in the process of interpreting a human rights treaty. It has been argued, for instance, that states' responses to the treaty bodies' work, including their General Comments,<sup>63</sup> establish subsequent practice in the sense of Article 31(3)(b).<sup>64</sup> A significant degree of concurrence in state practice has been taken as an indication of agreement by states regarding a particular interpretation of a right.<sup>65</sup> Subsequent practice has been understood as states' realizations of rights and their participation in the supervisory mechanisms,<sup>66</sup> where they have the opportunity to express their views on the interpretation of a treaty by a committee. In practice, states rarely put forward their own interpretations of specific rights. They typically base their reports on the interpretations offered by the treaty bodies in General Comments, the reporting guidelines, and the questions provided to

CESCR, *General Comment No. 9*, ¶ 3, E/C.12/1998/24 (Dec. 3, 1998) (referencing art. 27 of the Vienna Convention); U.N. Human Rights Comm., *General Comment No. 31*, ¶¶ 3–4 CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (referencing arts. 26–27 of the Vienna Convention); U.N. Human Rights Comm., *General Comment No. 26*, ¶¶ 1–2, CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997) (referencing art. 41 of the Vienna Convention); U.N. Human Rights Comm., *General Comment No. 24*, ¶¶ 6, 16 CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (referencing arts. 19(3) and 20(4) of the Vienna Convention). *But see also supra* U.N. Human Rights Comm., *General Comment No. 24*, *supra*, ¶ 17 (rejecting the application of the Vienna Convention). The application of legal rules of interpretation does not eliminate the possibility that different treaty bodies might interpret similar rights differently, but it provides for a legitimate and rational way of achieving an interpretation. *See* Fionnuala Ní Aoláin, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 *FORDHAM INT'L L.J.* 101, 102 (1995) (documenting the divergence in interpretation in the areas of derogation from enunciated rights in international treaties and the protection of non-derogable rights by various human rights judicial bodies).

61. Vienna Convention, *supra* note 8, art. 31(3)(b).

62. International Law Association (ILA), Committee on Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, in *INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SEVENTY-FIRST CONFERENCE* 621, 628 (2004) [hereinafter *ILA Final Report*].

63. The term "General Recommendations" instead of "General Comment" is used by the CERD and the CEDAW. For ease of reference, the remainder of this Article uses "General Comments" as shorthand for both.

64. CRAVEN, *supra* note 20, at 91.

65. *Id.* Craven views General Comments as being able to provoke agreements in the sense of art. 31(3)(a).

66. *Id.*

them.<sup>67</sup> They thereby indirectly endorse the views of the treaty bodies. In such cases, the treaty bodies' interpretations and the fact that they have been accepted and jointly acted upon by states establish subsequent practice. During more than two hundred state reporting procedures before the CESCR until 2005, only a handful of states have pointed out that General Comments are not legally binding<sup>68</sup> and have thereby indicated indirect disapproval of the CESCR's work. Some states, however, have indicated disapproval or simply ignored the CESCR's work, which speaks against the establishment of subsequent practice in the areas discussed.<sup>69</sup>

There are also rare cases where the views of a treaty body and of states parties differ clearly. An example is the recent challenge to the validity and substance of the HRC's views by the United States, which expressed concern about the HRC's interpretation that the ICCPR applies outside a country's territory.<sup>70</sup> Any direct or indirect rejection of a treaty body's views requires a detailed analysis of how convincingly each side has argued its case and how widely the objecting state's views are endorsed by other states.

The interpretations of a treaty body may hence establish and reflect the parties' agreement regarding the interpretation of rights and obligations under a treaty<sup>71</sup> and, where widely accepted, can induce and reflect "subsequent practice" in the sense of Article 31(3)(b).

Two conclusions can be drawn. First, the treaty bodies are the main interpreters of the human rights treaties. Because they thereby fulfill the role that normally states fulfill, they are bound by the same rules of interpretation as states—the Vienna Convention rules. The application of the Vienna rules of interpretation is, hence, not merely

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67. See *ILA Final Report*, supra note 62, at 631–57 (cataloguing the use of General Comments in national courts).

68. Eibe Riedel, *Allgemeine Bemerkungen zu Bestimmungen des Internationalen Paktes über Wirtschaftliche, Soziale und Kulturelle Rechte der Vereinten Nationen [The General Comments on the Clauses of the United Nations International Covenant on Economic, Social, and Cultural Rights]*, in *DIE GENERAL COMMENTS ZU DEN VN-MENSCHENRECHTSVERTRÄGEN—DEUTSCHE ÜBERSETZUNG UND KURZEINFÜHRUNG [THE GENERAL COMMENTS ON THE UN HUMAN RIGHTS TREATIES—GERMAN TRANSLATION AND SHORT INTRODUCTION]* 160, 165 (2005). Occasionally, the work of the Human Rights Committee has elicited negative responses, in particular its General Comment on Reservations. CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM TO REALISM* 157 (2003). For states' objections to the latter General Comment, see U.N. Human Rights Committee, *Report of the Human Rights Committee*, Annex VI, U.N. Doc. A/51/40 (Apr. 13, 1997) (France); U.N. Human Rights Committee, *Report of the Human Rights Committee*, Annex VI, U.N. Doc. A/50/40/ (Oct. 3, 1995) (UK and U.S.).

69. See *infra* Part IV.

70. U.S. Comments on the Concluding Observations of the Human Rights Committee, Addendum, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb. 12, 2008).

71. THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* 10 (1986) (referring to CERD).

an option but an obligation. Second, the committees' findings, together with states' endorsement of them, constitute subsequent practice under Article 31(3)(b).

B. *A Necessity: The Need to Ensure Impact by Using Legal Rules of Interpretation*

While the treaty bodies are obliged to adhere to legal rules of interpretation, it is also in their own best interest to do so because the de facto legal force and impact of their work depends on its persuasiveness and analytical rigor. The next subpart will discuss to what extent each of the treaty bodies' activities has a legal character, and what role legal interpretation should play for each. It will demonstrate that the application of legal means of interpretation is necessary because of the legal dimension of the treaty bodies' output.

The treaty bodies carry out three main tasks to discharge their functions: they (1) formulate concluding observations on state reports, (2) develop General Comments, and (3) adopt views on individual communications.<sup>72</sup> The last activity is performed only by those treaty bodies open to individuals—the CERD, the HRC, the CAT, and the CEDAW.<sup>73</sup> In the future, the remaining treaty bodies might also be able to hear individual petitions.

Some of the treaty bodies may also perform monitoring functions through inquiry procedures<sup>74</sup> and the examination of inter-state complaints.<sup>75</sup> In practice, both mechanisms have played a marginal role, as they have been used rarely. Finally, since June 2006, a sub-committee of the Committee Against Torture—the Sub-Committee on Prevention—can carry out in-country inspections of places of detention.<sup>76</sup>

1. Concluding Observations

The activity where the role of legal interpretation is, at first glance, least apparent is the formulation of concluding observations—

72. See Office of the United Nations High Commissioner for Human Rights, Human Rights Treaty Bodies, <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited Apr. 2, 2009) [hereinafter Human Rights Treaty Bodies].

73. *Id.*

74. Convention Against Torture, *supra* note 29, art. 20 (conducting inquiries on Turkey, Egypt, Peru, Sri Lanka, and Mexico); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, annex, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999) (conducting only one inquiry: on Mexico).

75. The procedure of inter-state complaints has never been used.

76. See Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, annex, U.N. GAOR, 57th Sess., U.N. Doc A/RES/57/199 (2003).

the mainstay of the treaty bodies' work. In their concluding observations, the committees assist parties with realizing human rights.<sup>77</sup> The treaty bodies review national implementation of the treaty they monitor state by state, on the basis of reports that states parties have to submit at regular intervals. States are required to submit an initial report usually one year after joining a treaty and then required by the provisions of the treaty to submit periodic reports thereafter, generally every four or five years.<sup>78</sup> In addition to the government report, the treaty bodies receive information from other sources, including nongovernmental organizations, UN agencies, other intergovernmental organizations, academic institutions, and the press.<sup>79</sup> During their regular sessions, the committees examine the state reports together with government representatives in a "constructive dialogue."<sup>80</sup> This characterization provides an indication of the nature of the process: it is meant to be one of dialogue, not of adjudication in the sense of court proceedings. Primarily, the task of the treaty bodies is to convince and persuade rather than to judge. Finally, the committees publish their concerns and recommendations in "concluding observations," in which they set out whether or not the state concerned was acting in conformity with its treaty obligations and show the relevance of a treaty to a specific situation.<sup>81</sup> The Concluding Observations reflect a consensus on how the provisions of a treaty should be interpreted with regard to the particular situation in a country. Generally, they include an introductory section and parts on positive aspects, concerns and recommendations.<sup>82</sup> Unfortunately, given the relatively short time that the treaty bodies can dedicate to each country, the concluding observations remain often at a rather general level, and their jurisprudential impact is marginal and exceptional.<sup>83</sup>

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77. Formally, the CESCR only "assists" ECOSOC in the consideration of state reports. ECOSOC Res. 1985/17, *supra* note 33, at 2. In practice, the work of the Committee has, however, drawn little interest from the latter, and only in a few cases the CESCR has sought the approval of ECOSOC for the adoption of its working methods, e.g., when adopting its Rules of Procedure or when determining the ability of NGOs to submit information. CRAVEN, *supra* note 20, at 50. In practice, ECOSOC does little more than to note the CESCR's annual report, and states have accepted this practice.

78. Human Rights Treaty Bodies, *supra* note 72.

79. *Id.*

80. *Id.*

81. *Id.*

82. The way the treaty bodies structure their concluding observations differs slightly from one treaty body to another. The concluding observations of the CESCR, for instance, contain an introduction and sections on positive aspects, on factors and difficulties impeding the implementation of the ICESCR, on principal subjects of concerns, and suggestions and recommendations.

83. *ILA Final Report*, *supra* note 62, at 684; Philip Alston, *The Historical Origins of "General Comments" in Human Rights Law*, in L'ORDRE JURIDIQUE INTERNATIONAL, UN SYSTEM EN QUÊTE D'ÉQUITÉ ET D'UNIVERSALITÉ—LIBER

When focusing only on the strong emphasis on constructive dialogue, it could be assumed that legal rules of interpretation played a lesser role in the formulation of concluding observations than with regard to the other two activities of the treaty bodies—individual communications and General Comments. However, a closer look at the differences between formal legal processes before a court and the comparatively informal procedures before the treaty bodies reveals that concluding observations can operate to similar effect as judgments. Despite the facts that treaty body members are not judges, that their concluding observations are not binding, and that the committees rely to a great extent on the goodwill and cooperation of the states in front of them, it seems that governments and especially NGOs perceive these concluding observations as something akin to judgments, rendering the difference between formal adjudication and concluding observations less significant in practice. Nonetheless, whereas courts can rely on the fact that their judgments are legally binding in a formal sense, the degree of de facto legal force that accrues to the output of treaty bodies depends on the extent to which the concluding observations are convincing and persuasive. This, in turn, depends on the degree to which the application of an appropriate and accepted method of interpretation is discernible which makes the interpretations rational and legitimate as far as legal issues are concerned. Where policy advice is provided or policy options are mentioned, other methods come into play.

## 2. Individual Communications

The second activity of the treaty bodies—the hearing of individual communications—has a clearer legal character than the adoption of concluding observations because the committees have to determine whether an individual's rights were violated or not in a specific case.

Individuals who claim that a state party has violated their rights may, under certain circumstances, bring a complaint or communication before four of the human rights treaty bodies.<sup>84</sup> One

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AMICORUM GEORGES ABI-SAAB 763, 769 (Laurence de Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001).

84. The HRC may consider individual communications relating to States Parties to the First Optional Protocol to the ICCPR. First Optional Protocol to the International Covenant on Civil and Political Rights art. 1, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966). The CEDAW may consider individual communications relating to states parties to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, *supra* note 74. The CAT may consider individual communications relating to states parties who have made the necessary declaration under Art. 22 of the Convention Against Torture, and the CERD may consider individual communications relating to

criterion of admissibility for this process, among others, is that local remedies have been exhausted.<sup>85</sup> The human rights treaties thereby assume that the issues raised in a communication were or could have been raised and dealt with in state judicial or administrative proceedings.<sup>86</sup> The procedure before the treaty bodies is, however, not a continuation of the national proceedings in any way.<sup>87</sup> Rather, the treaty bodies undertake an independent review of the activities in question, based on the respective treaty.<sup>88</sup> They state their findings and may also propose an appropriate remedy for a violation.<sup>89</sup> If a treaty body finds a violation, it thereby indicates that, in its opinion, the state party is under a legal obligation to remedy the situation.<sup>90</sup> The independent review of the treaty bodies differs significantly from the work of a court. Whereas the judges of a court typically have legal training, the members of the treaty bodies have diverse backgrounds.<sup>91</sup> There are no oral proceedings and individual communications are considered in closed session.<sup>92</sup>

Through the individual communications procedure, the treaty bodies are inevitably involved in the development of the human rights treaties by “confronting [a treaty’s] ambiguities and indeterminacy,

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states parties who have made the necessary declaration under Art. 14 of the International Convention on the Elimination of All Forms of Racial Discrimination. Convention Against Torture, *supra* note 29, art. 22; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 36, art. 14. The Convention on Migrant Workers also contains a provision for allowing individual communications to be considered by the CMW. CMW, *supra* note 39, art. 77(1). These provisions will become operative when ten states parties have made the necessary declaration under Art. 77. CMW, *supra* note 39, art. 77. The CRPD has the competence to receive and consider communications from or on behalf of individuals or groups of individuals relating to states that have ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities. See Optional Protocol to the Convention on the Rights of Persons with Disabilities art. 1(1), G.A. Res. 61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/Res/61/106 (Dec. 13, 2006), available at <http://www2.ohchr.org/english/law/disabilities-op.htm>. The CED will be able to receive and consider communications relating to states parties of the International Convention for the Protection of All Persons from Enforced Disappearance, subject to a declaration by the relevant state party under Art. 31. Convention Against Enforced Disappearance, *supra* note 1, art. 31. Finally, there will be an individual communications procedure under the ICESCR once the Optional Protocol to the ICESCR enter into force. See ICESCR, *supra* note 17; *supra* note 7.

85. Steiner, *supra* note 25, at 27 (referring to the HRC).

86. *Id.* (referring to the HRC).

87. *Id.* at 28 (referring to the HRC).

88. *Id.* (referring to the HRC).

89. *Id.* at 28–29 (referring to the HRC).

90. Cf. Martin Scheinin, *International Mechanisms and Procedures for Implementation*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 429, 444 (Rajja Hanski & Markku Suksi eds., 1997).

91. See *supra* Part II.B.1–.2.

92. Steiner, *supra* note 25, at 29 (referring to the HRC).

resolving conflicts among its principles and rights, [and] working out meanings of its grand terms.”<sup>93</sup>

Despite their differences from court proceedings, the communications procedures have been called “a distinctive form of adjudication”: “a collegial body of independent experts decides a claim of violation . . . in favor of one or the other party, by applying norms that it interprets to facts . . . . It reaches a conclusion accompanied by a suggestion of appropriate remedies for any violation that it transmits to the parties.”<sup>94</sup> According to Steiner, individual communications procedures can serve three functions associated with adjudicative bodies: (1) to do justice in the individual case within its jurisdiction and to that extent vindicate the rule of law; (2) to protect rights under the respective treaty through deterrence and related behavior modification; and (3) to expound, elucidate, interpret or explain the respective treaty so as to engage the treaty bodies in an ongoing, fruitful dialogue with states parties, nongovernmental and intergovernmental institutions, advocates, scholars, and students.<sup>95</sup> In particular, the HRC has developed an important body of jurisprudence on civil and political rights that has helped to clarify state obligations, led to remedies at the domestic level and regularly inspired the regional human rights bodies and national courts.<sup>96</sup> The HRC has been heavily criticized, however, when it did not adhere to accepted principles of international law. Notably, the HRC’s decision to declare incompatible with the object and purpose of the ICCPR a reservation by Trinidad and Tobago to the Optional Protocol to the ICCPR that would have precluded the HRC from considering individual communications involving death row prisoners—therefore rejecting that preclusion—met with strong criticism, including by four dissenting HRC members whose arguments relied on the text, context, and object and purpose of the ICCPR.<sup>97</sup>

### 3. General Comments

The third major activity of the treaty bodies is the development of General Comments. General Comments are, in Philip Alston’s words, “means by which a UN human rights expert committee distills its considered views on an issue which arises out of the provisions of

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93. *Id.* at 39 (referring to the HRC).

94. *Id.* at 30 (referring to the HRC).

95. *Id.* at 31 (referring to the HRC). Interestingly, according to Steiner, the views of the HRC have not made a significant contribution to the normative development of the human rights movement. *Id.* at 39.

96. It remains to be seen whether the strong representation of non-lawyers becomes an issue for the CESCR as soon as it starts hearing cases under the Optional Protocol. *See supra* note 7.

97. *Kennedy v. Trinidad and Tobago*, U.N. Human Rights Comm., No. 845/1999, app. ¶¶ 6–12, U.N. Doc. CCPR/C/67/D/845/1999 Annex (Dec. 31, 1999).

the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance.”<sup>98</sup> As discussed below, many commentators attach particular normative significance to General Comments—a fact that strongly calls for the use of legal means of interpretation.

General Comments interpret specific rights or deal with cross-cutting issues. They provide detailed content in a comprehensive and coherent way to the rather generally worded provisions of a human rights treaty, which is not possible when a treaty body comments on an individual state’s report.<sup>99</sup> Indeed, General Comments lend interpretive assistance to the decision of individual complaints. General Comments can advance thought about a difficult matter, encourage debate about a treaty, and spread and deepen its relevance to the human rights movement.<sup>100</sup> They assist states in better reporting on the situation in their respective countries, facilitate NGOs’ efforts to provide the committees with useful shadow reports, and improve the committees’ opportunities for using the reporting procedure effectively. In addition, they are useful for Specialized Agencies and other bodies that deal with the implementation of a specific right. They can also exert considerable persuasive force on

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98. Alston, *supra* note 83, at 764.

99. A disadvantage of General Comments is that they are not contextual but abstract developments of the content of a right. It should also be noted that this description does not apply to the same extent to the General Comments of all treaty bodies. The General Comments of the CERD, for instance, are rather short statements than elaborate analyses of specific topics. Whereas the General Comments of the HRC and the CRC are also rather long and detailed, the General Recommendations of CERD and CEDAW are typically rather short statements. The CAT has adopted only two General Comments, and the CMW has not yet issued any. All General Comments of the treaty bodies except very recent ones are reproduced in International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) and U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 2) (May 27, 2008) [hereinafter *Compilation of General Comments*]. General Comments that are cited but not further referenced in this article can be found there.

100. Steiner, *supra* note 25, at 52.

decision makers in domestic legal systems and national courts.<sup>101</sup> As of May 2008, 119 General Comments had been issued.<sup>102</sup>

In contrast with the development of the meaning of a right by a court, the drafting of a General Comment is a participatory process that usually involves three stages, although there is some variance from committee to committee. First, a treaty body consults widely with Specialized Agencies, NGOs, academics, and other human rights treaty bodies, sometimes in the context of a day of general discussion or a thematic debate.<sup>103</sup> Next, a designated member of the committee compiles a draft on the basis of the consultation process, which is intended for further discussion by the committee and interested parties.<sup>104</sup> Finally, the revised draft of the General Comment is formally adopted in plenary session.<sup>105</sup> The committees act as “clearing centres” for the divergent interpretations that are proposed and draw on the insights they have gained from the review and assessment of state reports.<sup>106</sup> General Comments are adopted unanimously and represent the collective opinion of the respective treaty body.<sup>107</sup>

The adoption of a General Comment is a cumbersome, contested, and competitive process and obviously some committee members, academics, and NGOs exert greater influence than others and shape the quality and content of the outcome. The particular nature of the drafting procedure helps to explain why different General Comments from the same committee can vary in their treatment of an issue, as the example of the CESCR’s conceptualization of core obligations discussed in Part IV will show.

Given that the drafting of a General Comment is a process in which a large number of actors pursue their interests and advance

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101. For a detailed overview of the extent and nature of the reception of General Comments by national courts, see *ILA Final Report*, *supra* note 62, at 631–57; International Law Association, *Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals*, in INTERNATIONAL LAW ASSOCIATION REPORT OF THE SEVENTIETH CONFERENCE 507, 516–26 (2002) [hereinafter *ILA Interim Report*]. While their use by courts, tribunals, and similar adjudicative or quasi-judicial institutions such as ombudspersons is well documented, the impact of their work on domestic legislatures is not yet well researched. See, nonetheless, the illustrative overview of the use of treaty body work by legislatures, human rights commissions, law reform committees, and other national actors in *ILA Final Report*, *supra* note 62, at 675–83.

102. *Compilation of General Comments*, *supra* note 99.

103. International Human Rights Instruments, *Note by the Secretariat, Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process*, ¶ 107, UN Doc. HRI/MC/2005/4 (May 25, 2005).

104. *Id.*

105. *Id.*

106. *Cf.* CRAVEN, *supra* note 20, at 4.

107. *Cf.* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE—ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 347 (1991) (recognizing the General Comment as a collective opinion of the body).

their views, the treaty bodies must be guided by a clear method when making their interpretative decisions. Otherwise, they will face difficulties in explaining and justifying their decisions and in carrying out their task as “clearing centres” in a principled and legally convincing way. Only on the basis of clear criteria can it be explained why one proposed interpretation is to be favored over another.

Legal method is also necessary in view of the normative significance of General Comments for the development of human rights law. Views on the legal relevance of General Comments differ widely. Some commentators attach no legal value to them<sup>108</sup> or regard them only as valuable indications of the content of rights and the steps that states parties could or should undertake to ensure implementation,<sup>109</sup> as useful signposts,<sup>110</sup> or as important aids for interpretation.<sup>111</sup> According to others, General Comments have “practical authority” because they represent an important body of experience in considering matters from the angle of the respective treaty.<sup>112</sup> Many commentators, however, accept that General Comments have considerable legal weight.<sup>113</sup> They suggest that a committee is the most authoritative interpreter of the treaty it monitors<sup>114</sup> and that states parties are not free to disregard a treaty body’s interpretation with which they disagree, despite its nonbinding nature.<sup>115</sup> They view a treaty body’s output as more than mere

108. See *Kavanagh v. Governor of Mountjoy Prison*, [2001] I.E.H.C. 77, § 12 (June 29, 2001) (Ir.) (“The views [of the HCR have] the moral authority but nothing more than that.”). The High Court of Ireland referred to the views of the HRC, but it is unlikely that it would pass a different judgment on General Comments. See also *Minister for Foreign Affairs and Trade v. Magno*, (1992) 112 A.L.R 529, 573 (Austl.) (“[T]he HR Committee’s report is not binding on an acceding state party.”). In various instances, Japanese courts have stated that General Comments are at most taken into account as opinions on the level of facts and do not bind the interpretation of the ICCPR and the ICESCR by Japanese Courts. See *ILA Interim Report*, *supra* note 101, at 519 n.34 (observing the tendencies of Japanese courts).

109. Cf. *MCGOLDRICK*, *supra* note 107, at 94 (citing the role the General Comment plays in advising States of the necessary steps to comply with treaty obligations).

110. Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 231 (1998).

111. Riedel, *supra* note 68, at 164.

112. Torkel Opsahl, *The General Comments of the Human Rights Committee*, in *DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG—FESTSCHRIFT FÜR KARL JOSEF PARTSCH ZUM 75 GEBURTSTAG 273–75*, 283–84 (Jürgen Jekewitz ed., 1989); see also Riedel, *supra* note 68, at 164 (emphasizing that General Comments reflect typical problems with the implementation of a right as apparent from the practice of the CESCR).

113. *Craven*, *supra* note 20, at 91; see also *ILA Interim Report*, *supra* note 101, at 517–18 (citing numerous references to national cases).

114. Cf. Scheinin, *supra* note 90, at 444.

115. *ILA Interim Report*, *supra* note 102, at 517–18.

recommendations.<sup>116</sup> Some even regard General Comments as “authoritative interpretations”<sup>117</sup> of the rights of a treaty.<sup>118</sup> General Comments also contribute to the formation of customary international law by helping to shape *opinio iuris* and state practice. Given their normative authority and role, the treaty bodies bear a specific responsibility to apply a sound legal methodology when legal questions are concerned, since otherwise no useful interpretations can be achieved.

#### IV. NEGLECT OF THE VIENNA RULES OF INTERPRETATION AND ITS CONSEQUENCES: THREE EXAMPLES FROM THE WORK OF THE CESCR

Having set out an abstract argument in favor of a stronger and more coherent application of Articles 31 and 32 of the Vienna Convention, this Part will illustrate its relevance by discussing three examples from the work of the CESCR. Following a brief

116. See Scheinin, *supra* note 90, at 444.

117. Commission on Human Rights, *The Right to Food: Report on the Third Expert Consultation on the Right to Food*, ¶ 14, U.N. Doc. E/CN.4/2001/148 (Mar. 30, 2001); Commission on Human Rights, *The Right to Food: Report of the High Commissioner for Human Rights*, ¶ 58, U.N. Doc. E/CN.4/2000/48 (Jan. 13, 2000); Andrew Byrnes, *Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?*, 12 AUSTL. Y.B. INT'L L. 205, 216 (1992); Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms*, 11 GEO. INT'L ENVTL L. REV. 1, 21 (1998); Karl Herndl, *Zur Frage des rechtlichen Status der Entscheidungen eines Staatengemeinschaftsorgans: die “views” des Menschenrechtsausschusses [On the Question of the Legal Status of the Decision of an Organ of the Community of States: The Human Rights Committee's Views]*, in VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT: Festschrift für Karl Zemanek zum 65. Geburtstag [PUBLIC INTERNATIONAL LAW BETWEEN NORMATIVE DEMAND AND POLITICAL REALITY: Festschrift for Karl Zemanek's 65th Birthday] 203, 209, 212 (K. Ginther ed., 1994) (referring to the views of the HRC); David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1, 4 (2003). *Contra* U.S. Comments on the Concluding Observations of the Human Rights Committee, *supra* note 70, at 9 (arguing that article 40 of the ICCPR does not give the HRC authority to issue legally binding or authoritative interpretations of the Covenant); Christian Tomuschat, *National Implementation of International Standards on Human Rights*, CAN. HUM. RTS. Y.B. 31, 36 (1984) (referring to the HRC).

118. See Carlos Villán Durán, *The Rights to Food and Drinking Water in International Law: New Developments*, in 4 OS RUMOS DO DIREITO INTERNACIONAL DOS DIREITOS HUMANOS—RUMBOS DEL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS—TRENDS IN THE INTERNATIONAL LAW OF HUMAN RIGHTS 453 (Renato Zerbini Ribeiro Leão ed., 2005) (describing the ICESCR). Such increased legal relevance can only be assumed where the treaty bodies interpret rights and obligations under a treaty. It does not accrue to policy recommendations which are much more dependent on context and might change over time.

introduction to the specific characteristics of the General Comments of the CESCR, the examples of (1) the obligations of international organizations; (2) extraterritorial obligations; and (3) core obligations will demonstrate how the text, context, and object and purpose, respectively, have been neglected and how such neglect has led to unconvincing results that have harmed the credibility, legitimacy, and usefulness of the work of the CESCR with respect to illuminating the meaning of the legal obligations created by the ICESCR.

The following critique of the General Comments of the CESCR does not deny that the General Comments of the committee have contributed significantly to the understanding of social, economic, and cultural rights. The CESCR has taken a constructivist approach and developed a common understanding of the rights guaranteed by the ICESCR. Since General Comment No. 12 on the Right to Food,<sup>119</sup> the CESCR has consistently used two analytical frameworks for the interpretation of the ICESCR's rights. The first distinguishes availability, accessibility, and adequacy or quality.<sup>120</sup> The second refers to states parties' duties and breaks them down into obligations to respect, protect, and fulfill and, with regard to the last obligation, the sub-duties to facilitate, promote, and provide.<sup>121</sup> Each General Comment on a right or cross-cutting issue sets out in some detail basic premises, normative content, states' obligations, violations and implementation at the national level, and international obligations. Despite having achieved some consistency in the overall approach and presentation, considerable inconsistencies and discrepancies remain in the interpretation of obligations from one General Comment to another, and some of the obligations suggested by the CESCR cannot be based on a principled interpretation of the ICESCR guided by Articles 31 and 32 of the Vienna Convention.

#### A. *The Text of the ICESCR and the "Obligations" of International Organizations*

The first example that shows the negative consequences of not adhering to legal rules of interpretation is the CESCR's treatment of the obligations of international organizations under the ICESCR. This example demonstrates the importance of paying close attention to the *text* of a human rights treaty, which is one of the three requirements under Articles 31 and 32 of the Vienna Convention. The Article rejects the assumption of obligations of international

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119. CESCR, *General Comment No. 12*, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

120. Depending on the right protected, additional elements come into play, for instance acceptability in the case of the right to food.

121. The obligation to "promote" was introduced as a sub-category of the obligation to fulfil in General Comment No. 15. CESCR, *General Comment No. 15*, ¶ 25, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

organizations under the ICESCR on the basis that there is no indication the text of the ICESCR which only addresses the obligations of states.<sup>122</sup> It suggests that the CESCR's contrary position has weakened each of the General Comments in which it has addressed the issue.

As with other human rights treaties, only states can become parties to the ICESCR and be bound by its provisions.<sup>123</sup> Throughout, the ICESCR addresses states parties.<sup>124</sup> International organizations are only mentioned in Part IV of the treaty, which contains provisions on the reporting procedure and the interplay of various UN bodies in this process.<sup>125</sup> The roles of international cooperation and of international organizations in achieving the implementation of the ICESCR are mentioned.<sup>126</sup> The relationship between the CESCR and international organizations is addressed in Article 22 of the ICESCR, according to which ECOSOC

may bring to the attention of other organs of the United Nations, their subsidiary organs and Specialized Agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.<sup>127</sup>

The role of ECOSOC has since been taken up by the CESCR. In Article 22, the ICESCR recognizes that international organizations and bodies may play an important role in contributing to the realization of economic, social, and cultural rights, and gives ECOSOC (the CESCR) the power to make recommendations on how to do so.<sup>128</sup> It contains, however, no obligation to this effect.

Very early on in its work, the CESCR has elaborated upon the role of international organizations. In General Comment No. 2 on International Technical Assistance Measures, the CESCR recommended a number of ways that international organizations or bodies can contribute to the realization of economic, social, and cultural rights.<sup>129</sup> It also mentioned detrimental measures that

122. The Author does not generally reject the concept of human rights obligations of international organizations. The argument is limited to the question whether such exist under the ICESCR.

123. ICESCR, *supra* note 17, art. 26.

124. See, e.g., *id.* pmb., arts. 1(3), 2(2), 3(1), 4(1).

125. See *id.* pt. IV.

126. See *id.*

127. *Id.* art. 22.

128. *Id.*

129. CESCR, *General Comment No. 2*, U.N. Doc. E/1990/23, annex III, at 86 (1990).

should be avoided.<sup>130</sup> Following some recommendations in General Comment No. 7 on Forced Evictions,<sup>131</sup> General Comment No. 8 on Sanctions introduces (albeit only in passing) the concept of human rights *obligations* of international organizations.<sup>132</sup> The turning point can be found in General Comment No. 12 on the Right to Food, where the CESCR for the first time speaks specifically and in detail of international obligations of international organizations.<sup>133</sup> It discusses the role of the UN, the WFP, the UNHCHR, UNICEF, the FAO, the World Bank, and the IMF, among others, in realizing the right to food, under the heading “international obligations”.<sup>134</sup> In General Comment No. 13 on the Right to Education, the pendulum swings back to mere recommendations, which are based explicitly on Article 22 of the ICESCR.<sup>135</sup> In General Comments No. 14 on the Right to Health and No. 15 on the Right to Water, the CESCR returns to the heading “obligations of actors other than States parties.”<sup>136</sup> Although General Comment No. 16 on the Equal Rights of Men and Women does not address the issue,<sup>137</sup> General Comments No. 17 on Authors’ Rights and No. 18 on the Right to Work do contain a section with this heading—but they mention specifically that only states parties are held accountable for compliance with the ICESCR.<sup>138</sup> The Comments shed no further light on this contradiction. In both General Comments, the CESCR further provides some recommendations for international organizations,<sup>139</sup> as does General Comment No. 19 on the Right to Social Security.<sup>140</sup>

Three characteristics of the CESCR’s work on the obligations of international organizations are troubling. The first is that the

130. As the CESCR has assumed the functions of ECOSOC in the reporting procedure, the CESCR plays the role set out in this paragraph of providing recommendations to international organisations and bodies.

131. General Comments Nos. 3, 4, 5, and 6 do not address international organisations. General Comment No. 7 on Forced Evictions contains two paragraphs with recommendations. CESCR, *General Comment No. 7*, ¶¶17–18, U.N. Doc. E/1998/22, annex IV (May 20, 1997).

132. CESCR, *General Comment No. 8*, ¶ 11, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997).

133. *General Comment No. 12*, *supra* note 119, ¶ 38.

134. *Id.* ¶¶ 38–41. It is noteworthy that the formulations used by the CESCR resemble recommendations more than obligations.

135. CESCR, *General Comment No. 13*, ¶ 60, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

136. CESCR, *General Comment No. 14*, ¶¶ 63–64, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); *General Comment No. 15*, *supra* note 121, ¶ 60.

137. CESCR, *General Comment No. 16*, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005).

138. CESCR, *General Comment No. 17*, ¶ 55, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006); CESCR, *General Comment No. 18*, ¶ 52, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006).

139. *General Comment No. 17*, *supra* note 138, ¶ 57; *General Comment No. 18*, *supra* note 138, at ¶ 53.

140. CESCR, *General Comment No. 19*, ¶¶ 82–84, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).

CESCR does not set out from where it derives the obligations of non-state actors. According to its text, but also its context and object and purpose, the ICESCR clearly binds only states parties.<sup>141</sup> Even if all members of an international organization were party to it, the organization itself, being a separate legal entity, would not be bound. The CESCR also neither implicitly nor explicitly engages with any of the theories that have been developed in favor of human rights obligations of international organizations.<sup>142</sup> Second, the CESCR exceeds its mandate by dealing with *obligations* of international organizations. As only states have obligations under the ICESCR, the CESCR's mandate is limited to an interpretation of states' obligations. Yet, the CESCR explicitly addresses obligations of non-state actors, including international organizations.<sup>143</sup> Third, the CESCR addresses the topic in an incoherent manner: whereas the headings speak of international *obligations*, the text beneath is always formulated in more flexible terms, using "should" throughout,

141. See *supra* note 124 and accompanying text.

142. The U.N. itself has human rights obligations because the protection of human rights is one of its purposes, U.N. Charter art. 1(3). Sohn proposes that the ICCPR and the ICESCR

[t]hough [they] resemble traditional international agreements which bind only those who ratify them . . . partake of the creative force of the [Universal] Declaration [of Human Rights] and constitute in a similar fashion an authoritative interpretation of the basic rules of international law on the subject of human rights which are embodied in the Charter of the United Nations.

Louis Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 135 (1977). De Wet suggests that as the ICCPR and the ICESCR were negotiated under the auspices of the UN and as the organization created an extensive system for monitoring states' obligations under these treaties, it created the expectation that it would respect human rights itself. Erika de Wet, *Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime*, 14 LEIDEN J. INT'L L. 277, 284 (2001). Some regard the UN Specialised Agencies (in the sense of UN Charter art. 57) as having human rights obligations by virtue of their relationship with the UN. Through relationship agreements (as provided for in the U.N. Charter art. 63(1)) they became part of the UN system and undertook to respect the principles and purposes contained in the UN Charter, including human rights. Philip Alston, *The International Monetary Fund and the Right to Food*, 30 HOW. L.J. 473, 479 (1987). In addition and most importantly, all international organizations are bound by customary international law, including customary human rights law. See Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 95 (Dec. 20) (referring to obligations under "general international law"); HENRY G. SCHERMERS & NILS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW—UNITY WITHIN DIVERSITY 1002, § 1579 (2003); BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 458, 14-037 (Philippe Sands & Pierre Klein eds., 2001); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 46 (Philip Alston ed., 2005).

None of these authors argues, however, that international organizations have direct legal obligations under human rights treaties to which they are not party.

143. See *infra* Part IV.B.

as well as “responsibility,” and avoiding the words “obligation” and “duty.”<sup>144</sup> This incoherence indicates that the CESCR is aware of the difficulties associated with its treatment of the subject matter but has not been willing or able to find a less ambiguous way of expressing itself. In the end, it remains unclear whether, according to the CESCR, international organizations have human rights obligations under the ICESCR, or some other source, or none at all. It seems that the CESCR intends to associate itself with the growing number of voices that support human rights obligations of international organizations and private actors. Although this is a laudable goal, it is problematic that by using the concept of “obligations of actors other than states” the CESCR disregards the text of the ICESCR, goes beyond its mandate, and favors its promotional role at the expense of its interpretative function.

Because the CESCR’s approach cannot be based on the text of the ICESCR, it does not result from an application of the methods laid down in Articles 31 and 32 of the Vienna Convention, which forbids interpretation contrary to the text. Disconnected from any methodological basis, its conclusions seem to have been reached at random. Because statements rather than arguments are offered, it is also difficult to reconstruct the train of thought of the CESCR. This methodological shortcoming could have been avoided by eschewing the expression “obligations of actors other than states,” and by instead addressing the important role of non-state actors in more flexible and policy-oriented terms, in line with Article 22 of the ICESCR.

The CESCR pays a price for its endorsement of forward-looking human rights thinking. Because this endorsement cannot be based on a legally sound interpretation of the ICESCR, it undermines the credibility and legitimacy of its overall interpretation output. Embracing the concept of obligations of non-state actors is a short-sighted gain, given the serious longer-term decrease of the persuasive force of its work.

#### B. *The Context of the ICESCR and States’ Extraterritorial Obligations*

The second example of the importance of method concerns the concept of extraterritorial obligations, where the CESCR has not paid sufficient attention to the methodological requirement of taking into account the overall *context* of human rights law. The CESCR has introduced a vague concept of extraterritorial obligations without spelling out any meaningful detail and, more importantly in this context, without basing its views on the context of the ICESCR. The

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144. See, e.g., *General Comment No. 19*, *supra* note 140, ¶¶ 82–83.

result has been an approach that seems to be driven by good intentions rather than by rational application of the ICESCR, and which is detrimental to the legitimacy and legality of its interpretations.

The CESCR developed the concept of extraterritorial obligations based on various articles of the ICESCR that refer to international co-operation<sup>145</sup> or international action.<sup>146</sup> These include Article 2(1) of the ICESCR, according to which “[e]ach State Party . . . undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant[.]”<sup>147</sup> The CESCR interprets this and other references as implying extraterritorial obligations, i.e., obligations of states vis-à-vis individuals in other states directly and indirectly through a state’s activities in international organizations. This Part focuses on the CESCR’s views concerning direct extraterritorial obligations, as in this field the scope of states parties’ obligations under the ICESCR has remained particularly unclear and unsystematic, and little guided by a methodologically grounded approach.

Since its early General Comments, the CESCR has interpreted references to international co-operation as implying obligations to provide development assistance.<sup>148</sup> General Comment No. 8 on Sanctions expanded this understanding and developed an obligation of every state involved in a sanctions regime “to protect at least the core content of the economic, social and cultural rights” of people in a state affected by sanctions.<sup>149</sup> In an attempt to cover all states, including nonparties to the ICESCR, the General Comment mentions, in a convoluted paragraph, the UN Charter, Article 2(1) of the ICESCR, and general international law as the legal bases of this

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145. ICESCR, *supra* note 17, arts. 2(1), 11(1), 11(2), 15(IV).

146. *Id.* art. 23.

147. *Id.* art. 2.

148. CESCR, *General Comment No. 4*, ¶ 19, U.N. Doc. E/1992/23, annex III at 114 (1991); CESCR, *General Comment No. 3*, ¶ 14, U.N. Doc. E/1991/23, annex III at 86 (1990). The CESCR regularly calls upon states to increase their levels of official development assistance. *E.g.* CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights—Finland*, ¶¶ 12, 21 UN Doc. E/C.12/CO/FIN/5 (Jan. 16, 2008); CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights—Ireland*, ¶ 37, UN Doc. E/C.12/1/Add.77 (June 5, 2002); CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights—Germany*, ¶ 33, UN Doc. E/C.12/1/Add.68 (Sept. 24, 2001); CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights—Japan*, ¶ 37, UN Doc. E/C.12/1/Add.67 (Sept. 24, 2001); CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights—Finland*, ¶¶ 13, 23, UN Doc. E/C.12/1/Add.52 (Dec. 1, 2000).

149. *General Comment No. 8*, *supra* note 132, ¶¶ 7–8, 12–14.

obligation.<sup>150</sup> More specifically, the CESCR regards states parties as obliged to take economic, social, and cultural rights fully into account when designing a sanctions regime as well as to monitor its effects and to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.<sup>151</sup> A concept of general extraterritorial obligations was introduced in General Comment No. 12 on the Right to Food where the CESCR developed very far-reaching obligations.<sup>152</sup> It applied its three types of obligations—the obligations to respect, protect, and fulfill—to conduct with an extraterritorial locus or with adverse effects beyond a state's borders without requiring a territorial, jurisdictional, or other link.<sup>153</sup> It proposed that states “should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”<sup>154</sup> The only example of a concrete application of these obligations provided is the obligation to refrain from food embargoes and not to use food as an instrument of political and economic pressure.<sup>155</sup> Subsequently, the treatment of extraterritorial obligations has not been homogenous. General Comment No. 13 on the Right to Education refers only generally to international assistance and cooperation.<sup>156</sup> In words similar to the ones cited from General Comment No. 12, General Comment No. 14 on the Right to Health requires states parties to “respect the enjoyment of the right to health in other countries, . . . to prevent third parties from violating the right in other countries, if they are able to influence these parties by way of legal or political means,” and to “facilitate access to essential health facilities, goods, and services in other countries, wherever possible and provide the necessary aid when required.”<sup>157</sup> General Comment No. 15 applies the same scheme to the right to water but makes the obligation to facilitate dependent on the availability of resources, which is repetitive, given that all obligations under the ICESCR that are not resources-neutral are subject to that limitation, according to Article 2(1) of the ICESCR.<sup>158</sup> Extraterritorial obligations are not discussed in General Comment No. 16 on Equal Rights Between Men and Women.<sup>159</sup> General Comment No. 17 on

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150. *Id.* ¶ 8.

151. *Id.* ¶¶ 12–14.

152. *General Comment No. 12, supra* note 119, ¶ 36.

153. *Id.*

154. *Id.*

155. *Id.* ¶ 37.

156. *General Comment No. 13, supra* note 135, ¶ 56.

157. *General Comment No. 14, supra* note 136, ¶ 39.

158. *General Comment No. 15, supra* note 121, ¶¶ 31–34; ICESCR, *supra* note 17, art. 2; *see also General Comment No. 19, supra* note 140, ¶ 55 (describing a similar limitation in reference to the right to social security).

159. *General Comment No. 16, supra* note 137.

Authors' Rights refers only in rather general terms to the importance of international co-operation and does not mention extraterritorial obligations.<sup>160</sup> In addition to this general cooperation obligation, General Comment No. 18 on the Right to Work contains a direct extraterritorial obligation "to promote the right to work in other countries."<sup>161</sup> In contrast, the most recent General Comment, General Comment No. 19 on Social Security, applies the three types of obligations again but seems to merge the obligations to facilitate and to provide.<sup>162</sup>

The picture of extraterritorial obligations that appears from the CESCR's General Comments remains patchy and unclear. With every new General Comment the scope of such obligations seems either to expand or to shrink again. No arguments are offered for these changes. In addition, the mentioned paragraphs raise more questions than they provide answers. Among them are: When is it "required" to provide aid? To what extent do states have to assess *ex ante* the potential implications of their policy measures for other countries in order to respect rights abroad? How does the obligation of the home state to regulate third parties like private corporations relate to the obligations of the state of activity? Does the home state bear responsibility if the foreign state is complicit in the violations of a private actor? If there are differences in degree of realization of certain rights between the home state and the state of activity, with which standards should the private actor be made to comply?

It becomes clear that the purpose of General Comments has been turned right around: instead of clarifying the meaning of state obligations, the passages on direct extraterritorial obligations create confusion and uncertainty. Largely, this is a function of the CESCR's liberal approach to interpretation, which does not rely strongly enough on clearly explaining its views' basis in the text, context, and object and purpose of the ICESCR.

Given the far-reaching scope of the extraterritorial obligations that the CESCR suggests in some of its General Comments, it is striking that the CESCR has based its proposals on neither a detailed analysis of the text of the provisions of the ICESCR and the different ways in which they could be interpreted,<sup>163</sup> nor on the context or object and purpose of the ICESCR. In contrast with many other human rights treaties, the ICESCR contains no clause limiting its

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160. *General Comment No. 17, supra* note 138, ¶¶ 36–38.

161. *General Comment No. 18, supra* note 138, ¶ 30.

162. *General Comment No. 19, supra* note 140, ¶¶ 53–55.

163. It could be argued, for instance, that each state only has an obligation to cooperate with other states and international organisations to realise economic, social, and cultural rights at home. Such an obligation would imply that a state has to accept food aid offered bi- or multilaterally in case of a domestic crisis, but not that a state has to provide food aid in case another state suffers from hunger.

application to the territory or jurisdiction of states parties.<sup>164</sup> Its text is hence open as to the geographical scope of states parties' obligations and may be read as extending to all acts of a state irrespective of where they may be taken or having effect.<sup>165</sup> However, the object and purpose of the ICESCR is not to create a confusing and vague web of unclear relationships of rights and duties between individuals and all other states parties, but primarily to establish clear rights-and-duty relationships between a governing authority and those governed or affected in another specifically direct way.<sup>166</sup>

Moreover, and most significantly, the CESCR's approach does not take into account the context of human rights law in general, which is based on a spatial separation of spheres of obligations that are normally demarcated based on territorial jurisdiction.<sup>167</sup> Also, in terms of context, the draft optional protocol to the ICESCR limits the right to submit communications to individuals or groups under the jurisdiction of a state party,<sup>168</sup> another indication that extraterritorial obligations are not as far-reaching as suggested in some of the CESCR's General Comments. States parties also continue to report only with respect to their territory, so that no subsequent practice in the sense of Article 31(3)(b) of the Vienna Convention has developed.<sup>169</sup> Finally, the International Court of Justice, in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories,<sup>170</sup> in contrast with the CESCR, viewed the obligations of the Covenant as "essentially territorial."<sup>171</sup>

In sum, the object and purpose and, even more so, the context of the ICESCR speak against the assumption of the wide-ranging extraterritorial obligations proposed by the CESCR. Neglect of these

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164. For an example of such a clause, see ICCPR, *supra* note 19, art. 2.

165. For a discussion of the scope of treaty obligations, see M. Craven, *Human Rights in the Realm of Order: Sanctions and Extraterritoriality*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 233, 251 (Fons Coomans & Menno T. Kamminga eds., 2004).

166. *Cf. General Comment No. 3, supra* note 148, ¶ 9 (noting that the "overall objective" of the ICESCR "is to establish clear obligations for States parties in respect of the full realization of the rights in question").

167. Craven, *supra* note 165, at 252.

168. U.N. Human Rights Council Res. 8/2, *supra* note 7, art. 2.

169. *See supra* Part II.A.

170. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136, 180 (July 9).

171. The ICJ subsequently endorsed the application of the ICESCR to the Occupied Palestinian Territories but does not support extraterritorial obligations in general. Interestingly, the ICJ is also reserved concerning the extraterritorial application of the ICCPR. While it relies on the HRC's concluding observations on Israel, it does not cite its General Comment No. 31, in which the HRC clearly states that, in contrast to the text of Article 2 of the ICCPR, according to which the treaty is applicable to individuals on the territory *and* under the jurisdiction of a state party, this provision should be read as on the territory *or* under the jurisdiction.

two essential methodological elements of interpretation has created a situation in which the scope of states parties' obligations has become unclear. This result undermines the requirements of legal certainty and the rule of law in a dangerous manner. Given the importance of the topic and the difficult questions it raises, the CESCR would have done better to dedicate a specific General Comment to a systematic and analytical treatment of the question of the existence and extent of extraterritorial obligations under the ICESCR, instead of inserting short and rather cryptic paragraphs in selected General Comments that appear to be motivated more by good intentions than rigorous analysis. As the scope of extraterritorial obligations is a distinctly legal question, the findings in such a General Comment should be reached by clearly applying legal rules of interpretation. If the CESCR took such an approach, it would also stand a much better chance of convincing other human rights actors to endorse its findings and follow its lead.

*C. The Object and Purpose of the ICESCR and the Expansion  
of the Concept of "Core Obligations"*

The last example that demonstrates the importance of using the method set out by Articles 31 and 32 of the Vienna Convention focuses on the central methodological requirement of taking into the account the *object and purpose* of a treaty when interpreting it. The example used is the occasional occurrence of a very far-reaching variant of the concept of core obligations. This concept renders compliance with the ICESCR impossible for many poorer countries. It therefore conflicts with the object and purpose of the ICESCR, which is to provide a framework for all states parties, including poorer developing countries.<sup>172</sup> The CESCR's unconvincing treatment of such a central issue, which is relevant for every right protected under the ICESCR, undermines the persuasiveness of its General Comments, which, in turn, weakens the validity of the CESCR's views, not only concerning this question but also generally.

The CESCR introduced the concept of minimum core obligations in General Comment No. 3 on the Nature of States Parties' Obligations.<sup>173</sup> Initially, the concept was well defined, properly confined, and clearly related to the object and purpose of the ICESCR. General Comment No. 3 established that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."<sup>174</sup> The core obligation would comprise access to "essential foodstuffs, . . .

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172. See ICESCR, *supra* note 17, art. 26(1).

173. *General Comment No. 3, supra* note 148, ¶ 10.

174. *Id.*

essential primary health care, . . . basic shelter and housing, or . . . the most basic forms of education.”<sup>175</sup> If a state wanted “to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”<sup>176</sup> Originally, minimum core obligations related therefore to true essentials; and even where those were not provided, states could justify their noncompliance by pointing to a lack of resources if certain stringent conditions were met. In support of core obligations the Committee stated that, without them, the ICESCR would be deprived of its *raison d’être*.<sup>177</sup> The CESCR thus based a convincing argument on an analysis of the object and purpose of the ICESCR, the text and context of which are open to such an interpretation. It made it impossible for states parties to argue that complete disregard for some rights was justified by focusing efforts exclusively on the realization of others.

The CESCR used the concept of core obligations again in General Comment No. 12 on the Right to Food, stating rather concisely that “States have a core obligation to take the necessary action to mitigate and alleviate hunger . . . even in times of natural or other disasters.”<sup>178</sup> Since then, inconsistent and at times very far-reaching characterizations of the concept of core obligations can be found in five of the six General Comments adopted since 2000:<sup>179</sup> inconsistencies arise with regard to the question of whether core obligations have immediate effect and with regard to the consequences of noncompliance with them. Even though General Comments No. 15 on the Right to Water<sup>180</sup> and No. 17 on Authors’ Rights<sup>181</sup> hold that core obligations are of immediate effect and hence not subject to progressive realization,<sup>182</sup> General Comments No. 14 on the Right to Health,<sup>183</sup> No. 18 on the Right to Work,<sup>184</sup> and No. 19 on Social Security<sup>185</sup> do not include core obligations in their lists of immediate obligations. In addition, General Comments No. 14 and

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175. *Id.*

176. *Id.*

177. *Id.*

178. *General Comment No. 12, supra* note 119, ¶ 6.

179. By contrast, General Comment No. 16 on “the equal right of men and women to the enjoyment of all economic, social and cultural rights” does not use the concept. *General Comment No. 16, supra* note 137.

180. *General Comment No. 15, supra* note 121, ¶ 37.

181. *General Comment No. 17, supra* note 138, ¶ 25.

182. *General Comment No. 15, supra* note 121, ¶ 37.

183. *General Comment No. 14, supra* note 136, ¶ 30.

184. *General Comment No. 18, supra* note 138, ¶ 19.

185. *General Comment No. 19, supra* note 140, ¶ 40.

No. 15 declare that noncompliance cannot be justified at all,<sup>186</sup> but this is no longer stated in General Comments No. 17 and No. 18.<sup>187</sup> On the contrary, in General Comment No. 19 the CESCR explicitly repeats the formula originally developed in General Comment No. 3<sup>188</sup> that a state can attribute a failure to meet minimum core obligations to a lack of available resources, if it can demonstrate that every effort has been made to use all resources at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations.<sup>189</sup>

The CESCR does not provide any explanation for these inconsistencies. It neither links its interpretations to the text, context, or object and purpose of the ICESCR, nor does it discuss the role of immediate core obligations in relation to the concept of progressive realization, which indicates how little attention the CESCR has paid to Articles 31 and 32 when developing its approach and demonstrates how such neglect leads to weak and contestable results.<sup>190</sup>

Particularly problematic with respect to the object and purpose of the ICESCR is the combination of two of the suggested characteristics: the requirement of immediate fulfillment and the impossibility of justifying noncompliance (for instance, in General Comment No. 15). The text of Article 2(1) of the ICESCR establishes as the main obligation under the ICESCR the obligation to realize the protected rights progressively.<sup>191</sup> This central obligation is

186. *General Comment No. 14, supra* note 136, ¶ 47; *General Comment No. 15, supra* note 121, ¶ 40.

187. *General Comment No. 17, supra* note 138, ¶ 41; *General Comment No. 18, supra* note 138, ¶ 32.

188. *General Comment No. 3, supra* note 148, ¶ 10.

189. *General Comment No. 19, supra* note 148, ¶ 60. The CESCR has also broadened the substantive scope of the concept by including rather extensive lists of core obligations. In *General Comment No. 14*, the CESCR identified six core obligations and five obligations of "comparable priority." *General Comment No. 14, supra* note 136, ¶ 43. In *General Comment No. 15*, it lists nine core obligations, *General Comment No. 15, supra* note 121, ¶ 37; in *General Comment No. 17*, five, *General Comment No. 17, supra* note 138, ¶ 39; in *General Comment No. 18*, three, *General Comment No. 18, supra* note 138, ¶ 31; and in *General Comment No. 19*, six, *General Comment No. 19, supra* note 140, ¶ 59. In addition, whereas their nature was originally purely results-focused ("satisfaction of minimum essential levels"), it now covers also specific policy measures such as to adopt and implement national strategies and plans of action, *General Comment No. 14, supra* note 136, ¶ 43(f); *General Comment No. 15, supra* note 121, ¶ 37(f); *General Comment No. 18, supra* note 138, ¶ 31(c); *General Comment No. 19, supra* note 140, ¶ 59(d), or to monitor the extent of the realisation of a right, *General Comment No. 15, supra* note 121, ¶ 37(g); *General Comment No. 19, supra* note 140, ¶ 59(f).

190. It should be noted that the obligations under the ICESCR are all based on Article 2 of the ICESCR and are structurally identical, so that the variations from one General Comment to the next cannot be explained away by the fact that they refer to the protection of different rights.

191. In *General Comment No. 17 on Authors' Rights*, one of the core obligations is identical to the main obligation of states parties as stated in the text of the ICESCR,

conditioned on the availability of resources.<sup>192</sup> Where the implementation of an obligation depends on a considerable amount of resources, as do some of the proposed core obligations, the text of Article 2(1) does not lend itself to an interpretation that turns such an obligation into an immediate one. Moreover, to suggest that noncompliance with obligations that carry significant resource implications cannot be justified under any circumstances is difficult to reconcile with the object and purpose of the ICESCR. This object and purpose is to set up a framework that obliges states to do what they can to realize the rights protected. It is not to impose obligations that cannot realistically be met immediately because of their significant financial implications.<sup>193</sup> Given the principle

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which raises the question whether there is any special characteristic of the so-called core obligations: Art. 15(I)(c) of the ICESCR obliges states parties to recognise the right of everyone “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.” ICESCR, *supra* note 17, art. 15. According to Art. 2(1) ICESCR, each state party “undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognised in the [ICESCR] by all appropriate means, including . . . adoption of legislative measures.” *Id.* art. 2(1). According to General Comment No. 17, states have a core obligation “to take legislative and other necessary steps to ensure the effective protection of the moral and material interests of the author.” *General Comment No. 17, supra* note 138, ¶ 39(a).

192. See ICESCR, *supra* note 17, art. 2(1).

193. According to General Comment No. 15, states parties have, for instance, a core obligation

To adopt and implement a national water strategy and plan of action addressing the whole population[.] [T]he strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; [and] the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups.

*General Comment No. 15, supra* note 121, ¶ 37(f). To immediately fulfill the requirements of this “core obligation” is a tall order for many developing countries in which access to clean drinking water as such is a problem. Such countries will find it difficult to immediately establish indicators and benchmarks, gather enough disaggregated information from every part of their country to monitor progress with particular regard to different disadvantaged and marginalized groups, and develop strategies and plans of action in a transparent and participatory manner. It should also be noted that the CESCR, together with other human rights bodies, is itself still developing indicators for the realization of the different rights protected under the ICESCR. Hence, the question which indicators measure best the realization of each of the rights has not yet been settled conclusively. Many of the mentioned “obligations” would have been better formulated as policy options strongly recommended by the CESCR, given that states have been able to fulfill the right to water without taking the specific approach the CESCR proposes. For relevant examples of initiatives on indicators, see the IBSA project on right to food indicators carried out by CESCR member Professor Eibe Riedel at the University of Mannheim, <http://ibsa.uni-mannheim.de/> (last visited Mar. 29, 2009), the development of right to water indicators by the NGO Centre on Housing Rights and Evictions, VIRGINIA ROAF, ASHFAQ

*impossibilium nulla obligatio est*, core obligations under the ICESCR simply cannot be interpreted in a way that is impossible to fulfill, which would be the case if immediate compliance were mandated, with no possible justification for noncompliance. It is noteworthy that states parties regularly continue to ascribe the non-implementation of what the CESCER calls “core obligations” to a lack of available resources,<sup>194</sup> so that no evidence of agreement exists to support the variant strand of the CESCER reasoning that combines immediate effect of core obligations with the impossibility of justifying nonfulfillment. States’ ignoring of this variation of core obligations also demonstrates how strongly the treaty bodies rely on the persuasiveness of their work. Applying the method laid down in Articles 31 and 32 of the Vienna Convention and, in particular, paying more attention to the object and purpose of the ICESCR would have avoided this unsatisfactory and unconvincing result, and the inconsistent treatment of the concept of core obligations by the CESCER. Most likely, it would have resulted in a concept more akin to the balanced one used in General Comments No. 3 and No. 19, which focus on the realization of a core of every right and true essentials, and which provides highly useful guidance to states.<sup>195</sup>

The CESCER’s treatment of core obligations also offers an example of the extent to which the impact of the treaty bodies’ output depends on its persuasiveness and analytical rigor. In the *Grootboom* judgment, the South African Constitutional Court declined to use the concept of core obligations because of difficulties of determining minimum core content.<sup>196</sup> The Court pointed out that the floor beneath which the realization of a right might not fall would depend on factors such as the economic and social history of a country, its current circumstances, the prevalence of poverty, the availability of land, the degree of unemployment, and the fact of whether an

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KHALFAN & MALCOLM LANGFORD, CENTRE OF HOUSING RIGHTS AND EVICTIONS, MONITORING IMPLEMENTATION OF THE RIGHT TO WATER: A FRAMEWORK FOR DEVELOPING INDICATORS 3 (2005), available at <http://www.cohre.org/store/attachments/right%20to%20water%20-%20indicators%20framework.pdf>, and the OHCHR’s own work, Office of the High Comm’r for Human Rights, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, UN Doc. HRI/MC/2006/7 (May 11, 2006). By requiring states parties to use indicators, the CESCER imposes an obligation which it might have difficulty fulfilling itself.

194. See, e.g., CESCER, *Second Periodic Report by Nepal—Addendum*, U.N. Doc. E/C.12/NPL/2, at 73 (Aug. 7, 2006); CESCER, *Second Periodic Report by Benin—Addendum*, U.N. Doc. E/C.12/BEN/2, at 62, 63 (Mar. 30, 2007).

195. See *General Comment No. 3*, supra note 148, ¶ 10 (describing core obligations as entailing access to essential needs, while providing a means of justifying noncompliance that may result from a lack of available resources); *General Comment No. 19*, supra note 140, ¶¶ 59, 60 (suggesting that the concepts of core obligations refers to the satisfaction of minimum essential levels of each of the rights of the ICESCR and reiterating the justification language of General Comment No. 3).

196. Government of the Republic of South Africa & Others v. *Grootboom*, 2000 (11) BCLR 1169 (CC), ¶ 32 (S. Afr.).

individual lived in an urban or rural environment.<sup>197</sup> Moreover, and even more importantly, it added that the state is not obliged to go beyond available resources,<sup>198</sup> and that it is impossible to give everyone access to a core service immediately.<sup>199</sup> In contrast to the CESC, the court thereby interpreted the South African Constitution as not obliging the state to do what would be impossible to do. A synchronous interpretation of human rights obligations by a treaty body and national courts, which is not necessary but is strongly desirable, had become impossible.

## V. CONCLUSIONS AND RECOMMENDATIONS

The treaty bodies fulfill a unique function in the global human rights system. They develop the substantive content of rights; supervise states parties' compliance with treaty obligations; serve an instrumental role in promoting global human rights standards; feed into the work of the Charter bodies, regional human rights bodies, and domestic actors; and contribute to the formation of customary international law. Their activities range from entertaining an ongoing dialogue with states to issuing General Comments, in which they set out the meaning of human rights and offer options for their realization.

Among the committees' most important functions is the interpretation of the rights granted and the obligations imposed by a treaty. While an exclusively legal approach might not be helpful in carrying out all the functions of a treaty body, showing respect for legal rules of interpretation is vital for this function. Given that significant legal expertise is represented on the committees, they are well equipped to apply the customary international legal method of interpretation codified in Articles 31 and 32 of the Vienna Convention. Because the treaty bodies are charged with interpreting treaties of international law largely in lieu of state parties, they are also bound to apply these rules when carrying out interpretative functions which come into play with respect to each of the treaty bodies' three main functions. In addition, good substantive reasons exist to do so.

First, methodological weaknesses compromise the comprehensibility, consistency, rationality, and legitimacy of a

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197. *Id.*

198. *Id.* ¶ 94; *Minister of Health & Others v. Treatment Action Campaign & Others*, 2002 (10) BCLR 1033 (CC), ¶ 32 (S. Afr.).

199. *Minister of Health & Others v. Treatment Action Campaign & Others*, 2002 (10) BCLR 1033 (CC), ¶ 35 (S. Afr.). The Court regarded, however, the minimum core as relevant in the determination of what constitutes a reasonable measure, which is the standard required by the South African Constitution.

committee's output, as the detailed discussion of the three examples from the work of the CESCR has shown. Such weaknesses call into question a treaty body's rigor of analysis and thereby weaken legal certainty. Lack of clearly discernible method means how a committee has reached its conclusions cannot be reconstructed, and its future approaches cannot be predicted. This result weakens both the work of the committees and the authority of the treaties they interpret. Second, clear consideration of the text, context, and object and purpose of a treaty facilitates the development of a coherent body of interpretation of the rights and obligations under a human rights treaty. As the treatment of obligations of international organizations, extraterritorial obligations, and core obligations has shown, lack of coherence weakens a treaty body's overall argument, especially if changes appear to be introduced at random and are not explained. Third, disregard for rules of interpretation raises the question of where a committee draws the line between interpreting a treaty and developing new law for which it does not have a mandate. Although playing a general promotional role is part of a treaty body's overall mandate and contributes to the realization of human rights, a conflation of the promotion and the interpretation of rights and obligations endangers the credibility and significance of the treaty body monitoring system, which depends on the persuasiveness of its output. As Steiner points out, the influence of a treaty body will rest primarily on the quality of its argument and on the degree to which it expounds the respective treaty in a serious, probing, and illuminating way.<sup>200</sup>

Given the absence of a world human rights court, treaty bodies should follow the example of many state constitutional courts, as far as substantive deliberations and argumentative cohesiveness are concerned—especially when writing their General Comments and hearing individual communications.<sup>201</sup> The more they rely on extensive argument and justification based on clear methodological grounds to reach their conclusions, and work as truly deliberative bodies, the better they can convince other human rights actors to follow their lead. Such change would involve clearly distinguishing between obligations and desirable policy options. In recommendations concerning policy options, the treaty bodies can advance human rights by making forward-looking suggestions based on best practices as discerned through their monitoring work, without

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200. Steiner, *supra* note 25, at 49 (referring to the HRC and the ICCPR); see also *wa Mutua*, *supra* note 110, at 231 (suggesting that "improv[ing] the quality of General Comments by making them more substantial arguments . . . including analyses and references to leading authorities would raise the prestige of the HRC").

201. See also Steiner, *supra* note 25, at 18–19. While the nature of the treaty bodies will make it very difficult to achieve the same legal precision as courts, much stronger adhesion to legal interpretative standards is achievable.

compromising the integrity of their interpretative role by conflating obligations and recommendations. The CESCR, for instance, accepts that the Covenant does not formally oblige states to incorporate its provisions in domestic law, but it strongly encourages formal adoption or incorporation in national law.<sup>202</sup> Such an approach will ultimately strengthen human rights law by contributing to clearly circumscribing rights and obligations, instead of risking weakening human rights law by blurring the line between existing obligations and desirable future developments. In this way they could also best profit from their diversity in membership: while the techniques of interpretation should be legal, the interpretative content to be given to human rights and policy recommendations will have to be informed by the expertise of other disciplines so that social, economic, and developmental considerations come into play.

Finally, developing the unique role of the treaty bodies by strengthening the legal aspects of their work, by moving from statement to argument, and by distinguishing clearly policy and law, would increase the degree to which their technical and legal work and the political work of other human rights bodies—such as the Human Rights Council—complement each other, and would thereby serve the larger purpose of developing the human rights system as a whole.

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202. According to the CESCR, “[d]irect incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the [ICESCR’s] rights by individuals in national courts.” *General Comment No. 9*, *supra* note 60, ¶¶ 5, 8.

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