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LISTENING TO DISSONANCE AT THE INTERSECTIONS OF INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

Rights frequently are pitted against each other. During the COVID-19 pandemic, for example, in countries across the world, both harmony and dissonance emerged from the varying ways states interpreted and prioritized the right to work, the right to religious freedom, the right to peacefully assemble, and the rights to life and health.[1] In two covenants and many treaties, international human rights law recognizes these rights.[2] According to the United Nations ("UN"), all rights in human rights treaties are officially "interdependent and mutually reinforcing."[3] Within the UN human rights system, it is the ten treaty bodies[4] or "Committees" that offer the most authoritative sources of interpretations of the ten human rights treaties.[5]

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1. *See* Ingrid Nifosi-Sutton, *Human Rights and COVID-19 Responses: Challenges, Advantages, and an Unexpected Opportunity*, 24 HUM. RTS. BRIEF 18 (2020) (discussing the human rights implications of the COVID-19 pandemic and arguing that the COVID-19 pandemic, and future pandemics, should be addressed through the implementation of a rights-based approach); *see also* Eric Richardson & Colleen Devine, *Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights*, 42 MICH. J. INT'L L. 105 (2020) (analyzing the ICCPR standards that apply to emergency regulation in times of public health crisis and arguing that derogation best protects human rights and the treaty structure).

2. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; *see also infra* Table A.

3. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993).

4. *See infra* Table A.

5. *See* discussion on weight of General Comments, *infra* Part II. The UN human rights system also consists of Charter-Based bodies such as the Office of the High Commissioner for Human Rights, the Human Rights Council, the Universal Periodic Review, and the Special Procedures. As explained further, *infra* Part III, it is beyond the scope of this article to examine conflicting interpretations outside the treaty-based human rights system, though aspects of this analysis have implications for broader conflicts. Further research is recommended.

As their number has grown,[6] and with no formal hierarchy of authority among their respective interpretive bodies, risk of conflicting interpretations has increased.[7] Variations and conflicts within the treaty body system have included issues related to autonomy-related rights such as reproductive freedom, involuntary detention, and the right to live with a family.[8]

When the content of and balance between these rights is interpreted differently by the various international human rights treaty bodies,[9] how should conflicts and variations between these international organs' interpretations be reconciled, and by whom?[10] In domestic systems, hierarchies of authority ultimately resolve such conflicts. For example, in the United States, the Supreme Court is the court of last resort for federal issues and cases. Divergent or conflicting interpretations may be appealed to a court of last resort. Yet in international law, unlike in domestic law, it is often unclear how, and under whose authority, conflicts and divergences between rights interpretations should be resolved.

The interpretations generated by the treaty body system matter to successful rights promotion. State parties have the obligation to implement all provisions of treaties, subject to their valid reservations.[11] What happens

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6. *See, e.g.*, Gerald L. Neuman, *Arbitrary Detention and the Human Rights Committee's General Comment 35*, *in* JUSTICE ET DROITS DE L'HOMME 111, 122 (Pedone ed., 2019) ("From another perspective, the treaty bodies are independent institutions created by separate treaties with overlapping sets of state parties. Their jurisdiction is defined by their own treaties and their preeminent interpretive authority extends only to their own treaties.").

7. *See, e.g.*, Walter Kälin, *Examination of State Reports*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 16, 19 (Helen Keller & Geir Ulfstein eds., 2012) (Former UN Human Rights Commissioner Navi Pillay also noted with concern, "[A]t times recommendations from different human rights mechanisms [even] contradict one another.").

8. *See infra* Part IV.

9. As explained further *infra* Part II, it is beyond the scope of this article to examine other components of the international human rights system, such as regional human rights courts and domestic constitutional courts, though future research into the further intersections and variations is recommended.

10. The authority of treaty bodies' interpretations is discussed further *infra* in the text accompanying note 17. This article investigates conflicts and variations between human rights treaty bodies' interpretations within the UN human rights treaty system itself. The problem this article addresses is not the problem of conflicts between two different bodies of overlapping law, as in the case of international human rights law and international humanitarian law which is the subject of an extensive literature. *See, e.g.*, Anthony E. Cassimatis, *International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law*, 56(3) INT'L AND COMP. L.Q. 623 (2007) (Discussing how the "closeness" of IHL and IHRL "ensure[s] overlapping operation and greater scope for conflict."); Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21(1) EUR. J. INT'L L. 15, 16 (2010) (analyzing the interrelationship of and distinctions between IHL and IHRL); Jens Ohlin, *The Duty to Capture*, CORNELL L. FAC. PUB'NS 567 (2013) (discussing how whether there is a duty to capture depends on whether IHL or IHRL applies).

11. *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331; *see also* U.N. Charter art. 2(2) (noting that "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.").

before the treaty bodies matters to states and can have tremendous impacts for individual rights claimants.[12] In the *American Journal of International Law*, Cosette Creamer and Beth Simmons recently theorized why the treaty bodies' state reporting processes matter, and how these processes are often successful in inculcating state compliance.[13] Yet the treaty body system faces many challenges, including a backlog of state reports, lack of adequate resources, and the disconnect of varied working methods,[14] and thus has been the focus of UN General Assembly efforts to strengthen the system.[15]

The legal issue of varying and conflicting interpretations of rights directly affects the credibility and authority[16] of the distinct human rights treaty regimes.[17] These treaty regimes have been particularly vulnerable in recent years, when human rights law and human rights authorities have been under

12. Indeed, as anecdotal evidence for this claim, some states have resorted to intimidation and threats to prevent individuals from testifying before the treaty bodies. *See e.g.*, *Acts of Intimidation and Reprisal for Cooperation with the Treaty Bodies*, U.N. HUM. RTS. OFF. HIGH COMM'R (2021), https://www.ohchr.org/EN/HRBodies/Pages/Reprisal.aspx; United Nations International Hum. Rts. Instruments, Mapping the Practices of Treaty bodies on Intimidation and Reprisals and Identifying Issues That Need Further Action by the Chairs, U.N. Doc. HRI /MC/2020/2/Rev.1 (Jun. 9, 2020).

13. Cosette D. Creamer & Beth A. Simmons, *The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT'L L. 1 (2020) (discussing how periodic reporting of steps taken to implement human rights obligations following treaty ratification has become a procedural tool to ensure a government's compliance with treaty obligations).

14. U.N. President of the G.A., *Review of the United Nations Human Rights Treaty Body System*, UNITED NATIONS (Jun. 2, 2020), https://www.un.org/pga/74/2020/06/02/review-of-the-united-nations-human-rights-treaty-body-system/.

15. *See, e.g.*, Letter from the President of the G.A., *Rep. of the Co-Facilitators on the Process of the Consideration of the State of the UN Human Rights Treaty Body System* (Sept. 14, 2020), https://www.un.org/pga/74/wp-content/uploads/sites/99/2020/09/2HRTB-Summary-report.pdf; *see also The Ongoing Business of Strengthening the UN Human Rights Treaty Bodies*, INT'L FED. FOR HUM. RTS. (Dec. 12, 2020), https://www.fidh.org/en/international-advocacy/united-nations/the-ongoing-business-of-strengthening-the-un-human-rights-treaty (noting that "The co-facilitators' report clearly reflects widespread support for the treaty bodies, as well as the urgent need for technological upgrades and additional resources to facilitate and strengthen their ability to work effectively.").

16. Hiroshi Taki, *Effectiveness*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013) (The term "effectiveness" "refers to the efficacy (actual observance) of law as distinguished from the validity (binding force) of law"); Cora True-Frost, *The Development of Individual Standing in International Security*, 32 CARDOZO L. REV. 1183, 1195 (2011) (The term "credibility" refers to an institution's "motivation for the action in question. To act credibly is to reliably carry out a mandate or agreement."); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1001–02 (1989) (The term "authority" refers to what "we look to in the process of deciding what to do. They are agents or agencies whose utterances are in some sense reasons for action, as opposed to mere reasons for belief, such as are provided by scholarly authorities or the like.").

17. The credibility and authority of the treaty body system arguably recently experienced a setback when the International Court of Justice, which has treated the treaty bodies' interpretations as authoritative in the past, refused to do so in the Qatar v. UAE case. *See infra* note 102 for discussion.

attack.[18] State parties, international organizations ("IOs"), and the individual rights claimants are all important stakeholders, and their views of the credibility and authority of the system affect the system's effectiveness.

This article presents an analysis of specific variations and conflicts in treaty interpretation, together with some institutional design recommendations, to show that the dissonance arising from multiple overlapping treaties should be acknowledged rather than eliminated. Conflicts and variations of interpretation concern individuals seeking clarification of potential legal claims, as well as legislators and regulators seeking to draft legislation to comply with or evade human rights standards. How these conflicts will be resolved also matters to courts seeking to either incorporate, or avoid, authoritative treaty body interpretations of rights in their national jurisprudence.

The issue of conflicts within a specialized regime was addressed, but not resolved, by the International Law Commission's 2006 "Fragmentation of International Law" report.[19] The study "focuses on normative conflicts that illustrate the expanding scope of international law but may challenge the coherence of the international legal system."[20] Scholarly attention has largely focused either on the reform or effectiveness of the human rights treaty system.[21] Some scholars have examined conflicts between regimes of international law, but very little of those examinations focused on the conflicts that

18. Hum. Rts. Council, *Opening Statement and Global Update of Human Rights Concerns by UN High Commissioner for Human Rights Zeid Ra'ad Hussein at 38th Session of the Human Rights Council*, U.N. HUM. RTS. OFF. HIGH COMM'R (Jun. 18, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23206&LangID=E; *see* ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014).

19. Int'l Law Comm'n, *Rep. of the Study Group on Fragmentation of International Law*, U.N. Doc. A/CN.4/L.628 (2002); *see generally* Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?,* 5 MINN. INTELL. PROP. REV. 47 (2003) (addressing questions relating to fragmentation); Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. INT'L ORGS. 385, 386 (2014) (asserting the concept of contested multilateralism "which emphasizes that contemporary multilateralism is characterized by competing coalitions and shifting institutional arrangements, informal as well as formal."); s*ee also* Eva Brems, *Smart Human Rights Integration*, *in* FRAGMENTATION AND INTEGRATION IN HUMAN RIGHTS LAW 165 (Eva Brems and Saïla Ouald-Chaib eds., 2018).

20. Int'l Law Comm'n ["ILC"], *Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (2006) [hereinafter ILC Report].

21. *See, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2023 (2002) (advocating for reforms to the human rights treaty system by strengthening self-reporting); Dinah PoKempner & Thomas Buergenthal, *Making Treaty Bodies Work: An Activist Perspective*, 91 AMER. SOC'Y INT'L L. 475, 480–81 (1997) (proposing reforms of the human rights treaty body system that would encourage effectiveness, such as on-site fact finding and reporting, scheduled reporting sessions, and workload and coordination adjustments); Suzanne Egan, *Strengthening the United Nations Human Rights Treaty Body System*, 13 HUM. RTS. L. REV. 209 (2013) (considering the feasibility of the United Nations High Commissioner for Human Rights' proposed reforms to the human rights treaty body system).

arise within the "interdependent" specialized regime of human rights law at the UN level.[22]

This article primarily focuses on conflicting and varying interpretations of human rights treaties by the Convention on the Rights of Persons with Disabilities ("CRPD") Committee, Human Rights Committee ("HRC"), and Convention on the Rights of the Child ("CRC") Committee, which are illustrated using three main examples. First, the case of access to reproductive rights, in which the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and CRPD Committees forged a joint statement and tabled statements regarding fetal abnormality, in a display of solidarity.[23] Second, in the last five years, in its General Comment 35 on liberty and security, [24] the HRC disagreed with the CRPD Committee "regarding whether involuntary hospitalization [by the state] is ever permitted."[25] The final example pertains to the CRC and the CRPD Committees' continuing debate about the right to live in a family, and the related issue of the permissibility of placing children with disabilities in group homes.[26] The CRC Committee holds that such placement by the state may be necessary, even as the CRPD Committee maintains that institutional living for children with disabilities should not be an option for state parties.[27]

Through these examples, this article demonstrates that when the members of treaty bodies, such as the CEDAW and CRPD Committees, interpret the provisions of their treaties in General Comments, they generate specific and identity-sensitive formulations of rights protections, consistent with their mandates, and often in a manner that Professor Mehrdad Payandeh has called structural bias.[28] By contrast, human rights treaty bodies with broad

22. *See, e.g.*, Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights,* 42 VAND. J. TRANSNAT'L L. 905 (2009) (arguing that treaty bodies should avail themselves of legal methods of interpretation); Brems, *supra* note 9, at 167-68.

23. *See infra* note 125.

24. Hum. Rts. Comm'n, General Comment No. 35, Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

25. *See infra* Part III.

26. Eric Rosenthal, *The Right of All Children to Grow Up with a Family Under International Law: Implications for Placement in Orphanages, Residential Care, and Group Homes*, 25 BUFF. HUM. RTS. L. REV. 101 (2019)

27. *See* G.A. Res. 64/142, Guidelines for the Alternative Care of Children, ¶28(b) (Feb. 24, 2010) (Group homes are defined as a type of residential care, which is "any non-family-based group setting, such as places of safety for emergency care, transit centers in emergency situations, and all other short and long-term residential care facilities including group homes."); Eric Rosenthal, *A Mandate to End Placement of Children in Institutions and Orphanages: The Duty of Governments and Donors to Prevent Segregation and Torture*, *in* PROTECTING CHILDREN AGAINST TORTURE IN DETENTION: GLOBAL SOLUTIONS FOR A GLOBAL PROBLEM 303, 310 (Am. U. College of Law ed., 2017) (describing institutions, including orphanages, as custodial facilities of detention, falling under the UN Special Rapporteur on Torture's report calling on states to stop the unnecessary placement of children in institutions).

28. Mehrdad Payandeh, *Fragmentation Within International Human Rights Law*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGE IN INTERNATIONAL LAW 297

mandates, such as those of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), are more likely to generate understandings of rights without a similar orientation or focus on gender, ability, or race.[29] This is true even though the breadth of the ICCPR and the ICESCR Committees' mandates arguably allow more latitude for these Committees to address the overlap and intersectionality of rights than do the more narrowly-focused CEDAW, CRPD, International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), or CRC treaty bodies' mandates.[30] However, the HRC (the interpreting body for the ICCPR) focuses on civil and political rights.[31] Combined with the limits of traditional discrimination law, this focus often prevents the HRC from addressing, for example, the economic supports necessary for the equitable treatment of many people with disabilities, whereas these limitations do not exist with bodies such as the CRPD Committee.[32]

Correspondingly, this article suggests preliminary implications for conceptualizing and better understanding the overlap and intersectionality of rights within the international human rights treaty system, including by mapping out ways that the current system both permits and precludes monolithic interpretations of rights.[33] Finally, it offers institutional design

(Eirik Bjorge & Mads Adenas eds., 2015). Even the group-specific treaties, though, offer only limited analysis of intersectionality. *See, e.g.*, "Anti-discrimination law has come under scrutiny for its failure to accommodate intersectionality. The non-discrimination calculus operates according to discrete groups, which can be very powerful if an individual belongs to a group targeted by a particular ground of discrimination. However, it also creates or sustains a distorted picture of an individual's lived experience." Gauthier de Beco, *Protecting the Invisible: An Intersectional Approach to International Human Rights Law*, 17 HUM. RTS. L. REV. 633, 641 (2017).

29. *See infra* note 218.

30. "Some of these bodies, like the Convention on the Elimination of Discrimination Against Women ("CEDAW") Committee, have over the years been consistently sensitive to intra-group differences, whereas others, like the Human Rights Committee, have merely acknowledged that different discrimination grounds can be intertwined." See de Beco, *supra* note 28.

31. *Human Rights Committee*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx (last visited Nov. 14, 2021) ("The [HRC] is the body of independent experts that monitors implementation of the [ICCPR] by its State parties.").

32. In its General Comment 18 on non-discrimination, the HRC notes that discrimination regarding economic and social rights is not permissible. *See* International Covenant on Civil and Political Rights, *supra* note 2, at art. 26. ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

33. Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 74, 107 (2003) ("There are signs, however, that the international human rights community is beginning to

recommendations about how to respect and further cultivate diverse legal interpretations, mindful of intersectionality and the need to strike a "balance between universalism and particularism."[34] The resulting dissonance, in what Sarah Cleveland has called a "patchwork cacophony of the current human rights system," may disrupt harmony, but is worth listening to.[35]

This article's examples show why a top-down, formal approach to resolving conflicts and variations is likely to have negative implications for high-stakes rights at the overlap of treaties—rights regarding difference and inclusion that uniquely affect minority groups, such as people of color, people with disabilities, and women.[36] Through its examples, this article shows that impulses toward coherence and harmonization[37] might well extinguish important analyses, and that the identity-sensitive formulation of the human rights norm advanced by treaty bodies, established to protect specific vulnerable groups, might be absorbed into a more mainstream and less-nuanced view. In a hierarchical approach, those with multiple, overlapping, and intersectional experiences of being excluded,[38] for example, women who are also racial minorities with disabilities, might find it even more challenging to have their particular experiences addressed.[39] Available legal procedures and

explore ways to analyze women's human rights that do not represent 'women' as a monolithic category, within which, inter alia, race, class, ethnicity, religion, and sexual orientation are absent or irrelevant."); Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations: Abstract*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109878 (last visited Nov. 21, 2021) ("The international human rights community has, in fact, relied on its own permutation of a unified, monolithic identity for women, which has led to a myopic approach to women's human rights that fails to address complex forms of human rights violations.").

34. *See* de Beco, *supra* note 28, at 650 (arguing for building connections between the many international-level treaty bodies by mainstreaming intersectionality).

35. "The modern challenge, then, is how, out of the patchwork cacophony of the current human rights system, to ensure that the human rights treaty bodies function as part of a larger cohesive whole, to better link them to civil society and parallel institutions, to maximize their capacity as catalysts for norm enunciation, transfer, and internalization. In sum, how do we leverage a whole that is greater than its parts? This is the challenge of our current Age of Connectivity." Sarah Cleveland, *Human Rights Treaty Bodies in the Age of Connectivity*, *in* SYSTÈME DE PROTECTION DES DROITS DE L'HOMME DES NATIONS UNIES: PRÉSENT ET AVENIR 79, 82 (Pedone ed., 2017).

36. *See infra* text accompanying note 42.

37. *See, e.g.*, Int'l Hum. Rts. Instruments, Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, ¶¶ 30, 44, 51, U.N. Doc. HRI/MC/2006/2 (2006).

38. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43(6) STAN. L. REV. 1241 (1991) (naming intersectional theory which "conceptualizes a person, group of people, or social problem as affected by a number of discriminations and disadvantages, taking into account people's overlapping identities and experiences in order to understand the complexity of prejudices they face.").

39. Indeed, Chow warns of possible negative results of generalizations related to intersectionality itself. Pok Yin S. Chow, *Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence*, 16 HUM. RTS. L. REV. 453, 473–74 (2016) ("[t]he approach assumed *a priori* that an individual is necessarily doubly or multiply burdened without analyzing the nature and extent of complex forms of

hierarchies of authority too often fail to engage with the substance of conflicting and varying interpretations, and thus risk sidestepping debates about the meaning of rights.

Human rights claimants might succeed in pressing appellate-level legal decisionmakers to accept technical legal arguments regarding *lex specialis* to displace a more mainstream, generalized norm regarding discrimination. For example, a party before the International Court of Justice ("ICJ") might argue the CRPD Committee's interpretation, pertaining to a child with disabilities, is *lex specialis* compared to that of the CRC Committee's interpretation, not an unreasonable argument.

But at present, within the UN system, a mandatory appellate decision maker does not exist for the human rights system, and there is no right of appeal of treaty body interpretations.[40] Indeed, the age and prestige of the HRC, as well as the more generalized text of the ICCPR it interprets, might be argued to represent the pinnacle of the human rights hierarchy. But while the HRC has recognized that different grounds of discrimination can be intertwined,[41] it has not otherwise engaged with overlapping and intersectional statuses in ways that move beyond conventional discrimination analyses.

A minority-, disability-, or gender-group sensitive perspective would, thus, hardly counsel in favor of "harmonization" toward the generalized, majoritarian norm. People with specialized, compounded, or intersectional rights claims within and across race, gender, and disability, may have more opportunities to have their rights violations acknowledged and addressed through varying, un-harmonized, and sometimes even dissonant interpretations.[42] Therefore, perhaps paradoxically, in the short-term, ongoing dissonance in interpretation, in spite of the confusion it may create, may benefit historically marginalized people by moving toward new conceptualizations of time-

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inequality. Altogether, this approach ignores the actual and traversal implications of multiple identities. Secondly, the assumption generalized the effects of intersecting social structures and easily rendered intersectionality an 'additive' exercise. Not only would it 'support the law's propensity to classify,' it would also reinforce the essentializing and exclusionary effects that categories entail by creating 'new 'intersectional' categories' of presumed victims. . . . Thirdly, the presumption of victimhood undermined intersectionality's potential to explain how multiple discourses affect subjectivity and personhood.") (explaining also that broad generalizations regarding intersectionality can be damaging to those with intersectional identities).

40. Natalie Samarasinghe, *How Does the United Nations Make a Decision?*, BRIT. COUNCIL (Oct. 20, 2017), https://www.britishcouncil.org/voices-magazine/how-united-nations-decision.

41. *See* de Beco, *supra* note 28.

42. In an analogous fashion, Bond points out that while the international women's human rights movement was initially very generalized, and thus forfeited a "complex, nuanced understanding of human rights violations" but "maximize(d) support for the movement." Now that there is support for the movement, activists are able to call for addressing violations with a more "complex, nuanced understanding." Bond, *supra* note 33, at 88. As the multiple treaty bodies have developed, their necessity as well as the clear connections between them are difficult to dispute.

honored legal doctrine.[43] Yet, this article also argues that allowing possibly conflicting interpretations to persist in the short term leaves treaty bodies, human rights claimants, and states frustratingly vulnerable to indeterminacy and power differentials.

Informed by the analysis of the three examples, this article's institutional design suggestions aim to manage dissonance between the human rights treaty bodies with the goal of balancing the interests of vulnerable minorities[44] with those of the general polis, while preserving the possibility for ongoing debate over substance between the treaty bodies. This analysis suggests that, as argued above, rather than adopting proposals for reform that would impose a strict hierarchy, it is essential to allow each treaty body to advance their own interpretations of rights in their treaty. The quest for a "coherent system" should not destroy the potential to develop overlapping and intersectional norms for minority groups such as female children with physical disabilities; poor pregnant women who are religious minorities; or Deaf Black men. Indeed, if eventually an appellate human rights body were to be established over the treaty system, for such a body to be effective, it would have to be well-versed in intersectionality and ready to interrogate the norm against which discrimination and equal protection of the laws has historically been measured.[45]

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43. *See* Chow, *supra* note 39.

44. The human rights treaty bodies have variously described women, children, people with disabilities, racial minorities, religious minorities and elderly people as vulnerable minorities. *See A Rough Guide to the Human Rights Treaty Bodies,* UNIVERSAL RTS. GRPS., https://www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-human-rights-treaty-bodies/ (last visited Nov. 7, 2021) ("Several other subsequent international human rights conventions substantively complement and expand upon . . . the protection of vulnerable groups (such as women, children, migrant workers, or disabled persons.").

45. It is beyond the scope of this article to develop the ideal non-discrimination test(s) that could accommodate demands for justice from the various groups, yet the question of how anti-discrimination law is limited but could be understood underpins many of the divergences and conflicts between Committees' interpretations. Gerald L. Neuman, *Submission to the Committee on the Rights of Persons with Disabilities Regarding Draft General Comment on Article 5, Equality and Non-Discrimination*, U.N. OFF. HIGH COMM'R HUM. RTS. (Jun. 18, 2017), https://www.ohchr.org/Documents/HRBodies/CRPD/DGD/Article5/GeraldNeuman.docx ("Referring to disability as a 'prohibited ground' does not mean that it is a ground that can never provide the basis of a lawful difference in treatment, but rather that differential treatment requires a high level of justification. The distinction between differential treatment (irrespective of justification) and 'discrimination' (in the absence of sufficient justification) is fundamental in international human rights law and should also inform the Committee's interpretation of the Convention."). A vast literature addresses evolving understandings of the possibilities and limitations of traditional discrimination law. *See, e.g.*, *Gregor* Mau ec, *Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities*, 12 J. INT'L. DISP. SETTLEMENT 42, 44 (2021) (arguing that "the Court's greatest potential for minorities' protection lies in creative and resourceful interpretation and development of applicable law, notably by recognizing and addressing the issues of intersectionality where a criminal conduct resulted from the accumulation and/or intersection of individual grounds of discrimination."); Maria Canterina La Barbera & Marta Cruells López, *Toward the Implementation of Intersectionality in the European*

In the near term, dissonance may be modulated by design modifications, including deepening consultation between treaty bodies, encouraging joint General Comments regarding the intersectionality of rights, and strengthening treaty bodies' capacity to develop the scientific and policy records that apply to persistent conflicts. Until a more robust context is developed or exists for a particular potential conflict, however, it would be useful for treaty bodies to create a practice of taking notice in Concluding Observations and other work product that a standard articulated by another treaty body conflicts with the current interpretation. Such recognition need not waive the treaty body's competency to assert a dissonant interpretation of a particular right, but naming the ongoing conflict via footnote in General Comments, for example, would promote transparency and credibility for the treaty bodies and possibly create more urgency for working toward substantive resolution of the conflict.

Part II situates this article's unique contribution within the literature regarding fragmentation and the less extensive literature addressing fragmentation with respect to international human rights law. Part III describes the similarities and variation in the architecture of the human rights treaty bodies and the harmonies and dissonance in treaty bodies' interactions. Part IV analyzes the three examples described above. Part V sets out preliminary implications of these examples for rights interpretations affecting historically vulnerable groups; unpacks the implications of relying exclusively on secondary legal standards to resolve these conflicts in the absence of a hierarchy;[46] and concludes with pragmatic institutional design recommendations.[47]

Multilevel Legal Praxis: B.S. v. Spain, 53 LAW & SOC'Y REV. 1167, 1168 (2019) ("Intersectionality highlights the substantive dimension of equality. It considers discrimination as a structural issue, rather than a collection of individual behaviors, requiring a systematic response to social inequalities."); Kristin Henrard, *An E.U. Perspective on New Versus Traditional Minorities: On Semi-Inclusive Socio-Economic Integration and Expanding Visions of "European" Culture and Identity*, 17 COLUM. J. EUR. L. 57, 61 (2010) ("A minority conscious interpretation of the prohibition of discrimination would mean that substantive equality concerns are taken on board, while the scope of application ratione materiae of this prohibition is sufficiently broad so as to cover identity matters. A minority conscious interpretation of general human rights and other minority-neutral policies would have adequate regard to identity concerns of persons belonging to minorities.").

46. ILC Report, *supra* note 20, at ¶ 128. ("It is possible to distinguish between two uses for the notion 'self-contained regime.' In a narrow sense, the term is used to denote a special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation. In a broader sense, the term is used to refer to interrelated wholes of primary and secondary rules, sometimes referred to as 'systems' or 'subsystems' of rules that cover some particular problem differently from the way it would be covered under general law.").

47. While conflicts emerge in other areas of the Committees' work as well, General Comments represent a synthesis of the treaty bodies' interpretations and thus provide the most efficient and deliberate target for comparison purposes. *See infra* Part II for more on General Comments.

II. INTERSECTIONS WITHIN THE BACKBONE OF HUMAN RIGHTS: THE LITERATURE ON FRAGMENTATION AND INTERNATIONAL HUMAN RIGHTS LAW

As international law has matured, scholarly and practical attempts to theorize and manage the so-called fragmentation of international law have proliferated.[48] This scholarly attention has focused primarily on conflicts across different functional regimes of law, such as how international human rights law and international humanitarian law should interrelate during times of conflict,[49] or whether international human rights law norms can and should be imported into trade law.[50] Fewer scholars have examined "institutional fragmentation," that is, the conflicts that arise when there are multiple institutions generating, interpreting, and applying norms within a functional category, such as international human rights law.[51]

There are multiple sources of human rights norms, none of which has more international-level authority than the treaty bodies. While the treaty bodies are the focus here, regional courts and the ICJ are also part of the conversation about the appropriate interpretation of international treaties, and conflicts between them also exist.[52] The examples of variations and conflicts below demonstrate that a complainant proceeding before the HRC on the issue of involuntary detention might have a different outcome were she to proceed before the CRPD Committee. Such variation makes it more difficult for all parties, including states, to predict the outcome of, or reaction to, a particular law or policy.[53] Conflicts between the decisions of legal authorities can put legal subjects in uncertain positions, a concern that domestic law generally deals with by permitting appeals through a hierarchy of authority,[54] but international human rights law does not.[55]

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48. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

49. *See supra* note 10.

50. *Human Rights in the Trade Arena*, U.N. OFF. HIGH COMM'R HUM. RTS. (Oct. 25, 2011), https://www.ohchr.org/EN/NewsEvents/Pages/HRInTheTradeArena.aspx.

51. *See, e.g.*, Harro van Asselt & Fariborz Zelli, *The Institutional Fragmentation of Global Environmental Governance: Causes, Consequences, and Responses*, 13(3) GLOB. ENV'T POL. 1 (2013).

52. *See, e.g.*, Geir Ulfstein, *Who is the Final Interpreter in Human Rights: the ICJ v CERD?*, EJIL: TALK! (Feb. 22, 2021), https://www.ejiltalk.org/who-is-the-final-interpreter-in-human-rights-the-icj-v-cerd/.

53. *See, e.g.*, Michael Kimberly, *Symposium: The Importance of Respecting Precedent*, SCOTUSBLOG (Dec. 20, 2017), https://www.scotusblog.com/2017/12/symposium-importance-respecting-precedent/.

54. *See e.g.,* ILC Report, *supra* note 20.

55. As noted *supra* in the text accompanying note 40, the ILC does not have appellate jurisdiction over human rights treaty body decisions. State consent is required for the ILC to assert jurisdiction over a dispute. The International Court of Justice ("ICJ") is often called upon by parties to disputes to apply a treaty body interpretation within a contentious matter.

Nevertheless, Professor Tomer Broude persuasively argued that a "normalization of fragmentation,"[56] followed Professor Martti Koskenniemmi's 2006 Report of the Study Group of the International Law Commission on the Fragmentation of International Law ("Study Group") ("Report").[57] The fragmentation discussion centers around concerns that "law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of law."[58] From a pluralist perspective, disagreement across functional regimes may not necessarily be negative, and this dissonance has the potential to beneficially highlight strengths of each regime.[59] Even for non-pluralist legal theorists, over time there has been general acquiescence that fragmentation need not spell the doom of a "system" of international law.[60] Professors Yuval Shany and Tomer Broude's study on "multi-sourced equivalent norms (MSENs)" attempts to highlight the common normative content of many binding norms, focusing on how the same legal subjects may be bound by similar norms in different international instruments or substantive areas of law.[61]

The Study Group advocates using professional tools to harmonize international law and overcome the "challenges of fragmentation."[62] Such tools include Vienna Convention on the Law of Treaties ("VCLT") article 31(3)(c) on systemic integration, and doctrines such as *lex specialis* and *lex posterior*.[63] Such tools are of limited utility in the conflicts surveyed here, however. It is not the goal of this article to resolve each of the variations and conflicts mentioned here, but rather to shed light on the incidence of these conflicts, commonalities underpinning them, and then to offer institutional recommendations. Why secondary rules of international law, such as *lex specialis*, are limited in their utility is addressed below at Part V.[64] As Dr. Marjan

56. Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMP. INT'L & COMPAR. L.J. 279, 279 (2013).

57. *See* ILC Report, *supra* note 20.

58. KATJA L.H. SAMUEL, THE OIC, THE UN, AND COUNTER-TERRORISM LAW-MAKING 139 (2014); ILC Report, *supra* note 20, ¶ 5.

59. *See, e.g.*, Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence, in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 1, 6 (Martha Minow, Michael Ryan, and Austin Sarat eds., 1992) (Cover describes the possible virtue of overlapping jurisdictions and conflicts, even in the domestic realm).

60. *See* Broude, *supra* note 56, at 280.

61. MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (Tomer Broude & Yuval Shany eds., 2011).

62. *See* Broude, *supra* note 56.

63. *See* ILC Report, *supra* note 20, at ¶ 17; Vienna Convention on the Law of Treaties, *supra* note 11, at art. 31 ¶3(c).

64. *See* Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law*, 22 DUKE J. COMPAR. & INT'L L. 349, 354 (2012) ("Thus, under the rule of [*lex superior*], the hierarchically superior rule trumps the hierarchically inferior. It is for this reason that constitutional law trumps ordinary statutory

Ajevski points out, however, conflicts *within* the field of human rights may be more "dangerous" than those from outside institutions.[65] Internal conflicts may appear more threatening in human rights law than in other areas as variation and conflicts in human rights emerge in the face of the presumption of the normative unity of international human rights law, the underpinnings of which are provided by the Universal Declaration of Human Rights.[66] Given the challenges the treaty body system faces,[67] enhancing the credibility and authority of the UN human rights regime is critical. Otherwise, varying, and possibly even conflicting, interpretations can generate opportunities for opponents to discredit the system and open vulnerabilities within the system.

This article sheds light on unexplored and important conflicts *within* the core of the international human rights regime. There is a relatively smaller literature on such conflicts. A *Nordic Journal of Human Rights* study, for example, focused on conflicts between substantive norms in the decisions of the Inter-American Court of Human Rights and the European Court of Human Rights, and looked closely at the tests and standards applied by these regional human rights courts.[68] Even where these human rights courts used similar tests and doctrines, the outcome of the cases were sometimes divergent or overlapping. The areas of overlap and divergence provide important information about different normative regional or institutional understandings.[69] Professor Adamantia Rachovista also examines regional human rights courts but focuses on how they have interacted with international human rights law treaties. He cautions that systemic integration applied in an uncritical fashion, as on occasion, by these courts, raises serious concerns, including the jurisdictional expansion of some legal decisionmakers, and the threat of "poorer and less diverse international law."[70]

Relevant to the treaty bodies, Mehrdad Payandeh analyzes a case of conflict between a treaty body and a state party, though not between treaty bodies themselves.[71] Payandeh argues that the structural bias of Committee members leads to conflicts of jurisprudence which he says poses a

law, which in turn trumps common law rules.") ("As between more general and more specific rules, for example, the one with the more specific scope of application applies (*lex specialis* derogate lege generali).").

65. Marjan Ajevski, *Fragmentation in International Human Rights Law – Beyond Conflict of Laws*, 32 NORDIC J. HUM. RTS. 87, 88–90 (2014).

66. *See id.*

67. *See infra* note 198 and accompanying text.

68. *See* Ajevski, *supra* note 65.

69. *See id.* at 93.

70. Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law – A Critical Appraisal*, 66 INT'L & COMPAR. L.Q. 557, 557 (2017).

71. *See, e.g.*, Payandeh, *supra* note 28, at 308–09. Payandeh's focus is a case in which Germany, an CERD State Party, and an individual complainant come before the CERD Committee. In the Sarrazin case, a Turkish organization sought review by the CERD Committee of the German Office of the Prosecutor's determination that Mr. Sarrazin was not inciting hatred. The CERD Committee's determination that Germany's failure to prosecute Mr. Sarrazin was a

> realistic threat to the coherence and integrity of international human rights law. This potential for conflict is caused not so much by incompatible substantive provisions of the different human rights treaties, but rather by the different structural biases and institutional preferences that are at work within the different rights treaty bodies.[72]

Payandeh's argument regarding treaty member mandate biases maps easily on to the "specialized" treaty regimes, in which CEDAW Committee members are directed to favor the interests of women and girls, the CRPD to examine particular challenges of people with disabilities, and the Committee Against Torture ("CAT") to favor protection against torture.[73]

Payandeh is not the first scholar to argue treaty bodies should pay closer attention to the legal coherence, analytic rigor, and legitimacy of treaty body work product. Kristen Mechlem for example, argued Committees should apply customary legal rules of interpretation, codified in VCLT Articles 31 and 32, in their work product[74] to render it more reliable as a source of law. Although not focused on the treaty bodies, Professor Stephanie Berry's analysis of the convergence of the European Court of Human Rights and the Advisory Committee to the Framework Convention for the Protection of National Minorities ("AC-FCNM") and its resulting conflicts, has useful implications for the conflicts and variation arising within the treaty body regime. Berry examines two treaties within the Council of Europe: the AC-FCNM and the European Convention on Human Rights (ECHR).[75] While the AC-FCNM has a provision deferring to the ECHR in case of conflict, Berry emphasizes the "worry about the potential for a hegemonic regime."[76] She argues that the majoritarian values of the ECHR will endanger the minority rights protected by the AC-FCNM if a crude hierarchy is applied.[77] She therefore recommends collaboration between the two regimes to optimize the values each promotes. She makes this recommendation even as she recognizes that the ECHR is perceived to be the more powerful of the two treaties.[78] Her notion is that important minority values are promoted by the AC-FCNM, and rote application of a hierarchy of authority would avoid important contests of meaning.[79]

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breach of the CERD, without giving due attention, according to Mr. Payandeh, to freedom of expression.

72. *Id.* at 300.

73. *See id.* at 311.

74. *See* Mechlem, *supra* note 22, at 909.

75. Stephanie E. Berry, *Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework*, 24 INT'L J. ON MINORITY & GRP. RTS. 205, 206–07 (2017).

76. *See id.* at 223.

77. *See id.* at 223–24.

78. *See id.* at 223, 227.

79. *See id.* at 214–15.

As Part III explains, the text of each human rights covenant or treaty, as well as the institutional assumptions upon which each is drafted,[80] create opportunities for diverging interpretations, and even direct conflicts, which are the focus of the examples in Part IV.[81] While the two Covenants are drafted broadly, the specialized treaties address in great detail the rights of historically marginalized groups such as racial minorities, persons with disabilities, women, and children.[82] These specialized treaties challenge structural discrimination and prioritize protecting individuals falling into those groups, even as the ICCPR evinces a structural bias in favor of civil and political rights, interpreted as freedom from discrimination with substantively neutral "equality" for all.[83] As these examples indicate, there is ample opportunity for diverging interpretations of the treaties.

A. *Limitations and Objections*

This article's focus is limited to the backbone of the UN human rights system, that is, on variations and conflicts only between the UN treaty bodies and with some UN Special Procedures. Focusing on the variation and conflicts within the UN international human rights framework allows analysis of the willingness and capacity of the treaty body system to stretch and adapt to various interpretations within the Office of the High Commissioner for Human Rights ("OHCHR"). Such a focus more easily isolates institutional dynamics and offers possibilities for limited and applied recommendations. There are also many examples of dissonance and deviation in interpretation between the regional and constitutional courts, the UN treaty bodies, and UN Special Procedures, which compose the broader system of international human rights law. Indeed, further research into the divergence between regional courts and these same UN bodies is recommended to focus more narrowly on the potential for regimes to coordinate while maintaining their appropriate

80. *See* Ajevski, *supra* note 65, at 87; Payandeh, *supra* note 28.

81. *See infra* Part IV.

82. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women arts. 2(9)–2(16), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

83. *See, e.g.*, *The Evolution of Human Rights*, COUNCIL EUR., https://www.coe.int/en/web/compass/the-evolution-of-human-rights (last visited Oct. 24, 2021) ("The idea at the basis of the third generation of rights is that of *solidarity*; and the rights embrace collective rights of society or peoples, such as the right to sustainable development, to peace or to a healthy environment. In much of the world, conditions such as extreme poverty, war, ecological and natural disasters have meant that there has been only very limited progress in respect of human rights. For that reason, many people have felt that the recognition of a new category of human rights is necessary: these rights would ensure the appropriate conditions for societies, particularly in the developing world, to be able to provide the first and second generation rights that have already been recognized."); Hope Lewis, *Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 18 (1995) ("[T]hird generation rights are those that require broader international economic and political cooperation to achieve, such as the right to development or the right to a clean environment.").

jurisdictional focus.[84] Analysis of the regional and constitutional courts will, in turn, permit better understanding and analysis of the implementation and enforcement of these rights, as well as the impact on the ground of the variations and conflicts. The three examples analyzed here are in no way exhaustive of the conflicts and variations within the UN human rights system.

Astute readers will have realized that each of this article's examples intersect with the issue of disability. That all three examples overlap with the most recent human rights treaty, the CRPD, offers the opportunity for a control of sorts. Examining the dynamics of the text of the treaty which, as the most recent human rights treaty, embraces intersectionality and overlapping rights, allows for better understanding of variations in substance and form of the conflicts between treaty bodies' and Special Procedures' interpretations. Indeed, disability rights advocates have celebrated the unique character of the CRPD in embracing intersectionality and thoroughly integrating economic and social with civil and political rights.[85] Disability law scholars note that in order to remove social obstacles to full inclusion faced by people with disabilities, economic and political rights in the text of this widely-ratified treaty were integrated.[86] Analogously, some argue traditional discrimination paradigms will need to be transcended to address the needs of people with disabilities.[87]

In addition, it is beyond the scope of this analysis to examine the impact and effectiveness of the treaty bodies' General Comments, though such research would be valuable. Some readers might assert that the analysis here overvalues the effect of the General Comments and undervalues Concluding Observations of the Committees. This analysis focuses on General Comments precisely because of the time and focus Committees can commit to these documents, working to synthesize the state of the law as they see it.[88] The General Comments allow Committees the opportunity to deliberate and clarify. General Comments also offer a window into the Committees' understanding of their own roles in the international system.[89] Concluding Observations are

84. *See, e.g.*, Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1896 (May 2003) (discussing the ways in which constitutional rights and human rights both act in concert with each other and diverge from each other.).

85. *See* de Beco *supra* note 28, at 646.

86. *See, e.g.*, ARLENE KANTER, THE DEVELOPMENT OF DISABILITY UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS 3 (2015).

87. *See, e.g.*, SAMUEL BAGENSTOS, THE LAW AND CONTRADICTIONS OF THE DISABILITY MOVEMENT 128–30 (2009). Future research into how the three examples of variation and conflicts in this article, each of which involves disability in some fashion, might be unique and distinguishable from non-disability-related conflicts between and among other treaty bodies.

88. *See generally* Hum. Rts. Comm., *Rep. of the Human Rights Committee*, ¶¶ 541–57, U.N. Doc. A/39/40 (1984).

89. *See* Hum. Rts. Comm., General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6

important to the international system and to application of the principles,[90] but during the haste of state reporting sessions, the treaty bodies themselves often miss opportunities to build continuities between their General Comments and the Concluding Observations.[91]

For purposes of this article, a conflict between interpretations is found where "there is a difference between the laws of two or more jurisdictions (i.e. treaty bodies) with some connection to [an issue], such that the outcome depends on which jurisdiction's law will be used to resolve each issue in dispute."[92] Some variations in interpretation set a "higher standard" for compliance, but for a rights-claimant seeking to enforce that standard and not another treaty body's "weaker" standard, the distinction between a variation and a conflict may be elusive. In addition, state parties to both treaties observing only the lower standard may comply with one treaty's standard but be out of compliance with the other treaty.[93] Further research is recommended into the effects of norm conflicts and variations within the human rights regime, including whether enduring conflicts between treaty bodies are exploited by states. Recent developments in treaty bodies' varying and conflicting decisions could be researched to examine compliance of state parties.

This analysis also raises other directions for future research, each of which would build on various existing literature. For example, it includes a comparative inquiry into whether and how the modern practice of treaty bodies has improved over their initial practices. Research into the power differentials between the various treaty bodies would also be beneficial to understanding prospects for striking a balance between particularism and universalism. Some of the recommendations in this article raise questions regarding how independent experts should understand their ethical obligations to the general population, and to the various, narrower discrete populations that are the focus of their treaties.

(1994); *see also* Konstantin Korkelia, *New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights*, 13 EUR. J. INT'L L. 437, 438 (2002).

90. For one example of the required actions for compliance with the CRPD according to Concluding Observations, see Paul Harpur & Michael Ashley Stein, *Universities as Disability Rights Change Agents*, 10 NE. U. L. REV. 542, 555 n.76 (2018).

91. *See* Gerald L. Neuman, *Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members*, 3–4 (Hum. Rts. Program, Working Paper No. 16-002, 2016).

92. Legal Info. Inst., *Conflict of Laws*, CORNELL L. SCH., https://www.law.cornell.edu/wex/conflict_of_laws (last visited Oct. 21, 2021).

93. Necessarily, if a State Party is bound to abide by one standard in one treaty, yet a lower standard in another, and abides only by the less restrictive treaty, it will inherently be out of compliance with the higher standard found in the first.

III. THE HARMONY AND DISSONANCE BETWEEN THE TEN HUMAN RIGHTS TREATY BODIES PROMOTING AND PROTECTING INTERNATIONAL HUMAN RIGHTS LAW

In many respects, the treaty bodies' specialized regime of international human rights law is harmonious, universal, and interdependent. Yet the ten treaty bodies also vary in their foci and mandates.[94]

Beginning with the ways the existing system tends toward universality and harmony, this Part explains how the treaties' texts and treaty body systems enable both shared interpretations of human rights norms as well as dissonance in the distinct bodies' interpretations. The Part concludes by setting forth recent improvements in the internal processes of how treaty bodies collaborate, communicate, and sometimes disagree.

A. *The Treaty Bodies as the Backbone of the Human Rights Regime*

The UN human rights treaty body system is the backbone of the international human rights regime. Treaty bodies have a strong claim to universality, as the treaty body system is matched in its universal reach only by the UN Human Rights Council.[95] Indeed, the treaty bodies' reach is vast: Every single UN member state has ratified at least one human rights treaty, and over three-quarters of UN member states are parties to fully three-quarters of the ten human rights treaties.[96]

The treaty body system is housed within the OHCHR, which additionally coordinates the UN Charter-based human rights bodies.[97] As Table A elucidates, each of the ten human rights treaties establishes a Treaty Body, or Committee, to monitor implementation by the state parties of the international human rights obligations.[98] As of this writing, these treaty bodies are staffed with a total of 172 pro bono independent experts with recognized competence in the subject matter, the treaties, and human rights law generally. They are nominated and elected for fixed renewable terms of four years by the state

94. *See infra* Tables A, B, & C.

95. G.A. Res. 60/251, Hum. Rts. Council (Apr. 3, 2006). Design recommendations for the relationship between the treaty bodies and other UN rights bodies, such as the Human Rights Council, are set forth, *infra* Part V.B.

96. *See* Kälin, *supra* note 7, at 16–17.

97. Charter-based bodies include the Human Rights Council, the Universal Periodic Review, the Commission on Human Rights, the Special Procedures of the Human Rights Council, and the Complaints Procedure of the Human Rights Council. *See Human Rights Bodies,* U.N. OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last visited Oct. 21, 2020).

98. *See infra* Table A (chart describing the treaties which created these bodies).

parties.[99] As Payandeh emphasizes, independent experts' mandates and relevant experience often affects the content of their interpretations.[100]

TABLE A

Treaty	Corresponding Committee
Convention on the Elimination of All Forms of Racial Discrimination	Committee on the Elimination of Racial Discrimination ("CERD")
International Covenant on Civil and Political Rights ("ICCPR")	Human Rights Committee ("HRC")
International Covenant on Economic, Social and Cultural Rights ("ICESCR")	Committee on Economic, Social and Cultural Rights ("CESCR")
Convention on the Elimination of All Forms of Discrimination against Women	Committee on the Elimination of Discrimination against Women ("CEDAW")
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Committee against Torture ("CAT")
Convention on the Rights of the Child	Committee on the Rights of the Child ("CRC")
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Committee on Migrant Workers ("CMW")
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment	Subcommittee on Prevention of Torture ("SPT")

99. U.N. Secretary-General, *Status of the Human Rights Treaty Body System*, U.N. Doc. A/74/643, ¶3 (Jan. 10, 2020). Table B sets out the qualifications required. "Recognized competence in the field of human rights law" is a qualification required of independent experts of the Human Rights Committee, Convention on Economic, Social, and Cultural Rights ("CESCR") Committee, Convention Against Torture ("CAT") Committee and Convention on Economic Development ("CED") Committee. The CEDAW, Convention on the Rights of the Child ("CRC"), Convention on Migrant Workers ("CMW"), and Convention on the Rights of Persons with Disabilities ("CRPD") committees require "recognized competence in the field covered by the Convention." The CERD and Subcommittee on the Prevention of Torture ("SPT") Committees do not have either of these two requirements.

100. Payandeh, *supra* note 28, at 312.

Convention on the Rights of Persons with Disabilities	Committee on the Rights of Persons with Disabilities ("CRPD")
International Convention for the Protection of All Persons from Enforced Disappearance	Committee on Enforced Disappearance ("CED")

The universality of the treaty body system means the Committees' interpretations of their treaties are significant to the promotion, protection, and fulfillment of human rights law. While the Committees' work product is not legally binding, it is highly authoritative.[101] The ICJ, for example, has affirmed that the Concluding Observations of the HRC and the CESCR Committee are authoritative under the Covenants.[102] Today, in addition to receiving state reports, various Committees also have the capacity to adopt recommendations, make site visits, adopt interim measures, receive interstate communications, make inquiries about grave abuses, and receive individual complaints.[103]

Centrally, treaty bodies monitor implementation of the treaties by states to promote states' compliance with the treaties, and to invite public scrutiny of, and reflection on, the states' practices.[104] This was not always the case. Since the establishment of the first treaty body—the CERD Committee in 1970[105]—the processes and the procedures of the treaty bodies have continued to evolve. An early aim of state reporting for the HRC was merely to "strengthen friendly relations between States in accordance with the Charter of the United Nations,"[106] but over time the dialogue has matured into a more focused exercise, eventually including the practice of the Committee to adopt Concluding Observations, a process developed by the HRC after the end of the Cold War, in 1992.[107]

101. *See* Mechlem, *supra* note 22, at 929–30.

102. *See* Kälin, *supra* note 7, at 31. Michael O'Flaherty, *The Concluding Observations of Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 35–36 (2006). Recent developments cast doubt on the certainty of the ICJ treating as authoritative all treaty body recommendations, however. In the recent *Qatar v. UAE* case, the Court asserted that while in the previous case of Ahmadou Sadio Diallo, it ascribed "great weight" to the Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights, it also noted that it is under no obligation to follow an independent body's recommendation, in this case the CERD Committee's. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J 172 (Feb. 4).

103. *Monitoring the Core International Human Rights Treaties*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx (last visited Nov. 17, 2021).

104. *See id.*

105. Convention on the Elimination of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

106. Kälin, *supra* note 7, at 35.

107. *See* Kälin, *supra* note 7, at 36. *See also* O'Flaherty, *supra* note 102, at 29.

Nine of the ten Committees also have the capacity to adopt General Comments, which are the focus of this article's analysis.[108] These non-binding but authoritative Comments present the work of the Committee in a more readily accessible format.[109] According to the 2015 Report of the Chairs:

> General Comments are an important legal tool for the effective and coherent implementation of the purpose and objectives of the international human rights treaties.[110] In their least controversial form, General Comments might be understood as a synthesis of the interpretations of the treaty body, representing the Committees' condensed perspective on issues that arise from the text of the treaty. Thus, the Committees' clarification of rights in the General Comments are fundamental to States' successful implementation and individuals' expectations of human rights globally.[111]

When the treaty bodies adopt General Comments, they expect states to take action in compliance with their decisions.[112] Some states accept a duty to give due consideration to the treaty bodies' findings,[113] but controversial General Comments often prompt statements by state parties asserting their disagreement.[114] By the end of 2017, nine treaty bodies had adopted 166 General Comments.[115] Some General Comments have notoriously pushed further

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108. *See Human Rights Treaty Bodies – General Comments*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx (last visited Nov. 17, 2021) (only the Committee on Enforced Disappearances lacks the capacity to adopt General Comments) (two treaty bodies issue "General Recommendations," not "General Comments").

109. Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 117 (Helen Keller & Geir Ulfstein eds., 2012).

110. U.N. Secretary-General, *Implementation of Human Rights Instruments: A Note from the Secretary-General*, U.N. Doc. A/70/302, ¶ 90 (Aug. 7, 2015).

111. *See* EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, REPORT ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN DOMESTIC LAW AND THE ROLE OF COURTS ¶78, (Dec. 8, 2014), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)036-e (declaring the legal consequence [of HR Treaty Body judgments and General Comments] that member states are under the obligation to take HRC's final views into consideration in good faith).

112. Machiko Kanetake, *UN Human Rights Treaty Monitoring Bodies Before Domestic Courts*, 67 INT'L & COMPAR. L.Q. 201, 201 (2018).

113. *See id.*

114. *See, e.g.*, U.S. & U.K., OBSERVATIONS BY THE GOVERNMENTS OF THE UNITED STATES AND THE UNITED KINGDOM ON HUMAN RIGHTS COMMITTEE GENERAL COMMENT NO. 24 (52) RELATING TO RESERVATIONS (Mar. 28, 1995), https://www.iilj.org/wp-content/uploads/2016/08/US-and-UK-Responses-to-the-General-Comment.pdf (asserting that General Comment No. 24, "goes too far." The U.S. government notes that "here the Committee appears to reject the established rules of interpretation of treaties as set forth in the Vienna Convention on the Law of Treaties and customary international law[.]").

115. U.N. Secretary-General, Status of the Human Rights Treaty Body System: Supplementary Information, U.N. Doc. A/73/309, annex XXI (Aug. 6, 2018). Nine of the ten human

than the text of the treaty immediately suggests,[116] and some Committees, such as the CRPD Committee, have earned reputations for being more aggressive about interpreting the treaty they are charged to interpret than the *travaux preparatoires* supports.[117]

B. *The Institutional Mandates of Each Treaty Body Vary*

Although the treaty system "rest[s] on the assumption of normative unity due to [treaty bodies'] allegiance to the Universal Declaration on Human Rights,"[118] inter-treaty interpretation variations and conflicts arise. They do so because the ten treaty bodies' foci, mandates, workloads, capacities, and constituencies vary, as do the specific purposes of the treaties themselves, even as they are united in a general concept of human dignity. Regarding discrimination, core UN human rights treaties can be divided into many categories, including single issue and comprehensive treaties.[119] As a legal matter, the provisions of the treaties necessarily constrain the scope of each Committee's legal interpretations, so the broader the scope of the Committee's commentary beyond the text of the treaty, or in conflict with another treaty body, the weaker the Committee's authority.[120]

In addition, as a practical matter, not all treaty bodies have had the same opportunity to establish a reputation among states and stakeholders.[121]

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rights treaty bodies adopt General Comments, and five of the treaty bodies also receive individual communications. See Table B – Human Rights Treaty Bodies.

116. *See, e.g.*, Hum. Rts. Comm., *supra* note 89; Hum. Rts. Comm., General Comment On Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (1997).

117. *See, e.g.*, Melvyn Colin Freeman, Kavitha Kolappa, Jose Miguel Caldas de Almeida, Arthur Kleinman, Nino Makhashvili, Sifiso Phakathi, Benedetto Saraceno & Graham Thornicroft, *Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities*, LANCET PSYCHIATRY (2015) ("The question then becomes, why does the General Comment Committee's interpretation veer so sharply away from previous intergovernmental agreements and from what is currently deemed best medical practice."); *see also* John R. Vaughn, *Finding the Gaps: A Comparative Analysis of Disability Laws in the U.S. to the U.N. Convention on the Rights of Persons with Disabilities*, NAT'L COUNCIL ON DISABILITY (2008) ("Therefore, while as currently interpreted and enforced, there appears to be a gap between U.S. law and the CRPD, there is no reason why with more vigorous interpretation and/or action by Congress, the two could not be on an equal level."); Paul Gosney & Peter Bartlett, *The UK Government Should Withdraw from the Convention on the Rights of Persons with Disabilities*, 216(6) BRIT. J. PSYCHIATRY 296 (2020) (arguing that "the Committee's interpretation of the Convention 'goes too far.'").

118. Ajevski, *supra* note 65, at 88.

119. WOUTER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES 183 (2005).

120. *See id*. For more on the need for legal methods in General Comments, see also Mechlem, *supra* note 22.

121. *See* PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 839–43 (2013).

Indeed, the treaty bodies vary in age and have different workloads,[122] session lengths,[123] and mandates,[124] depending on the text of their treaties and optional protocols. The allocated work time of each Committee is not equal, with each Committee entitled to a specific number of weeks of meeting time, determined by the OHCHR.[125] The treaty body with the greatest workload,[126] the HRC, was established in 1976.[127] Table B below shows that treaty bodies' practice in issuing General Comments also vary, with some treaty bodies having published as few as four and others as many as thirty-seven General Comments. The content of these General Comments also varies, some remaining specific and applied to provisions of the treaty, and others stretching legality to the limit, for example, by advising states to ratify other treaties.[128]

Treaty body working methods differ, with the CRPD and CEDAW Committees often permitting remote participation by states, and the other Committees less likely to do so (especially before the pandemic).[129] Most Committees now permit non-governmental representatives to participate remotely on occasion.[130] Working methods are relevant to understanding conflicting

122. *See* U.N. Secretary-General, *supra* note 115, Annex VI (for example, the Human Rights Committee receives significantly more individual communications than do the other treaty bodies).

123. *Id.* Annex XIV (for example, CEDAW had 15 weeks of meeting time, the HRC 14.7, and the CRPD 8.5 weeks of meeting time according to 2017 data).

124. *Id.* Annex I (for example, the Subcommittee on Prevention of Torture "has a mandate to visit all places where persons are or may be deprived of their liberty.").

125. *Id.* Annex XIV (for 2017, the HRC Committee's total meeting time entitlement was 14.7 weeks, the CEDAW Committee's was 15 weeks, and the CRPD Committee's was 8.5 weeks. 2021 estimates track similar results).

126. *See Human Rights Bodies*, *supra* note 97. U.N. Secretary-General, *supra* note 115, Annex VI (for example, the Human Rights Committee receives significantly more individual communications than do the other treaty bodies).

127. *See* International Covenant on Civil and Political Rights, *supra* note 2.

128. *See generally UN Human Rights Treaty Bodies – What Do They Do? How Are They Relevant To My Work?*, U.N. SUSTAINABLE DEV. GRP., https://unsdg.un.org/2030-agenda/strengthening-international-human-rights/un-treaty-bodies (last visited Nov. 19, 2021) (noting that "General comments may also outline actions which would be considered potential violations of rights and offer advice to States on how best to comply with their obligations under the treaties.").

129. *See* U.N. Secretary-General, *supra* note 115, at Annex XII; *see also* Comm. on the Elimination of Discrimination against Women, Statement of the Committee on the Elimination of Discrimination Against Women on Virtual Sessions (Jan. 14, 2021), https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx; Comm. on the Rights of Persons with Disabilities, Guidelines on the Participation of Disabled Persons Organizations (DPOs) and Civil Society Organizations in the work of the Committee, U.N. Doc. CRPD/C/11/2, ¶ 13 (May 14, 2014).

130. *See also* G.A. Res. 68/268, ¶ 22 (Apr. 21, 2014) ("*Decides* in principle, with the aim of enhancing the accessibility and visibility of the human rights treaty bodies and in line with the report of the Committee on Information on its thirty-fifth session, to webcast, as soon as feasible, the public meetings of treaties bodies"); *see also UN Treaty Bodies Announce New Measures to Synchronize Their Work*, INT'L JUST. RES. CTR. (July 11, 2019), https://ijrcenter.org/2019/07/11/un-treaty-bodies-announce-new-measures-to-synchronize-their-work/

interpretations, and indeed, they have been a focus of efforts to strengthen the system. Human rights laws relating to accessibility and structural interpretations of equal protection are under consideration by the treaty bodies, and the working methods themselves may screen out necessary perspectives to be weighed in the interpretation. For example, basic UN infrastructure and working methods curtail who may serve as independent experts on the treaty bodies.[131] Even over ten years after ratification of the CRPD, basic accessibility challenges in work spaces and methods have limited the capacity of nine of the ten treaty bodies to include disabled independent experts, creating de facto obstacles to their participation on Committees other than the CRPD Committee.[132] Indeed, the treaty body system currently provides only the formal meetings of the CRPD Committee in accessible formats.[133] Discussions of mainstreaming disability access within the UN are underway, but according to the High Commissioner, there have still been accessibility challenges at every session.[134] To date, UN disability access has relied heavily on voluntary contributions from member states.[135]

Relatedly, the relevant expertise of the experts who staff the treaty bodies also creates variation in the tone of the work of the Committees, with some Committees tending to attract more legal experts than others.[136] Of all the treaty bodies, the HRC and CAT had the most members with a legal background.[137]

("Proposed changes include holding interactive dialogues with States in their own geographic regions (rather than in Geneva), conducting periodic reviews even when the State has failed to submit a report, making the simplified reporting process available to States for all reviews, and allowing civil society members to participate in briefings via video conference."); *Human Rights: UN Treaty Body Chairpersons Envision a Stronger Monitoring System*, U.N. OFF. HIGH COMM'R HUM. RTS. (July 4, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24787&LangID=E.

131. *See* U.N. Secretary-General, *supra* note 115, at Annex XI ("Reasonable accommodation is provided to a very limited extent and within existing resources, in the absence of an operative voluntary fund for accessibility and reasonable accommodation.").

132. *See Opening of the 22nd Session of the CRPD Committee (26 Aug 2019 – 20 Sep 2019),* INT'L DISABILITY ALL. (Aug. 26, 2019), http://www.internationaldisabilityalliance.org/crpd-22nd-session; U.N. Secretary-General, *supra* note 99, at ¶ 39.

133. Services provided include sign language interpretation, simultaneous remote captioning, and Braille printing as required. There is no right to demand easy to read versions of documents for any of the Committees. *See* U.N. Secretary-General, *supra* note 115, Annex XI.

134. *See id.*

135. *See id.* Annex XXIV. From September 2016 to June 2018, public meetings of the treaty bodies have been webcast in the language of the speaker ("floor") and in English. CRPD meetings will be webcast with sign language and captioning. *UN Web TV*, UNITED NATIONS, http://webtv.un.org (last visited Nov. 4, 2021).

136. As demonstrated in the attached Tables B and C.

137. *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 20 (Philip Alston & James Crawford eds., 2000). Globally, people with disabilities remain woefully underrepresented in the law. While law schools in the United States have generally achieved gender parity in their student bodies, there remains a paucity of law students with

The diversity of independent experts within treaty bodies varies widely. For example, the CRC and CEDAW Committees famously were the only treaty bodies that included strong representation of women.[138] At the same time, the preponderance of female independent experts on CEDAW has been criticized as undermining the impartiality and credibility of its work product, rendering it too subjective.[139] States claim obstacles at the national level in the nomination process, including difficulties locating qualified female candidates, have created many of the existing imbalances.[140] The CRPD Committee's standards are unique in that they affirmatively require consideration to be given to "balanced gender representation and participation of experts with disabilities."[141]

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disabilities and recruitment and retention of racial minorities remains challenging. *See* John Weiser, Claire Morduch, & Marian Breeze, *People with Disabilities in the Legal Profession: Understanding the Barriers, Challenges and Opportunities to Improve Diversity*, BWB SOLS. (Jul. 13, 2015), https://www.mnbar.org/docs/default-source/diversity-msba/persons-with-disabilities-in-the-legal-profession-final-report-7_13_151.pdf?sfvrsn=2. Women and racial minorities continue to face distinct challenges to law school admission in various countries around the world, exacerbating the issue of need for experts with a legal background in the treaty bodies.

138. *See* U.N. Secretary-General, *supra* note 115, at Annex XXIV ("On 31 January 2018, out of 172 treaty body members, 44 per cent were women. Without CEDAW, the representation of women in the membership of the treaty bodies is 36 per cent. The CRC is the only Committee that has achieved parity.").

139. *See* Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98, 177 (2011) ("To eliminate discrimination against women, men must be included in the central defining language alongside women so that the design and implementation of remedies reflects the fuller nature of sex discrimination. Men must be allies in a battle on gender inequality; without men, broader goals for gender equality will remain unrealized.").

140. *See* ANNA-KARIN HOLMLUND, GENDER PARITY IN THE UNITED NATIONS TREATY BODIES - A HISTORICAL OVERVIEW, http://www.gqualcampaign.org/wp-content/uploads/2018/01/Gender-parity-in-the-United-Nations-Treaty-Bodies-final-for-publication1.pdf (last visited Nov. 19, 2021).

141. Convention on the Rights of Persons with Disabilities art. 34(4), Dec. 13, 2006, 2515 U.N.T.S. 3. [hereinafter CRPD]. While the CRPD treaty does not necessarily require that a majority (or any) of its members be individuals directly affected by the treaty, it does strongly encourage it. *See id.* art. 4(3) ("In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, *States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations*.") (emphasis added); *Id.* art. 34(3) ("The members shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, *States Parties are invited to give due consideration to the provision set out in article 4.3 of the present Convention*.") (emphasis added); *Id.* art. 34(4) ("The members of the Committee shall be elected by States Parties, consideration given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation *and participation of experts with disabilities*.") (emphasis added).

TABLE B

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
CERD Committee	1970[143]	Convention on the Elimination of All Forms of Racial Discrimination,[144] *adopted* Dec. 21, 1965. *Entered* into force on Jan. 4, 1969.	18	Persons have high moral standing and acknowledged impartiality. "[C]onsideration must also be given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems."[145]	Article 8 establishes the Committee. Article 10 addresses the Committee's procedures.	35	1972

142. Number of comments as of June 1, 2020.

143. FACT SHEET NO. 12: THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/Documents/Publications/FactSheet12en.pdf (last visited Nov. 19, 2021).

144. *See* CERD, *supra* note 105.

145. *Id.* art. 8(1).

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
Human Rights Committee	Mar. 23, 1976[146]	International Covenant on Civil and Political Rights,[147] *adopted* and open for signature on Dec. 16, 1966. *Entered* into force on Mar. 23, 1976.	18	"[R]ecognized competence in the field of human rights."[148] "[C]onsideration being given to the usefulness of the participation of some persons having legal experience."[149]	Article 28 establishes the Committee. Articles 29 – 43, and 45, address the Committee's duties.	36	July 27, 1981
CESCR Committee	May 28, 1985[150]	International Covenant on Economic, Social and Cultural Rights,[151] *adopted* Dec. 16, 1966. *Entered* into force Jan. 3, 1976.	18	Persons of high moral character and recognized competence in the field of human rights.	ECOSOC Resolution 1985 /17.	25	1989

146. FACT SHEET NO. 15: CIVIL AND POLITICAL RIGHTS, HUM. RTS. COMM., U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (last visited Nov. 19, 2021).

147. *See* International Covenant on Civil and Political Rights, *supra* note 2.

148. *Id.* art. 28(2).

149. *Id.*

150. Economic and Social Council Res. 1985/17 (May 28, 1985).

151. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
CEDAW Committee	1982[152]	Convention on the Elimination of All Forms of Discrimination Against Women[153], *adopted* on Dec. 18, 1979. *Entered* into force on Sept. 3, 1981.	23	"Consideration is given to equitable geographical distribution and to the representation of the different forms of civilizations as well as the principle legal systems."	Article 17 establishes the Committee. Articles 18 - 21 address the Committee's duties. Articles 1, 3 -14 of the Optional Protocol address the Committee's duties as well.	37	1986
CAT Committee	Jan. 1, 1988[154]	Convention Against Torture[155], *adopted* on Dec. 10, 1984. *Entered* into force on June 26, 1987.	10	Persons of high moral character and recognized competence in the field of human rights.	Article 17 establishes the Committee. Article 18 addresses the Committee's procedures.	4	Nov. 21, 1977

152. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, https://www.un.org/womenwatch/daw/cedaw/committee.htm#:~:text=The%20United%20Nations%20Committee%20on,issues%20from%20around%20the%20world (last visited Nov. 19, 2021).

153. *See* CEDAW, *supra* note 82.

154. FACT SHEET NO. 17: THE COMMITTEE AGAINST TORTURE, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/Documents/Publications/FactSheet17en.pdf (last visited Nov. 19, 2021).

155. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
CRC Committee	Feb. 27, 1991.[156]	Convention on the Rights of the Child[157], *adopted* and open for signature on Nov. 20, 1989. *Entered* into force on Sept. 2, 1990.	18	Must be experts with "high moral standing and recognized competence in the field covered by this Convention."[158] "Consideration being given to equitable geographical distribution, as well as the principle legal systems."[159]	Article 43 establishes the Committee. Articles 44 and 45 address the Committee's duties.	24	Apr. 17, 2001

156. FACT SHEET NO.10 (REV. 1), THE RIGHTS OF THE CHILD, U.N. OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf (last visited Nov. 19, 2021).

157. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

158. *Id.* art. 43(2).

159. *Id.*

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
CMW	March 2004[160]	International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families [161], *adopted* Dec. 18, 1990. *Entered* into force on July 1, 2003.	14	Persons of "high moral standing, impartiality and recognized competence in the field covered by the Convention."[162]	Article 72 establishes the Committee. Article 73, 74, and 75 address the Committee's role and procedures.	4	Feb. 23, 2011

160. COMMITTEE ON MIGRANT WORKERS, U.N. HUM. RTS. OFF. HIGH COMM'R https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIntro.aspx (last visited Nov. 19, 2021).

161. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter CRMW].

162. *Id.* art. 72(1)(b).

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
SPT	February 2007[163]	Optional Protocol to the CAT, *adopted* Dec. 18, 2002. *Entered* into force on June 22, 2006.	25	Persons of "high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty."[164]	Article 2 establishes the Subcommittee. Articles 5, 7, 9, 10, 11 address the Subcommittee's rules and procedures.	N/A[165]	N/A

163. Optional Protocol to the Prevention Against Torture ["OPCAT"]: Subcommittee on Prevention of Torture, U.N. OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/hrbodies/opcat/pages/opcatindex.aspx#:~:text=The%20Subcommittee%20on%20Prevention%20of,of%20torture%20and%20ill%20treatment (last visited Nov. 19, 2021).

164. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5(2), Dec. 18, 2002, 2375 U.N.T.S. 237.

165. Neither the description of the Subcommittee, nor the treaty establishing the Subcommittee provides a mechanism for the Subcommittee to submit General Comments.

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
CRPD Committee	Feb. 2009[166]	Convention on the Rights of Persons with Disabilities ("CRPD")[167], *adopted* on Dec. 13, 2006. *Entered* into force on May 3, 2008.	18	Recognized competence and experience in the field covered by the CRPD. "[C]onsideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities."[168]	Article 34 establishes the Committee. Articles 35-39 address the Committee's duties.	7	Apr. 11, 2014

166. Comm. on the Rts. of Persons with Disabilities, Provisional Agenda and Annotations of its First Session, U.N. Doc. CRPD/C/1/1 (Jan. 20, 2009), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=366&Lang=en.

167. CRPD, *supra* note 141.

168. *Id.* art. 34(4).

Treaty Body	**Date Est.'d**	**Treaty & Date Adopted and Ratified**	**# Experts**	**Standards for Independent Experts as set forth in Treaties**	**Relevant Provisions Establishing Treaty Body**	**# of General Comments Issued**[142]	**Date First General Comment adopted**
CED Committee	2011[169]	International Convention for the Protection of All Persons from Enforced Disappearance [170], *adopted* Dec. 20, 2006. *Entered* into force on Dec. 23, 2010.	10	Persons of high moral character and recognized competence in the field of human rights.	Article 26, 31, and 32 of the Convention establish the Committee and its reporting procedures.	Cannot issue General Comments.	None

169. U.N. OFF. OF THE HIGH COMM'R OF HUM. RTS., 10TH ANNIVERSARY OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE, https://www.ohchr.org/Documents/HRBodies/CED/Brochure10thAnniversaryCED_EN.pdf (last visited Nov. 21, 2021).

170. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3.

C. *Treaty Bodies' Interactions Within the "Strengthened" Specialized Human Rights Regime: Harmony and Discord*

To better understand why treaty bodies' interpretations might conflict, this sub-section sketches how treaty bodies currently interact with each other.[171] From its initial humble beginnings, the treaty body system has grown in size and complexity. As noted in the introduction, there have been frequent calls for, and attempts at, reform as the system has grown more complex.[172] Along with calls for systemic reform of the UN human rights system, in recent years, there has been an increased focus on harmonization of Committees' practices and procedures.[173] Conflicting and even varying interpretations of rights can place stress on the claims to universality of the system of human rights protection.[174] The human rights system faces tremendous and unprecedented hostility from many states and non-state actors; such tensions can be difficult to reconcile.[175]

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171. Treaty bodies also interact with other entities within the UN human rights system, such as Special Procedures, the Secretariat, and organs of the UN, but these receive only limited treatment in this short article.

172. In late 2009, Navi Pillay, UN High Comm'r for Hum. Rts., called upon "all stakeholders to embark upon a process of reflection on ways to strengthen the treaty body system." At the end, what was "absolutely made clear through the process is that the approach of absorbing new mandates within existing resources is not sustainable." U.N. Off.of the High Comm'r for Hum. Rts., Strengthening the United Nations Human Rights Treaty Body System, U.N. Doc. A/66/860, at 9 (June 26, 2012).

173. *See e.g.*, U.N. Secretary-General, *supra* note 99, at ¶34 ("Alignment or harmonization of working methods has been coordinated through the annual meeting of the Chairs, which is held once a year for one week . . . At the 31st meeting of the Chairs, in June 2019, the Chairs endorsed the elements of a common aligned procedure for the simplified reporting procedure to be offered to States Parties."). Calls for systemic reform of human rights have met with some success—see, e.g., the reshaping of the Human Rights Commission into the Human Rights Council and the system of universal periodic review. It is beyond the scope of this article to address these reforms in detail, except to the extent that conflicts between treaty body General Comments impact States' willingness or desire to comply with treaty body's recommendations and interpretations in Concluding Observations.

174. *See, e.g.*, Navanethem Pillay (U.N. High Commissioner for Human Rights), *Are Human Rights Universal?*, U.N. CHRONICLE, https://www.un.org/en/chronicle/article/are-human-rights-universal (last visited Nov. 21, 2020) (noting how the poverty reduction and development's human rights approach exemplifies how the framework of the human rights institutions "help reduce disparities and foster cooperation. This approach helps mediate conflicting claims that inevitably arise through development processes.").

175. *See, e.g.,* Colum Lynch, *U.N. Chief Faces Internal Criticism Over Human Rights*, FOREIGN POL'Y (Feb. 4, 2020), https://foreignpolicy.com/2020/02/04/un-chief-antonio-guterres-internal-criticism-human-rights/; Human Rights Council, *supra* note 18 (identifying frequent attacks on the Universal Declaration from many States, populists, violent extremists and U.N. officials); Press Release, U.N. High Comm'r for Hum. Rts., Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on the 25th Anniversary of the Vienna Declaration (May 22, 2018) (noting that "today is not a time for soporific complacency. Human rights are sorely under pressure around the world – no longer a priority: a pariah. The legitimacy of human rights principles is attacked. The practice of human rights norms is in retreat.").

Although every treaty body has its own distinct mandate, each also operates within the growing and increasingly beleaguered UN human rights system. The General Assembly's "Strengthening the Treaty Body System" report's recommendations helped evolve treaty bodies' communication with each other, with the primary focus of harmonization efforts being procedures, and not substance.[176] The Chairs of the treaty bodies now meet every June to harmonize their methods and to address issues of common concern.[177] In addition, the General Assembly adopted a resolution on strengthening and advancing the effective functioning of the human rights treaty body system in G.A. Res. 68/268.[178] This resolution encourages the Chairs to "formulate conclusions on issues related to working methods and procedural matters, promptly generalizing good practices and methodologies among all treaty bodies, ensuring coherence across the treaty bodies, and standardizing working methods."[179] That resolution was endorsed as the continuing framework for the treaty body system in the September 2020 report.[180]

As the examples below demonstrate, increasing harmonization between and among the treaty bodies means that Committees now also solicit views on draft General Comments from other treaty bodies, national human rights institutions, non-governmental organizations, and states before finalizing their General Comments. In June 2015, the Chairs of the Committees agreed on the common elements for the elaboration of, and consultation on, General Comment observations.[181] Encouraging consultation helps avoid unnecessary

176. G.A. Res. 68/268 (Apr. 9, 2014).

177. U.N. Off. of the High Comm'r for Hum. Rts., Handbook for Human Rights Treaty Body Members, U.N. Doc. HR/PUB/15/2, at 10 (2015).

178. G.A. Res. 68/268 (Apr. 9, 2014).

179. *Id*. ¶38.

180. U.N. President of the G.A., Report on the Process of the Consideration of the State of the UN Human Rights Treaty Body System, ¶10, (Sept. 14, 2020), https://www.ohchr.org/Documents/HRBodies/TB/HRTD/HRTB_Summary_Report.pdf.

181. *See* U.N. Secretary-General, *supra* note 115, at Annex XXI (as of December 31, 2017, every treaty body had adopted/endorsed the elements for the elaboration of and consultation on General Comments observations, except the Human Rights Committee and CAT Committee). The same two treaty bodies have not endorsed the framework for Concluding Observations, the CAT and the HRC Committees. *Id*., *see also* U.N. Secretary-General, *supra* note 110, at ¶91 ("On the basis of existing practices and with a view to developing an aligned consultation process for the elaboration of General Comments, ensuring coherence across the treaty bodies and standardizing working methods, the Chairs endorsed the following elements for the elaboration of and consultations on General Comments and recommended their generalization among all treaty bodies that issue General Comments:

(a) A General Comment could be adopted by one treaty body or more, jointly;

(b) The decision to draft a General Comment would be made in plenary;

(c) A note describing the consultation process for General Comments would be shared with States parties and made publicly available for other stakeholders (national human rights institutions, civil society, academia, international organizations);

and unforeseen conflict, as demonstrated when the CRPD Committee issued comments on some aspects of the HRC's draft General Comment 36 on Article 6 (the right to life), and the HRC made several of the requested changes.[182]

There have been attempts to create harmony in other aspects of the regime, such as developing the "UN Harmonized Guidelines for State Reporting of 2009," to set forth the purpose of state reporting, which not all states have followed.[183] These include creating a coherent framework for a streamlined process, ensuring commitment to the human rights treaties, reviewing implementation at the national level, and establishing a basis for constructive dialogues at the international level between states and treaty bodies.[184] As explained above, a central function of treaty bodies is receiving and reviewing state reports, and addressing practices and rights violations at the national level.[185]

The content of the interpretations and observations of the treaty bodies are salient to state parties' fundamental, constitutional norms. The two bodies of international human rights and constitutional law overlap significantly. For example, freedom of movement is fundamental to most democratic constitutions, and is protected by international human rights law, including both in

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(d) Each time a treaty body initiated the drafting of a General Comment, a working group composed of treaty body members or a rapporteur would be appointed and entrusted with the process of drafting the General Comment;

(e) Advance versions of draft General Comments would be shared with other treaty bodies and relevant special procedures mandate-holders for input, comments or feedback, with a view to strengthening the coherence of treaty law interpretation;

(f) Advance versions of draft General Comments would be posted on the OHCHR website to make them accessible to States parties and a broad range of stakeholders;

(g) Input, comments or feedback received from States parties, special procedures, national human rights institutions, civil society organizations and other stakeholders would be given due consideration by the treaty body, as appropriate;

(h) The treaty body would lead the consultation process and decide on the contents and adoption of the General Comment.")

182. In the final draft of General Comment 36 – right to life, the Human Rights Committee removed language, located in paragraph 9, line 9 of the first draft, that permitted abortion on the grounds of fetal impairment, at the request of the Committee on the Rights of Persons with Disabilities. *See* U.N. Off, of the High Comm'r of Hum. Rts., Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life (July 14, 2015), https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx; *see also* U.N. Hum. Rts. Comm., General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, U.N. Doc. CRPD/C/GC/36 (Oct. 30, 2018).

183. *See* U.N. Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, U.N. Doc. HRI/GEN/2/Rev.6 (Jun. 3, 2009).

184. Kälin, *supra* note 7, at 38–39; *see also* U.N. Secretary-General, *supra* note 115.

185. *See* U.N. Secretary-General, *supra* note 110, at ¶ 2.

the ICCPR[186] and the CRPD.[187] Every lawyer understands the opportunity for conflict, tension, and discord between two rights provided within a single legal instrument, as depicted in Figure 1 below. Figure 2, however, depicts the types of variations and conflicting interpretations that are the focus of this article, i.e. those between two or more distinct treaties' provisions.

FIGURE 1 CONFLICTING RIGHTS WITHIN A SINGLE TREATY

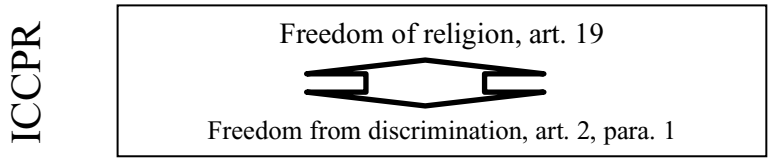

FIGURE 2: CONFLICTS AND VARIATIONS BETWEEN TREATIES' PROVISIONS DUE TO AUTHORITATIVE TREATY BODY INTERPRETATIONS

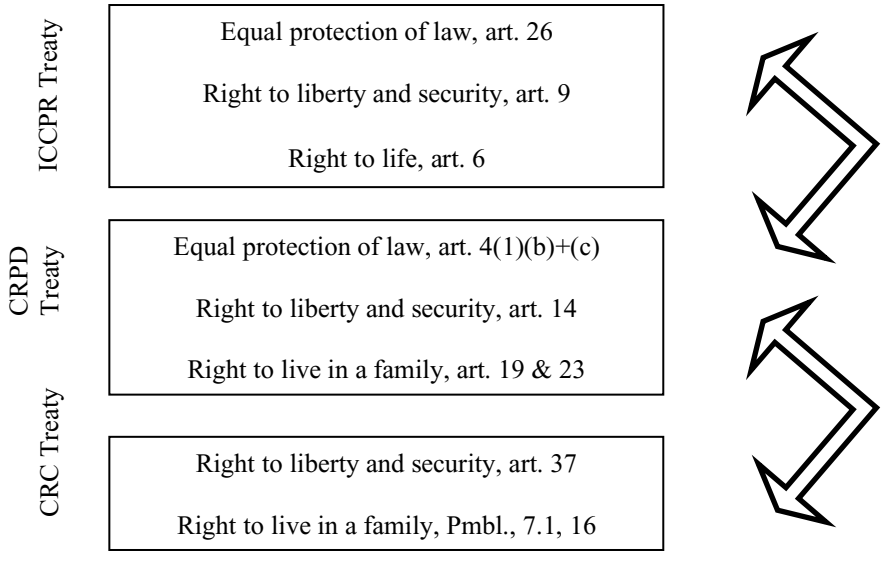

Figure 2 depicts three distinct treaties with similar provisions, which are thus subject to potential variation and conflicts between their distinct treaty bodies' interpretations of rights. But before delving into the examples of

186. International Covenant on Civil and Political Rights, *supra* note 2147, at art. 12.

187. CRPD, *supra* note 141, at art. 18.

Committees' varying and conflicting interpretations, it is worth noting that the occasional discord between human rights treaty bodies' interpretations is not entirely unique. All legal systems produce and manage potentially conflicting rules, standards, and decisions. Even in a dictatorship, there is a possibility that the decisions of various bodies and subsidiary authorities may conflict. However, in domestic legal systems non-normative hierarchies of authority, determining the weight of particular sources of law and setting forth jurisdictional competencies, often settle questions about how to resolve conflicts.[188] Even with such rules in place to help resolve conflict and hierarchies, conflicting and overlapping decisions on similar issues persist within and across jurisdictions in domestic systems—whether between federal and state agencies, or simply between and amongst various states within federal systems.[189]

While the conflicting interpretations that persist in the treaty body system do not represent a unique pathology, their containment in the relatively new field of human rights presents specific challenges. Procedural rules and hierarchies within this specialized regime of international law are still evolving, thus limiting the potential to easily resolve these conflicts in the near term.[190] State consent continues to play a central role in adopting legally binding treaties.

What follows are three examples of conflicting treaty body approaches. The first example demonstrates how treaty bodies collaborated to avoid an obvious potential conflict, the second a conflict about which collaboration was not successful in reaching resolution, and the third is an example of overlapping jurisdiction leading to a variation between two treaty body interpretations with the effect of undercutting the legally required protections available to disabled orphans.

IV. EXAMPLES

A. *Communication and Collaboration: The Right to Life and its Intersection with Reproductive Freedom*

The question of whether abortion should be permitted in the case of "fetal impairment" raised a potential conflict between the positions of the HRC, CEDAW, and CRPD Committees. From 2015-18, after the HRC and CRPD Committees' disagreement over the standard for involuntary hospitalization,

188. This is not to say that conflict resolution is always a simple matter. *See, e.g.* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448 (1999).

189. *See, e.g.*, SUP. CT. R. 10(a) (noting that the United States Supreme Court can review cases where "a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter.").

190. Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 605 (2005) (noting that a prominent solution to solving such conflicts in the past has been resolution "in ad hoc political bargains rather than by an application of blackletter principles.").

described below, the fetal impairment question was presented during the HRC's drafting of its General Comment 36 on the right to life as defined in Article 6 of the ICCPR.[191] Unlike the issue of involuntary hospitalization, this potential conflict was both partially resolved[192] and partially avoided through the treaty bodies' interactions.[193]

The CEDAW Committee did not submit any formally recorded written comments to the HRC regarding General Comment 36.[194] In March 2017, the CRPD Committee, however, raised its concerns to the HRC about the conflict with the CRPD in the draft General Comment, as the draft allowed for abortion in cases "when [the] foetus suffers from fatal impairment."[195] The issue of "fatal impairment" arose when Ms. Mellet applied to the HRC in *Mellet v. Ireland*, as her fetus had Trisomy 18 and Ireland forbade abortion. The HRC ruled in favor of Ms. Mellet.[196]

During the HRC's drafting process of General Comment 36, the CRPD Committee submitted a list of recommended changes to the HRC. The final draft of General Comment 36, considered one such change.[197] The CRPD Committee asserted that laws which "explicitly allow for abortion on grounds

191. The Human Rights Committee began the drafting process of General Comment 36 on the right to life, over three years before it was adopted in 2018. The Committee released a draft version on July 14, 2015. U.N. Off, of the High Comm'r for Hum. Rts., *supra* note 182.

192. *See infra* Part IV(A); *see also* U.N. Off. of the High Comm'r for Hum. Rts., Stop Regression on Sexual and Reproductive Rights of Women and Girls, UN Experts Urge (Sept. 5, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23503&LangID=E ("Rollback and regression on respect for international human rights norms threatens the sexual and reproductive health rights of women, including women with disabilities, UN human rights experts warned today.").

193. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 182.

194. U.N. Off. of the High Comm'r for Hum. Rts., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life (July 14, 2015), https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx.

195. Comm. on the Rights of Persons with Disabilities, *supra* note 182.

196. Mellet applied to the HRC for relief in her challenging case, and the HRC found that Trisomy 18 was a fatal impairment. Mellet sought (and secured) relief from the HRC because of the mental anguish she endured by having to travel abroad for the termination, citing violations of Articles 2, 3, and 26 (equal protection and discrimination), Article 7 (cruel and degrading treatment), article 17 (right to privacy), and Article 19 (right to freedom of information). U.N. Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2324/2013*, U.N. Doc. CCPR/C/116/D/2324/2013 (Mar. 31, 2016). The Trisomy 18 diagnosis straddles the line of what constitutes a fatal impairment versus what is a fetal impairment. For additional information on Trisomy 18. *See What is Trisomy 18*, TRISOMY 18 FOUND., https://www.trisomy18.org/what-is-trisomy-18/ (last visited Nov. 21, 2021) ("And although 10 percent or more may survive to their first birthdays, there are children with Trisomy 18 that can enjoy many years of life with their families, reaching milestones and being involved with their community. A small number of adults (usually girls) with Trisomy 18 have and are living into their twenties and thirties, although with significant developmental delays that do not allow them to live independently without full time caregiving.").

197. U.N. Comm. on the Rts. of Persons with Disabilities, *supra* note 182.

of impairment violate the CRPD (Arts. 4, 5 & 8)."[198] The CRPD Committee asserted that this assessment of impairment "perpetuates notions of stereotyping disability as incompatible with a good life."[199] In the final draft of General Comment 36, the Human Rights Committee removed this language from paragraph 9, line 9.[200]

The CEDAW Committee also had comments for the HRC. CEDAW Article 16 guarantees women equal rights in deciding "freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."[201] CEDAW Article 10 also specifies that women's right to education includes access to information about family planning.[202]

In July 2017, the CEDAW Committee issued its own General Recommendation 35 on gender-based violence against women, which covered sexual and reproductive health services.[203] In its General Recommendation 35, the CEDAW Committee twice considered abortion. First, the Committee deemed any state provisions "that criminali[ze] abortion," as a form of gender-based violence against women.[204] Second, the CEDAW Committee declared:

> [F]urther violations of women's sexual and reproductive health and rights, include the criminali[z]ation of abortion, denial or delay of safe abortion and[/or] post-abortion care, forced continuation of pregnancy, [and] abuse and mistreatment of women and girls seeking sexual and reproductive health information . . . [all of which] are forms of gender-based violence that, depending on the circumstances may amount to torture or cruel, inhuman or degrading treatment.[205]

In other words, the CEDAW Committee's statement remains silent on the issue of fetal impairment. Less than two months before the HRC adopted its final General Comment 36 on the right to life, the CRPD Committee issued a joint statement with the CEDAW Committee expressing concern about restrictive access to safe and legal abortions worldwide.[206] Finally, on October 30, 2018, the HRC adopted General Comment 36 on the right to life.[207]

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198. *Id.*

199. *Id.*; *see* Table C.

200. The Human Rights Committee declined some of the requested changes by the CRPD. However, this is a subject the author explores in a work in progress.

201. CEDAW, *supra* note 82153, at art. 16.

202. *Id.* art. 10.

203. Comm. on the Elimination of All Forms of Discrimination against Women, *General Recommendation No. 35 on Gender-Based Violence against Women: Updating General Recommendation*, U.N. Doc. CEDAW/C/GC/35, ¶ 18 (July 26, 2017).

204. *Id.* ¶ 31(a).

205. *Id.* ¶ 18.

206. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 192.

207. U.N. Hum. Rts. Comm., *supra* note 182.

The HRC took three years to draft the final version of General Comment 36.[208] First, in paragraph 8, the HRC allows state parties to "adopt measures designed to regulate voluntary terminations of pregnancy . . . [b]ut the restrictions on the ability of women or girls to seek abortion must not, *inter alia,* jeopardize their lives, subject them to physical or mental pain or suffering."[209] Later in paragraph 8, the HRC declares that state parties "may not regulate pregnancy or abortion in all other cases . . . that run contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions."[210] In addition, state parties "should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion."[211]

In September 2018, the CRPD and CEDAW Committees issued a joint statement on international human rights norms and the reproductive rights of women, showing that disability rights and gender equality do not need to contradict each other.[212] The Committees focused on the idea that access to sexual and reproductive health services is a "prerequisite for safeguarding [women's] human rights to life, health, equality before the law and equal protection . . . non-discrimination . . . and freedom from torture and ill treatment."[213]

In the joint statement, both Committees cautioned that advocates against sexual and reproductive health services use the argument advancing disability rights as an excuse to curb access to sexual and reproductive health for women.[214] The CRPD Committee Chairperson at the time, Theresia Degener, dismissed these efforts as "constitut[ing] a misinterpretation of the Convention on the Rights of Persons with Disabilities" because disability and gender

208. U.N. Off. of the High Comm'r for Hum. Rts., UN Human Rights Committee Publishes New General Comment on the "Right to Life" (Nov. 1, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23809&LangID=E (noting that "The general comment the Committee just issued on the right to life has been in the works for more than three years…").

209. U.N. Hum. Rts. Comm., *supra* note 182, ¶8.

210. *Id.*

211. *Id.* Tension is clearly possible between the HRC's position regarding regulation and the Convention on the Elimination of Discrimination Against Women ("CEDAW") Committee's position, creating uncertainty for rights claimants and states. The CEDAW Committee believes any "denial or delay of safe abortion and post-abortion care . . . [is a] form[s] of gender-based violence that . . . may amount to torture or cruel, inhuman or degrading treatment." Comm. on the Elimination of All Forms of Discrimination against Women, *supra* note 203, at ¶18.

212. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 192, at 2.

213. CRPD Comm. & CEDAW Comm., *Joint Statement Guaranteeing Sexual and Reproductive Health and Rights for All Women, in particular Women with Disabilities: Joint statement by the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)* 1 (Aug. 29, 2018), *available at* ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx. [hereinafter *CRPD & CEDAW Joint Statement*]

214. Off. of the High Comm'r for Hum. Rts., *supra* note 192, at 2.

equality are two components of the same human rights standard that should not be construed as conflicting.[215] The Committees also advised state parties that they must "enable women, including women with disabilities, to make autonomous decisions about their sexual and reproductive health and ensure that women have access to evidence-based and unbiased information."[216]

This example demonstrates how potential disagreements and conflicts have been at least partially addressed and resolved through the consultation process that the treaty bodies have developed, as in the case of the HRC deleting the language about fetal impairments from General Comment 36 after receiving the CRPD Committee's objection. However, the possibility of conflict still looms, as the three Committees have not yet reached agreement about the legality of regulations permitting abortion in the case of fetal impairments. But, in their joint statement, the CEDAW and CRPD Committees recognized the interconnectedness and dependency between the rights they safeguard, particularly as those rights affect women with disabilities.[217]

B. *Conflict After the Strengthening of the System: Involuntary Hospitalization and the Right to Liberty and Security*

Should involuntary hospitalization always be considered an impermissible form of detention and forbidden by the right to liberty? Two treaty bodies have disagreed on the answer to this question and have been unable to resolve or to avoid this disagreement.

The roots of the conflict regarding involuntary hospitalization run deep,[218] but during the drafting process of the HRC's General Comment 35 on the right to liberty and security in Article 19 of the ICCPR, the HRC and the CRPD Committee disagreed directly in numerous exchanges.[219] In May 2014, the CRPD Committee issued its first General Comment, focusing on Article 12, equal recognition before the law, and directing state parties to ensure that people with disabilities are not divested of their legal capacity, as has historically been the case under international law as well as under many domestic laws.[220] Additionally, the CRPD Committee predicated deprivation

215. *Id.*

216. *Id.*

217. *CRPD & CEDAW Joint Statement*, *supra* note 213.

218. *See, e.g.*, Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, U.N. Doc. HR/PUB/02/1 (2002).

219. U.N. Special Rapporteur on Disability, Urgent Request to Amend the Human Rights Committee's Draft version of General Comment No. 35 (CCPR/C/107/R.3) on Article 9 (Right to Liberty and Security of Person) Bringing it in Line with the U.N. Convention on the Rights of Persons with Disabilities (May 27, 2014), https://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/Submissions/SRDisability.doc.

220. Comm. on the Rts. of Persons with Disabilities, General Comment No. 1 (2014), Article 12: Equal Recognition Before the Law, U.N. Doc. CRPD/C/GC/1 (Apr. 11, 2014). Note, however, that "Thirteen States parties to the Convention have issued reservations and

of liberty and security under Article 14 of the CRPD on the consent of either the individual or their supportive decision maker.[221] The CRPD "does not focus on the limitations of the individual [with a disability] but on the barriers that society creates to full participation."[222]

Yet in paragraph 19 of the draft of the HRC's General Comment 35, states are permitted to compel a person to be involuntarily detained without criminal charge, for the purpose of protecting the person "in question from harm or preventing injury to others," so long as the deprivation of liberty is "necessary and proportionate."[223] In most states, consent of the putative patient is required for treatment of people without disabilities, except in select cases.[224]

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declarations upon ratification or accession, with the intention of limiting the implementation of article 12 and other related articles. According to article 19 of the Vienna Convention on the Law of Treaties and article 46 of the Convention itself, reservations and declarations incompatible with the object and purpose of the Convention are not permitted. Given the centrality of article 12 to the enjoyment and exercise of all rights set out in the Convention, such restrictions clearly contradict the object and purpose of the Convention, as they hinder and/or deny the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. In that regard, the Special Rapporteur urges the States parties concerned to withdraw all their reservations and declarations." Catalina Devandas (Special Rapporteur on the Rights of Persons with Disabilities), *Rep. of the Special Rapporteur on the Rights of Persons with Disabilities*, U.N. Doc. A/HRC/37/56, ¶ 37 (Dec. 12, 2017).

221. Comm. on the Rights of Persons with Disabilities, *Rep. of the Committee on the Rights of Persons with Disabilities*, U.N. Doc. A/72/55, at 22 (2017).

222. *See* Rosenthal, *supra* note 26, at 102. ("The CPRD is changing the way people with disabilities are portrayed in society and how people with disabilities are responding to their new roles in society as rights holders rather than passive recipients of services."); Arlene Kanter, *Do Human Rights Treaties Matter: The Case for the United Nations Convention on the Rights of People with Disabilities*, 52 VAND. J. TRANSNAT'L L. 577, 596–97 (2019) ("[H]undreds of men and women with disabilities . . . explained that what causes their exclusion from society is often not their disability but rather the physical, attitudinal, and legal barriers that prevent them from fully participating as equal members of society.").

223. Hum. Rts. Comm., *supra* note 24. In Communication No. 754/1997, A. v. New Zealand, the HRC found that treatment in a psychiatric institution against the will of the author constituted a deprivation of liberty under Art. 9. *See* Hum. Rts Comm., Communication No. 754/1997, U.N. Doc. CCPR/C/66/D/754/1997 (Aug. 3, 1999). In dicta in Fijalkowska v. Poland, the "Committee acknowledges that circumstances may arise in which an individual's mental health is so impaired that so as to avoid harm to the individual or others, the issuance of a committal order, without assistance or representation sufficient to safeguard her rights, may be unavoidable." *See* Hum. Rts. Comm., Communication No. 1061/2002, U.N. Doc. CCPR/C/84/D/1061/2002 (Aug. 4, 2005).

224. For examples of circumstances when medical treatment may be given without consent in the United States, see, e.g., Bryan A. Liang, *Informed Consent: Know Rules and Exceptions, When they Apply*, ED LEGAL LETTER (Aug. 1, 2003), https://www.reliasmedia.com/articles/29540-informed-consent-know-rules-and-exceptions-when-they-apply (noting that "[i]nformed consent is a legal requirement applicable to all medical care. Physicians who provide services to patients are compelled, ethically and morally, to allow patients to make their own health care decisions based upon all material information available," but also offering that a physician is not required to obtain informed consent when the cost of doing so "would

According to both the Special Rapporteur on Disability and the CRPD Committee, a state may not compel an individual to receive treatment, or involuntarily commit the person without criminal conviction, and thus "mental health services must be based on the free and informed consent of the person concerned."[225] The CRPD seeks, in part, to address the legacy and after-effects of the prolonged history of people with disabilities being pathologized and viewed through a medical model, including being institutionalized without consent.[226] Therefore, in the context of hospitalizations and mental health services, the free and informed consent of the person with disabilities must be procured.[227] The CRPD Committee believes that if a person with disabilities is to properly enjoy the right of liberty and security of person, then laws and policies must be put in place and enforced to guarantee that all mental health services are provided based on the free and informed consent of the person concerned.[228]

It is beyond the scope of this article to examine closely the interrelationship between disability and involuntary detention and incarceration, but further study into this particular conflict is warranted for those interested in self-determination, autonomy, and the limitations of conventional discrimination law.[229] Indeed, as Liat Ben-Moshe notes, "[while there is a] prevalence of

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seriously undermine the health, safety, and life of any patient who requires emergency treatment but cannot provide informed consent for it.").

225. U.N. Special Rapporteur on Disability, *supra* note 218.

226. *See* LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 3 (2020) (The U.S. population of "people with I/DD labels living in institutions decreased by 80 percent from 1977-2015 while the number of people living in small residences (six or fewer people) increased by greater than 1900 percent over same time period. In the last twenty years, the number of people with I/DD who receive support and services from the state while living in home of family member increased by 135 percent. As a result, by 2014, fourteen U.S. states had closed all their state-operated institutions for people with I/DD… [These states] have just learned how to accommodate their needs outside institutional framework.").

227. "The right to enjoyment of the highest attainable standard of health (art. 25) includes the right to health care on the basis of free and informed consent. States parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment." Comm. on the Rts. of Persons with Disabilities, *supra* note 219, at ¶ 41.

228. For work on the relevance of supported decision-making to self-determination, see, e.g., Anna Arstein-Kerslake, Joanne Watson, Michelle Browning, Jonathan Martinis & Peter Blanck, *Future Directions in Supported Decision-Making*, 37 DISABILITY STUD. Q, 2017, https://dsq-sds.org/article/view/5070/4549.

229. It is beyond the scope of this article to engage the merits of this involuntary hospitalization debate in depth. Involuntary detention and involuntary treatment are intertwined topics. For a discussion on the complex problem of involuntary treatment, see, e.g., Piers Gooding & Eilionóir Flynn, *Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?*, 4 LAWS 245 (2015) (discussing compulsory mental health treatment in the context of the CRPD); Faraaz Mahomed, Janos Fiala-Butora & Michael Ashley Stein, *Anna Nilsson's Compulsory Mental Health Interventions and the CRPD: Minding Equality*, 43 HUM. RTS. Q. 616 (2021).

disability/madness in carceral locales, [-] it is often missing from *analysis* of these sites and logics."[230] Yet, the institutions themselves can disable in multiple ways.[231] According to Ben-Moshe, "[c]entering disability and mental difference" can lead to deeper understanding/analysis of the phenomena of in /de-carceration.[232]

The fears and concerns of non-disabled people about the erratic conduct and behavior of people with psychosocial disabilities are well-known. Such concerns and fears are reflected in three states' reservations "to article 14 (on the liberty and security of the person) of the otherwise widely ratified CRPD, animated in part by concern about a lack of appropriate support for people with psychiatric disabilities."[233] As they ratified the CRPD, Ireland, the Netherlands, and Norway lodged reservations to permit the state to maintain the power to require compulsory care of people with "mental illness."[234] While "[s]ecurity and safety are [classically] protected aims of the state,"[235] many states have historically considered a mere diagnosis of a psychosocial disability to be sufficient to constitute a potential for harm, sufficient to justify involuntary treatment or institutionalization.[236] The HRC would allow the

230. BEN-MOSHE, *supra* note 226, at 9; *see also*, Peter Blanck, *Disability in Prison*, 26 S. CAL. INTERDISC. L. J. 309 (2017).

231. *See* Kanter, *supra* note 222, at 594.

232. BEN-MOSHE, *supra* note 226, at 9; SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 2 (1998) ("Disability studies takes for its subject matter not simply the variations that exist in human behavior, appearance, functioning, sensory acuity, and cognitive processing but, more crucially, the meaning we make of those variations.").

233. As of 2021, there are 183 ratifying states parties to the CRPD. Among these 183 ratifying states parties, however, are innumerable reservations, understandings and declarations. *See Declarations and Reservations to the Convention on the Rights of Persons with Disabilities*, United Nations Treaty Collection, https://treaties.un.org/Pages /ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4 (last visited Nov. 21, 2021).

234. *Id*. As Ireland's Declaration and Reservation to Article 12 notes, "To the extent article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards." The Netherlands, meanwhile, declared that "the Kingdom of the Netherlands declares its understanding that the Convention allows for supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. The Kingdom of the Netherlands interprets Article 12 as restricting substitute decision-making arrangements to cases where such measures are necessary, as a last resort and subject to safeguards." Lastly, Norway noted that it "declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards."

235. ICCPR, *supra* note 2, at art. 4 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation"); *see also id.* art. 6 ("Every human being has the inherent right to life. This right shall be protected by law.").

236. U.N. Hum. Rts. Comm., Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, U.N. Doc. A/HRC/10/48, ¶ 48 (Jan. 26, 2009)

state to demonstrate, in a case of absolute necessity, that the person in question might present a "potential for harm" sufficient to justify hospitalizing that person without their consent.[237] Despite its exchanges with the CRPD Committee, the HRC did not accept the CRPD's position that the state must secure the consent of the person or charge them criminally prior to their institutionalization.[238] In its finalized General Comment, therefore, the HRC does not require the accompanying procedural protections, non-deferential court review of medical determinations, or support model requested by the CRPD Committee.[239]

As mentioned above, the UN Special Rapporteur on the Rights of Persons with Disabilities also took issue with the HRC permitting involuntary detention of people with psychosocial disabilities in cases of absolute necessity in draft General Comment 35.[240] However, upon receiving these concerns and submissions from the CRPD Committee and the Special Rapporteur, and after multiple exchanges, the HRC refused to omit the conflicting interpretation from the final version of General Comment 35.[241] According to Professor Neuman, who was an independent expert on the Committee at the time, although the HRC worked with the CRPD Committee to address its concerns, the two Committees' positions ultimately remained far apart. He related that:

> The CRPD Committee takes an absolutist approach to differential treatment on the basis of disability, which it always considers to be discrimination forbidden by the Convention, without any possibility of justification. The Human Rights Committee, in contrast, applies the same concept of discrimination that it applies with regard to other bases of unequal treatment . . . and differential treatment will not be considered prohibited discrimination under the ICCPR without inquiry into its objective justification.[242]

("Prior to the entrance into force of the Convention, the existence of a mental disability represented a lawful ground for deprivation of liberty and detention under international human rights law.").

237. U.N. Special Rapporteur on Disability, *supra* note 218.

238. *Id.*

239. For an overview of the drafting history of art. 14, and the view that the history reflects a desire to ensure that disability and additional factors such as dangerousness or the need for care or treatment do not suffice to justify a deprivation of liberty, see ARLENE KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS 124–36 (2015).

240. U.N. Special Rapporteur on Disability, *supra* note 218.220

241. The Human Rights Committee kept language permitting deprivation of liberty when it is necessary and proportionate. *See* Hum. Rts, Comm., *supra* note 24 ("The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.").

242. Neuman, *supra* note 6, at 9. Professor Neuman also raised concerns to the CRPD Committee about avoiding an "absolutist" position regarding disability discrimination again during the drafting of CRPD General Comment on art. 4. Neuman, *supra* note 45.

A handful of treaty bodies issued General Comments on non-discrimination, as indicated by Table C. The CRPD Committee's General Comment 6 in 2018 explains that the medical model of disability leads to discrimination against individuals with disabilities, often divesting them of agency without adequate process or supports.[243] It specifically addresses involuntary hospitalization in Article 14 of the treaty, stating that "States Parties must take all appropriate measures, to provide protection from and prevent all forms of exploitation, violence, and abuse against persons with disabilities. Forced corrective disability treatments should be prohibited."[244] The CRPD Committee further calls on state parties to ensure that non-discrimination legislation forbids institutionalization and forced mental health treatments.[245]

TABLE C: TREATY BODY GENERAL COMMENTS ON NON-DISCRIMINATION AND EQUAL PROTECTION OF THE LAW

Treaty Body	**General Comment**	**Date of Adoption**	**Document Symbol**
Human Rights Committee	General Comment 18 Non-discrimination[246]	Nov. 21, 1989	U.N. Doc. CCPR/C/21 /Rev.1/Add.1
Committee on Economic, Social and Cultural Rights	General Comment 20 Non-discrimination in economic, social, and cultural rights[247]	July 2, 2009	E/C.12/GC/20

243. *See* U.N. Comm. on the Rts. of Persons with Disabilities, General Comment No. 6 (2018) on Equality and Non-Discrimination, U.N. Doc. CRPD/C/GC/6 (Apr. 26, 2018).

244. *Id.* ¶ 56.

245. *See id.* ¶ 73(c).

246. Hum. Rts. Comm., General Comment No. 18: Non-Discrimination, U.N. Doc. CCPR /C/21/Rev.1/Add.1 (Nov. 12, 1989).

247. ESCOR, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights),,U.N. Doc. E/C.12/GC/20 (July 2, 2009).

Committee on Economic, Social and Cultural Rights	General Comment 21 Right of everyone to take part in cultural life[248]	December 21, 2009	E/C.12/GC/21
Committee on the Rights of Persons with Disabilities	General Comment 6 Equality and non-discrimination[249]	April 26, 2018	CRPD/C/GC/6

The HRC's General Comment 35, with language regarding involuntary detention that conflicts with the position of the CRPD Committee, was finalized by the HRC in October 2014.[250] This was the same year that the General Assembly took action to strengthen the treaty body system, but before harmonizing measures were put in place.[251] This conflict in interpretation still has not been resolved.[252]

C. *Conflict Predating the Strengthening of the Treaty Body System: The Right to Live in a Family and Institutionalization*

Must state parties provide alternatives to orphanages and institutions to families of children and parents with disabilities?[253] Might failure to do so amount to torture? Three treaty bodies have offered varying responses to these questions, providing an example of conflict that mostly predates the General Assembly's strengthening the treaty body system reforms.

Since the CRC's ratification in 1990, the CRC Committee, perhaps more than any other Committee prior to the adoption of the CRPD, has paid attention to disability-based discrimination.[254] Yet its General Comment 9 now conflicts with the position of the CRPD.[255] The CRC treaty was the first to

248. ESCOR, General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15, ¶ 1 (a), of the International Covenant on Economic, Social, and Cultural Rights), U.N. DOC. E/C.12/GC/21 (Dec. 21, 2009).

249. U.N. Comm. on the Rts. of Persons with Disabilities, *supra* note 166.

250. Hum. Rts. Comm., *General Comment No. 35, Article 9 (Liberty and Security of Person)*, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

251. *See* G.A. Res. 68/268, *supra* note 130.

252. The sources of conflict in the interpretations of the Committees in this example run deep, with the CRPD Committee advancing a unique definition of discrimination. See *infra* for a note on the conflicting views of the appropriate definition of discrimination. The issue of involuntary detention is further exacerbated and complicated by the pandemic and a new wave of mental health issues. *See, e.g.*, Peter Blanck, *On the Importance of the Americans With Disabilities Act at Thirty*, J. DISABILITY POL'Y STUD. (forthcoming).

253. For a thorough analysis of this issue, and an argument that human rights law should require states to provide all children the right to live in a family, *see* Rosenthal, *supra* note 26.

254. *See* VANDENHOLE, *supra* note 119, at 170.

255. *See* Rosenthal, *supra* note 26, at 67.

explicitly include disability as a prohibited ground of discrimination.[256] Under Article 23 of the CRC treaty, "States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."[257] In addition, state parties must ensure that a child with disabilities has the "the fullest possible social integration and individual development."[258]

Encouraging children's social integration and participation in the community arguably means that all children, including those with disabilities, should be raised in a family setting as opposed to an institution.[259] In its General Comment 9 from 2006, however, the CRC offers a "last resort" exception for children with disabilities to be placed into institutions or residual care facilities. The General Comment urges states to only use institutionalization "when it is absolutely necessary and in the best interests of the child."[260] States Parties have wide latitude to determine when a last resort or "absolute necess[ity]," exists, as the Comment does not define either term. Obviously, without more specificity and necessary support, for some states, this "last resort" could become the most frequently utilized option.[261]

In addition, through its call for reform of standards for such institutions, the CRC implicitly endorses their continued use by the state parties only for children with disabilities.[262] CRC General Comment 9 urges state parties to engage in "transforming existing institutions, with a focus on small residential care facilities . . . [and] developing national standards for care in institutions."[263]

Contradicting the CRC's position, the CRPD treaty body's position, as set forth in its General Comment 5 adopted in 2017, is that institutionalization

256. *Id.* at 70; *see also* Arlene S. Kanter, *The Right to Inclusive Education for Students with Disabilities Under International Human Rights Law*, *in* THE RIGHT TO INCLUSIVE EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW 24 (G. de Beco, S. Quinlivan & J. E. Lord eds., 2019); Arlene S. Kanter & Carla Villarreal López, *A Call for an End to Violence Against Women and Girls with Disabilities Under International and Regional Human Rights Law*, 10 NE. U. REV. 118, 147 (2018).

257. CRC, *supra* note 157, at art. 23.

258. *Id.*

259. *See generally* Rosenthal, *supra* note 26 (making the case that the protections recognized by the CRPD apply to all children and that governments are under an obligation to create the range of supports needed to ensure that children are with families who can be support their development and community-based needs).

260. U.N. Comm. on the Rts, of the Child, General Comment No. 9 (2006), The Rights of Children with Disabilities, U.N. Doc. CRC/C/GC/9, ¶ 47 (Feb. 27, 2007).

261. *See generally* Madeleine M. Plasencia, *The Torture of Children and Adolescents Living and Dying in Guatemala's Institutions*, 25 U.C. DAVIS J. INT'L L. & POL'Y 37 (2018) (examining the legal context of treatment of children with disabilities in Guatemala who live in institutionalized environments); Rosenthal, *supra* note 26, at 65 (discussing the institutionalization of children with disabilities within the framework of the CRPD and the CRC).

262. *See* Rosenthal, *supra* note 26, at 115 –16.

263. *Id.* at 116.

of children with disabilities in any institution, whether it be a large orphanage or a smaller group home, violates the child's rights under the CRPD.[264] According to the CRPD Committee, Articles 19 and 23 of the CRPD, like Article 23 of the CRC treaty, call on States Parties to ensure the social integration of children within their community and ensure the child's right to live with a family rather than in an institution.[265]

When the CRC adopted its General Comment 9 in February 2009, the CRPD had only been in effect since May 2008.[266] Given the position that the language of the CRPD takes on institutions, the CRC General Comment drafters did not allow themselves to be influenced by those parties involved with the CRPD.[267] The CRPD treaty itself, drafted fifteen years after the CRC and partially in response to the CRC,[268] explicitly addresses treatment of children with disabilities. It holds States Parties responsible for removing obstacles to the full integration of children with disabilities into society and to providing necessary resources to support them as well as to support children whose parents have disabilities.[269] Article 23 of the CRPD sets forth how states should protect a child with a disability's right to live in a family, stating clearly that disability should not be a factor in the decision to remove a child from their family.[270] It stipulates that states must use "every effort to provide alternative care within the wider family, and failing that, within the community in a

264. *See* U.N. Comm. on the Rts. Of Persons with Disabilities, General Comment No. 5 on Living Independently and Being Included in the Community, ¶¶ 16 (c), 49, 57. U.N. Doc. CRPD/C/GC/5 (Oct. 27, 2017).

265. *Id.* ¶¶ 2, 3, 12. The CRPD's protections cover all children in a family involving disability, regardless of whether the child themselves has a disability or their parent has a disability. *See* Rosenthal, *supra* note 26, at 105. *See generally* Arlene S. Kanter, *Permanency Planning for Children with Disabilities: The Right to Live with a Family for Every Child,* 28 CHILD. LEGAL RTS. J. 1 (2008) (discussing how courts have begun to legitimate claims of "shared parenting" to expand on the concept of permanency planning for children with disabilities). The CRPD Committee has also engaged in debates regarding foster parents with disabilities.

266. Comm. on the Rts. of the Child, General Comment No. 9 (2006), The Rights of Children with Disabilities, U.N. Doc. CRC/C/GC/9 (Feb. 27, 2007). Meanwhile, the CRPD opened for signature in March 2007, and took effect in May 2008. *10th Anniversary of the Adoption of the Convention on the Rights of Persons with Disabilities*, U.N. DEPT. OF ECON. AND SOC. AFFAIRS, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-10th-anniversary-of-the-adoption-of-convention-on-the-rights-of-persons-with-disabilities-crpd-crpd-10.html (last visited Nov. 21, 2021).

267. The CRPD Committee was not yet formed, so it could not submit comments to the CRC during the drafting process of CRC General Comment 9 (2006). *See Celebrating 10 years of the Convention on the Rights of Persons with Disabilities*, U.N. Hum. Rts. Off. High Comm'r (2016), https://www.ohchr.org/en/hrbodies/crpd/pages/crpd10.aspx (discussing the adoption of the CRPD, which occurred on December 13, 2006.).

268. *See* Rosenthal, *supra* note 26, at 73.

269. *See* CRPD, *supra* note 141, at art. 9.

270. *See id.* art. 23(4) ("State parties shall ensure that a child shall not be separated from his or her parents against their will… and in no case shall a child be separated from parents on the basis of disability of either the child or one or both of the parents.").

family setting."[271] According to Eric Rosenthal of Disability Rights International, Article 23's right to live in a family becomes even stronger when combined with article 19, which is the right to live independently and to be included in the community.[272] Since Article 19 requires States Parties to allow people with disabilities to choose their residence within the community, the CRPD Committee has taken the position that state parties must ensure that all children with a disability, as well as children of parents with a disability, have the right to live with their family or in a family setting within the community. The logic of the CRPD dictates that state parties cannot force a child to live in an institution which would isolate them from their community and a family life.[273]

In addition, the Special Procedures of the UN human rights system have amplified the CRPD's position in certain instances. For instance, the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment has affirmed that institutionalized children are in vulnerable positions, exposed to violence and abuse that can amount to torture.[274] As a result, depending on the weight of the Special Rapporteur's report, for the 170 state parties to the CAT, there is a potential legal conflict with the CRC's General Comment 9 exception allowing states to keep children with disabilities in institutions.

How then should the 183 states which are parties to both the CRPD, and the CRC manage the CRPD's prohibition of placement of any child in an institution with the CRC's position allowing institutional care when it is absolutely necessary and as a last resort? At present, states are left to choose to comply with the CRC's lower standard but not meet the CRPD's standard, or to comply with the CRPD's more universal standard, which would not violate the CRC's requirements, but exceed them.[275] Children with disabilities seeking a home can only hope that their state will choose to follow the CRPD's interpretation of rights.

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271. *Id.* art. 23(5).

272. Rosenthal, *supra* note 26, at 65 (noting that "The more recently adopted U.N. Convention on the Rights of Persons with Disabilities (CRPD) now creates stronger protections through a combination of Article 23 (respect for home and family) and Article 19 (living independently and being included in the community).").

273. *See, e.g.*, Olmstead v. L. C. *ex rel.* Zimring, 527 U.S. 581 (1999) (holding that unjustified segregation of people with disabilities constitutes discrimination in violation of Title II of the Americans with Disabilities Act.).

274. *See* Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/28/68, ¶ 16 (Mar. 5, 2015) (noting that "[c]hildren deprived of their liberty are at a heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment.").

275. *See supra* note 93 and accompanying text. On the other hand, a state which chooses to hold itself to the higher standard between two competing treaties will of course find itself in compliance with the lower standard present in the other treaty.

V. IMPLICATIONS

A. *Secondary Rules as Solutions*

This sub-section takes a closer look at the effects of secondary rules of international law to resolve the conflicts of interpretation between the treaty bodies, before turning to recommendations for inter-institutional dialogue and context-specific analysis in the next sub-Part. Secondary legal rules alone such as those advocated by the Study Group are not sufficient to resolve the conflicts in the examples above. It is not the goal of this article to resolve each of the conflicts mentioned here, but rather to shed light on the incidence of these conflicts and a theme that underpins them. Tools include the general principle of systemic integration, the attempt to reconcile rules which otherwise conflict through interpretation, and doctrines such as *lex specialis* and *lex posterior*.[276] The overlap of these rights demonstrates why applying a secondary rule of international law across all of these conflicts is unlikely to satisfactorily resolve these conflicts. Rather, context-specific analysis of each and expanded opportunities for inter-institutional dialogue is needed.

According to the ILC Report, drawing from a purposive understanding of general international law can help optimize legal certainty and equality of legal subjects.[277] Beginning with the text, the VCLT specifies that when a treaty states that it should not be considered as incompatible with another treaty, the other treaty prevails.[278] For the most part, the treaties in question here do not have provisions with text which obviously conflicts. Article 23 of CEDAW clarifies that its provisions are a floor, and that treaties and legislation may adopt provisions "more conducive to the achievement of equality between men and women,"[279] but doing so is not a case of conflict. In Article 38(b), the CRPD stipulates that the "Committee . . . shall consult . . . other treaty bodies instituted by international human rights treaties . . . to [ensure] the consistency of . . . general recommendations, and [to avoid] . . . overlap in the performance of their function[s]."[280] The text of the CRPD requires

276. *See* ILC Report *supra* note 20, at ¶17 (discussing the principle of systemic integration); Vienna Convention on the Law of Treaties, *supra* note 11, at art. 31(3)(c) (discussing the relevant rules of IL applicable in relations between the parties). *See generally* ILC Report, *supra* note 20 (discussing the doctrines of *lex specialis* and *lex posterior*).

277. ILC Report, *supra* note 20, at ¶34.

278. Vienna Convention on the Law of Treaties, *supra* note 11, at art. 30(2). Similar provisions can be found in some of the UN human rights treaties. *See, e.g.*, CEDAW, *supra* note 82, at art. 23; International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 170, at art. 28.

279. CEDAW, *supra* note 82, at art. 23. In addition, the CMW and the ICESCR each have provisions preserving the responsibilities of the specialized agencies of the UN in case of conflict with the treaty provisions. *See e.g.,* CRMW, *supra* note 161, at art. 80; International Covenant on Economic, Social and Cultural Rights, *supra* note 2, at art. 24.

280. CRPD, *supra* note 141, at art. 38(b).

consultation, not conformity. In the involuntary detention example above,[281] the CRPD Committee did consult with the HRC, and with the CEDAW Committee in the case on fetal impairment and right to life. Article 38(b)'s duty to consult is one that seeks to integrate the human rights system and can be interpreted as wise guidance by the CRPD Committee, but is not a requirement to cohere.[282]

In cases of norm conflicts, the Study Group advocated applying the principle of systemic integration of the normative environment, wherever possible, and honoring a generally shared notion of public international law, to "protecting rights and enforcing obligations."[283] How would the VCLT's concept of systemic integration of the various treaty bodies affect the content of the rights articulated by the human rights treaties?[284] The principle of systemic integration seeks to resolve or minimize the so-called fragmentation of international law through rules and doctrine to achieve a harmonized international legal system. This demonstrates the need to carry out the interpretation to see the rules in view of some comprehensible and coherent objective, to prioritize concerns *that are more important* at the cost of less important objectives. Generally, the idea of systemic integration applies across functional areas of international law, but it can also be applied within the system of international human rights law and cases of conflict like those presented in the above examples.

If the treaty bodies seek a sense of coherence and meaningfulness, they might agree to apply rules of deference to a preceding decision based on a different treaty by a different treaty body. Yet in his exploration of the conflict regarding involuntary hospitalization, Professor Neuman says, "[t]he HRC has found the interpretations by other treaty bodies of their treaties informative, but it has not tried to emulate all their innovations. To maintain dynamic consistency would not only be taxing; it would also mean abandoning the HRC's own credibility as authoritatively interpreting the ICCPR."[285] By contrast, Gauthier de Beco argues for greater collaboration and mainstreaming of intersectionality concerns through the work of the treaty bodies, despite the way doing so could potentially blur boundaries between the existing treaties.[286] Article 31(c)(3) of the VCLT[287] has a very limited use as a constitution

281. *See* discussion related to involuntary detention *supra* text accompanying note 229.

282. *See* Michael A. Stein & Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential,* 32 (3) HUM. RTS. Q. 689, 716 (2010).

283. ILC Report, *supra* note 20, at ¶ 480.

284. *See* Vienna Convention on the Law of Treaties, *supra* note 11, at art. 31(3)(c).

285. Neuman, *supra* note 91, at 14.

286. *See generally* de Beco, *supra* note 28, at 657 (acknowledging that international human rights treaties may be ill-equipped to address intersectionality but that they may still have the capacity to do so).

287. Vienna Convention on the Law of Treaties, *supra* note 11, at arts. 31(3)(c), 32 ("Article 31, General Rule of Interpretation: 1. A treaty shall be interpreted in good faith in

for all of international law, particularly as it does not answer the question of which norm should prevail in cases of conflict. As Professor Koskenniemi, author of the ILC Study Report, points out, "the world can be grasped through a constitutional vocabulary, but this does not provide determinate answers to international problems."[288] Therefore, constitutionalism is best "seen as a mindset—a tradition and a sensibility about how to act in a political world."[289] The notion is that there are multiple legal authorities and that they should engage each other and take each other into consideration in interpretation. While further study is recommended, this analysis, based in part on the examples, preliminarily indicates that a minority-group sensitive perspective should question efforts at harmonization that push toward coherence at the expense of rigorous, context-specific analysis.[290] Even with the confusion ongoing conflicts create, particularly those regarding the rights of minorities, interpretive conflicts may be preferable to a mainstream approach favoring uniformity and systemic integration which might otherwise absorb minority perspectives and "harmonize" them into a dominant understanding of "neutral" equality.[291]

It is also worth recalling Rachovitsa's concern[292] that systemic integration applied in an uncritical fashion raises serious problems, including yielding jurisdictional expansion of some legal decisionmakers, and "poorer and less diverse international law."[293] From a pluralist theoretical perspective, disagreement is not necessarily negative, and can instead be viewed as dissonance that has the potential to beneficially highlight strengths and other

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; (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."). In a separate work in progress, the author is examining in more detail the effects of applying *lex specialis* for the Convention on the Rights of Persons with Disabilities.

288. Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9 (2007) (arguing for a constitutionalist-mindset in building institutions).

289. *Id.*

290. U.N. Hum. Rts. Comm., *supra* note 15.

291. *See* discussion *supra* Part II.

292. *See* Rachovitsa, *supra* note 38, at 557.

293. *Id.*

harmonies within the various bodies of the regime.[294] Berry's analysis demonstrates that even when a treaty offers a provision stating that another treaty should prevail, there are counter-majoritarian reasons to work to reconcile, rather than obviate one of the conflicting doctrines.[295]

The doctrines of *lex specialis* and *lex posterior* are also common tools for reconciling conflicts. *Lex specialis* affords priority to the most specialized instrument in applying to a situation in which rules conflict.[296] The examples above suggest that treaty bodies with mandates prioritizing the rights of historically vulnerable minorities emphasize specific applications of the non-discrimination principles, focusing on the particular implications for the group that is the focus of the treaty.[297] Relative to the ICCPR, which contains the only generalized non-discrimination clause, the treaties relating to

294. *See, e.g.*, Paul Schiff Berman. *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*. Cambridge: Cambridge University Press, 2012; Michael Rosenfeld, *Rethinking constitutional ordering in an era of legal and ideological pluralism*, 6 INT'L J. CONST. L. 415 (Oct. 1, 2008).

295. *See* Berry, *supra* note 75, at 228.

296. ILC Report, *supra* note 20, at ¶ 56 (It is both a principle of legal interpretation and a method of resolving norm conflict).

297. The limitations of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR") when applied to specific minorities and groups is clearly shown from the *travaux preparatoire* of some treaty bodies. In the case of CEDAW, see, e.g., U.N. Comm'n on the Status of Women, 26th Sess., 634th mtg. ¶7, U.N. Doc. E/CN.6/SR.634 (Sept. 16, 1976) ("The protection of the rights of women should in principle have been ensured by the Universal Declaration of Human Rights and by the two instruments based on that Declaration, namely the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which had entered into force in 1976. However, members had been agreed in recognizing that discrimination based on race and discrimination based on sex would require special attention. The United Nations had first elaborated the International Convention on the Elimination of All Forms of Racial Discrimination and the Commission might use that instrument as a basis, for example, with regard to article 1, which referred to restrictions or preferences based on race."). In the case of the CRC, see, e.g., U.N. Comm'n on Human Rights, 45th Sess., 55th mtg. ¶51, U.N. Doc. E/CN.4/1989/SR.55 (Mar. 20, 1989) ("Mr. Andres (Observer for Switzerland) said that his Government had always been in favour [sic] of the elaboration of international standards to improve the protection of certain groups of the most vulnerable persons, in particular persons deprived of liberty, refugees, women and children. His delegation had therefore participated as an observer in the meetings of the Working Group, which had resulted in a draft convention on the rights of the child."). Lastly, in the case of CRPD, *see, e.g.*, *Draft Article 10: Liberty and Secuity of the Person*, U.N. ENABLE, n.35, https://www.un.org/esa/socdev/enable/rights/ahcstata14wgtext.htm (last visited Nov. 21, 2021) ("The jurisprudence of the Human Rights Committee (see, for example, General Comment No. 8) notes that States interpret deprivation of liberty too narrowly, so that it applies only to the criminal justice system. The right to liberty and security of persons, however, applies to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness or intellectual disability, vagrancy, drug addiction, educational purposes or immigration control. The Ad Hoc Committee may wish to consider: (a) whether civil and criminal cases should be dealt with separately; (b) whether the text needs further elaboration on civil cases of deprivation of liberty; and (c) whether, for criminal cases, the clauses in this text dealing with procedural matters need strengthening (see also article 9 of the International Covenant on Civil and Political Rights.)").

vulnerable minority groups might be viewed as *lex specialis*. But it will matter in what context we are applying the principle of *lex specialis*, and what the text of the treaties in that conflict says, as well as what the interpretation by the treaty body says. As the debate regarding the coexistence of humanitarian law and human rights law, or as human rights law's displacement demonstrates, the application of *lex specialis* does not resolve all conflicts.[298]

Further, regarding conflicts between the specialized treaties, it is even less clear what constitutes *lex specialis*. For example, in the case of a child with a disability, is the CRPD or the CRC the specialized law? Does it depend on the conflict, so that if the status of being disabled would afford more protections, it should displace the CRC interpretation? In the case of a Black woman with disabilities, is CEDAW or CERD or CRPD the most specialized treaty, and are they mutually exclusive?

As for *lex posterior*, as a broad analysis, the most recent human rights treaty, the law of the CRPD treaty, could be argued to displace earlier treaties' standards. But according to the HRC, it is not their responsibility to apply the interpretations of the CRPD Committee; it has jurisdiction over only its own treaty. Another question that would arise would be whether the most recent interpretation of a particular Committee should count as the most recent law, especially since such interpretations are not binding, but only authoritative? Again, the point here is not to apply this analysis for each case, but to demonstrate that secondary rules raise conflicts of meaning that might more beneficially be dealt with directly.

B. *Pragmatic Recommendations to Address Inevitable Discord Without Silencing It*

This sub-section offers practical recommendations for listening to and honoring the sources of dissonance between treaty body interpretations. Given the limitations of existing doctrine to resolve conflicts within the treaty body system, pragmatic recommendations hold some promise for managing conflicts. First, treaty body experts should continue to coordinate and collaborate with each other and with stakeholders, including before issuing General Comments regarding their own treaties. In 2012, the High Commissioner for Human Rights, in consultation with stakeholders including the treaty bodies themselves, advanced measures to strengthen many aspects of the system.[299] As a result, the treaty bodies have developed soft administrative procedures for commenting on and coordinating their work. For example, they now post draft comments to solicit feedback from stakeholders in an attempt to

298. *See, e.g.*, Cassimatis, *supra* note 10; *see also* Tomuschat, *supra* note 10; Ohlin, *supra* note 10.

299. U. N. High Comm'r for Hum. Rts., United Nations Reform: Measures and Proposals, U.N. Doc. A/66/860, at 11 (June 16, 2012).

minimize conflict in advance of finalizing the comments.[300] In their recent letter, the Chairs of the treaty body system agreed to coordinate issues during state reviews so as not to "raise substantively similar questions [with States Parties] in the same time period."[301] The treaty bodies face real constraints in this regard, as their sessions are staggered, and as noted above, the backlogs of work are substantial.

Yet, the right to reproductive freedom example above demonstrates how informal coordination and collaboration can work to treaty bodies' advantage by strengthening shared agreement where there might otherwise be conflict. The reproductive freedom example also demonstrates the value of building and emphasizing consensus within the human rights system wherever possible. This may mean deciding to leave some important human rights issues, like whether fetal impairment is a permissible reason for abortion, unaddressed.[302]

Secondly, as a substantive matter, treaty bodies' independent experts should remain mindful of the limits of their authority, hewing closely to the legal jurisdiction and mandates of their treaty body. All independent experts should be offered (not mandated to take)[303] expanded legal training on international law and how the treaties interact with each other, including, for example, training in areas where rights often conflict, such as the right to freedom of expression and racial incitement,[304] or the examples mentioned above, to offer broader context before experts begin their Committee work. Independent experts can be reminded that while their Committee has significant authority, treaty bodies lack the capacity to coerce states, so there is value in persuading states in the current system. In short, Committee members should be trained on the dynamics of compliance with international law. Important measures by UN human rights entities such as the treaty bodies or Special Procedures have incurred costs to the authority of the bodies. Such measures

300. U.N. Int'l Hum. Rts. Instruments, Other Activities of the Human Rights Treaty Bodies and Participation of Stakeholders in the Human Rights Treaty Body Process, U.N. Doc. HRI /MC/2013/3, ¶17 (Apr. 22, 2013) (noting that "[m]ost committees circulate draft general comments to a selected number of experts, including those from other treaty bodies, for comments, with some adopting the practice of calling for comments on the text of the general comment from other treaty bodies. Some treaty bodies request that draft general comments be posted on the OHCHR website to allow for wider input.").

301. U.N. Secretary-General, *Position Paper of the Chairs of the Human Rights Treaty Bodies on the Future of the Treaty Body System*, U.N. Doc. A/74/256 Annexes, Annex III (June 28, 2019).

302. Of course, Committees may be forced to engage an issue when faced with a communication from a possible victim of a rights violation. This recommendation should not be interpreted to advise avoiding resolving an issue before the Committee.

303. This article does not recommend mandated training because of the wide variation in expertise of the independent experts. Some trainings will be neither helpful nor necessary for some members, a wide variety of trainings could be stored online.

304. *See generally* Payandeh, *supra* note 28 (discussing how "[p]roblems are not caused by incompatible substantive provisions of human rights treaties but by colliding institutional preferences and structural biases of the different human rights treaty bodies.").

include purporting to sever reservations[305] and denying the ability of states to withdraw from treaties;[306] these were vital steps to maintaining the integrity of human rights treaties that also strained the authority of treaty bodies. Although the human rights system may be weakened by recent attacks,[307] states still have difficulty exiting these legal regimes. States instead draw down funding and delay reporting to avoid compliance.[308] Treaty body experts must remain mindful of overreaching and losing credibility as they expand determinations beyond the clear terms of their mandates.

Proffered training and encouraged dialogue should thus seek to increase experts' willingness to see themselves as vital shapers of a broad body of international human rights law, not just in their area of expertise on women's, children's, or disability rights. Yet another goal could be to broaden Committee members' understanding of the compounded and perhaps even intersectional harms associated with different minority statuses and further exploration of the norm against which discrimination claims are being measured.

In short, on-point legal and institutional training may help mitigate what Payandeh calls the "structural bias" of independent experts on treaty bodies, further broadening experts' awareness of the institutional and legal considerations on the other side of the balance.[309] Doing so could in turn enhance how treaty body experts interact with one another. If such training motivates more harmonious decisions, respectful of the treaty bodies' individual jurisdictions, the treaty bodies' credibility vis-à-vis States Parties[310] might also be enhanced, even as some advocacy groups may be disappointed in the near-term. While potentially valuable, increased dialogue and trainings are not cost-free.[311] Such initiatives may be time-consuming within an already burdened system. In addition, they are not intended to impinge on or limit the independence of the experts, rather they should ideally broaden the context of the experts' understandings of their roles. Given the practical constraints of the treaty bodies' calendars, it is unlikely that a Committee will be able to reliably communicate its position to another Committee during its busy sessions

305. *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No 2: Reporting Guidelines, U.N. Doc. HRI/GEN/1/Rev.6 (2003); Kasey L. McCall-Smith, *Severing Reservations*, 63(3) INT'L & COMP. L.Q. 599 (2014).

306. U.N. Hum. Rts. Comm., General Comment 26, Art. 40 on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (1997).

307. Hum. Rts. Council, *supra* note 18.

308. *See, e.g.*, Ed Bates, *Avoiding Legal Obligations Created by Human Rights Treaties*, 57(4) INT'L & COMP. L.Q. 751 (2008); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (June 2002).

309. *See* Payandeh, *supra* note 28; *see, e.g.*, de Beco, *supra* note 28 (recommending the mainstreaming of intersectionality).

310. *See* Payandeh, *supra* note 28.

311. *See* U.N. Info. Servs., Comprehensive Cost Review of the Human Rights Treaty Body System (Apr. 2013), https://www.ohchr.org/Documents/HRBodies/TB/HRTD/ComprehensiveCostReview.pdf.

which last just a few weeks and very likely do not overlap with those of the other Committee. However, the treaty body can communicate possible conflicts within the administrative structure of the OHCHR to heighten awareness and enable it to produce further research.

Third, treaty bodies could create more formal opportunities for discussion, outside of the reporting processes, between themselves and states on select controversial issues, much as they sometimes do with General Days of Discussion or as the UN Security Council does by hosting open debates for states on particular topics such as children in armed conflict.[312] Such open discussions, if informed by data, might foster greater understanding and perhaps even voluntary convergence among stakeholders, including independent experts. Data about various methods, tests, decisionmakers, and measures of capacity, as well as circumstances that have been held to constitute absolute necessity, may be analyzed and discussed during such debates.[313] Such debates could provide more opportunities for engagement and discovery than the current process of comment submission in advance of finalizing General Comments. Cross-treaty body dialogues with various stakeholders on controversial issues require significant expenditure, which is of course difficult to procure during a time when the treaty body system has been under tremendous strain.

The devotion of greater resources to the treaty body system is also necessary as states ratify more optional protocols and the treaty bodies receive an increasing number of individual communications,[314] developing a significant body of treaty law while also straining their capacity and creating a backlog.[315] Discussions continue about devolving some treaty body deliberations to the regional level, a move which might enable closer examination of comparative context.[316]

Fourth, as was widely recognized during the recent pandemic, working methods matter. The recent "Strengthening the System" report wisely recommends enhancing digital communications and centralizing the administration of the individual communications system as well as setting clear admissibility criteria to help Committees manage the cases.[317] All Committees should be

312. *See, e.g.*, Committee on the Rights of the Child, Days of General Discussion, https://www.ohchr.org/en/hrbodies/crc/pages/discussiondays.aspx (last visited Nov. 21, 2021); SCOR, Open Debate on Women, Peace and Security, https://www.un.org/peacebuilding/news/security-council-open-debate-women-peace-and-security (last visited Nov. 21, 2021).

313. Of course, data will only be useful to Committee members to the extent they are open in their understanding of possible and varying interpretations of the applicable standards.

314. U.N. Secretary-General, *supra* note 99, at ¶¶ 16–18. ("For the present report . . . the average number of individual communications received (prorated for the last two months of 2019) increased to 540.1 per year. This represents an increase of 80 percent").

315. *Id.* ¶ 18 ("The backlog of communications that have been received and are awaiting review by the relevant Committees was 1,587 as of 31 October 2019, representing an increase of 62.4 percent compared with the backlog of 977 communications as of 31 December 2017.").

316. *Id.* ¶ 61.

317. U.N. President of the G.A., *supra* note 180, at ¶ 21.

made fully disability-accessible immediately and continue to welcome flexible participation arrangements, as the CEDAW and CRPD Committees have been doing for some time. Conducting videoconference meetings with stakeholders, as necessary, will reduce costs while increasing participation and coordination, though concerns might be raised by permitting states to participate via videoconference.[318] Ensuring that work methods are made more accessible can lead to more diverse representation on all Committees, which in turn may mitigate some of the homogeneity of expertise.[319]

Fifth, to promote resolution of conflicting interpretations within the system, treaty bodies should continue to work with other UN entities, such as Special Procedures, to explain their respective interpretations and help develop the research, science, and policy related to these contested issues. An example can be found in the interaction between the Special Rapporteur on the rights of persons with disabilities 2019 report and CRPD Committee, when the Special Rapporteur helped promote the standards advanced by the CRPD relating to children with disabilities having a right to live with a family.[320] This is not to say that Special Procedures are neutral arbiters of standards, of course, they too are subject to a form of the structural bias Payandeh describes. The hope would be that more information would help to resolve or at least clarify the nature of some of the conflicts, so as not to rely on pure ideology, on the one hand, or on a purely technical legal solution, on the other hand.

Sixth, in addition to working with various actors in the system, treaty bodies can encourage domestic level review of issues and invite debates over meaning, encouraging greater transparency at the national level, where states will need to implement Committee decisions. State review offers a mechanism for clear comments to be delivered from the international level to the domestic level.

Finally, as a substantive matter, it would be helpful for the treaty bodies to explicitly recognize divergent interpretations in their own General Comments, much as Gerald Neuman did in an article regarding the drafting of the General Comment on liberty.[321] It is worth Committees' consideration to do

318. U.N. Secretary-General, *supra* note 301, at ¶33.

319. U.N. Secretary-General, *supra* note 110, at ¶68.

320. *See* Hum. Rts. Council, *Rep. of the Special Rapporteur on the Rights of Persons with Disabilitie*s, U.N. Doc. A/HRC/37/56 (Dec. 12, 2017); Hum. Rts. Council, *Rights of the Child: Empowering Children with Disabilities for the Enjoyment of their Human Rights, Including Through Inclusive Education*, U.N. Doc. A/HRC/40/L.20/Rev.1, ¶ 16 (Mar. 20, 2019) (in this regard this report encourages States to replace institutionalization with appropriate measures to support family and community-based services and, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family and, failing that, within the community in a family setting, bearing in mind the best interests of the child and taking into account the child's will and preferences).

321. *See* Gerald L. Neuman, *Submission to the Committee on the Rights of Persons with Disabilities Regarding Draft General Comment on Article 5, Equality and non-discrimination*,

so in the Comments themselves, perhaps via footnote. In addition, if the goal is to work toward a harmonious international-level system while recognizing heterogeneity, the Committees might take notice of a varying or conflicting interpretation by another treaty body when responding to State reports via footnote. As word limits apply to both Concluding Observations and General Comments, the notice need only be brief and perhaps refer to the document that best summarizes the varying perspectives of the Committees. While the treaty body's power to interpret a standard is limited only to their own mandate, they may certainly acknowledge the existence of the conflict. Mere recognition of a conflicting interpretation by a treaty body begins to build accountability for states and treaty bodies alike within the existing processes. The literature on the etiquette of comparative interpretation may offer guidance in this regard.[322]

VI. CONCLUSION

These examples highlight ongoing conflicts and collaboration in rights interpretations between human rights treaty bodies. A theoretical implication of this analysis is that, even with the confusion they create, such conflicting interpretations may be the best available option to protect historically vulnerable minorities with rights claims or interests. In the short term, a systemic approach favoring hierarchy and uniformity or recourse to a technocratic solution of secondary rules or hierarchy would likely stifle rather than promote the laws sought by these groups.

This article correspondingly offers institutional design recommendations that are responsive to, but not categorically determinative of, the conflicts of values present in these examples. It suggested that any normative framework for considering the "fragmentation of international law" should incorporate consideration of hierarchies at the national level and allow for deep contests of meaning and multiple avenues for resolving such contests, over time and with multiple authorities.

U.N. OFF. HIGH COMM'R HUM. RTS. (Jun.*Non-Discrimination* (June 18, 2017), *available at* https://www.ohchr.org/EN/HRBodies/CRPD/Pages/WSEqaulityArt5.aspx.

322. *See, e.g.*, Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307 (2009); John C. Reitz, *How to Do Comparative Law*, 46(4) AM. J. COMPAR. L. 617 (1998); David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545 (1997); Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L L. 949 (2011); Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOB. STUD. L. REV. 451 (2009).