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The Journal of International Organizations Studies is the peer-reviewed journal of the United Nations Studies Association (UNSA), published in cooperation with the David M. Kennedy Center for International Studies at Brigham Young University. JIOS provides a forum for scholars who work on international organizations in a variety of disciplines. The journal aims to provide a window into the state of the art of research on international governmental organizations, supporting innovative approaches and interdisciplinary dialogue. The journal's mission is to explore new grounds and transcend the traditional perspective of international organizations as merely the sum of their members and their policies.

Details on Submission and Review

JIOS is published twice annually, in spring and fall, online and print-on-demand. Submission deadline for the fall issue is 1 May each year and for the spring issue is 1 November of the previous year. JIOS publishes three types of articles:

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LETTTER FROM THE EDITOR

In our second issue of 2018, we have five peer-reviewed contributions and two non-peer reviewed essays in the back of the issue. Leading our journal is an essay in tribute to the late James Muldoon, who passed away prematurely and whose influence on those associated with United Nations studies was immense. Three of his colleagues not only wrote up the essay assessing his contribution but also helped finish an essay in progress by Muldoon, which carries his signature. We also have important scholarly contributions on "Cultural Diversity and the Politics of Recognition in International Organizations"; "Collective Security, Peaceful Change and UN Security Council Reform"; and "China and the UN Climate Regime."

We continue the new tradition of providing book summaries by our book editor Christopher Jackson, and two non-peer reviewed essays on the accreditation regime at the UN, which has such a large impact on civil society's influence on UN governance regimes. There is a personal account of the challenges of working with various domestic and international organizations and NGOs on elections in Haiti, by someone hired for his accounting expertise. I have also provided excerpts from documents on important new trends and initiatives on expanding norms and soft law affecting international global governance.

As always I hope readers will share their thoughts either through private channels or, if desired, for publication in a future issue.

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James P. Muldoon, Jr. (1959–2016) held a BA from St. Louis University and an MA in political science from Miami University in Ohio. Muldoon was director of education programs with the UN Association of the United States of America (1986–96), visiting scholar at Shanghai Academy of Social Sciences in China (1996–99), senior research fellow at the Carnegie Council on Ethics and International Affairs (1999–2000), senior fellow at the Center for Global Change and Governance at Rutgers University in Newark (2001–12), an independent scholar of international affairs, and vice-chair of the Mosaic Institute's Board of Directors in Toronto (2013–16). Muldoon has lectured and published on multilateral diplomacy, global governance, and the UN.

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Transitional Governance in Increasingly Turbulent Times: Jim Muldoon's Legacy

by Rob van Tulder, RSM Erasmus University Rotterdam; Bob Reinalda, Radboud University Nijmegen; and Dennis Dijkzeul, Ruhr University Bochum

The following short tribute elaborates and assesses the three central themes in the late James Muldoon's scholarly work: 1) the nature and speed of transition, 2) the ins and outs of hybrid governance forms, and 3) new governance forms, such as cross-sector partnerships. Muldoon introduced his idea of transitional governance as an analytical approach to two developments that undermined the fate of the Westphalian sovereignty-based, international order: from above by supranational forces (globalization) and from below by sub-national trends (localization). The second theme Muldoon covers with his concept of transitional governance includes the bottom-up initiatives that have filled the void of international regulation. Muldoon was one of the first to cover the role of the Internet in terms of governance and institutional voids. He gave an account of the Internet Corporation for Assigned Names and Numbers (ICANN) as a form of hybrid governance, including where it confirms realist assumptions about major states retaining ultimate authority. Muldoon showed that by jumping on the bandwagon of multi-stakeholder engagement, some IOs regained legitimacy. In particular the UN with its Sustainable Development Goals (SDGs)—established in September 2015 to set an agenda for the period until 2030—smartly used the long-term engagement of thousands of stakeholder representatives from civil society, corporations, and knowledge institutes.

During the extended time that James P. Muldoon Jr. worked on his doctoral dissertation in between his book projects (roughly between 2002 and 2015) important societal developments materialized, which reinforced the importance of Muldoon's accurate insights. Important shifts in the form and structure of the world moved from an international system of governance to a system of global governance, albeit in a rather fragmented and volatile form. Many articles and books have been published on issues of global governance, such as the more than fifty review essays in the anthology edited by Thomas Weiss and Rorden Wilkinson (2014). But Muldoon's plea to look at global governance issues as transitional remains relevant. While the transition process has picked up considerable pace, it remains unclear in what direction it will head.

Muldoon's effort to integrate insights from at least three different disciplines (international relations, public administration, and business administration) have also gained significance. His interdisciplinary perspective has generated followers, though it is for others to further modify and amplify his legacy of timely, relevant, and lucid scholarship. The accompanying article, which began as his work and was completed by colleagues after his passing, illustrates a combination of theoretical insights and practical implications of transitional governance.

The following short tribute elaborates and assesses the three central themes in Muldoon's scholarly work: 1) the nature and speed of transition, 2) the ins and outs of hybrid governance forms, and 3) new governance forms, such as cross-sector partnerships.

The Increasing Pace of Transition and Pressure for Governance

Muldoon introduced his idea of transitional governance as an analytical approach to two developments that undermined the fate of the Westphalian sovereignty-based, international order: from above by supranational forces (globalization) and from below by sub-national trends (localization). Initially, the forces of globalization all seemed to point in one direction: The successful embedding of most countries (including former communist countries) in a world capitalist trading system, as well as the coming of age of the Internet. The international governance challenge initially could be conceived as primarily an adaption and opening up of multilateralism. However, during the first decade of the twenty-first century, globalization took different and more vicious turns that affected the nature and pace of transition. From 2008 onward, a global economic crisis brought unilateralism back to the foreground, against the previously heralded multilateralism. Protectionism became more important than globalization in trade and investment regimes, while deregulation and privatization slowly moved toward reregulation (cf., Van Tulder et al., 2010 for an overview). States started to renegotiate bilateral treaties and even withdrew from some multilateral and regional agreements, with the Brexit vote being the most dramatic example. The subsequent intensification and new initiatives and trajectories of these trends by the Donald J. Trump Administration illustrate the multidimensional processes at play. Global governance now sees the global trading system as supported more strongly by the Chinese than the U.S. government, rendering the contemporary challenge to be more about "how to prevent a decline in globalization" than the previous mantra, "how to enable progress in globalization." Instead of reducing regulatory gaps, institutional voids at the international level are growing. Already by the end of the twentieth century, the U.S. Army War College described the multilateral world, which resulted from the end of the Cold War, as a VUCA world; one in which international relations have become more volatile, uncertain, complex, and ambiguous (Thurman 1991). There are strong indications that on almost all accounts globalization processes have become more acute in VUCA terms. A leading scholar like Rodrik (2011) argued that so far the futile pursuit of hyper-globalization, governed by institutional functions, has been provided by the nation-state, creating serious transition problems, such as increasing inequality and economic stagnation. He observed a trilemma, where democracy, national sovereignty, and global economic integration operate simultaneously despite their mutual incompatibility. We might combine any two of the three but never all three simultaneously and in full. Rodrik argued that some reversal from globalization is inevitable and possibly desirable to avoid an unstable global no-mans-land. Therefore, Muldoon's concept of transitional governance has become even more relevant. It is highly unlikely that any type of stable global governance system will emerge. However, more research needs to be done on the impact of temporary governance constructions on the VUCA dimensions of the global system.

The Increasing Risks of Hybrid Governance Mechanisms

The second theme Muldoon covers with his concept of transitional governance includes the bottom-up initiatives that have filled the void of international regulation. Muldoon was one of the first to cover the role of the Internet in terms of governance and institutional voids. His account of ICANN[1] as a form of hybrid governance can be considered required reading for anyone interested in understanding this type of regulation, not only where it is innovative (its institutional evolution as public-private organization) but also where it confirms realist assumptions about major states retaining ultimate authority.

Muldoon questions whether these forms of hybrid governance can institutionalize beyond transitional epiphenomena. ICANN can still be considered an experimental phase and there are

1. See www.icann.org. Muldoon also planned to make comparative studies of the United Nations Global Compact, the World Economic Forum, and the Global Fund to Fight AIDS, Tuberculosis, and Malaria; only the ICANN case could be covered, unfortunately. The subsequent essay, an excerpt from his work, provides an account of his concept of hybrid governance.

arguments to question whether the new forms can replace existing modes of governance. Initially, the Internet was largely unregulated or was difficult to regulate on a national basis. This partly explains its success but also explains the dominance of particular companies. *The Economist* (12 July 2017) talked about an "era of digital exceptionalism," in which online platforms in America and to some extent in Europe, "have been inhabiting a parallel legal universe [. . . in which] they are not legally responsible, either for what their users do or for the harm that their services can cause in the real world." New technology firms often operate in an institutional void, which can actually help in spreading the technology and networks but leaves questions of control open.

This system has come under increasing scrutiny due to a number of developments (Kenney and Zysman 2016): The dominant position of a few U.S.-based, multinational companies in social media, search web sites, and other platforms such as Facebook, Google, Twitter, Uber and Amazon; the manifestation of multinational company tendencies that scholars emphasized in the 1970s (Vernon 1981); the unclear nationality of these companies (reinforced by their use of tax evasion schemes); the unclear legal liability of platform companies (such as for transmitting criminal material); and their apparent violations of customer privacy. The uncertainty and volatility of the world economy is also threatened by social media's falsification of news and polarization of democratic policies, as recent elections and false political posturing in the U.S. and Europe have demonstrated (*The Economist* 4 November 2017). In all of these cases, governments, transnational advocacy networks, and expert forums like the World Economic Forum (2016) have advocated new governance models to effectively regulate the platform economy. The world hereby faces a particular transition dilemma. Whereas a retreat to national regulation might jeopardize progress in international integration and the preferred network effects, the harm caused by the lack of regulations to authenticate the producer of information as the person being presented harms the quality and stability of democracy and contractual arrangements in any type of political regime. International forums like the World Economic Forum plea for collaborative approaches to the regulation challenges and governance issues. While the top layer of the world's Internet network might be the simplest place to regulate, most users interact with the least regulated part of the Internet. Platform companies, such as Google and Facebook, operate at this level in particular. The ICANN hybrid approach does not seem sufficient to strike a balance between nongovernmental, private sector autonomy, and U.S. corporate and national interests represented by the U.S. government, despite the multilateral nature of both participating states and stakeholders from around the world. The U.S. creating the ICANN did not eliminate U.S. interests, such as whether to permit an unregulated environment, where even labeling the domain names of pornographic sites was opposed in order to prevent reducing traffic to those sites. Moreover, large platform companies have resisted formal regulation (other than self-censorship by the companies themselves) of hate speech, libel, slander, and even calls for violence, because of the additional costs associated with such efforts and the varying national legal standards proscribing hate speech, and whether its protected as free speech, however harmful.

The Increasing Relevance of New Governance Mechanisms for Positive Change

The ICANN case shows how difficult it was for the UN and other global governance mechanisms to become legitimate and effective in governing of some of the more tendentious dilemmas emerging from the global Internet revolution. Muldoon concluded that "there is only limited empirical support of these claims that multi-stakeholder partnerships are more effective in terms of policy formulation and implementation than traditional intergovernmental negotiations and arrangements." This observation still seems relevant. Research on cross-sectoral partnerships has slightly progressed, but due to the lack of a needed, interdisciplinary method, it is still in its infancy. Muldoon gave many reasons for why international organizations have been slow to adapt to globalization, which in turn allowed the gap between organizational design and operational performance to grow. But Muldoon

showed that by jumping on the bandwagon of multi-stakeholder engagement, some IOs regained some legitimacy. In particular the UN with its Sustainable Development Goals (SDGs)—established in September 2015 to set an agenda for the period until 2030—smartly used the long-term engagement of thousands of stakeholder representatives from civil society, corporations, and knowledge institutes. This has been a clear departure from the Millennium Development Goals that were created earlier at the initiative of the Secretary-General Kofi Annan. The implication of the SDGs is that no country should dominate standards that ought to be generally applied on their own merits. They mirror what Muldoon dubbed the "pluralization of international relations." The effective implementation of the SDGs depends on the internalization of the goals by major companies and governments while coordinated by the UN and other international organizations. For example, the Organization for Economic Cooperation and Development (OECD), the World Resources Institute (WRI), the World Business Council for Sustainable Development (WBCSD), and the World Economic Forum (WEF) have all embraced the SDGs as universal goals for states to implement through public-private initiatives and regulation. The WBCSD (2015, 8) concluded that SDGs are "an effective way for companies to communicate their contribution to sustainable development." There are indications that these goals are, at least initially, actually being achieved. A 2015 PwC study disclosed that 71 percent of businesses said that they are already planning how they will comply with the SDGs. Forty-one percent of them stated that they will implement the SDGs to an unknown extent in their corporate strategies within five years (PwC 2015). Another study concluded that 87 percent of CEOs worldwide believe that the SDGs provide an opportunity to rethink approaches to sustainable value creation, and 70 percent of them see SDGs as providing a clear framework to structure sustainability efforts (Accenture and UN Global Compact 2016). Muldoon observed that "multi-stakeholder arrangements are fundamentally a provisional form of governance in as much as most of them are in an experimental phase in their organizational development, supplementing rather than replacing existing modes of governance."

Another supplemental governance technique would be through partnering, according to Muldoon brings public-private ventures as inputs to strengthen both private businesses and the public good provided or corrects market failures. Partnership is effective when core activities do not compromise public purpose and also support the enlightened self-interest of private actors by pooling complementary competencies (Kolk et al., 2008). Partnership deals are forged when individual actors cannot solve collective action challenges through governmental techniques alone. Bryson (et al., 2015) concluded that traditional (1.0) approaches to governance have been evolving from second generation approaches (i.e., via a 2.0 approach, new public management, based on micro-economic cost-benefit analysis) to a 3.0 type approach of collaborative governance, in which common goal systems can be defined, and partnerships share collaborative advantages by pooling resources. Muldoon had already covered this evolving trend earlier in his studies of international developments in a more interdisciplinary way. In the case of ICANN, he also pointed out some of the conflicts and conflicting logics that arise in the process.

Conclusion: A Permanent State of Transition?

These examples show why the transition toward global governance also involves the challenges of transitions. Muldoon's example and advocacy of creating interdisciplinary knowledge on effective transition governance processes contributes to the scientific and policy discourse. Muldoon underscored that shifts in "relational authority" between states and non-state actors on the global level (see Lake 2010) result from the new dynamics and complexity of a globalizing international environment. In the words of Muldoon, "Transitional governance shows the diversity of organizations (public, private, and hybrid forms) and their ongoing dynamics that have not (yet) created a stable system of global governance." Transitional governance, how-

ever, is becoming more institutionalized. Existing global governance institutions, like the UN, will have to transform into different forms, involving international law, regimes, partnerships, initiatives, compacts, soft law norms, and whatever else as states and stakeholders try to address increasingly necessary actions to resolve problems that can only be ignored at our global peril, and can even influence human survival. The increasing polarization of domestic and international politics have both complicated these challenges and the forms that global governance may take to regain legitimacy through effectiveness, consensus promotion, and rights protection. By defining transitional governance as "the innovation of processes and structures of governance that enable societal actors to reconfigure and reconstitute governance roles and practices vis-à-vis each other and the system as a whole," Jim Muldoon as a leading scholar has, in our view, successfully laid the foundation for further interdisciplinary research into processes of governance. Furthermore, he provides a benchmark for success by defining the outcome of these processes as the confluence of norms, rules, laws, and institutional arrangements of new and unforeseeable dimensions that seek to address the compelling predicaments of the new century.

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International Organizations and Governance in a Time of Transition

James P. Muldoon, Jr. (†), Mosiac Institute, Toronto

In 1999, in a co-edited book about multilateral diplomacy and the United Nations, Jim Muldoon began to discuss the challenges of the global economy for post–Cold War diplomacy (Muldoon 1999, 80). In 2011, in a co-edited book about the new dynamics of multilaterism, Muldoon concluded that institutions and structures were in transition, "moving from the international order established after World War II to a global order for the twenty-first century" (341). In 2015, Karen A. Mingst and he discussed the reconceptualization of international relations for the twenty-first century from the perspective of global governance and nongovernmental organizations (Mingst and Muldoon 2015, 65–81). While developing his ideas about transitional governance, Muldoon also worked on a dissertation, supervised by Rob van Tulder. His aim was to develop an interdisciplinary approach, combining theory from international relations and organization theory, rooted in both international business and public administration, as well as focus on the role and function of hybrid governance forms. Sadly, Muldoon's illness and death in 2016 meant his major opus remained unfinished. This article, edited by Dennis Dijkzeul, Bob Reinalda, and Rob van Tulder, attempts to complete that task posthumously. It summarizes Muldoon's work for his dissertation, with an explanation on the ongoing relevance of international organizations (IOs) and governance in a time of transition, as illustrated by the case study of the Internet Corporation for Assigned Names and Numbers (ICANN), a GONGO (Government-Created NGO). ICANN governs crucial aspects of the Internet administration, but is not constituted as an inter-governmental organization controlled by states. Its neoliberal origins may reflect post–Cold War dynamics and ideology but will also provide a mode of global governance that deserves the attention of scholars and policy makers.

Introduction

This article analyzes the changing global context after the end of the Cold War and the need for even more innovative forms of governance that have emerged in this transitional period. It will explore the ins and outs of transitional governance by evaluating its conceptualization in the disciplines of international relations, public administration, and business administration. Evolving interactions among states and non-state actors have produced new mechanisms of cooperation and coordination, and hybrid organizational forms of governance. The pressures put on international institutions and organizations to address the governance needs of an emerging global political, economic, and social order requires attention, as well as limits of reform, with multi-stakeholder arrangements supplementing rather than replacing existing modes of governance.

The focus of this essay is on the role and function of hybrid governance forms, in particular multi-stakeholder public-private partnerships, in the transition of the international system of governance to a system of global governance. The essay also illustrates this transition to global governance with the ICANN exemplar, one of the more prominent and innovative hybrid organizational forms of international governance, namely private management of public regulation of a natural monopoly: Internet traffic. ICANN has evolved into a new hybrid form where a private-sector entity has regulated a global public policy with legally binding decisions, yet remains independent of governments and treaty-based IGOs. However, the influence of individual states,

like the U.S. and the Governmental Advisory Committee (GAC), has remained significant in this international institution which, unlike intergovernmental organizations, is not based on a formal treaty among states.

Globalization and Global Change—the New Context

One of the greatest challenges confronting the world is managing globalization. This term came into vogue during the last decades of the twentieth century to describe the accelerating integration of national economies into the world market economy. In the early twenty-first century, globalization became more comprehensive, but also encountered protectionist resistance in the quest for increasing political, economic, and social interdependence. The complexity emerging from the forces of globalization and its objectors have been driving systemic change that calls for innovative forms of governance.

While the international system of governance "brought a measure of law and reciprocity to international politics" and "bred some measure of trust among sovereign states that had eyed each other warily at least since Westphalia" (Kennedy 2010, 93–94), it has been slow to adapt to rapid changes in the international system, especially the rise of non-state actors (e.g., nongovernmental organizations [NGOs], other civil and uncivil society groups, and transnational corporations) and the revolution in information and communication technologies. The forces of globalization have catalyzed transnational activity among non-state actors, much of which is outside the effective control of states or IOs, undermining the authority and preeminence of states and disrupting the power distribution and patterns of interdependence that have emerged over the centuries. Globalization has also been causing diffusion of authority among both governmental and nongovernmental entities, with an effect on the way states, markets, and societies interact and intersect at a global level. States, business, and civil society at the local and global levels are adjusting their respective governance roles. As the traditional divides between private and public, and national and international increasingly blur, relations between states, non-state actors, and IOs are being reconfigured.

Due to the shifts in relational authority between states and non-state actors on the global level (see Lake 2010) new forms of governance have emerged. Alternative governing modalities and mechanisms have included new intergovernmental arrangements like the G20, the BRICS Bank, and ad hoc coalitions of willing and multi-stakeholder arrangements like the Global Alliance for Vaccines and Immunization (GAVI), the Global Compact, and global Public-Private Partnerships. They "address issues that are presumed to be underattended or mishandled by the formal multilateral institutions" and increase the provision of international public goods and services "that national governments and intergovernmental institutions seem unable or unwilling to provide" (Forman and Segaar 2006, 214). This trend toward public-private governance arrangements reflects the demand for increased participation of non-state actors in global policy-making and for more effective and responsive governance. Institutionalizing private actors in global governance is transforming governance and epitomizing the process of transitional governance.

Three Disciplines and Transitional Governance

Despite its varied meanings, governance has become a core theoretical concern and a growth industry in at least three disciplines: international relations, public administration, and business administration (Dijkzeul 1997). By taking a closer look at how governance is conceptualized in each discipline, it is possible to discern common theoretical themes and establish core concepts and propositions to analyze transitional governance.

Governance, or rather global governance, gained prominence in the international relations discipline after the Cold War. This concept continues to evolve amid numerous disputes and conflicts among scholars. The essential components of global governance are still debated—such as the processes or forms of global institutions, the new norms, rules and patterns of behavior, or the

effective redistribution or diffusion of power among states and non-state actors. Moreover, the literature on global governance is under-theorized about the process of moving from international to global governance. International governance is a matter of states and intergovernmental organizations (the UN System, regional organizations), which suggests coherence in international efforts to manage political, economic, and social affairs, and assumes that both national and international society is malleable by governmental policies and institutions. Global governance no longer solely reflects the interests of states and intergovernmental organizations, but also those of INGOs, transnational corporations, and new kinds of networks, which include transnational private actors. Private actors may influence governments directly, but they also influence governments through participation in (quasi-)governmental institutions and networks. The world has a way to go before the ingrained international mindset of today (including countervailing forces, where states attempt to regain control) is superseded by a global one. Despite considerable discussion about governance processes, interactions, and dynamics, empirically demonstrating that such processes, interactions, and dynamics actually produce governance, let alone global governance, remains a challenge.

The concept of governance in public administration has traditionally been defined as what governments do and how the political system works, primarily in formal roles but also through informal processes. The field has also moved toward improving government and civil servants' performance through modern management practices, which has also paved the way for the emergence of public management as a distinct field of study. According to Peters and Pierre (1998), European scholars of public administration were among the first to distinguish governance from government to describe changes in the relationship between government, the private sector, and the changing patterns of government where "societal actors have become influential over policy and administration and have done so in ways that were unimaginable in earlier times. Government is seen as weakened and as incapable of steering as it had in the past. The traditional concept of government as a controlling and regulating organization for society is argued to be outmoded" (Peters and Pierre 1998, 223–24).

The idea of steering society became a key concept in the literature on governance. It refers to processes of interaction between government, business, and civil society that over time become regularized institutional patterns. In this view governments need to cooperate with nongovernmental actors to solve societal problems and to create societal opportunities (e.g., public-private partnerships, public policy networks). "Needs are no longer confined to society, capacity to government. Needs and capacities are both public and private. They are embedded in both state and society in their mutual interdependencies" (Hyden and Court 2002, 9). Weiss and Wilkinson (2014) have presented over fifty global governance debates within the IR field, indicating how far political science's IR subfield has advanced on "how the entire world hangs together through formal and informal governing techniques and processes." Although a lively debate continues over definitions and research strategies, the study of governance has advanced almost as much in public administration as in IR, but in its advancement, public administration has gone without the IR's focus on the transnational aspect of global governance.

The concept of governance in the field of business administration has become a focal point, largely in one topic, due in large part to a number of egregious corporate scandals uncovered in the U.S. and Europe in the early 2000s. Traditionally, hierarchy and control are key concepts in business management and organization theory, as well as basic principles that enable companies to be efficient and competitive. How management operates in increasingly complex internal and external relationships, including in international realms, has resulted in more emphasis on steering rather than controlling a company. Instead of using only market-based criteria, the stakeholder approach to corporate governance seeks to consider and include all those affected by its policies in the decision-making process. It emphasizes the relational characteristics among business and other societal actors, which raise issues of power, legitimacy, and representativeness of business, government, and civil society groups in their roles

and responsibilities toward each other and society as a whole. Since the 1960s, corporate social responsibility and corporate citizenship have emerged as key touchstones in defining business-society relations, including in global governance, even if this field does not use these terms as much as IR does.

Despite their naturally different concerns, these three disciplines share similar methodological and theoretical problems. The mainstream orientations of all three are rationalist, though there are significant socially constructed and critical approaches as well. At least five common theoretical themes are posited in governance: 1) institutions and organizations matter, 2) process (or interaction of systems, individuals, countries, and organizations) is a core governance principle, 3) complexity, diversity, and dynamics are key environmental challenges, 4) technological change and innovation are main drivers of systemic transformations, including new or (re)configured institutions, and 5) coordination, cooperation, and collaboration are the primary activity and purpose of governance systems. These common theoretical themes establish similar approaches among the three disciplines, even if they diverge on specific problems and actors, as well as the units and levels of analysis. These five theoretical themes form the basis of an interdisciplinary perspective on global governance structures and systems and the agents of this global transition.

Transitional Governance: Stakes, Processes, and Outcomes

Transitional governance is conceived as the processes of innovation that enable or obstruct societal actors to reconfigure and reconstitute governance roles and practices, and establish new mechanisms of cooperation and coordination, and hybrid organizational forms of governance. The emergence of multi-stakeholder partnerships, particularly legally binding, independent entities that are quasi-governmental or nonprofit organizations, often result from this evolution.

Three dimensions of transitional governance include stakes, processes, and outcomes. The stakes focus on change and innovation, processes give attention to mechanisms of cooperation and coordination, and outcomes concentrate on effectiveness and legitimacy. Transitional governance also includes the reality of countervailing processes in reaction to efforts, explicit or systemic, that resist these developments, contributing to complexity and hybridity.

The stakes may give rise to an incremental shift in existing patterns of interaction between states, business, and civil society, or to more radical innovations such as hybrid (multi-stakeholder) organizations. Stakes result from the pursuit of interests affected by a changing external environment out of which new governance needs appear and new, or latent, interests are formed. The complexity of the issue area affects actors, their interests, and other factors of change and innovation, such as composition and capabilities of actors, technology, and systems' failures.

The processes represent the interactive dynamics between and within governance organizations that occur both horizontally and vertically. Traditionally, governance by governments is a top-down (vertical) hierarchical process with centralized authority to set rules, allocate resources, and regulate behavior. It emphasized command and control mechanisms as a way to mitigate conflicts and increase efficiency (i.e., reduce transaction costs). As authority has diffused or been delegated to other actors, governance processes become less hierarchical, more decentralized, horizontal, and networked. The emphasis shifts from command and control to the notion of steering with and through innovative, hybrid governance organizations and the network structure of public-private and multi-stakeholder partnerships.

The outcomes are the results of governance processes, particularly norms, rules, regulations, and policies that address global problems or manage global issues and concerns. Research on public-private and multi-stakeholder partnerships claim the outcomes of these partnerships are more effective and legitimate for three reasons, only the first of which is rationalist: 1) the inclusion of all stakeholders brings in necessary resources and information to increase the problem-solving capacity of the system of governance (resource exchange theory), 2) the participation of all stakeholders creates a sense of ownership and more compliance with

generated norms, rules, and regulations (constructivist theory, Koh 1996), and 3) the network structure of public-private partnerships encourages communicative action and deliberation which contributes to greater consensus on policies and solutions to global problems (network/systems theory).

However, there is only limited empirical support of the claims that multi-stakeholder partnerships are more effective in terms of policy formulation and implementation than traditional intergovernmental negotiations and arrangements, whose own effectiveness is contested by realists and some liberals (Schäferhoff et al. 2009, 458–59; Forman and Segaar 2006). Effectiveness can be seen as the extent of achieving organizational and institutional goals and solving problems. This leads attention to the decisions and policies of an organization, the extent of compliance with these decisions and policies, and the degree to which such policies and decisions solve a market failure (or another problem) or provide a public good.

In sum, the form and structure of the transition from international to global governance is under-theorized concerning how and why hybrid forms are created, the function, and when they are effective and legitimate. To illustrate how I conceptualize this transition, I present the example of ICANN's role in Internet governance.

International Organizations in Times of Transition

The dramatic changes in the international political, economic, and social landscape since the end of the Cold War have put immense pressure on international institutions and organizations in the system of international governance. This is founded mostly in terms of intergovernmental organizations, supplemented by some supranational organizations within the United Nations (UN) and especially the European Union (EU), along with nongovernmental and other civil society organizations and social movements. The pace and scope of the adaptation (or innovation) of IOs—governmental and nongovernmental—to the new conditions has been slow and inadequate. Crucial gaps in the incipient international system of governance call into question the legitimacy and relevance of existing IOs for managing global challenges. At the same time, some new and innovative IOs reflect changes within and between three primary institutions: the state, the market, and civil society.

Structural changes in the international system, such as the end of the Cold War, technological change, and globalization, along with periodic crises and disasters (e.g., interstate and intrastate armed conflicts, economic collapse or depression, or catastrophic environmental events) that shock the system are the most obvious exogenous factors driving changes in IOs. They expose weaknesses in existing international, institutional arrangements and point out needed alterations in the fundamental world order. IOs that are unable to adapt to such new conditions and mobilize support from powerful constituencies are endangered, while those that have the capability to adapt and serve "a value critical to succeeding world orders," survive and evolve (Cupitt, Whitlock and Whitlock 1997, 11–12). Aside from exogenous shocks, shifts in the international system's characteristics or nature can also drive organizational change. Kapur (2002, 340–43) identifies three key factors: 1) competition "among IOs and between IOs and national bodies, market institutions, and NGOs" for resources and mandates, 2) norms, that is, "complex sets of meanings" that frame peoples' views of the world and their behaviors in the world, "have played an important role in institutional change," and 3) domestic politics, particularly those in more powerful, funding states. These three endogenous sources of change in IOs are supplemented by two intervening variables, namely IO leadership and organizational learning.

The various hybrid forms of IO change are incremental and evolutionary. According to Kapur (2002, 346), the variation in IOs' capacity to change is due to "the interaction between institutional history and the type of exogenous changes discussed." An IO's goals, instruments, governance, and financial structure shape the specific trajectory of change in response to exogenous change. The formal organizational ecology includes

its constitution (or articles of agreement) that delineates membership criteria, mandated functions, institutional governance, and internal organizational processes, such as recruitment practices and budgetary sources—factors that are sometimes ignored in IO analysis. Following exogenous shocks or shifts in general environmental factors, stakeholders of the system (e.g., states, business, civil society, epistemic communities) demand reforms, however difficult they have proven to be.

Limits of Reform

IOs have to contend with the tension between change and continuity: The dilemma of how to meet new demands for which they are not designed, while fulfilling traditional roles and functions. This dilemma is often exacerbated by constitutional and resource constraints that have long plagued IOs.

IOs are chronically under-resourced and are dependent on contributions from members. Since IGOs like the UN rely almost exclusively on membership dues and voluntary contributions from member states, they are especially vulnerable to the vicissitudes of clashing or competing interests and goals of member states, particularly the most powerful. In the case of the UN, this has resulted in "a serious imbalance between what is expected from the UN and the financial resources available to translate such responsibilities into reality" (Hüfner 2003, 29). Most IOs' constitutions or charters restrict their latitude for action as new problems arise, either through explicit prohibitions or, contextually, by requiring super-majorities or consensus, or by other controlling procedures usually about decision-making, internal rules, and regulations for the staff. Political differences exacerbate cumbersome decision-making processes that thwart timely action and effective response operations. These constraints have inhibited the development of IOs and their ability to make structural and operational changes that circumstances demand.

It is relatively easy to pinpoint the deficiencies of international institutions and organizations, but it is much more difficult to rectify them. Especially as the context of the emerging global governance system evolves, of which IO roles and resources concurrently change as only one part of that governance system. Efforts at reform are often selective and poorly executed, producing marginal performance improvements resulting from such piecemeal changes in IO adjustments. For example, reforms of key IGOs like the UN, the World Bank, the International Monetary Fund, and the EU have minimized jurisdictional overlap and competition by retooling their respective programs and increasing inter-organizational cooperation. But, these reforms are much too limited since they have done little to expand or repair IOs' capabilities and effectiveness. The EU has developed a much broader supranational bureaucracy with autonomy and capabilities, because that has been the intent of its member states. More universal IGOs enjoy less consensus, even among the subset of the powerful states who will not yield autonomy needed for coherent, complex, programmatic, and procedural adaptations. The bolder reform proposals that call for creating new organizations or strengthening IO autonomy and operational capacity are often vetoed by great powers, who rarely approve of anything but interim projects on an ad hoc basis. For example, the broad peacebuilding initiatives in Bhoutros-Ghali's 1993 "Agenda for Peace," were restrained by the U.S. under President William J. Clinton. This and other attempts to institutionalize UN autonomy deposed him as secretary-general after only one term in office (see, for example, Frey and Stutzer 2006; Beigbeder 2011).

While IGOs have faced significant obstacles in this post–Cold War environment, the private sector, international NGOs (INGOs) and NGOs, have adapted more easily, though their capabilities are limited, since several of them are GONGOs and QUANGOs, to use the abbreviations of Gordenker and Weiss (1995), and are controlled by governments that respectively created and funded them. In the 1990s, many of the largest and oldest international NGOs "found themselves with large and growing bureaucracies, outdated operational

systems, and a perceived alienation from their original values," which led many of them to undertake "major overhauls of their financial, human resources, and information systems," as well as reviews of "how the organizations are governed" (Forman and Stoddard 2002, 258). Likewise, international business enterprises have innovated to remain competitive in the rapidly globalizing world economy. The more pronounced role of non-state actors has filled some of the political and economic space that states have either abandoned or been unwilling or unable to maintain or manage. This pluralization of international relations results from transnational private initiatives. Both civil society and the private sector have challenged states' efforts to control the international environment and IOs' rule-setting functions.

The increasing influence and power of non-state actors, epitomized by INGOs in contemporary international relations, "turns on their network structure and their capacity to use information technology to mobilize constituencies across the globe and thereby multiply their voices. These networks have been increasingly effective in shaping global public policy, especially when they managed, as the International Campaign to Ban Landmines did, to engage governments and intergovernmental organizations in their activities" (Forman and Segaar 2006, 217). INGOs have also become significant players in humanitarian assistance (HINGOs) as well as international development, since donor governments and IGOs have subcontracted relief and development projects throughout the world.

Previously clear boundaries between public and private sectors and between the political, economic, and sociocultural domains are becoming increasingly blurred. Institutional parameters of the international governance system are being reconfigured, as the interaction between states and non-state actors try to break free, or exceed institutional or member state-imposed constraints. The growing systemic complexity, diversity, and dynamics demand broader approaches and instruments (Kooiman 2000; Kruck and Rittberger 2010).

The operational and participatory gaps in the international system's institutional and organizational infrastructure induce partial organizational reforms that vary widely in size, composition, and functional capacity. Some have been instigated by the private sector, others by civil society, and still others by states and IOs. They go by a variety of names, such as global public policy networks, private sector initiatives, public-private partnerships, and (ad hoc) global alliances and coalitions (Forman and Segaar 2006; Van Tulder 2008). Since the turn of the century partnerships have been most common, usually in an ad hoc manner, to describe a vast array of informal and formal public-private arrangements to address a wide range of global issues. Their structure varies considerably depending on the partners and the partnerships' objectives.

Partnering with the private sector and civil society organizations on sustainable development projects and programs has been a favored tool of the UN Development Programme, the UN Environment Programme, the World Health Organization, and the World Bank. Some partnerships use contracts between a UN agency, NGOs, and companies that commit resources and assets for services, often as part of a joint venture. New IOs or institutionalized multisector networks have emerged, such as the Global Reporting Initiative, Medicines for Malaria, Global Alliance for Vaccines and Immunization, Forest Law Enforcement and Governance, and the UN Global Compact. They enhance the UN's operational capacity in directing foreign direct investment and other private sector resources toward poverty reduction and sustainable development through partnerships.

Such innovative modalities suggest that the overall international governance system is being partly dismantled and reinvented. Sectoral jurisdictions are to be reconfigured, organizational boundaries to be redrawn, and roles and responsibilities of international actors could be redefined. Yet, multi-stakeholder arrangements are fundamentally a provisional form of governance. Most are in experimental phases in their organizational development, supplementing rather than replacing existing modes of governance. Although insufficient to constitute a new structure of global governance by themselves, these novel governance mechanisms fill up some of the institutional void left by the failing international governance system. In other

words, multi-stakeholder arrangements are important catalysts of change and innovation in IOs and add a new dimension to the architecture of governance as the world transitions from an international order to a global order.

Hybrid or Transitional Governance? The Creation of ICANN

One of the more prominent organizations of a new generation of IOs is the Internet Corporation for Assigned Names and Numbers (ICANN). It is a private, nonprofit, public benefit corporation that was created in 1998 to take over the centralized coordination and management of the Internet's Domain Name System from the U.S. government. This example is highlighted here, not just as a new structure of global governance but as a building block of the systemic process toward which an incipient global order could evolve. Unlike IGOs as instruments of member governments, "ICANN was deliberately set up as a private sector, multi-stakeholder governance organization" that would operate independently of national governments and IGOs (Mueller, Mathiason, and Klein 2007, 238). It has a unique organizational design and decision-making process, with bottom-up policy development processes for "managing a global resource on a nongovernmental basis. Indeed, in its early days it was touted as a model for other issues that required unified action of numerous groups from government, industry, and civil society, such as treating communicable diseases or handling climate change" (Cukier 2005, 10–11). Yet, ICANN's ability to formulate and carry out policies through internal processes without significant IGO structure and resources was also inadequate for the challenge, which may still induce further evolution in global governance.

The revolution in information and communications technology (ICT) has rapidly transformed the political, economic, and social landscape of the international system. As a driving force of globalization ICTs, particularly the Internet, are dramatically changing the way people work, play, and interact, as well as changing the relationships between society, government, and business. They have arguably increased the number of significant international actors, disrupted traditional hierarchies, and decentralized power and authority. The Internet emerged out of a technical research project of computer scientists based in the U.S. and underwritten by the U.S. government. The original Internet backbone was directly owned and controlled by the U.S. Department of Defense or its contractor. Internet was based on the idea that there would be multiple independent networks of rather arbitrary design, beginning with a pioneering packet switching network but soon would include packet satellite networks, ground-based packet radio networks, and others.

The Internet now uses open architecture networking (see Leiner et al. 2003), which is based on the original concept of subsidiary computer networks and even individual computers made possible after the development (in 1972) of the Transmission Control Protocol (TCP) and the Internetwork Protocol (IP), which "allowed a streamlined overall system in which the IP protocols passed individual packets between machines (from host to packet switch or between packet switches), while the TCP ordered the packets into reliable connections between pairs of hosts" (Franda 2001, 21–23). The TCP/IP suite ultimately became the de facto global standard that all computer networks use, with two principles, namely 1) that the authority for operationalizing the Internet would be decentralized internationally, and 2) that the process for developing international technical standards would be inclusive rather than proprietary- or government-directed.

The Internet consists of two systems, one for communications (the TCP/IP protocols) and one for addressing (the Domain Name System [DNS]). As stated, the TCP/IP is decentralized (so much so that it is just a set of protocols by which independent computer networks can send data packets to each other), whereas the DNS is centralized. While IP numbers (or addresses) are machine-friendly numeric identifiers, domain names are alphanumeric and human-friendly. The DNS is considered the heart of the Internet, with a root server as a starting point and a group of Top-Level Domains (such as .com for commercial and .edu for education), as well as two-digit domains

for countries (such as .uk for United Kingdom and .jp for Japan). Control of the DNS raised many concerns, especially over the immense power of those administering and managing the system, and it became the focal point in the debate over the structure of Internet governance.

In the early years, managing the development and implementation of protocols and network operations was in the hands of the Network Working Group (NWG), which consisted of a core group of computer scientists and engineers. When the NWG was disbanded in the early 1970s, an advisory group of network experts called the Internet Configuration Control Board (ICCB), was set up to coordinate discussions about technical questions among government and private groups and to "oversee the network's architectural evolution." The ICCB was replaced in 1985 by the Internet Activities [in 1992: Architecture] Board (IAB) (Franda 2001, 45). The IAB, with two components (the Internet Engineering Task Force [IETF] and the Internet Research Task Force), set up a unique open procedure for discussion and resolution of governance issues, Internet protocols, and standards. This inclusive process has worked well in encouraging innovation and invention, as well as international collaboration among companies, academics, government agencies, and individuals on technical issues and standardization of the Internet's infrastructure.

During the period between 1986 and 1992, Internet governance and management functions became divided between the U.S. Department of Defense and the National Science Foundation (NSF), with a number of private associations playing various roles (Franda 2001, 45). In the early 1990s, NSF and other U.S. funding for IAB and IETF activities was insufficient, which led several long-standing IETF members to form the Internet Society (ISOC)—a nonprofit, nongovernmental, international, professional membership organization—as a mechanism to aggregate funds from a variety of sources to support the IETF and as the organizational home for groups responsible for Internet infrastructure standards and administration (Cerf 1995). The establishment of ISOC in 1992 coincided with the formal transfer of management of the Internet backbone from the U.S. government to private and to public companies, and the decision "to move the system's technical administration out of the U.S. government entirely, with the result that formal oversight of IAB and IETF was contracted to the Internet Society" (Franda 2001, 46). By 1995, the Internet backbone was replaced by a "fully commercial system of backbones" that had been erected through the privatization of regional networks into for-profit enterprises (Cerf 1997).

The U.S. government contracted the University of Southern California's Information Services Institute under the direction of Jon Postel to administer the DNS system. Postel single-handedly assumed the functions of maintaining the root zone file, authorizing the addition of new top-level domain names, choosing zone file administrators to whom to delegate authority, and other administrative tasks. Postel created the Internet Assigned Numbers Authority (IANA)—an informal organization that was "accepted as a constituent organization of ISOC in 1992, but never had legal standing" (Franda 2001, 48)—through which he exercised policy authority over the DNS (Klein 2002, 198). When the U.S. government started to privatize the Internet's technical management and administration, Postel tried to transfer his government contract to IANA in 1994 so the DNS would fall under the ISOC umbrella, but he was unsuccessful. Instead, the NSF reached a five-year cooperative agreement with Network Solutions, Inc. (NSI) to manage the so-called *A* root server, zone file, and the DNS registry (known as InterNIC), creating a monopoly and "a lucrative, multimillion dollar revenue stream for NSI" (Franda 2001, 49; Weinberg 2000, 199).

The contract with NSI was not well received by the Internet Society who "sensed that a key feature of its long stewardship of the civilian part of the Internet was being surrendered to NSI" (Franda 2001, 49). IANA (meaning Postel) and ISOC leaders began to develop alternative plans for expanding the Top-Level Domains to replace the NSI monopoly by the time the NSI contract expired in 1998. An ad hoc committee, formed by the Internet Society with representatives from the International Trademark Association, the World Intellectual Property

Organization (WIPO), and the International Telecommunications Union (ITU), developed a proposal to manage domain names in lieu of NSI. The ITU established control of an international regime to manage these issues. The result of this process was a Memorandum of Understanding (MOU) among the parties to the ad hoc committee, which assigned governance functions to an entity housed in the ITU, with representation from ISOC, business interests, and IGOs. In March 1997, the ITU arranged a formal signing ceremony to give the agreement the trappings of an international treaty. However, the Memorandum of Understanding immediately ran into opposition from two groups. Governments strongly protested the agreement. EU governments opposed it because of continued U.S. dominance. The U.S. secretary of state wrote a memorandum blasting the ITU Secretariat for acting "without authorization of member governments" and "concluding with a quote international agreement unquote." Additional opposition also emerged from Internet enthusiasts, who criticized the proposed governance structure as lacking in democratic accountability and too solicitous of corporate concerns (Drezner 2004, 494; also Mueller 2002, 146–56).

The Clinton administration moved swiftly to marginalize the proposed role of the ITU in the governance of the DNS. On 1 July 1997, President Clinton issued an executive order instructing the National Telecommunications and Information Agency (NTIA) of the U.S. Department of Commerce to support privatization of the DNS and create a contractually based, self-regulatory regime. On 3 June 1998, the NTIA released a white paper entitled "Management of Internet Names and Addresses," which officially rejected the MOU process and instead advocated DNS privatization. U.S. policy reflected the neoliberal foreign policy of the Clinton administration. Through the white paper process, the U.S. government resolved the issue by selecting the ISOC-led coalition proposal for a new private nonprofit corporation, the ICANN. IANA/ISOC had incorporated it under California state law and established its headquarters in Marina Del Rey. With the formal designation of ICANN to oversee the technical management and development of the DNS, administration and management of the Internet's technical infrastructure was situated in the private sector with some state participation in Internet governance. The Clinton administration's private sector-led governance system for the Internet relied on market competition and decentralized authority, instead of government regulation. At the same time, the U.S. government assured the business community that it would ensure Internet stability, including protecting intellectual property. The U.S. also pledged to cooperate with ICANN to "design, develop, and test the mechanisms, methods, and procedures that should be in place and steps necessary to transition management responsibility for DNS functions" to the private sector (Memorandum of Understanding, Department of Commerce and ICANN, November 25, 1998).

The ICANN Experiment—Structure and Management

The organizational structure of ICANN was corporatist in the European sense of tripartite representation, but instead of labor, management, and government, ICANN was organized to act like a public organization while under private ownership and management "with private management virtues" (Franda 2001, 60). ICANN's original bylaws set out the organizational structure to encompass a board of directors (the highest policy-making body), three supporting organizations (SOs that were to be self-organizing and the mechanisms for ICANN's bottom-up policy development processes and for electing representatives of ICANN's key constituencies to the board), an "At Large Membership Council" (the mechanism for selecting representatives of individual users of the Internet to sit on the board of directors), and two advisory committees (ACs), one for governments and the other for the DNS root-server operators (to implement ICANN decisions and policies), as well as administration, as small staff was available. This structure "met with a barrage of criticism during ICANN's first year of existence," in particular the electoral system for electing at-large board members (Franda 2001, 63). In response to this and subsequent criticism, ICANN made changes to the election procedures and developed accountability and transparency mechanisms.

Throughout its first four years, ICANN attempted to resolve the often controversial organizational and procedural issues of starting a new organization. Its initial multi-stakeholder, bottom-up governance model created multiple committees, working groups, advisory bodies, and other ad hoc entities. In 2001, its new CEO facilitated a systematic, reexamination of ICANN's mission, structure, and procedures. This resulted in the adoption of new bylaws in December 2002, which expanded the decision-making power of the board and staff and were designed to be more efficient and predictable, based on achieving stakeholder consensus. This reform redefined ICANN explicitly as a public-private partnership, with expanded governmental participation and reduced gaps in the ICANN contractual web (Antonova 2008, 277).

ICANN 2.0, a term commonly used since the new bylaws took effect, operates more like a private enterprise, a business to ensure DNS stability and security, and de-emphasize policy-making. Its staff grew from twelve in 2000 to 110 in 2009, its operating budget grew to USD 52 million in 2009, based on revenues of USD 61 million, and it established more offices. By most accounts, ICANN's performance improved significantly. ICANN 2.0 established open and transparent procedures for allowing stakeholders participation without capture, and achieving a balanced and representative board "that reflects the main stakeholders." However, one stakeholder group of governments and IGOs, were not permitted to serve as directors. Instead, governments are represented through the GAC, nonvoting liaisons to the board, the Nominating Committee, and the Councils and Advisory Committees (Mathiason 2009, 83–84).

Over its first decade, ICANN evolved into a unique hybrid governance form—a private-sector regulator of a global public resource. Its policy decisions are legally binding, yet at least nominally independent of governments and IGOs. ICANN's consensus process to satisfy diverse stakeholder demands was not the major challenge. Rather, many of ICANN's problems resulted from management of the DNS. Though technically owned by the U.S. Government, ICANN was contractually obligated to submit status reports for two years on fulfilling the conditions of the MOU as it transitioned to an autonomous agency (Mueller, Mathiason, and Klein 2007, 240). But, this short time frame was unrealistic, which ICANN's second status report of 30 June 2000 had already noted. Each subsequent status report "was followed by certain amendments [to the MoU] and, consequently, a year-long extension" (Antonova 2008, 172n248). There were six amendments made to the original MOU between 1999 and 2003, which was renamed the Joint Project Agreement in 2006 with a new end-date of 30 September 2009. While the U.S. government was judicious in exercising its oversight role, ICANN's autonomy was clearly limited, which led other stakeholders, especially non-U.S. groups, to question its decisions.

The delay in ending U.S. control reinforced existing suspicions that ICANN was an indirect tool of U.S. hegemony and led to calls for shifting oversight and control to a multilateral intergovernmental body. This came to a head in 2003, during the preparatory meetings for the World Summit on the Information Society, convened by the ITU and the UN. The U.S. government deflected some of the criticism of ICANN in bilateral discussions but was unable to block them at the multilateral meetings. By November 2004, UN Secretary-General Kofi Annan appointed a forty-person working group on Internet governance, which favored transferring authority over the Internet to the UN. The U.S. government opposed any changes. "In the brief Commerce Department statement [issued on June 30, 2005], Washington announced its decision: the United States would retain its authority over ICANN, period" (Cukier 2005, 11). In August 2005, the U.S. intervened directly in a key ICANN function—authorizing new generic Top Level Domains—thereby reversing the U.S. government's position and policy of not interfering in ICANN policy decisions. The so-called "XXX controversy" from 2005 to 2006, based on U.S. lobbying against a specific domain-name suffix for Internet pornography, exemplified U.S. dominance of ICANN, when the latter rejected the proposal in a 9 to 5 vote in May 2006. The incident awakened many governments of their limited influence on ICANN's management of Internet policy.

On 1 October 2009, the ICANN/DoC Joint Project Agreement (as stated formerly the MOU) was replaced by a long-term permanent agreement called Affirmation of Commitments (AoC)

between ICANN and the U.S. Department of Commerce. The AoC has recognized ICANN's autonomy as an international private sector, multi-stakeholder governance organization. At the same time, ICANN's freedom has come at a price, namely accepting the privileged role of the Governmental Advisory Committee (GAC). Consequently, since 2002, ICANN has been following the GAC's policy advice. However, unlike an IGO, GAC's authority is not based on a formal treaty and its rules and powers were never ratified by any democratically elected legislature or other IGO member state. Moreover, unlike a formal treaty or negotiation process, which requires near-consensus among member states, the GAC is able to issue policy advice without obtaining a formal consensus. Whether or not GAC is the appropriate mechanism to involve the world's national governments in the ICANN process, its influence on the decisions and policies of the ICANN board is obviously significant and certainly challenges the notion of ICANN's autonomy, as well as compromising the multi-stakeholder, private-sector led, bottom-up policy. In sum, the hybrid public-private nature of ICANN is not stable but continues to evolve in an environment characterized by different political and economic interests, including the dominance of the state-controlled GAC.

Case Analysis

This article has examined some of the origins and logic of international governance innovations that have emerged in the transitional period after the end of the Cold War. The pace and scope of IOs' adaptations to address the governance needs of an emerging global political, economic, and social order has been slow and inadequate. Partnerships and multisector networks have opened up the international governance system to non-state actors and private institutions. However, most of the new, multi-stakeholder arrangements remain in experimental phases in their organizational development, supplementing rather than replacing existing modes of governance.

As an example of such innovations, I discussed ICANN's role in Internet governance as a private sector regulator that fell prone to hegemonic state influence after it created the organization to whom the U.S. ostensibly granted autonomy. Although ending U.S. control of the root and oversight of ICANN had an explicit purpose, the U.S. would retain its authority over ICANN, which has led to questions about ICANN's effectiveness and legitimacy. My expectation of ICANN's role as an example of an innovative hybrid governance form was partly confirmed (not created to be an instrument of member governments and IGOs) but also met with a harsh realist conclusion about hegemonic influence. ICANN is an important institutional and organizational innovation, despite its operational flaws. Generally speaking, its capacity to act concerning the management of the DNS is autonomous, except for specific issues where U.S. economic interests can exert a veto through the GAC body. Nonetheless, ICANN is likely to pursue its own agenda and policies for the DNS but will also face difficult and controversial challenges. How well or poorly ICANN handles such challenges will determine the fate of both itself and the new generation of IOs.

The world system, as this case study of ICANN demonstrates, will need to continue establishing new forms, as states continue to prefer other multilateral bodies of various types, including private sector entities open to the concerns of private business or voluntary associations to take actions rather than hoping an IGO can achieve quixotic consensus needed for the transition to global governance. Transitional governance shows the diversity of organizations (public, private, and hybrid forms) and their ongoing dynamics that have not yet created a stable system of global governance.

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Cultural Diversity and the Politics of Recognition in International Organizations

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Because cultural diversity tends to fall within the purview of the state and related scholarly discussions about multiculturalism, its international relevance has largely been sidelined. However, a plethora of actors are making national, religious, and ethnic claims within international organizations, and new institutions have even been created to address some of these concerns. Building upon Nancy Fraser's recognition framework, we assess the extent to which international organizations, whose mandate is not cultural per se, find diversity claims on their agendas. We sample how three organizations from different issue areas—the World Intellectual Property Organization (WIPO), the World Health Organization (WHO), and the International Criminal Court (ICC)—are confronted with and respond to claims for cultural recognition. In conclusion, we highlight general insights from variation in the politics of recognition that should guide further comparative analysis.

Introduction

Cultural issues are increasingly on the global policy agenda. Formerly within the purview of states, if cultural issues garnered attention at the global level, it was likely at the UN's Education, Science and Cultural Organization (UNESCO). Over time, more and more parts of the UN's system have incorporated cultural dimensions, including within development programs and, notably, as an aspect of the rights of indigenous peoples (e.g., Office of the High Commissioner of Human Rights 2017). Recently, international initiatives with a *directly* cultural mandate have also proliferated. These include the Alliance of Civilizations, which "works toward a more peaceful, more socially inclusive world, by building mutual respect among peoples of different cultural and religious identities, and highlighting the will of the world's majority to reject extremism and embrace diversity" (Alliance of Civilizations 2017). And in the Permanent Forum on Indigenous Issues, culture is one of six mandated areas to acknowledge indigenous people's "rich sets of knowledge about the natural world, health, technologies and techniques, rites and rituals and other cultural expressions" (2017).

Less apparent within this general trend, international organizations (IOs) whose mandates are not specifically cultural increasingly find cultural claims on their agendas. This second development is our focus here, because it raises questions about whether IOs that have a noncultural focus can (or should) respond effectively to such claims. What constrains or enables IOs' positive response? While the global governance literature increasingly acknowledges cultural concerns (e.g., Reus-Smit 2017 at the macro-level and Lightfoot 2016 on the evolution of indigenous claims), thus far the frameworks offered, which concentrate on contestation over cultural claims, do not provide analytical tools for capturing the dynamics we observe in institutional settings without a cultural mandate. For instance, in these noncultural settings, we cannot take for granted that cultural claims-makers will even have a seat at the table.

For analytical guidance, therefore, we turned to Nancy Fraser's conception of recognition politics, which led us to ask, "*Who* exactly is entitled to participate on a par *with*

whom in *which* social interactions?" (Fraser 2009c, 61; emphasis in original). Specifically, we inductively examine instances of cultural claims-making within three noncultural IOs: the World Intellectual Property Organization (WIPO), the World Health Organization (WHO), and the International Criminal Court (ICC). In each case, we noted that stakeholders seek cultural recognition from the IO in varying degrees. What claims or claimants are IOs willing or able to recognize? What are the limits or obstacles of recognition?

These three IOs represent a sampling, drawn from political economy, social policy, and human rights, respectively. None contain cultural rights in their mandates, yet all do find cultural recognition claims on their agendas, to varying degrees. Most notably, indigenous groups have directly engaged with WIPO to contest the organization's understanding of intellectual property. However, we found scant evidence of similarly direct claims-making at the WHO or the ICC, despite significant debates over traditional medicine and alternative forms of transitional justice, respectively. Across the cases, universalist mandates and state-centric organizational structures appear to limit cultural claims, an inference that merits further comparative assessment.

The Politics of Recognition

Global-level recognition can empower cultural groups, especially those whose rights have not been adequately championed at the national level. Yet the rich theoretical literature on recognition politics, developed with special attention to the national level over the last twenty-five years, gives scant attention to the global level (Burns and Thompson 2013, 2). Not even those theorists who have acknowledged global justice concerns explore IOs as key sites for recognition claims (Fraser 2009b; Fraser and Honneth 2003; Honneth 1996). To some extent, this gap may reflect the relative newness of international initiatives, such as the Alliance of Civilizations, the 2007 UN Declaration on the Rights of Indigenous People, and the Permanent Forum on Indigenous Issues, which make relations with or between cultural groups their specific mandate.

IOs whose mandate is not cultural *per se* also increasingly find cultural claims on their agendas, in myriad forms. Therefore, we applied this lens of recognition politics to examine institutional willingness and ability to accommodate cultural difference. However, we did not assume that extending recognition is necessarily desirable, because the extensive domestic level literature highlights potential pitfalls. Crucially, recognition of a group's distinctiveness can reify culture. It can also have cross-cutting negative effects on claims grounded in gender or economic status. Furthermore, cultural rights at the international level may be at odds with the universal human rights regime.

A leading voice among those who have theorized the multicultural dimensions of liberalism, Fraser equated justice with "parity of participation," which "requires social arrangements that permit all to participate as peers in social life" (2009b, 16). Obstacles can take multiple forms; she noted justice claims in three "idioms" (2009a, 2). The *redistributive* dimension conceptualizes just outcomes in terms of "the fair allocation of divisible goods, typically economic in nature" (2009a, 3). A second dimension addresses cultural injustice by focusing on *recognition* as a way to grant appropriate standing, and *representation* seeks to rectify exclusion from the very act of claims-making (2000, 117; 2009b, 16).

Together, these three dimensions comprise "the 'what' of justice: redistribution or recognition or representation?" (Fraser 2009a, 5). They can overlap and interact; depending on the situation, one may recede while another comes to the fore. We acknowledged, therefore, the possibility of multiple simultaneous justice claims and that what appears at first glance to be a recognition issue may actually be more complex.

Institutions—broadly defined to include formal law, government policies, administrative or professional codes, associational patterns, customs or social practices—serve as both potential sources of and remedies for injustice (Fraser 2000, 114). In terms of political practices, these concerns pertain to whether procedures and decisions give equal voice to all members. Fraser noted that appropriate remedies can take a variety of forms: "In some cases, they [groups]

may need to be unburdened of excessive ascribed or constructed distinctiveness; in others, to have hitherto under-acknowledged distinctiveness taken into account" (2000, 115). She thereby avoids some well-known criticisms of multiculturalism, such as reification of identities, while she also acknowledges others, such as tensions over women's rights (Fraser 2000, 108; Okin 1997).

More deeply, these concerns highlight "the boundary-setting aspect of the political," which determines who is "authorized" to participate (Fraser 2009b, 19). As Fraser explained, "What is at issue here is inclusion in, or exclusion from, the community of those entitled to make justice claims on one another" (2009b, 17). Because "institutionalized patterns of cultural value," including the possibility of "parity-impeding cultural norms," affect relative standing, recognition would be "aimed not at valorizing group identity but rather at overcoming subordination" (Fraser 2000, 113–4). Notably, Fraser's framework figures prominently in literature beyond multiculturalism debates, for example in disability studies (Danermark and Coniavitis Gellerstedt 2004) and in social work (Webb 2010).

This focus on "institutionalized patterns" readily translates to the analysis of cultural claims-making in IOs. As Fraser herself noted, justice claims are no longer restricted to a domestic frame, because globalization has created new relationships, actors, and forums, including IOs (2009b, 12–14). The concept of recognition has also long been used in international relations, albeit with a more limited state-centric meaning (Claude 1966; Bartelson 2013). For example, a prolific research program analyzed the effects of recognition on interstate and intrastate conflicts (Lebow 2010; Lindemann 2010; Strömbom 2014; Wolf 2011). While we acknowledge the significance of such state-centric recognition politics, the analysis of cultural claims calls for the inclusion of a wider range of actors. In particular, following Fraser, we explore whether participatory parity for claims-making groups is sought, accorded, or withheld at IOs.

Of course liberal democratic societies, with citizens as stakeholders, do differ from IOs, which are typically created by states, with states as the primary (if not the only) members. Yet understandings of global stakeholders have evolved far beyond earlier views of powerful states. IOs as well as nongovernmental organizations (NGOs) can be autonomous actors whose legitimacy hinges at least partially on the degree to which they serve a wider range of stakeholders (Abbott, Genschel, Snidal, and Zangl 2015). For example, when the UN created the Permanent Forum on Indigenous Issues, it went beyond the interests of its member states to recognize justice claims of indigenous peoples (Niezen 2003).

Thus Fraser's "parity of participation" provides a pertinent metric. Each IO can be assessed on whether recognized stakeholders enjoy equal participation and, if they do not, whether their subordinate status is attributable to "institutionalized patterns of cultural value." As the following three sections detail, we found that IOs tread in cultural diversity waters to varying degrees: Indigenous groups have challenged WIPO's conceptualization of intellectual property, with some success, and WHO accommodates traditional medicine, within limits, whereas the ICC's direct engagement with non-retributive justice mechanisms remains minimal.

The World Intellectual Property Organization

Established in 1970, the World Intellectual Property Organization (WIPO) replaced the United International Bureaus for the Protection of Intellectual Property. With ideas and knowledge at the heart of the information economy, WIPO is now a central institution of global economic governance, administering twenty-six treaties related to intellectual property (IP) on behalf of its 191 member states. Core activities include helping to develop policies, structures, skills and laws related to IP; overseeing global registration systems for trademark, industrial design, appellations of origin, and patent protection; delivering dispute resolution services; and providing a forum for debate and exchange of expertise.

Indigenous groups have criticized WIPO's IP framework, which defines ideas in terms of commercial value, for its inconsistency with their understanding of traditional knowledge (TK) and traditional cultural expression (TCE). These claims for cultural recognition, made

primarily through WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), have been heard but with limited effect. Thus far, the global IP framework has not significantly accommodated an alternative indigenous understanding of knowledge.

The Knowledge and Culture Nexus

Conventional commercial notions of intellectual property protections, such as patents and copyrights, have time limits. Once they expire, the idea or work transfers into the public domain. Moreover, to register an idea for intellectual property protections at WIPO, a work must be novel, with an identifiable inventor. In contrast, for many indigenous groups, ideas are not commodities to be owned or sold by individuals. Rather, communities and elders, who can only transfer it under certain circumstances, collectively hold knowledge; some stewards of knowledge may never be authorized to share it (Drahos and Frankel 2012; Frankel 2015).

An understanding of TK as "a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity" (WIPO 2015, 13) maps poorly onto time-limited IP commercial protections, which are designed to provide a temporary monopoly as compensation (and incentive) to innovators. Customary practices might specify, for example, that the exchange of proprietary songs takes place through intermarriage (WIPO 2001, 60), something the conventional IP system is not built to accommodate. Furthermore, written records required to take advantage of the IP system may not exist or be desirable for some forms of TK.

Although the WIPO framework cannot provide protections to many forms of traditional and local knowledge, some areas do align sufficiently with the IP system for modifications to be conceivable. Therefore, indigenous peoples do not necessarily reject the IP system completely. For example, indigenous groups demand prior and informed consent when people from outside of their communities seek to patent traditional knowledge, traditional cultural expressions, or genetic resources. And where the subsequent sale or use of TK and TCE generates legitimate commercial gain, they ask for fair and equitable benefit sharing. At a minimum, there is room to raise awareness about TK and to facilitate access to existing IP protections (WIPO 2001, 81).

Nonetheless, indigenous groups have also advocated for their distinctive concerns within and beyond WIPO's regulatory framework. Their claims have been on WIPO's agenda in various forms since the 1960s, and in its latest incarnation, since the late 1990s. When these issues were not included in negotiations over the WIPO Patent Law Treaty, despite support from some member states, a compromise created an ad hoc committee to study how the IP system might accommodate TK, TCE, and genetic resources. That committee evolved into the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), whose work aims to reach a viable legal instrument (possibly a formal treaty). As one prominent participant in this negotiating process put it, indigenous peoples "might choose to restrict its use, to share or even to commercialize it, but they should not have the present IP system imposed on them as it basically provides them with inadequate control over their own culture" (Ahren 2009, 54).

Convened first in 2001, the IGC has met approximately twice yearly since then. The process stalled briefly after the 28th session in July 2014 but soon accelerated with multiple sessions in recent years. Since its goal is ostensibly to protect TK, TCE, and genetic resources, the IGC shifted to a text-based negotiating process in 2009. Efforts include sharing experiences and mapping the preferences of stakeholders spanning local, traditional, and indigenous communities, as well as industry, all of whom are accredited to the meetings. The committee has produced a number of formal working documents, including Draft Provisions for the protection of TK and TCE. To ascertain where new protections might be required, it generated an extensive gap analysis of existing national and international laws for the protection of TK and TCE. The WIPO Secre-

tariat has supplemented these activities with extensive data-gathering and analysis, including scores of fact-finding missions to indigenous and traditional communities around the world. Its web site provides an extensive database of existing practices, and accredited groups may post written statements about pending issues.

Indigenous representatives contribute directly in the IGC. Since 2004, panels of indigenous and traditional communities open the sessions, allowing their concerns and experiences to set the tone. Participation in these panels has been funded by WIPO, and representatives of the UN Permanent Forum on Indigenous Issues have been formally invited to take part in IGC deliberations. At IGC sessions, time on the meeting program is also set aside for indigenous group side events. As the secretariat affirmed, "These presentations are a rich source of information on the experiences, concerns and aspirations of indigenous and local communities" (WIPO 2015, 47).

Limits to Parity of Participation at WIPO

WIPO has generally been receptive to indigenous claims, including recognition through the IGC process. And the secretariat staff in the Traditional Knowledge division, where these issues reside, have worked hard to understand indigenous concerns. Furthermore, to facilitate indigenous participation in the IGC process, they have mounted capacity-building events for groups unfamiliar with the IP system. WIPO had also established a fund to defray the costs for indigenous representatives who would like to be present at IGC meetings.

In light of such institutional efforts to counter cultural subordination, why does the IP framework not accommodate indigenous knowledge more extensively? Some member states are reticent, to say the least, about indigenous demands, thereby constraining other members' or the secretariat's commitment to change. Member states have lined up in groups on these issues, with Group B encompassing developed countries including the U.S., Canada, Australia, New Zealand, the EU, and Japan. Critics view Group B participation in the IGC process as obstructive. In past IGC meetings, for example, these countries have not always put forth constructive proposals, asking instead for more research into suitable types of laws and regulations. Not surprisingly, the largest patent holders in the world belong to Group B, suggesting an incentive to resist altering a regulatory framework that serves their commercial interests (Abdel-Latif 2017).

In addition, the nature of any change is uncharted territory. There is no single indigenous perspective or proposal. Many indigenous groups are calling for a *sui generis* system. If adopted, a whole new series of IP rights holders would be created. Others are calling for local customary law to be recognized beyond domestic environments. Both of these options would be difficult to implement, leading some analysts to suggest that the outcome of negotiations should be a framework document that creates parameters within which states respect the interests of indigenous and local communities. Such a framework document, recognizing the distinctiveness of traditional knowledge, would make WIPO a more inclusive organization and set indigenous peoples on a path to fuller participation in the international IP regulatory framework.

Although the policy outcomes of recognition politics at WIPO remain in flux, clearly indigenous communities have successfully challenged the dominant commercial IP framework enough for their own views on traditional knowledge and traditional cultural expression to play out in institutional channels. By Fraser's standard, indigenous groups have achieved a notable level of participation, though not parity with state members. While the IGC process has not produced a binding outcome, indigenous participation "has become an important feature of the IGC's dynamics" (Abdel-Latif 2014, 26). The influence of powerful member states, as well as WIPO's structural preference for a certain understanding of IP, means that meaningful protections of TK and TCE may not emerge from the IGC process. Nonetheless, "never before have such in-depth discussions on these issues taken place in an intergovernmental setting" (Abdel-Latif 2017, 27), raising awareness and deepening understanding. Neither WHO nor the

ICC manifests comparable levels of parity of participation and direct claims-making by groups demanding a seat at the table. Regardless, cultural issues are on their respective agendas.

The World Health Organization

Established in 1948 as a specialized agency of the UN, WHO envisions its role broadly to be the support of health as a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" (WHO 2017; Youde 2012; Gostin 2014). Led by a director-general, its reach currently extends to more than 150 countries, with six regional offices, governed through the World Health Assembly, comprised of delegates from member states, and an executive board. Based on collaborative partnerships, its activities include establishing health norms and standards (with monitoring of supporting data), articulating policy options, providing technical support, and promoting research (WHO 2017d).

WHO seems a natural fit for cultural claims, because many people understand health—from conceptions of illness and wellness to the practice of interventions upon the body—as intimately connected to traditions and beliefs. In addition, the benefit derived from the recognition of cultural specificity in the implementation of health interventions is well documented and widely acknowledged (Airhihenbuwa, Ford, and Iwelunmor 2014; Allegranzi, Memish, Donaldson, and Pittet 2009; Huffman and Galloway 2010). We highlight significant examples of WHO-driven engagement with culture, primarily traditional medicine and its relationship with WHO's universal mandate; engagement appears most likely when consistent with this mandate, and to support the viability of organizational endeavors. In spite of these efforts, we found important limits to full parity of participation, particularly with respect to decision-making processes. We suggest several structural and ideational factors that might explain this dynamic.

The Health and Culture Nexus

Culture and health intersect most prominently in WHO discourse on traditional medicine (TM). Broad in scope, its Traditional Medicine Strategy (2,014–23) aims to "support Member States in: 1) harnessing the potential contribution of TM to health, wellness and people-centered health care; and 2) promoting the safe and effective use of TM by regulating, researching and integrating TM products, practitioners and practice into health systems, where appropriate" (WHO 2013, 11). This acknowledgement of complementary or alternative treatments as potentially beneficial for health and overall wellness demonstrates how traditional medicine's legitimacy has expanded beyond the communities in which it is historically practiced. The reality that many communities continue to rely on traditional medical practitioners reinforces such recognition.

Yet tensions remain, because the strategy document supports the medicalization of TM through the use of various regulatory measures, clinical training, quality and risk assessment, and evidence-based approaches for deciding to support or reject specific practices. The WHO plan encourages regulatory and legal mechanisms at the national level to ensure safety and efficacy of such therapies. Critics claim that the goal of integrating traditional communities into mainstream health systems appears to be control, not recognition, since TM experts may not derive clear benefits from incorporation of their techniques (Arowolo 2011, 2). Ironically, TM regulatory frameworks might even undermine recognition by subordinating cultural practice through a lens outside of its community of origin.

One venue where critics have pushed back against such subordination is the Pan American Health Organization (PAHO), which has been proactive on matters related to indigenous health (PAHO 2004; PAHO 2006). Statistics clearly demonstrate how indigenous communities suffer ill-health, due largely to unequal resources and access (PAHO 2006, 3–4). Cultural disconnect can also preclude indigenous engagement with so-called mainstream health systems. This gap is aggravated, critics argue, by perceived disrespect for indigenous cultural rights as a legacy of colonization and the politics of intervention (King, Smith, and Gracey 2009).

PAHO documents recognize cultural difference as one contributing factor that might prevent indigenous people from accessing health services; a history of discrimination may also lead to self-exclusion (PAHO 2004, 4 and 8). Discussions of the role of culture are embedded in the (re-) articulation of the social, economic, and environmental determinants of health, by which indigenous communities are likely to be impacted. Recommendations include the establishment of offices and divisions in national health ministries designed specifically to support indigenous health, the integration of intercultural and multilingual approaches into medical practice and training, and the development of strategic alliances with key stakeholders in indigenous communities (PAHO 2004).

Additional initiatives to address the relationship between culture and health are evident in WHO's European Regional Office, notably an Expert Group that met in 2015 to explore how cultural context affects the understanding and measurement of health (WHO Regional Office for Europe 2015, IV). The group seeks to provide advice specifically on how to measure wellness, as well as facilitating a broader discussion of "cultural enhancers" and "cultural obstacles" for health (WHO 2015c, IV).

Notably *Public Health Panorama*, the journal of the WHO Regional Office for Europe (Volume 3, Issue 1, 2017) recently devoted an entire issue to the intersection of culture and health. Articles and editorials highlight the anticipated contributions of the ongoing Cultural Contexts of Health (CCH) project and the advancement of collaboration between WHO and UNESCO.

In order to support WHO objectives of universal access to healthcare, a Multilingualism Plan of Action (approved in 2008) called for the use of languages beyond the six officially acknowledged by the UN. The plan called for the explicit allocation of resources toward expanding the languages in which WHO materials, including archival information, are printed. It also placed responsibility for translation and dissemination of information on WHO, rather than individual states.

Calls for the deeper consideration of culture and context appear increasingly in WHO materials, particularly as related to the communication of risk in public health emergencies (see Communicating Risk in Public Health Emergencies: A WHO guideline for emergency risk communication (ERC) policy and practice). On a related note, the WHO Community Engagement Framework for Quality, People-Centered and Resilient Health Services (2017c) highlighted "how culture and context shape not only the relationships between people, but also how the outcomes of these relationships and human interactions influence the way that health services and health care are organized, delivered and experienced" (22). Both reflect on the fallout from the 2014 Ebola outbreak in West Africa as motivating factors for a more active consideration of culture in pursuit of organizational objectives.

Limits to Parity of Participation at WHO

Given the aforementioned efforts by WHO to contend with culture, what are the limits to full parity of participation? Engagement with culture, regardless of the presence or absence of demands from cultural groups, is driven by concerns that failure to do so will subvert programmatic goals or broader institutional mandates, such as "health for all." In essence, WHO balances between acknowledging cultural distinctiveness and minimizing its potential impact. Cultural sensitivity is thus employed, when present, from the top down; processes of decision-making continue to undermine full parity of participation. Factors related to the institutional structure of WHO help explain this outcome, particularly, state centricity, regional fragmentation, substantive complexity across issue areas, and the proliferation of alternative health-related organizations. And again, the very nature of WHO's objectives—pursuit of "health for all," with an embrace of evidence-based approaches—minimizes individual or group characteristics in favor of a more universal and objective orientation.

The degree to which states continue to dominate agenda-setting and decision-making processes at WHO is debatable. In addition, there is a growing dependence on extra-budgetary funding for targeted projects, the details of which are subject to specification by a given donor

state rather than organization-wide debate on allocation (Youde 2012, 34–35). There has been some limited success of some health-related non-state actors in engaging with WHO policy design and programming also challenges presumptions of state-centricity (McInnes and Lee 2012, 122–3).

However, the prioritization of state preferences in organizational design, including procedures at the World Health Assembly, clearly limits access to a diverse set of actors. This includes groups who might demand more nuanced organizational engagement with culture in program and process design. WHO's 2015 Framework for Engagement with Non-State Actors (the finalization of which is ongoing) takes seriously demands of health-oriented NGOs for inclusion in policy-prescriptive conversations, but they remain less integrated in agenda-setting. Moreover, entering into official relations is a burdensome process (Gostin 2014, 117).

Subject to a review process designed to ensure compliance with regulations set forth in the framework, NGOs rely on states for inclusion in any given discussion and, therefore, have an incentive to restrict the breadth and depth of their demands. Furthermore, affiliated NGOs are subject to charges of elitism, as Battams (2014, 812) described in her comparison of the EU and WHO engagement with civil society; benefits of formal association with WHO create incentives to ingratiate themselves with states.

As described above, the regional nature of the WHO structure offers additional (potential) access points for advocates (Hanrieder 2014, 216), especially those demanding mechanisms for managing specific cultural practices. Yet such decentralization simultaneously undermines any overarching approach, leading to wide variation in health management (Hanrieder 2014, 216). And some substantive areas (such as domestic violence, circumcision, or hand-washing) may be more likely to provoke demands for cultural sensitivity than others, complicating WHO's ability (if willing) to establish formal channels of recognition. In this decentralized environment, the proliferation of global health organizations may provide preferable avenues (Youde 2012, 45).

Finally, the universality of the WHO's mission has traditionally relegated considerations of culture to the ways in which ignoring cultural context may frustrate institutional objectives. Beginning with the 1978 Declaration of Alma-Ata, WHO has promoted systems that support health for all, and the organization has advocated for the state's responsibility to ensure primary care across populations. Increased attention on the social, environmental, and economic determinants of health has emphasized equal access to care, while a global shift toward evidence-based approaches has sought to standardize the collection, dissemination, and analysis of health information (Adams 2013, 56). In this way, the desire to obtain positive health outcomes can be prioritized over cultural sensitivity. Where the two come into conflict, WHO appears to incorporate culture to the extent that it advances primary objectives.

Policy priorities and prescriptions, determined by top-down funneling of information to country-level policy-makers, reproduce existing power relationships potentially subordinating local solutions. Whether recent reform efforts, aimed at increasing accountability to stakeholders, can succeed remains to be seen (WHO 2015a, 2015b). Similarly, state-centric institutional structures and a universalist mandate constrain cultural claims-making and parity of participation at the ICC.

The International Criminal Court

Since the 1990s, prosecution of individuals for international crimes against humanity, genocide, and war crimes has increased, notably through two UN-initiated criminal tribunals, special hybrid courts, and domestic proceedings based on universal jurisdiction (Sikkink 2011). Established in 1998 as the first permanent international criminal court, the International Criminal Court (ICC) aspires to end impunity by prosecuting alleged perpetrators of mass atrocities. Based on the notion of retributive justice, the ICC process of trial and punishment ideally ensures accountability for past actions and deters future crimes (Jo and Simmons 2016; Broache 2016; Cronin-Furman 2013; Hillebrecht 2016; Appel 2016).

The idea of culturally contingent notions of justice has gained some traction in discussions of international courts. For example, forms of restorative justice include community driven processes in which victims are central to determining guilt with the goal of improving societal relations rather than punishing individuals. When applying Fraser's parity of participation standard, we note that the ICC privileges a certain type of (retributive) justice that states agreed to during the Rome Conference. In addition to its universal mandate, state-centrism and its commitment to the legalism principle makes it unlikely for the court to consider culturally-specific claims. Still, diversity concerns can enter a courtroom when lawyers invoke cultural defenses or local leaders call for the inclusion of restorative justice mechanisms.

The Rights and Culture Nexus

International criminal interventions assume that prosecutions of individuals benefit local communities affected by conflict. Defendants can invoke cultural claims, perhaps justifying their actions through engrained culture or to highlight a mismatch between local practices and international law (Renteln 2011, 274). At the ICC, however, such arguments would have to be used in the context of other defenses that fit within the Rome Statute, such as duress. Thus the court's first judgment in the *Lubanga* case focused on whether child soldiers joined the rebel group voluntarily. The arrest of Dominic Ongwen, a former brigade commander in the Lord's Resistance Army in Uganda, also spurred debate about a possible cultural defense, since he had been abducted at the age of ten and was exposed to spiritual indoctrination (Nakandha 2016; Roestenburg-Morgan 2015).

So far, criminal courts mainly view cultural diversity as a linguistic concern, as evident in procedures and trainings for staffers dealing with various languages in trials, especially the work of translators (Almquist 2006; Karton 2008). For example, the International Criminal Tribunal for Rwanda's *Akayesu* case acknowledged problems with translation of witness testimonies from Kinyarwanda into French or English and other "cultural factors which might affect an understanding of the evidence presented" (1998, 67). Consequently, the tribunal relied on the testimony of a linguistics expert to offer insights into the local language, which had several words for "rape," a crucial charge.

For translation of documents, the ICC relies on the Language Services Unit, which serves the Office of the Prosecutor, and the Court Interpretation and Translation Section, which serves the Registry, Chambers, and Presidency. In addition, prosecutions for rape, especially, have prompted broader cultural sensitivity training. For instance, the Victims and Witnesses Unit's procedures underscore "respect to victims' and witnesses' security, integrity and dignity" and the need for staff expertise in "[g]ender and cultural diversity" (ICC 2013, 7–8).

The complementarity principle provides a third avenue through which cultural claims may impact the ICC. At heart a compromise between sovereignty and international jurisdiction, the Rome Statute allows states to challenge ICC proceedings when the state itself is already conducting genuine domestic proceedings of the alleged crimes. This has come to be understood as meaning that the ICC will only intervene when a state is unable or unwilling to investigate crimes that occurred on its territory, such as shielding defendants from investigation or engaging in undue delays (Sriram and Brown 2012; Bjork and Goebertus 2011). Two premises underlie this complementarity principle: prosecuting only those deemed most responsible leaves the majority of perpetrators to be tried domestically, and valuing local proceedings allows victims to see justice happening.

Although societies arguably understand justice and its administration in culturally specific ways (Eriksson 2011, 517), the ICC does not automatically accept all domestic proceedings as genuine. For example, restorative justice mechanisms include amnesty laws for perpetrators and truth commissions. While the Rome Statute is silent on the question of amnesties, because the treaty only regulates the conduct of the ICC and state relations with it, complementarity

can discourage the use of amnesties for fear of international prosecution or even out of respect for the ICC's anti-impunity principle (Nouwen 2013, 42).

The ICC's intervention in Uganda, where it privileged trials over communal reconciliation, highlighted these tensions (Kamari Clarke 2009, 119). Local religious and cultural leaders started a campaign against the ICC, based on their fears of trials' adverse impacts on the security of Northern Ugandans and on their frustrations that the ICC failed to address socioeconomic recovery or to restore societal relationships (Nouwen 2013, 143). The alternative traditional practice of *matu oput* (Acholi for drinking the bitter root) has received special attention as a local justice mechanism, widely supported and institutionalized by governmental and nongovernmental organizations. In matu oput, two clans restore peace after an intentional or accidental killing following a period of separation, mediation, and negotiation led by elders (Kamari Clarke 2009, 127). Others, however, warn against celebrating traditional justice mechanisms when many victims want prosecution alongside reconciliation (Allen 2006, 140–46).

Finally, diversity concerns have most recently reached the ICC through its mandate to prosecute the destruction of cultural property as a war crime. According to the Rome Statute's Art 8, 2(e)(iv), "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected" are war crimes "provided they are not military objectives." The ICC's Office of the Prosecutor opened its first cultural property case in September 2015, when it accused (now convicted) Ahmad al-Faqi al-Mahdi of directing the destruction of nine mausoleums and the Sidi Yahia mosque in Timbuktu, Mali (ICC 2017). While proceedings of the International Criminal Tribunal for the Former Yugoslavia did include destruction of cultural heritage (e.g., the Mostar bridge), the ICC case represented the first time cultural heritage formed the main allegation (Lostal 2015).

Limits to Parity of Participation at ICC

Considering these multiple ways in which the ICC engages with cultural recognition indirectly—through potential cultural defenses, as a linguistic concern, through the complementarity principle, and as subject-matter jurisdiction over destruction of cultural heritage—we cannot claim parity of participation by cultural claimants due to the ICC's institutionalized form of retributive justice, as well as its universal mandate, its state-centric nature, and its reliance on the legalism principle. Although parity of participation may not be necessary at the ICC to produce a legitimate and just outcome, it may be desirable to achieve cognate goals, like community reconciliation.

Because the ICC seeks to ensure accountability for international crimes worldwide and its jurisdiction covers crimes of an international nature—so horrific that they become a concern for all of humanity—the Rome Statute speaks to a universal morality and sets up specific standards of criminal justice that subordinate local justice traditions that are focused on alternative aims such as communal reconciliation (Roach 2006). In Uganda, for example, proponents of international criminal justice have argued that local practices cannot substitute for the ICC. A Ugandan ICC judge stated: "You cannot expect someone who caused the death of 100 people to be tried in a traditional court if you are looking for justice to be done. . . . You must convince the international community that justice was done and that the punishment is appropriate with the crime" (Nouwen 2013, 152).

In addition, the ICC is state-centric in structure, despite being an independent judicial institution. As a treaty-based organization, its basis, the Rome Statute, can be changed by the Assembly of the State Parties, comprised of representatives of the member states. This assembly decides on the budget and selects the judges as well as the prosecutors. Thus there is no institutional channel through which cultural groups can make direct claims. While NGOs can lobby and participate in assembly discussions, they cannot vote. However, any individual or group with evidence of a crime that they believe the ICC should investigate can bring their allegations to the court's attention via communications that may then be used for an investigation.

The court's discourse of apolitical legalism, heightening in the face of criticisms over the preponderance of African cases, further forecloses claims-making. Charges of bias damage the ICC's legitimacy and create the impression that political considerations impact prosecutorial strategies (Bosco 2014; Struett 2009; Tiemessen 2014). Being receptive to local claims by groups would likely contribute to perceptions of undue politicization. Consequently, the only institutional avenue for cultural claims-making at this point seems to be victims themselves. Since the ICC can only prosecute a handful of perpetrators, other perpetrators can be held accountable through alternative justice mechanisms closer to the place of the crime, providing victims with a potentially more immediate sense of justice.

Conclusion

Our analysis of WIPO, WHO, and ICC demonstrated that extending Fraser's focus on recognition to the global level provides a viable framework for analyzing claims within IOs. These three case studies reveal distinctive approaches to cultural diversity: direct engagement with recognition claims in WIPO, and acknowledgement of culturally-sensitive claims in WHO, but subordination in the ICC. Drawing on social movement theory, we highlighted IOs' universalizing mandates as dominant discourses that circumscribe agenda-setting (Benford and Snow 2000, 618–19). The other overarching commonality is state-centric designs, which channel any possibilities for influence by non-state stakeholders (Benford and Snow 2000, 629).

Given the malleability of the term "culture," both politically and analytically, we are not surprised that this evidence underscored the absence of any agreement on collective principles for governing cultural diversity at the global level. A broader sampling would probably show even more definitions. For example, indigeneity gained significant traction in the International Labor Organization, whose conventions served as precursors to the 2007 UN Declaration on the Rights of Indigenous Peoples (Anaya 1991; Niezen 2003; Lightfoot 2016). Advocacy based on ethnic, linguistic, or religious diversities may be most salient in other IOs. Yet contestation over what counts as culture does not explain this variation. Instead, Fraser's framework helps by suggesting two key avenues of inquiry.

Can cultural claims-makers secure a just outcome (understood as parity of participation) in the absence of recognition by the IO in question? For local and indigenous communities at WIPO, the answer to this question appears to be no. The likelihood that misappropriation of traditional knowledge will continue is high without concerted action at the global level and by WIPO in particular. In contrast, practitioners of traditional medicine can continue to do so without limitation despite a lack of formal recognition by WHO. Similarly, victims of mass atrocities can see their perpetrators held accountable at the ICC, even if the process to do so does not reflect local justice traditions.

In according recognition to a cultural claimant, can the IO remain true to its original mandate and serve the interests of its member states? WHO and ICC do not reach this second stage, whereas WIPO's recognition process founders here. WIPO created a forum to hear claims about traditional knowledge protection. To a degree, then, indigenous and local communities achieved a procedural parity of participation. Nonetheless, the IGC process has so far fallen short in accommodating the distinct needs of TK holders due to conflicting interests with those who are well-served by the prevailing system.

Elements of this variation suggest directions for extending the comparative scope of research on IO responses to cultural diversity. Additional cases might include the UN High Commissioner for Refugees (UNHCR) and International Organization for Migration, which, on a daily basis, deal with issues of cultural diversity in the delivery of assistance through NGO intermediaries (Martin 2014). Focused comparison between the ICC and UNHCR, both operating at the intersection of security and human rights, could provide leverage on how organizational structure may impact claims. And in the sphere of social policy, possibilities include the Food and Agriculture Organization, which resembles WHO in its emphasis on technical knowledge.

Organizational theory might offer additional nuance on how state-centric institutions could most effectively or fairly accommodate non-state claims-makers.

One final observation warrants mention. IOs are not culturally neutral although there is sometimes a temptation to see them as such. WIPO enshrines a specific understanding of individual property ownership, WHO has a commitment to science and Western medicine, and the ICC is founded on notions of retributive justice involving trials and judicial proceedings. While WIPO's principles may lead to unjust outcomes for indigenous peoples, thus making greater recognition of cultural diversity desirable, WHO's and ICC's very legitimacy may be anchored in its limited response to narrower, non-universal claims.

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Collective Security, Peaceful Change, and UN Security Council Reform: Reframing the Debate

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The debate on UN Security Council reform has been fixated on issues concerning the council's size and composition. This article seeks to reframe the debate by focusing on peaceful change. It turns to the interwar debate on peaceful change for insight into the symbiotic relationship between the principles of peaceful change and collective security and their relationship with international organizations designed to maintain international peace and security, such as the League of Nations and the UN. On this basis, it will be argued that the effectiveness of the council in the maintenance of international peace and security hinges on its capacity to promote the symbiosis between these two principles. It then reviews the UN machinery for promoting peaceful change between and within states, with a focus on the council's powers under Chapter VI of the UN Charter, highlighting key issues to be addressed in future council reform debates.

Introduction

Recent international problems such as the Syrian Civil War, the Rohingya Crisis, and the Donbas Conflict in eastern Ukraine underscore yet again the need to improve the UN Security Council's ability to maintain international peace and security. To address the ineffectiveness of the council, much of the debate on the question of council reform has explored issues like what is the appropriate size of an enlarged council, whether to add new permanent as well as nonpermanent members to it, and whether to extend the right of veto to new permanent members. Indeed, much attention has been given to these issues, as discussed further below.

While the issues concerning the council's size and composition are of great importance, it needs to be asked whether these issues really exhaust the question of council reform. Is it not necessary to look at the question from a broader perspective if council reform is to result in the enhancement of its ability to maintain international peace and security? The purpose of this article is to illustrate the need to address the question from a perspective that takes into account peaceful change and its symbiotic relationship with collective security, which have hitherto been neglected in the current debate and literature on council reform.

Peaceful change means the principle that changes in the international status quo must be brought about without the disputing parties resorting to the use of threats or force.[1] More specifically, peaceful change concerns changes in, or adjustments to, aspects of the international status quo against which one or more of the disputing parties have grievances that could potentially lead to armed conflict. There are different ways of implementing peaceful change thus defined, as we will see later.

1. This definition leaves room for forcible measures, including sanctions, by international organizations such as the League of Nations and the UN.

Moreover, there is a symbiotic relationship between peaceful change and collective security—another key principle underpinning the UN. The drafters of the UN Charter had taken cognizance of this point, which is evident from the wording of Article 1(1) which reads as follows:

> The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, *and* to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. (UN 1945, emphasis added)

The UN Charter seeks to maintain international peace and security through promoting and entrenching both collective security and peaceful change in the international community, and as provided for in Article 24(1), it is the Security Council that carries the primary responsibility for achieving this purpose (UN 1945). The two principles and the council are mutually constitutive in the sense that the latter is based on the former and the former needs the support of the latter to be firmly entrenched in the international community. The focus on peaceful change, its symbiotic relationship with collective security, and their mutually constitutive relationship with the council helps to pinpoint what has been missing in the current debate and literature on council reform, which has mainly addressed issues concerning the council's size and composition.

This article proceeds in four stages. The first section starts by providing an outline of the history of council reform, showing that much of the debate has focused on the council's size and composition. The second section turns to the interwar debate on peaceful change for insight into the symbiotic relationship between collective security and peaceful change and their mutually constitutive relationship with international organizations designed for the purpose of maintaining international peace and security, such as the League of Nations. The interwar debate on peaceful change was the first ever attempt to systematically study the problems surrounding peaceful change in IR scholarship, and it provides insights that are still relevant to council reform today. Summarizing the findings of the previous sections, the third section calls for a greater focus on the council's ability to promote and entrench peaceful change in the international community. The fourth and fifth sections critically review the existing UN system in terms of peaceful change, and, in the sixth section, I shall set out key issues to be addressed in future council reform debates.

The History of and Debate on Security Council Reform

This section shows that the current council reform debate has mainly focused on the issues concerning the council's size and composition, which has resulted in the failure to take cognizance of the importance of the symbiotic relationship between collective security and peaceful change for the council's ability to maintain international peace and security. Much has been discussed concerning UN reform, and Security Council reform, among other topics, has been at the center of the debate (Bourantonis 2005; Ciechanski 1994; Fassbender 1998; Kennedy and Russett 1995, 60–62). This is understandable considering the UN's principal purpose and the central place occupied by the council in the UN system.

It has been widely acknowledged that the council needs to be reformed so as to reflect and adapt to changes in world politics. The UN membership has nearly quadrupled since its inception, and the power relations among the member states have been changing over the years. Despite the growing awareness of the necessity of council reform, there has been little progress since the 1965 amendment to the charter which increased the council membership from eleven to fifteen by adding four nonpermanent members. The amendment was a timely response to the increase in the UN membership brought about by decolonization (Blum 2005, 636–37). However, the number of the UN member states has continued to grow since then. To respond to this change, the Open-Ended Working Group (OEWG) was set up by the UN General

Assembly in 1993 (UN General Assembly 1993). However, the 1965 amendment has been the only council enlargement achieved so far.

In March 1997, Razali Ismail, then-president of the General Assembly, set forth a reform plan that proposed to add five permanent members without veto power and four nonpermanent members to the council (Razali 1997). However, the Razali plan faltered in the face of opposition from Italy and the Non-Aligned Movement, which were against the idea of increasing the number of permanent seats (Bosco 2009, 202–06; Bourantonis and Magliveras 2002). In November 2004, the High-level Panel on Threats, Challenges, and Change appointed by then-Secretary-General Kofi Annan published a report entitled "A More Secure World: Our Shared Responsibility," which put forward two models for the enlargement of the Security Council. Model A proposed the council be enlarged by adding six permanent seats without veto right and three nonpermanent seats. Model B proposed creating eight four-year renewable seats and one two-year nonrenewable seat (UN General Assembly 2004, 66–69). In his 2005 report, "In Larger Freedom: Towards Development, Security and Human Rights for All," Annan urged the member states to deliberate on these models, intending to reach agreement preparatory to the World Summit to be held in September that year (UN General Assembly 2005a, 41–43).

Following Annan's call for council reform, the G4 (Brazil, Germany, India, and Japan) seized the occasion to draft a reform plan which provided for six permanent and four nonpermanent seats, along the lines of Model A. Concerning the extension of veto right to new permanent members, the plan proposed shelving the issue for fifteen years (UN General Assembly 2005b). The G4's attempt to whip up support for their joint draft resolution was met with counterproposals. A group of African countries submitted their own reform plan that, in accordance with the common African position as set out in the Ezulwini Consensus, provided for the extension of veto right to newly appointed permanent members (African Union 2005; UN General Assembly 2005c). Despite the difference in the issue concerning veto right, the G4 and African proposals were similar in that they both were in favor of the addition of new permanent seats. In an attempt to block their efforts to increase the number of permanent seats, the Uniting for Consensus group submitted a counter proposal, which provided only for an increase in the number of nonpermanent members (UN General Assembly 2005d). None of these three draft proposals were put to a vote, and the World Summit Outcome document merely reaffirmed the member states' commitment to continue to work on issues related to council reform (UN General Assembly 2005e, 32).

In September 2007, the OEWG released a report calling on the member states to begin intergovernmental negotiations aimed at moving forward with Security Council reform (UN General Assembly 2007). In the following year, a decision was made to launch intergovernmental negotiations by the end of February 2009 with a focus on the following five pillars of council reform: "categories of membership; the question of the veto; regional representation; size of an enlarged Security Council and working methods of the Council; and the relationship between the Council and the General Assembly" (UN General Assembly 2008, 107). Ever since then, member states have engaged in a series of intergovernmental negotiations. Although recent intergovernmental negotiations have led to the surfacing of "elements of convergence" (Lykketoft 2016), no significant decisions on Security Council reform have been made so far.

As this survey shows, much of the debate on council reform has been centered around issues concerning its size and composition. Indeed, as Sabine Hassler (2013, 105–08) shows, there are a number of arguments for and against council reform based on the assumption that the representativeness of the council impacts, either positively or negatively, its effectiveness in carrying out its responsibilities. The prevalence of the view that the council's effectiveness in the maintenance of international peace and security is a function of its size and composition is reflected in states' proposals and statements. For example, the G4 joint statement declared as follows:

> The G-4 leaders stressed that a more representative, legitimate and effective Security Council is needed more than ever to address the global conflicts and crises, which had spiraled in recent years. They shared the view that this can be achieved by reflecting the realities of the international community in the 21st century, where more Member States have the capacity and willingness to take on major responsibilities with regard to maintenance of international peace and security. (G4 2015, 1)

Moreover, those who are against the idea of adding more permanent seats to the council on grounds of fairness and sovereign equality also justify their reform proposals from the viewpoint of the council's effectiveness. For instance, an Italian diplomat, supporting the plan submitted by the Uniting for Consensus group, suggested that the council could not be effective unless its legitimacy, as understood in terms of the fairness and equality in its composition, was enhanced (UN Press Release 2005). Both the G4 countries and the Uniting for Consensus group base their arguments on the proposition that a more representative council would enjoy greater legitimacy, which in turn would increase its effectiveness in carrying out its responsibilities, but they disagree as to the meaning of representativeness.[2] For example, the G4 proposals seem to be based on the belief that the council should reflect the power relations among the member states, while other proposals stress the importance of regional balance and co-opting onto the council countries with different values and cultures (Nadin 2016, 73–80). Furthermore, those who oppose any expansion of the council and instead argue for improving its working methods and procedures also tend to defend their positions from the point of view of its effectiveness (Russett et al. 1996, 73).

It can be questioned whether there exists any relationship between the council's size and composition and its effectiveness. Ian Hurd (2008, 200) argued that "[a]ll Council reform claims contain hypotheses about the effects of membership change on Council effectiveness." Although Hurd (2008) acknowledged that there exists a clear link between legitimacy and effectiveness, he saw no reason to assume that council expansion would lead to its enhanced legitimacy (and hence to its enhanced effectiveness).

Furthermore, the commonly shared assumption that the council's effectiveness in the maintenance of international peace and security is a function of its size and composition is problematic, since the fixation with issues concerning its size and composition has led to disregard for the symbiotic relationship between collective security and peaceful change and for their mutually constitutive relationship with the council. Even if the connection between representativeness and effectiveness is admitted, there is no basis for assuming that the former is the sole determinant of the latter. Any reform that confines itself to tinkering with the council's size and composition would not succeed in enhancing its effectiveness in the maintenance of international peace and security, for its effectiveness in carrying out this role also hinges on its ability to promote the symbiosis between collective security and peaceful change. To illustrate this point, the next section turns to the interwar debate on peaceful change.

Collective Security, Peaceful Change, and the League of Nations

By revisiting the interwar debate on peaceful change, this section shows the symbiotic relationship between collective security and peaceful change and their mutually constitutive relationship with international organizations in the role of maintaining international peace and security. The catastrophe of World War I prompted the emergence of the principle of collective security, and the League of Nations was established in order to promote and implement this principle. However, it was commonly held during the interwar period, especially in the 1930s, that the league's effectiveness in this instance depended on its ability to give substance to another principle, namely, peaceful change. This view was based on the assumption that there existed a symbiotic relationship between these two principles. As Charles Webster remarked:

2. On the meaning of representativeness, see Hassler (2013, 96–108) and Nadin (2016, 72–73).

> Collective Security and Peaceful Change are two aspects of all efforts to produce a more peaceful and ordered world and it may be said that each is impossible without the other. (Webster 1937, 3)

To cite another example, Arnold Toynbee stated as follows:

> We have not only to establish and maintain a system of "collective security" which will safeguard the existing international order against attempts to change it by violence; we have also, *pari passu*, to work out some method of "peaceful change" as an alternative to the violent method of change which, in the international field, has hitherto been provided by war. (Toynbee 1936, 26)

Collective security is a principle aimed at upholding the rule of law in international society through collective law enforcement. However, if collective security is to effectively uphold the rule of law in international society, it needs to be accompanied by another principle aimed at changing or revising the law which has become unreasonable or unjust (see Bull 2012, 53–54; Kunz 1939, 33; Wight 1978, 205–06). As Hersch Lauterpacht (1937, 137–38) pointed out, the rule of law would, without some such principle, be "synonymous with injustice." According to Hedley Bull (2012, 183), war was an institution of classical international society for bringing about international political change, including treaty revision. By the end of World War I, however, this traditional institution had become detrimental to international peace and security and was incompatible with the emerging norm that force should not be used by the disputing parties to bring about political changes in the international status quo. This gave rise to the need to develop and entrench the principle of peaceful change in international society. Moreover, the need for peaceful change increased as a result of the conclusion of the Pact of Paris of 1928, which categorically outlawed war as an instrument of national policy (Lauterpacht 1937, 139–40).

The League of Nations was based on peaceful change as well as collective security and was also expected to promote and entrench them in international society. Indeed, the Covenant of the League contained a provision for peaceful change. Article 19 reads as follows:

> The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world. (League of Nations 1919)

As Lauterpacht (1937, 156) explained, Article 19 was "the first deliberate attempt to create an institution of peaceful change within the framework of a comprehensive system of legal organisation." However, this article merely enabled the League Assembly to make recommendations and did not specify procedures for bringing about peaceful change. Such a provision was bound to be "a dead letter" in practice (Dunn 1937, 111).

The interwar period witnessed a series of efforts to improve the league's effectiveness in the maintenance of international peace and security. For example, the Geneva Protocol of 1924 attempted to fill the gaps in the covenant by making the settlement of disputes through arbitration compulsory. However, the protocol was not applicable to disputes involving revision of existing treaties (see Williams 1924, 303–04). The protocol did not come into effect, but even if it had, it would not have helped promote and entrench the principle of peaceful change in international society. A similar attempt to strengthen the functioning of the league system was made in 1928, which materialized in the form of the General Act for the Pacific Settlement of International Disputes. However, the act obliged the Arbitral Tribunal to apply existing treaties to the case when there were treaties applicable to it (Williams 1931, 335–37; see also Brierly 1930). Most of the efforts made in the early interwar years to fill the gaps in the covenant were rooted in the belief in *pacta sunt servanda* (Latin for "agreements are to be kept") as a principle underpinning the international legal order (Carr 1939, 232–33). Such efforts were bound to flounder in the long run, for they did not address the need to provide for peaceful change. As E.H. Carr remarked:

> Respect for law and treaties will be maintained only in so far as the law recognises effective political machinery through which it can itself be modified and superseded. (Carr 1939, 245)

By the end of the 1920s, it had become clear that the sanctity of treaties and the principle *pacta sunt servanda* could not be maintained without simultaneously giving substance to the principle of peaceful change (Williams 1928; Williams 1931). By the time reform of the league became the center of debate in the 1930s, it had become widely understood that there existed a symbiotic relationship between collective security and peaceful change, and the key to the league's effectiveness in the maintenance of international peace and security lay in the promotion of this symbiosis (see Salter 1936; Wright et al. 1936, 72–73). Although there were other factors affecting the league's effectiveness, such as the absence of the U.S., interwar debates surrounding league reform put much emphasis on the league's power to promote this symbiosis.

The importance of promoting the symbiosis between collective security and peaceful change was widely recognized by many at the time, and yet there were divergent views on how peaceful change could actually be implemented and entrenched in international society. Some held that this could be achieved by strengthening international law and international organizations. For example, Lauterpacht (1928, 310) claimed that international courts and tribunals could carry out the function of modifying the legal status quo "by way of interpreting the existing law and applying its general principles." More specifically, Lauterpacht (1966 [1933], 270–329) held that such legal doctrines as the abuse of rights, *clausula rebus sic stantibus* (Latin for "things thus standing"), and *ex aequo et bono* (Latin for "out of fairness and goodness") could be used by international courts and tribunals to bring about necessary international changes.

Proposals and suggestions of this kind were severely criticized at that time. For example, Carr criticized that the absence of deeply shared values among states would prevent international judicial organs from resorting to the principle of ex aequo et bono (Carr 1939, 262–63). However, many writers, including Carr himself, offered critiques of the legalistic approach on more fundamental grounds. For example, Josef Kunz remarked: "A problem of revision arises only if all the parties recognize that a treaty or situation is perfectly valid in positive law, but where at least one party not only desires a 'change,' but a change of the law in force" (Kunz 1939, 44). International judicial organs, be they arbitral tribunals or the Permanent Court of International Justice, were considered to be ill-suited for the settlement of political disputes since their primary function was to apply the existing law (Kunz 1939, 50–51; Carr 1939, 258). For this reason, it was argued that states seeking to change the status quo would not view international courts as providing a way out (Dunn 1937, 82). Therefore, what was required was something that would effectively change or revise existing rights and obligations of states, and this suggested the need for something in the nature of "supra-national legislation" (Kunz 1939, 52). Indeed, Lauterpacht (1937, 141) called for the establishment of a super-state, that is, an international legislature with overriding authority to "impos[e], if necessary, its fiat upon the dissenting State" (see also Lauterpacht 1941, 130–31). However, most of the practitioners and scholars at the time were of the view that such a proposal was nothing more than a utopian desk plan. Kunz (1939, 52), for example, dismissed it as "an utter impossibility" (see also Carr 1939, 266–68).

While it was practically impossible to establish an international legislature, there were other ways to implement peaceful change. One way to do this was to strengthen the function of the existing League of Nations; it was argued that the league could help implement peaceful change by settling disputes under Articles 11 and 15 of the covenant, which together provided for conciliation by the League Council (Dunn 1937, 90–91; Kunz 1939, 47, 53; Williams 1931, 339ff). Although the council could only make recommendations under Article 15, the council was not bound by existing law in making recommendations and had the power to propose such terms of settlement as it deemed appropriate and just. Another solution, which was favored by Carr (1939, 264–84), was to seek to give substance to peaceful change through the agency of the institutions of diplomacy and great power management (see Bull 2012, 156–77, 194–222).

Although the latter approach was favored by those who had been skeptical of the league project, the majority of the league's supporters were convinced that the former approach was more appropriate and desirable, inasmuch as it was held that the principle of peaceful change could be sustained in the long run only with the support of an international organization reflecting and supporting it (see Salter 1936, 480; Lauterpacht 1941, 131–32); peaceful change and the league were held to be mutually constitutive.

That said, the differences between these two approaches should not be overemphasized, for the success of either approach heavily depended on the willingness of the parties concerned to resolve the dispute in a peaceful manner (Dunn 1937, 81–82; Kunz 1939, 54). To address this problem, a proposal was made in 1930 to amend Article 15 of the covenant so as to confer on the League Council the power to determine and enforce terms of settlement (League of Nations 1930, 356–57). However, the proposal failed to gain traction since the amendment proposed entailed the diminution of state sovereignty. This episode in the history of the league suggests that the promotion and entrenchment of peaceful change may involve modification, if not elimination, of the principle of state sovereignty (see Kunz 1939, 54–55).

The key questions here are what the lessons of the interwar debate are and whether they are of any significance to the current council reform debate. It is to these questions that we now turn.

The Lessons of the Interwar Debate

What the interwar debate tells us is that the promotion of collective security depends largely on that of peaceful change and vice versa. It was the recognition of the symbiotic relationship between these two principles that underpinned the interwar debate. Moreover, it was widely held, especially among the league's supporters, that the key to improving the effectiveness of the League of Nations in the maintenance of international peace and security lay in its ability to maintain and support this symbiosis. This contrasts with the current Security Council reform debate which, due to its fixation with issues concerning the council's size and composition, has failed to recognize the importance of this symbiosis for the council's effectiveness in the maintenance of international peace and security.

As discussed above, the purpose of collective security is to collectively deter and fight against aggression and other forms of unilateral attempts to forcibly change the international status quo. The principle is based on an assumption or expectation that if collective security can effectively deter states from using force, they will seek to resolve disputes in a peaceful manner. This is not entirely wrong, but it is important to understand what collective security can and cannot do. While collective security can create a political environment in which pacific settlement of disputes can take place, it cannot by itself eliminate underlying causes of international disputes, nor can it provide political solutions to conflict. If collective security is decoupled from peaceful change, the former may only serve to prolong conflicts, thereby leading to worsened relations between the parties concerned. Therefore, if council reform is to improve its effectiveness in the maintenance of international peace and security, the council reform debate must explore ways to enhance its ability to implement and give substance to both collective security and peaceful change in international society. Any reform that leaves this issue unaddressed is bound to fail in enhancing the council's effectiveness.

The need to provide for peaceful change has increased under the current UN system. The UN is more powerful than its predecessor in terms of law-enforcement and collective security. The Security Council is authorized under Article 39 of the charter to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and, under Articles 41 and 42, to decide nonmilitary and military measures to be taken in order to safeguard international peace and security. Moreover, council decisions made under Chapter VII are binding upon the UN member states, as stipulated in Article 25 (UN 1945). Since the UN is equipped with a robust collective security system, it also needs to be equipped with a robust machinery for peaceful change so as to make sure that attempts to make just and reasonable changes are not

unduly blocked by the practice of collective security. For this reason, the need for some machinery for implementing peaceful change has increased, rather than decreased, under the current UN system.

One might ask whether there is any basis for assuming that peaceful change, which allegedly failed to prevent World War II, can be of any help in promoting international peace and security in contemporary international society. However, this is not a strong argument, because it may well be argued that the league could not prevent the war due to the fact that its machinery for peaceful change had not been robust enough. Indeed, this is why many of the participants in the interwar debate on peaceful change addressed the question of how the league could be reformed so that it would implement peaceful change more effectively. This also explains why the drafters of the UN Charter did not abandon the principle of peaceful change, despite reluctance on the part of some delegates to the 1945 San Francisco Conference, as discussed further below.

Furthermore, peaceful change is of increasing importance in light of the following two trends in contemporary world politics. Firstly, today's international system is characterized by global power transition, and this trend has foregrounded the issue of revision of the status quo yet again. In the face of global power transition, the UN, especially the Security Council, will have to address how the principle of the sanctity of treaties can be maintained, while at the same time bringing about just and reasonable changes in accordance with the principle of peaceful change. Secondly, there is a growing awareness that, if international peace is to be maintained, the international community must effectively prevent and respond to civil wars around the world. This raises the question as to how the international community can help implement peaceful change within as well as between states (more on this later). Viewed in this light, it can be argued that peaceful change has become ever more important and urgent today.

UN General Assembly and Peaceful Change

As discussed above, there exists a symbiotic relationship between collective security and peaceful change, and herein lies the key to the effectiveness of the Security Council in the maintenance of international peace and security. However, the UN mechanisms for implementing peaceful change and their effectiveness have been almost totally neglected in the council reform debate. In this and the next sections, I shall fill in this gap by focusing on Article 14 and Chapter VI of the charter. These provisions need to be compared with their counterparts in the Covenant of the League in order to highlight both similarities and differences between these two organizations with respect to peaceful change. Moreover, it is necessary to take into account how these provisions have or have not been used in practice, for mere textual interpretations and comparisons would not be sufficient if we are to fully understand how the UN system has actually operated. Article 14 of the charter reads as follows:

> Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations. (UN 1945)

This article is intended to play much the same role as Article 19 of the covenant. On the face of it, the powers of the General Assembly conferred by Article 14 of the charter seem to be much broader than those conferred on the League Assembly by Article 19 of the covenant in three respects (Zöckler and Riznik 2012, 557). First, while the League Assembly could only advise its member states to reconsider treaties and consider international situations, the General Assembly is authorized to recommend measures for peaceful change. Second, while making recommendations under Article 19 of the covenant required unanimity, recommendations under Article 14 can be adopted by a two-thirds majority vote in the General Assembly. Third, whereas the League Assembly could only advise states to reconsider "treaties which have

become inapplicable" and to consider "international conditions whose continuance might endanger the peace of the world," the General Assembly can make recommendations concerning "any situation, regardless of origin," including matters concerning treaty revision.

For all these, however, the fact remains that Article 14 only confers upon the General Assembly the power to recommend, and the recommendations of the General Assembly are not legally binding by definition, although they might have political and moral significance (Goodrich and Hambro 1949, 178). In view of this, Leland Goodrich, who was secretary of the committee in charge of drafting the provisions of the charter on the pacific settlement of disputes, concluded in 1947 that "there is the same chance, if not likelihood, that the United Nations will be ineffective as an instrument for treaty revision" (Goodrich 1947, 8). This is not surprising considering that some delegates to the UN Conference at San Francisco were reluctant to add a revision clause to the charter. Some of them even opposed any direct reference to revision of treaties from the point of view of the sanctity of treaties (Goodrich and Hambro 1949, 178–79). The wording of Article 14 "any situation, regardless of origin," which was introduced as the result of what is known as the Vandenberg Amendment, reflected the political contestation at the conference between those who hoped that the General Assembly would address the problem of treaty revision and those who sought to prevent the assembly from playing any such role (Zöckler and Riznik 2012, 553).

Since the establishment of the UN, Article 14 of the charter has been invoked in some General Assembly resolutions, as in Resolution 721(VIII) concerning the issue of race conflict in South Africa and in Resolution 1542(XV) concerning the overseas territories that were under the control of Portugal. Many other resolutions use phrases from the article without explicitly referring to it, as in Resolution 3395(XXX) about the question of Cyprus (Zöckler and Riznik 2012, 563–64). However, Article 14 has seldom been invoked for the purpose of treaty revision in the history of the UN. Even when the assembly uses the language of Article 14 in its resolutions, it usually does little more than call upon the parties to agree to a cease-fire and to come to the negotiating table without recommending specific terms of settlement, as with Resolution 2793(XXVI) concerning the hostilities between India and Pakistan over the status of Bangladesh being the epitome of the assembly's approach (UN General Assembly 1971).

However, Article 14 is not the only provision in the charter that can be used for implementing peaceful change. In fact, the provisions of Article 14 are subject to Article 12, which means that it is the Security Council that is expected to play a primary role in implementing peaceful change under the charter. To understand the council's powers with respect to peaceful change, we need to look at Chapter VI of the charter pertaining to pacific settlement of international disputes.

UN Security Council and Peaceful Change

The charter places emphasis on the importance of the parties resolving disputes themselves, as stipulated in Article 33(1). At the same time, however, the charter grants the Security Council broad discretionary powers over procedures for and terms of dispute settlement. If the Security Council sees a dispute as endangering international peace and security, or if it considers a situation as likely to endanger the peace, it shall, under Article 33(2), "call upon the parties to settle their dispute" by means of their own choice, and, under Article 36(1), it may "recommend appropriate procedures or methods of adjustment" (UN 1945).

However, in the context of this discussion, the most important article of the charter is Article 37. Article 37(1) provides that the parties of the dispute shall refer to the Security Council in case of failure to reach a settlement by themselves, and Article 37(2) provides that the council may "recommend such terms of settlement as it may consider appropriate" (UN 1945). According to Hans Kelsen (1948, 182), the council may, under this article, recommend terms of settlement that amount to "an infringement upon the rights which the one or the other party has under the existing international law." While this does not mean that the council should disregard the sanctity of treaties, it does mean that the council is not bound by existing treaties in making recommendations.

There is a clash of opinions over the nature of council recommendations made under Article 37(2). For example, Goodrich and Hambro (1949, 260) argue that council recommendations are not binding and cannot be made binding under other articles of the charter. According to them (Goodrich 1945, 966; Goodrich 1947, 8; Goodrich and Hambro 1949, 264–66), it was agreed by the delegates in the San Francisco Conference that under Article 39 the council may only make binding decisions about enforcement measures in accordance with Articles 41 and 42, the purpose of which is to bring hostilities between the disputing parties to an end, and the council may not impose terms of settlement on the parties under these articles. In the Dumbarton Oaks draft, there was no explicit provision empowering the council to recommend or determine terms of settlement. At the conference, the following two changes were made in order to make it clear that the council could not determine and impose specific terms of settlement. First, it was made clear in Article 37(2) that the council may recommend terms of settlement, when a dispute is referred to the council by one or more of the parties. The second change is the removal of the provision in the Dumbarton Oaks draft, which suggested "the possibility that failure to settle a dispute [by the means specified in what later became Chapter VI] might be deemed a threat to the peace" by the council (Goodrich et al. 1969, 258). This change was made to assure the delegates of the conference that "recommendations for settlement under Chapter VI were not binding" (292). Such an assurance was needed at the conference, since not a few small and middle powers aired concerns about granting the council power to make binding decisions on terms of settlement in fear of repetitions of the Munich Agreement (Goodrich and Hambro 1949, 264–65).

Nevertheless, many scholars (e.g., Eagleton 1946, 27; Kelsen 1948, 212–13) have argued that the council may legitimately take enforcement measures against states that disregard or reject its recommendations, and its recommendations become virtually binding on them in such cases. Indeed, the council has in practice shown its readiness to take enforcement measures against states that fail to comply with its substantive recommendations (Giegerich 2012, 1160). Such an interpretation of Article 37(2) would enable the council to play a more active role in the promotion and implementation of peaceful change.

Having expounded the council's powers under Article 37(2), we shall now look at the council's actual practice concerning the article. Although the functions of the council were often paralyzed by the superpower rivalry during the Cold War, the council passed some notable resolutions which contained recommended terms of settlement. The following are some of the examples. In Resolution 67 concerning the Indonesian question, the council recommended the parties, namely the Netherlands and the Republic of Indonesia, to commence negotiations with the intent of establishing "a federal, independent and sovereign United States of Indonesia" over which sovereignty was to be transferred and also specified the principles on which negotiations were to be based (UN Security Council 1949). Resolution 118 concerning the Suez question, which was adopted about two weeks before Israel's attack on Egypt, specified six principles that any settlement of the question must respect (UN Security Council 1956). Resolution 242, which was adopted following the Six-Day War, also contained substantive recommendations for "a just and lasting peace in the Middle East" (UN Security Council 1967). Resolution 457 concerning the Iran hostage crisis can also be viewed as adopted under Article 37(2) (UN Security Council 1979).

However, the effectiveness of these substantive recommendations should not be overestimated. As Steven Ratner (1995, 433) points out, when the aforementioned Resolutions 67 and 242 were put to a vote, it was already known that the principles and recommendations set forth in these resolutions were acceptable to the parties concerned. Moreover, Resolution 118 was not successful in deterring the Israeli, British, and French invasion of Egypt, thus failing to achieve a peaceful settlement of the question. As for Resolution 457, few people would argue that it had been decisive in defusing the crisis.

During the Cold War, the Security Council was generally disinclined to make substantive recommendations and tended to pass resolutions that merely called on the disputing parties to agree to a cease-fire (Higgins 1970, 12–13). Instead of actively engaging in conflict resolution

through the use of its powers under Article 37(2), the council became reliant on such mechanisms as the mediation of the secretary-general (and of his special representatives) and peacekeeping (Ratner 1995, 434). There is no denying that these practices have played valuable and constructive roles in conflict prevention and resolution, but they have also obscured the council's role in the promotion and entrenchment of peaceful change in international society.

Since the end of the Cold War, the council has frequently adopted resolutions that go beyond calling for a ceasefire. As Ratner (1995, 438) explained, it "has regularly either endorsed or proposed principles and terms for settlement of conflicts," such as in Cambodia, Central American states, and Southern African states. Moreover, the council has on occasion adopted such resolutions under Chapter VII of the UN Charter. For example, in the Bosnia and Herzegovina conflict, the council, acting under Chapter VII, adopted Resolution 824 recognizing "the unique character of the city of Sarajevo, as a multicultural, multiethnic and pluri-religious centre" and Resolution 1031 endorsing the Dayton Agreement (UN Security Council 1993, 2; UN Security Council 1995). To give another example, Council Resolution 1244, adopted under Chapter VII on 10 June 1999, demanded that "a political solution to the Kosovo crisis shall be based on the general principles" set out in the two annexes of the resolution (UN Security Council 1999, 2).

Key Issues to Be Addressed in Security Council Debates

In these cases, however, the council failed to prevent disputes from escalating to armed conflict between the parties concerned. Therefore, it is necessary to look for ways to improve the council's ability to implement peaceful change before disputes escalate to armed confrontation. Here I shall point to three issues that need to be discussed in order to address this problem.

First, ways need to be explored to reinforce the council's ability to guide the disputing parties through the process of dispute settlement. Under Article 33(1), the disputing parties, which are "likely to endanger the maintenance of international peace and security," are obliged to seek a settlement by peaceful means "of their own choice" (UN 1945). However, in reality, when a dispute is genuinely likely to jeopardize the peace, it is usually difficult for the parties concerned to agree on the mode of settlement, and such a political impasse can lead to armed conflict. To avoid such a scenario, the council may "recommend appropriate procedures or methods of adjustment" under Article 36(1) (UN 1945). The problem here is that recommendations made under this article are not legally binding on states. One way to enhance the effectiveness of council recommendations on the dispute settlement process is to accompany them with a statement to the effect that noncompliance may result in enforcement measures under Chapter VII. Although this may prove contributory to peaceful change in some cases, whether the council is allowed to combine Chapters VI and VII in this way is disputable in light of the fact that "the Dumbarton Oaks text was revised to eliminate the provision expressly permitting the Security Council to determine that a failure to settle a dispute under Chapter VI was a threat to international peace and security" during the drafting of the charter (Goodrich et al. 1969, 292). This leaves room for further discussion on what the council can legitimately do and what it should be encouraged to do to influence and guide the dispute settlement process under Chapter VI so as to prevent international disputes from escalating to armed conflict.

The second issue, which is related to the first one, is whether the council may recommend terms of settlement on its own initiative under Article 37 of the charter. Under the charter, the council can make substantive recommendations only after a dispute is referred to the council by one or more parties. This prohibits the council from proactively recommending terms of settlement on its own initiative when, for some reason, all of the parties either fail or refuse to refer the dispute to the council, thus limiting its role in the process of dispute settlement. In fact, however, there is a difference of opinion concerning this, and some states have argued that the council can legitimately act under Article 37 on its own judgement (Goodrich et al. 1969, 285; Giegerich 2012, 1154). In light of this ambiguity, there is room for further discussion on

what the council can legitimately do and what it should be encouraged to do to promote peaceful change when the disputing parties fail or refuse to refer the dispute to the council.

Finally, there is room for debate about whether the charter can be interpreted as permitting the council to virtually determine and impose terms of settlement by taking enforcement measures against states disregarding its substantive recommendations made under Article 37(2). While such an interpretation is at odds with the original intention of some of the founders of the UN, it has been argued by Kelsen and others that the council can virtually impose its substantive recommendation under Chapter VII. On practical grounds, one might question whether permitting the council to impose terms of settlement would enhance its actual ability and willingness to implement and entrench the principle of peaceful change in international society. John Fischer Williams (1931, 342), for example, criticized the idea on the grounds that the League Council would have balked at setting out terms of settlement if it had been required to make binding decisions on the merits of disputes. This is a fair-enough point, but it must be noted that allowing the council to determine terms of settlement does not mean it can no longer make recommendations. The key issue to be addressed is whether the council has or should be allowed to have the option to virtually determine terms of settlement.

In short, if the Security Council's ability to promote and entrench peaceful change in international society is to be enhanced, it is necessary to critically review its powers under Chapter VI and reconsider the relationship between Chapters VI and VII. As has been discussed in this article, the council is an international organization reflecting and reinforcing both collective security and peaceful change, and its effectiveness in the maintenance of international peace and security depends on its capacity to maintain and promote the symbiotic relationship between these principles. Chapter VI deserves more attention than it has received in the council reform debate, for it is primarily this part of the charter that provides for peaceful change under the UN system. The failure to address this aspect of the question of council reform would not only be unsatisfactory from a theoretical point of view but would also be detrimental to the council's effectiveness in practical terms.

At this point, it is good to give some thought to whether the UN membership would be willing to accede to such reform proposals as are designed to strengthen the powers of the council concerning peaceful change. As discussed in the second section, the problem of peaceful change is closely linked to the principle of state sovereignty, and the council was given limited powers because of the fear that a stronger council would undermine this principle. One way to address this concern is to ensure that the council is adequately representative of the UN membership, and, therefore, it is hereby proposed that the item or category entitled "the Council's powers under Chapters VI and VII of the UN Charter" be added as the sixth pillar to the aforementioned five pillars of council reform so that the issues surrounding the council's powers and ability to promote peaceful change can be discussed along with other issues surrounding council reform, including the issues concerning its size, composition, and representativeness.

The question remains though of whether UN member states would agree to add this new pillar to the agenda. From a purely normative standpoint, this new item should be added to the agenda, since peaceful change is one of the fundamental principles enshrined in the UN Charter, and the member states are expected to be fully committed to it. However, peaceful change is also beneficial to them. As discussed above, some of the founders of the UN put more effort into creating a system that would serve to maintain the international status quo, and from their viewpoint, the problem of peaceful change had perhaps been of secondary importance. However, the increase of the UN membership since its inception has resulted in the growth of the number of member states that are dissatisfied with aspects of the international status quo, and due to changes in circumstances, most of the countries, which were satisfied with the status quo back in 1945, have become dissatisfied with aspects of the status quo in one way or another. Strengthening provisions for peaceful change is beneficial to all those who want to bring about political changes in the international status quo in accordance

with international law, especially with that governing the use of force in contemporary international society.

One might still wonder if the permanent five would agree to add the new item to the agenda, but peaceful change does not necessarily work to their detriment. Changes in Chapters VI and VII of the UN Charter aimed at enhancing the council's ability to promote peaceful change can expand room for great power management, thus increasing their collective institutional power. Moreover, the permanent five can block Security Council decisions concerning peaceful change as long as they retain their veto right. Whether the institutionalization of peaceful change would work against them largely hinges on how the question of veto right is addressed, and this more contentious problem, which has direct implications for the institutional power of the permanent five, has long been discussed in the context of council reform. If so, there should be no reason why the relatively innocuous problem of peaceful change cannot also be discussed in the context of council reform.

The issues to be discussed under the sixth pillar are relevant not only to interstate conflicts but also to internal conflicts with global repercussions. There is a growing awareness of the importance of conflict prevention at both international and domestic levels. UN Secretary-General António Guterres, addressing the Security Council on 10 January 2017, stated:

> Most of today's conflicts are still essentially internal, even if they quickly take on regional and transnational overtones. . . . We must rebalance our approach to peace and security. For decades, this has been dominated by responding to conflict. For the future, we need to do far more to prevent war and sustain peace. (UN Security Council 2017, 3)

With this in mind, the secretary-general went on to call on the Security Council "to make greater use of the options laid out in Chapter VI of the Charter of the United Nations" (UN Security Council 2017, 4). Indeed, as discussed above, since the end of the Cold War, the council has been occupied with responding to internal conflicts that have already occurred. In view of this, it is vitally important today that the promotion of peaceful change be addressed while taking note of changing global security environments so as to enable the council to effectively prevent internal conflicts as well as the interstate ones.

Conclusion

The current debate on Security Council reform has mainly been fixated on the issues concerning the council's size and composition. In order to look at the question of council reform from a broader perspective, this article has focused on peaceful change, its symbiotic relationship with collective security, and their mutually constitutive relationship with the council. On the basis of the insights obtained from the interwar debate on peaceful change—the first ever attempt in IR scholarship to systematically study the problems surrounding peaceful change—the present article pointed out that the effectiveness of the council in the maintenance of international peace and security hinges on its ability to promote and entrench the symbiosis between collective security and peaceful change in international society. If council reform is to have any meaningful impact on its effectiveness, the symbiotic relationship between collective security and peaceful change and their mutually constitutive relationship with the council must be taken seriously as we deliberate on ways to reform it. Any council reform that neglects this nexus would be inadequate in practice.

On the basis of these findings, this article has argued that future council reform debates should explore ways to enhance the council's ability to implement peaceful change so that it can proactively prevent international and internal disputes from escalating to armed conflict. This requires a critical review of the council's ability to give substance to peaceful change in terms of its powers under Chapter VI of the UN Charter. More specifically, it requires a rethinking of the council's powers to recommend appropriate dispute-settlement procedures and terms of settlement and a reconsideration of the legality and desirability of enforcing council recommendations under Chapter VII.

As pointed out in the introduction, the UN Charter recognizes the importance of peaceful change as well as that of collective security for the maintenance of international peace and security in Article 1(1). Therefore, if we are to stay true to the spirit of the UN, equal weight must be given to both of them, and peaceful change must be taken more seriously in future Security Council reform debates. This is not to claim that peaceful change is a panacea, but conferring on the council the power to take necessary and effective measures to implement peaceful change is an important step forward toward the enhancement of its effectiveness in the maintenance of international peace and security.

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China and the UN Climate Regime: Climate Responsibility from an English School Perspective

Sanna Kopra

This paper analyzes how states have negotiated, distributed, and contested responsibilities within the United Nations Framework Convention on Climate Change (UNFCCC). It applies the English School (ES) theory and argues that climate responsibility constitutes an emerging primary institution of international society. Due to its rising great power status, China plays an increasingly important role in social processes in which international society defines and distributes states' responsibilities, especially those of the great powers, now and in the future. Therefore, this paper pays particular attention to China's contribution to the UNFCCC. Ultimately, the paper offers ES empirical observations about the relationship between primary and secondary institutions as well as the role of agency in institutional change.

Introduction

In this paper, I examine how states have negotiated, distributed, and contested responsibilities within the UN Framework Convention on Climate Change (UNFCCC). Based on my analysis of the generation and evolution of international practices of climate responsibility within the UNFCCC, I argue that climate responsibility is an emerging primary institution of international society. Ultimately, I aim to contribute to the English School (ES) via empirical observations about the relationship between primary and secondary institutions as well as the role of agency in institutional change.

Hence, I set two objectives for this paper: First, I aim to provide the ES with empirical observations, which are needed "if an institutional project *à la* ES is to get off the ground" (Wilson 2012, 577) by examining the emergence of a new primary institution of international society, namely, climate responsibility. Second, I develop Tonny Brems Knudsen's (2013) "pre-theory of fundamental institutional change" by bringing agency back to the discussions of institutions of international society within the ES. However, I deliberately focus on state agency, because states—and especially great powers—pursue definitions of international rules in a way that serves their (domestic) interests and values. In empirical terms, I focus on the role of China in international climate politics, because its role is crucial for the future of international society in general and for climate responsibility in particular. China is the largest carbon emitter in the world. Due to its rising power status and the failure of the U.S. to shoulder its own share of climate responsibility under the Trump administration, China is also in a position to dictate how climate responsibility is defined, allocated, and implemented in the future. China's rise has generated so-called China threat theories that speculate on the negative impacts of its growing global outreach. Although this article does not touch upon questions about whether or not China is a status quo power, it may provide useful suggestions about the ways in which it might transform practices of international society.

The paper proceeds as follows: I begin with a brief introduction to debate over primary and secondary institutions within the ES and discuss the relevance of this distinction in state

responsibility. Because the UNFCCC is the key secondary institution that bridges the gap between primary institutions and real life experience, I analyzed how states have debated and distributed responsibilities within it. I introduce the key events and tensions that have shaped the formation of climate responsibilities globally. Thus, I study international climate agreements in order to find out how responsibility is defined and distributed within the UNFCCC: Who is appointed to be responsible for what, when, and how? In this way, I offer a narrative of the evolution of the emerging primary institution of climate responsibility and analyze China's contribution to the process.

Institutions and Agency

The basic premise of the ES is that states form an international society that is organized and sustained by common (primary) institutions (Bull 2002). According to Barry Buzan's (2004, 181) definition, these primary institutions are "durable and recognized patterns of shared practices rooted in values held commonly by the members of interstate societies, amd [sic] embodying a mix of norms, rules and principles." Buzan's definition is somewhat similar to Chris Reus-Smit's (1999) fundamental institutions and Kal Holsti's (2004) foundational institutions. Given the centrality of the notions of institutions within the ES, as Peter Wilson (2012, 568) pointed out, it is indeed very surprising how premature its agreement on the definitions, identity, and role of institutions remains. Many ES theorists have focused on the nature of international society and debated what institutions are constitutive for its maintenance (see, for example, Buzan 2004, 2014a; Holsti 2004; Schouenborg 2013, 2014; Wight 1999; Wilson 2012). Most of these lists, however, do not provide any explicit criteria to define what makes something a primary institution. Nor do they pay attention to how those institutions transform. In fact, not even Hedley Bull has explained how he defined his five common institutions (balance of power, diplomacy, international law, great power management, and war) or why he excluded other institutions from his list (but see Buzan 2014a, 97–98; Schouenborg 2014, 80–81). Wilson's own solution to the debate on what counts as a primary institution is empiricism: "Until we [ES scholars] have data about what institutions exist internationally, our speculations about them will remain just that, speculations, and our taxonomies and theories about them will remain rootless, subjective and abstract" (Wilson 2012, 577). Wilson himself (2016, 114) suggested that ES scholars should analyze the "social assumptions, standards and expectations" of people, especially those of the political elites and study how they socially construct institutions.

I propose that the literature of practices may illuminate what constitutes an institution in ES terms and shed light on how to recognize and study them empirically via historic materials. In fact, Cornelia Navari (2011, 620) noted that Bull's concept of institution is identical to Theodore R. Schatzki's concept of integrative practice, which refers to the "more complex practices found in and constitutive of particular domains of social life" (Schatzki 1996, 98). In addition to practical understandings, they include "explicit rules, principles, precepts, and instructions," and "teleoaffective structures comprising hierarchies of ends, tasks, projects, beliefs, emotions, moods, and the like" (Ibid., 99). These understandings, rules, and teleoaffective structures organize practices normatively (Ibid., 101–102). In addition, Charlotta Friedner Parrat's (2014, 10) checklist is a very useful tool for an assessment of whether an international (climate) practice is so constitutive of international society that it comprises a new primary institution:

- Is the institution truly international, or can the same institution exist within a state?
- Is it a routinized practice based on ideas and does it include norms, rules, and etiquette?
- Is it consciously upheld by actors?
- Is it quite stable over time and does a critical mass of states endorse it?
- Is it co-constitutive of actors?

If the definition of the concept of a primary institution is not clear within the ES, neither is the concept of a secondary institution. Buzan (2004, 2014a) and Holsti (2004) emphasized the

regulative nature of secondary institutions and see them merely as empirical materializations of primary institutions. It would be tempting to define secondary institutions as concrete international organizations that are intentionally established pragmatic solutions to "real-world" problems. However, that definition would ignore international treaties and informal multilateral institutions. For example, international climate governance is largely coordinated by the UNFCCC, a political framework treaty or a regime. Killian Spandler (2015, 607–08) noted that secondary institutions "include international organizations and regimes" and "specific rules" as well as "*sets of discursively formulated expectations, but they are more specific* [than primary institutions] *in that they refer to temporally and spatially discrete sections of international reality and apply to a clearly defined set of actors*" (Ibid., 613 emphasis in original). Friedner Parrat (2014, 10) developed Spandler's conceptualization and defined secondary institutions as "specific rules, which, in principle, are institutionalized by states, within international organizations." Her example of such a rule is the UN Security Council's permanent members' veto power. In the context of international climate politics, Common But Differentiated Responsibilities (CBDR) could be a plausible candidate for such a rule.

I define secondary institutions as "stable, goal-oriented bodies that are intentionally designed by international actors to manage and regulate common problems in specific pragmatic issue areas and to govern cooperation through collectively settled norms and rules, whether legally codified or not" (Kopra 2018). They include regimes, international organizations, and international rules that have become established practices over time (cf. Keohane 1989, 3–4). They not only provide material evidence of the existence of primary institutions but also play a genuine role in institutional change (Knudsen 2013, 2016; Navari 2016; Spandler 2015; Friedner Parrat 2014). In particular, Knudsen (2013, 18) pointed out that international organizations are central to the "reproduction and working [of primary institutions], and therefore also to changes in their working." His approach differs profoundly from that of Buzan (2004, 186), who contended that clashes amongst primary institutions are the "key driving force" for institutional change in international society. This means that despite the terminology, the relationship between primary and secondary institutions is not a one-way hierarchical relationship, because they both shape each other. Indeed, Knudsen (2013, 34) concludes that secondary institutions are the "most important frameworks for the reproduction and change of fundamental institutions, and thus for the maintenance and development of international order and justice." Consequently, I assert that secondary institutions (and their constitutive documents in particular) are the most important venues for gathering empirical data on the institutions of modern international society, as well as for studying the role of agency in the history of international society (Kopra 2018).

Despite its merits, Knudsen's model cannot thoroughly understand and explain the evolution of international practices, because it does not pay explicit attention to the role of agency in institutional change. What makes secondary institutions special is that they create a social and political space in which individual actors can shape the workings of international society. Normally, the establishment of secondary institutions cannot be traced back to one single primary institution, but they reflect and operationalize many primary institutions simultaneously. As I have argued elsewhere, climate responsibility makes no exception; it cannot be located in one single secondary institution, but there are many international forums in which the participants can discuss climate responsibility or at least some aspects of it. Yet there is a special secondary institution, namely the UNFCCC, that gathers state and non-state actors together and coordinates climate practices and makes them possible. Like other secondary institutions, the UNFCCC functions as a bridge between an emerging primary institution of climate responsibility and everyday politics at the national level. On the one hand, it embeds primary institutions in the quotidian workings of international relations; on the other hand, it embodies changes in the workings of the day-to-day international relations in primary institutions. Power shifts in international relations, as well as domestic happenings—such as the inauguration

of a head of state—that take place in powerful states may gradually shape the constitutive principles of primary institutions via secondary institutions. For example, if President Trump ignored the climate policies made by the Obama administration, it would probably not only transform the workings of the UNFCCC but also generate more profound change in international society. However, the UNFCCC has no intrinsic value as such. Instead, it provides states and non-state actors with a platform to negotiate the content, scope, and allocation of issue-specific general and special responsibilities and to monitor the fulfilment of international rights and responsibilities. In this way, it functions as a link between international society and world society. It offers non-state actors a forum to influence existing primary institutions, such as sovereignty, or to forward the emergence of new ones, as the cases of international environmental and human rights practices demonstrate. Again, these negotiations are shaped by primary institutions (Kopra 2018).

Climate Change and Practices of International Society

When it comes to economics, the ES theory remains undeveloped, and there is "hardly any discussion" about potential economic primary institutions (Buzan 2014a, 136). For the purposes of this paper, it is adequate to examine how international practices that focus on economic growth have dictated international climate practices. I treat the market as a primary institution and view economic growth as one of the international practices it comprises. This is not to say that there were no economic practices before the emergence of free markets and capitalism, which brought with them the "growth fetish" of the late eighteenth century (cf. Holsti 2004, 211–18). Although the market did not gain "something like fully global status as an institution of international society" before the end of the Cold War (Buzan 2014a, 138), it has undoubtedly been the most influential economic practice since the emergence of international climate practices (Newell and Paterson 2010, 11–35). Moreover, it has affected China's climate practices from a very early stage, as China started to take steps toward red capitalism in 1978. No doubt, modern capitalism is "with increasingly few exceptions" and will continue to be the "operating system of the world economy" now and in the foreseeable future (Speth 2008, 7). Since Truman's inauguration speech in 1949, development has been the key word of the capitalist era (Sachs 1993, 4). In particular, development has been largely understood as a synonym for economic growth, and its qualitative aspects are often dismissed. The well-being of humankind is usually measured in economic terms, such as gross domestic product (GDP), and governments tend to take economic growth as their ultimate responsibility. This approach clearly emphasizes material conditions over the social, environmental, and spiritual factors of well-being (Speth 2008, 147). It has also legitimized highly technocratic ideas of nature and promoted policies based on cost-benefit calculations rather than on genuine value consideration.

The Emergence of Climate Responsibility

When the UN was founded, environmental issues were not a major concern of international society. The UN Charter, for example, did not address the environment at all. The UN discussed environmental issues for the first time in 1968, and four years later, the UN Conference on the Human Environment (UNCHE) was held in Stockholm, Sweden. Although the UNCHE did not focus on climate change as such, it created most of the principles and rules of international environmental practices, which framed how climate change was later defined, what kind of responses were seen as appropriate, and how global responsibilities were allocated. Prior to the UNCHE, environmentalists began to express their concern over the clash between the system of sovereign nation-states and global environmental problems. However, governments were not eager to compromise on their sovereignty and national interests for the sake of environmental protection. Particularly, many developing countries had gained their independence just shortly before the UNCHE, and for them, sovereignty was nonnegotiable. As a result, sovereignty served as a cornerstone of the definition of state environmental responsibil-

ity. Principle 21 of the Stockholm Declaration declares that "States have, in accordance with the Charter of the UN and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies." This right, however, is constrained by a state-centric no harm principle—the latter part of principle 21 declares that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" (UN 1972).

Maoist China played quite an important role at the UNCHE, which was the first ever UN conference it participated in. It made key contributions to paragraphs two, four, and five of the Stockholm Declaration (see Greenfield 1979; Sohn 1973). In particular, China made a substantial contribution to the establishment of the link between the environment and economic development (with emphasis on the latter) and promulgated all governments' general legal obligation to protect the environment. It also became a voluntary leader of developing countries by promoting the interests of all developing countries. Despite China's active participation in the debate at the UNCHE, it did not sign the final agreement since it did not contain strong socialist statements.

When it comes to climate responsibility, scientists have been important "norm entrepreneurs" (Finnemore and Sikkink 1998, 896), and scientific consensus on climate change emerged during the 1970s and the 1980s (see Paterson 1996). The first World Climate Conference, to which China did not send a representative, was held in Geneva in 1979. In the late 1980s and early 1990s, a series of non- and intergovernmental conferences focusing on the scientific and political dimensions of climate change were organized. Of these conferences, the Villach Conference in October 1985 is often applauded as the most influential, not because it would have represented a "significant change in scientific conclusions" about climate change but rather because these scientific conclusions started to translate into concerted demands for political actions (Franz 1997, 2–3). Consequently, climate change transformed from being a scientific phenomenon to a political problem during the 1980s. This changed the framing of climate change—it became an object of hard political struggles over the significance of the problem, potential resolutions, and distribution of responsibility, etc. The debate was, and continues to be, an important factor for defining and allocating climate responsibilities amongst states: Do we categorize climate change as an economic, environmental, human security, or ethical problem? Do we focus on historical or contemporary greenhouse gas emissions? And do we place the responsibility on those who produce the most greenhouse gas emissions or to those whose consumption patterns cause the most emissions?

The United Nations Framework Convention on Climate Change and its Kyoto Protocol

The UN Conference on Environment and Development (UNCED) took place in Rio de Janeiro between 3rd and 14th of June 1992. As it was a massive, unprecedented event with representatives from 172 states (of which 108 were state leaders), about 2,400 NGO representatives (plus 17,000 participants in the parallel NGO forum) and about 10,000 on-site journalists, it is probably fair to say that the outcomes of the conference—Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, the UN Framework Convention on Climate Change, and the UN Convention on Biological Diversity—represented universal agreement of all the states in the world. All the outcomes were characterized by the concept of sustainable development. The NGOs' unusually extensive access to international negotiations resulted in their greater participation in other international forums as well (Porter, Brown, and Chasek 2000, 69).

From the perspective of climate responsibility, the most central outcome of the UNCED was the UNFCCC. The purpose of the UNFCCC was to establish a legal framework that holds certain parties liable for climate-related harm and hence formulates effective solutions to tackle climate change. The ultimate objective of the UNFCCC is to achieve the "stabilization

of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (UN 1992). What dangerous anthropogenic interference means is inevitably a scientific, ethical, and political question, which was left unresolved at the Rio Conference. The UNFCCC acknowledged that "change in the Earth's climate and its adverse effects are a common concern of humankind." Although developing countries were not very comfortable about accepting "common responsibility" (Porras 1993, 28), the UNFCCC assigned general responsibilities to all the parties of the convention. First, all of the parties have a solidarist, intergenerational responsibility to "protect the climate system for the benefit of present and future generations of humankind." They also have a responsibility to cooperate, because "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response." Moreover, all states have a general responsibility to "take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects." This general responsibility is, however, limited by and puts flesh on the bones of the principle of CBDR. States must also provide information. For instance, they have to compile and publish national inventories of anthropocentric greenhouse gas emissions (GHG) by sources and removals of sinks. In addition, they must develop national climate programs and cooperate in the fields of science, education, training, etc. in order to improve capacities to mitigate and adapt to climate change around the world. The UNFCCC views sustainable development as both a right and responsibility of states and declared that states "have a right to, and should, promote sustainable development," which links climate responsibility with development goals. As binding emission reduction caps would restrict developing countries' development objectives, this article did not only underline developed countries' historic responsibility, but also indicated that developing countries have a right to increase their GHG emissions via industrialization that raises the living standards of the poor. Finally, the UNFCCC also affirmed the right to sovereignty as an important principle in climate politics (UN 1992).

Although states in general agree that the distribution of responsibilities is a matter of fairness and that some of them have special responsibilities, there is a heated political dispute about the ethical underpinnings of how to define and distribute responsibilities in an equitable manner. Historically, special responsibilities have predominantly been attached to great powers, which have "fundamental global capabilities and responsibilities that minor or medium powers do not have" (Jackson 2000, 21). The UN Security Council has indeed addressed climate change several times but has failed to define climate change as an international security threat due to resistance from China and Russia. The UNFCCC defined states' climate responsibility in accordance with the Rio principles 2 and 7. In other words, the UNFCCC underlined sovereignty and the CBDR principle. Both were prerequisites to reach an international agreement with developing countries. CBDR acknowledged that developed (Annex I countries) and developing countries (non-Annex I countries) cannot be subjected to the same standards, but states' responsibility has to be tied to their national circumstances and capacities.

International negotiations over the special responsibilities of developed countries have been characterized by two tensions: The first is concerned with the scope of the emission reduction commitments of the U.S. and other industrialized countries. The second disputes how much (financial) assistance (to meet the costs of climate change) developed countries should provide to developing countries. Due to the refusal of the U.S. to accept a legally binding emission reduction target, the UNFCCC failed to set up quantitative emission reduction targets to any party. In accordance with the CBDR, it declared that developed countries must take the "lead in combating climate change and the adverse effects thereof" but it did not set any binding requirements for them (UN 1992). The Kyoto Protocol, however, operationalized the CBDR—whereas the UNFCCC encourages developed country parties to reduce emissions, the Kyoto Protocol commits them to doing so. Developed countries' special responsibility to support developing countries' capacities to meet climate change has also been a heated debate in

international politics for decades. The CBDR noted that developed countries have a special responsibility to assist developing countries to mitigate and adapt to climate change. As this formulation did not describe the assistance as aid but as a responsibility, it made a "significant step in the development of normative international relations," based on the "fact that everyone, including developed countries, will benefit from such transfers which cannot therefore be regarded as charity" (Jackson 1996, 185–86). States have created diverse institutional arrangements to coordinate and implement developed countries' special responsibility to assist developing countries' climate policies and actions. For example, the UNFCCC established a Financial Mechanism to offer funds to developing countries, and the Adaptation Fund was established in 2001.

Like environmental practices in general, climate responsibility is linked closely to the practices of economic growth. China and other developing countries played a central role in making economic development a key objective of climate responsibility. According to their Beijing Declaration in June 1991:

> Environmental problems cannot be dealt with separately; they must be linked to the development processes, bringing the environmental concerns in line with the imperatives of economic growth and development. In this context, the right to development for the developing countries must be fully recognized. (Quoted in Sachs 1993, 7)

Consequently, the Rio Declaration highlights the importance of development whenever possible, and the UNFCCC underlines sustainable development and the right developing countries have for development.

At the UNCED, China took a very reluctant attitude to international climate negotiations. For it, the UNFCCC was a great diplomatic success—its stances on sovereignty, opposition to interference in internal affairs, the responsibility of developed countries, development rights, foreign aid, and technology transfer were incorporated within the convention. By participating in the UNFCCC, China fulfilled its responsibility to cooperate. In other words, the participation per se was China's contribution. Furthermore, China refused to commit to any kind of emission reductions but demanded that developed countries must shoulder all the responsibility for climate change mitigation for historical reasons. As a non-annex state, China was not ordered to cut greenhouse gas emissions under the UNFCCC, but it was obligated to prepare national inventories of greenhouse gas emissions caused by human activities, to develop a national climate program to mitigate and adapt to climate change, and to conduct research on climate change. In 1992, the then Chinese Premier, Li Peng, ratified the UNFCCC.

The UNFCCC entered into force in 1994. At the first Conference of Parties (COP) in Berlin in 1995, the parties agreed that developed countries should set quantified emission reduction targets within specified timeframes, such as 2005, 2010, and 2020, and that these commitments should be written into a protocol. The Berlin Mandate hence launched the negotiation process leading to the adoption of the Kyoto Protocol in 1998. Negotiations culminated in two issues: What kind of emission reductions should developed countries undertake? Whether and, if so, what kind of mechanisms should be established to help developed countries to achieve their emission reduction targets in a flexible manner (Bodansky 2001)? The Kyoto Protocol defines that each Annex I country should agree on a legally binding, specific, and differentiated emission reduction target. Only Australia, Norway, and Iceland obtained targets that allowed them to increase their emissions above 1990 levels, and other developed countries were asked to cut their emissions up to 8 percent. In accordance with the CBDR, no quantitative targets were included for developing countries. To facilitate and monitor emission reductions, the Kyoto Protocol also established reporting and verification procedures, as well as three market-based mechanisms, Clean Development Management, emission trade, and joint implementation (so-called Kyoto mechanisms).

The U.S. ratified the UNFCCC in 1992 and hence, at least in principle, accepted the CBDR principle. Then U.S. President Bill Clinton signed the Kyoto Protocol in 1998, but his

successor President George W. Bush refused to ratify it. Bush (2001, 2002) found the protocol unfair, as it did not assign special responsibilities for major developing emitters, such as China and India. Naturally, the U.S. withdrawal from the Kyoto process diluted the scope of climate responsibility. Nonetheless, the Kyoto Protocol entered into force in 2005 after its ratification by Russia in 2004.

The Road to Paris and Beyond

The first Meeting of the Parties to the Kyoto Protocol in Montreal was in 2005 and established an ad hoc working group to organize negotiations of the second phase of the Kyoto Protocol (2012–20). Then, in 2007, the Bali Conference raised high, perhaps over-optimistic, expectations of the achievements of post-Kyoto climate negotiations. Notably, China and other developing countries committed to implementing nationally appropriate mitigation actions (NAMAs) of sustainable development supported and enabled by "measurable, reportable and verifiable" (MRV) technology, financing, and capacity building. Although NAMAs were not legally binding emission reduction targets but voluntary national policies, this was an important step in the negotiation process, as it was becoming more and more clear that major developing countries had become major emitters and that without their participation, climate change mitigation would be difficult. Many developing countries submitted their NAMAs by 2012, and many of them indeed pledged to undertake actions comparable to, or even more ambitious than, those of developed countries (see, for example, Held, Roger, and Nag 2013).

At the Copenhagen Conference in 2009, however, China and other developing countries argued that MRV standards only be applied to internationally supported climate actions but not voluntary, independently financed national actions. China, in particular, emphasized its sovereignty and declared that since its climate measures would not be supported internationally, they could not be externally reviewed (Bukovansky, Clark, Eckersley, Price, Reus-Smit, and Wheeler 2012, 149). China was pleased with the Copenhagen Accord, as it respected China's sovereignty and short-term national interests. However, other states blamed China for being irresponsible and for blocking progress, because it opposed not only binding the emission reductions for developing countries but also reducing the global greenhouse gas emissions by 50 percent by the middle of the century (Christoff 2010).

At the Durban Conference in 2011, the parties agreed to launch a new round of negotiations to compile a new climate treaty by 2015, to come in to force in 2020, and to include all the major emitters. The distinction between Annex I and non-Annex I was no longer mentioned, but the proactive climate policies of developing countries were considered increasingly important to tackling climate change. The EU also committed to the second commitment period under the Kyoto Protocol. Before Durban, the Chinese government determinedly refused to agree to any binding climate obligation and offered voluntary national objectives instead. Since the Durban Conference, however, China has taken a more constructive role in international climate negotiations. To some extent, the attitude change was driven by the desire to improve China's seriously damaged international image following the Copenhagen Conference. The government did not want to be viewed as the spoiler, because such an image would prevent the Chinese from expanding their businesses and political influence—both being important elements of the party-state's legitimacy on the domestic front. In addition, Chinese citizens started to complain more vociferously about air pollution and other environmental problems caused by economic growth. The government was forced to take these worries more seriously, again for legitimacy reasons. Finally, we should not ignore the role of great power management yielding change in China's attitude toward international climate politics. Sino-American climate cooperation was successful, and a shared understanding of the climate responsibility of great powers began to evolve between the two countries in the early 2010s. This gradually changed China's position vis-à-vis international climate negotiations (Kopra 2018).

The 2014 Lima Accord (COP20) asked all parties to develop their intended nationally determined contributions (INDC) well in advance of the COP21 in Paris. As a result, 187 sovereign states submitted their INDC to the UNFCCC. Even some very poor and conflicted areas, such as Afghanistan, issued a national climate change plan, and all together the INDCs represented about 95 percent of the world's greenhouse gas emissions (see UNFCCC 2016). The very inclusive—nearly universal—participation of states indicated a fundamental paradigm shift in climate responsibility. Although the CBDR was not abandoned, even developing countries were now required, and willing, to contribute to climate change mitigation. In other words, all states are now urged to "undertake and communicate ambitious efforts" to combat climate change (UNFCCC 2015). Again, the INDCs were not ambitious enough to limit the rise of global temperatures to 2°C.

At COP21, in 2015, a new international climate agreement entitled the Paris Agreement was adopted. China played a very influential role in the conference. Notably, the Paris Agreement decided to limit "the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels," recognizing that this would significantly reduce the risks and impacts of climate change. Although the goal of 1.5°C was appreciated, many analysts and NGOs did not deem it as realistic, since the agreement did not require measures ambitious enough to achieve it or the 2°C target. The COP21 also acknowledged the gap between states' emissions reduction commitments and the emission reduction actions needed to achieve the goal. It obligated states to submit an updated INDC by 2020 and, thereafter, every five years. It also asked the IPCC to produce a report in 2018 to describe a roadmap outlining how global temperature increase could be limited to 1.5°C above preindustrial levels. Furthermore, the Paris Agreement declared that states "aim to reach global peaking of greenhouse gas emissions as soon as possible . . . and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (Ibid.). This means that states pursue measures to achieve a carbon-neutral world.

Although the Paris Agreement does not distinguish between Annex I and non-Annex I countries, it is guided by CBDR. It stated that developed countries "should continue taking the lead by undertaking economy-wide absolute emission reduction targets." Nevertheless, it created a common framework for all countries' climate responsibilities. It noted that developing countries "should continue enhancing their mitigation efforts, and *are encouraged* to move over time toward economy-wide emission reduction or limitation targets in the light of different national circumstances" (Ibid., emphasis added). Moreover, the Paris Agreement established a transparency framework with a common binding commitment for all states involved. Each state is required to submit a "national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases" and to provide information "necessary to track progress made in implementing and achieving" their nationally determined mitigation and adaptation goals. This required a compromise from China, which previously viewed reporting obligations as a violation of its sovereignty. In addition, developed countries had to report on the financial, technology transfer, and capacity-building support they have provided to developing countries, and developing countries have to report on the support received, respectively (Ibid.).

The Paris Agreement noted that developing countries need assistance to implement their national climate action plans and that the peak in their GHG emissions may be realized later than that in developed countries (Ibid.). China was a strong advocate of this formulation, together with the BASIC countries (Brazil, South Africa, India, and China) and Like-Minded Developing Countries on Climate Change (LMDC) (including Argentina, Bolivia, China, Cuba, El Salvador, Ecuador, Iran, Nicaragua, Venezuela, Malaysia, Vietnam, Saudi Arabia, and India), which all resist legally binding GHG emission reduction targets for developing countries. These groups see no subcategories between developed and developing countries,

because such categories would apparently impede their position in international climate negotiations. Nevertheless, China no longer focuses exclusively on the historic responsibility of developed countries, since—in his speech to COP21—Xi Jinping (2015) called for all states to "assume more shared responsibilities for win-win outcomes."

The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (Loss and Damage Mechanism) was established in 2013. After long and heated debates, Loss and Damage gained its own article in the Paris Agreement. In particular, the COP21 not only asked that the Loss and Damage Mechanism "establish a clearinghouse for risk transfer that serves as a repository for information on insurance and risk transfer" but also that it "develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change." The COP21 hence acknowledged a special responsibility that is especially critical to international justice: Developed countries have to help poor countries cope with, for example, flood damages because it is the right thing to do even if they themselves do not benefit from the assistance. Essentially, loss and damage assistance is very different from mitigation and adaptation assistance, which also serves developed countries' interests through, for example, global emission reduction and the creation of business opportunities. At the insistence of the U.S., however, the COP21 noted that the ratification of the agreement does not "involve or provide a basis for any liability or compensation" (UNFCCC 2015). For the time being, a no-harm principle constituted the most important rule in the context of climate change damage. It applies to all the states, but in accordance with the CBDR, it is largely recognized that developed countries have better capacities to prevent environmental harm (Voigt 2008, 17).

Despite some shortcomings, the Paris Agreement is widely applauded as a historic landmark of climate responsibility. Although it does not include quantitative, binding emission reduction targets for any state—nor does it level sanctions if states fail to implement their climate action plans—there are strong hopes that states will fulfill their climate action pledges. It seems that one of the biggest strengths of the Paris Agreement is that although it does not set a top-down obligation, states have committed to voluntary, domestically appropriated mitigation plans. In particular, this style appealed to China, which prefers moderate voluntary commitments over legal international obligations, as there is no risk of failure and losing face. In contrast, China can easily exceed global expectations and gain international respect in this way. The bottom-up approach attracted the nearly universal participation of states, because it demonstrates both a strong global concern for climate change and the determined political will to combat it.

The Paris Agreement went into effect on 4 November 2016. Since it established an international framework of what parties were expected to do but did not specify how they should limit global temperature rise, the parties decided to negotiate and adopt a Paris rulebook by 2018. Those negotiations suddenly became more complicated as Donald Trump, who has called climate change a Chinese hoax, was elected U.S. president. As Trump had repeatedly threatened to vitiate the U.S. climate policy, his election immediately raised China's position as a new climate leader—whether or not it wanted this distinction or was ready for it (Kopra 2018). In June 2017, Trump did indeed withdraw the U.S. from the Paris Agreement, which opened a whole new chapter in international climate politics. The Chinese government has explicitly described itself as taking a driving seat in international climate negotiations (Xi 2017, 4). It remains unclear which direction China will lead the world: Toward more ambitious actions to mitigate climate change or toward a deeper bifurcation between developed and developing countries that will not be helpful for achieving the ultimate goals of the UNFCCC.

Climate Responsibility's Potential for a New Standard of Civilization

According to Holsti (2004, 144–45), a practice becomes institutionalized when "most states most of the time is consistent with its rules," "there is a reasonable consensus on the interpretation

of norms, rules, and rights," and it has "some authority independent of the particular interests of particular states at a given time." It seems that climate responsibility has now passed all three of these stages and now constitutes an institutionalized international practice. However, it is not clear whether it has proceeded to the stage of assimilation, where a new practice becomes the new normal and its rules become so widely accepted that they are taken for granted and embedded in other social practices. At the stage of assimilation, participants perceive the rules of practice to be legitimate and worthy of being obeyed. In the words of Hurd (1999, 387), when an "actor believes a rule is legitimate, compliance is no longer motivated by the simple fear of retribution, or by a calculation of self-interest, but instead by an internal sense of moral obligation: control is legitimate to the extent that it is approved or regarded as 'right.'" Although it is not crystal clear that climate responsibility has proceeded to this stage, this section investigates the potential of climate responsibility to achieve a status of a standard of civilization in the future.

By 1905, the standard of civilization emerged as a practice that was used by many societies, both Western and non-Western, to differentiate between the civilized and non-civilized or barbarian (see Gong 1984; Buzan 2014b). The differentiation was made by quite racist rankings, and the rules of practice defined what kind of requirements states must meet in order to become accepted, or civilized, members of international society. As the international society of that time was very European, the standard of civilization was firmly rooted in European norms and values, especially Christianity. After World War II, "the right of independence and sovereign equality" became fundamental international principles, and requirements for states' entry to international society were abolished (Buzan 2014b, 585). Although the standard of civilization was no longer used as an explicit legal idea after decolonialization, the practice did not disappear. Today, it continues to live on in practices of international law. As David Fidler (2001) pointed out, states and international organizations promote universal ideas such as human rights, rule of law, and good governance in order to "impose liberal, globalized civilization on the world." Yet, it can be argued that human rights is a (Western) practice that started to evolve after the horrors of World War II and has now somewhat achieved the status of a new standard of civilization.

Despite its Western origin, the concept of a standard of civilization could provide food for thought to environmental ethics. I believe that climate responsibility has great potential to become a new standard of civilization. This is not, however, an entirely novel idea. The possession of an environmental policy already became a status symbol during the years preceding the Stockholm Conference. It became a piece of "evidence that a nation belonged among the more advanced or advancing states of the world and not among the backward nations" (Caldwell 1990, 46, 49). Today, environmental protection is a routine aspect of any civilized state's practices, without a doubt. Though it is also now clear that climate change is happening, it has not yet caused significant changes in states' practices or the general public's life. In contrast to previous standards of civilization, such as human rights and democracy, climate responsibility is not a Western concept. Climate practices are a pragmatic attempt to respond to a physical problem pointed out by the natural sciences, and it is not about a colonial pursuit to expand Western (philosophical) practices. This does not mean the evolution of climate practices would not include the use of power, at least in discursive means. In contrast to the traditional West-rest framing of the concept, however, climate responsibility does not aim to spread racist views or Western ideas but to construct a genuinely global standard of conduct. Though there is a wide north-south gap, the placing of blame is the reverse of previous standards of civilizations. In climate responsibility, it is usually non-Western states attempting to advance principles and ask industrialized countries to shoulder their responsibility. Hence, it is more or less the developed countries seen as failing to live up to the standard of civilization in the sense of climate responsibility.

For China, this is obviously a desirable development. For years, it had been criticized for being an irresponsible member of international society, because it did not conform to the new standard of civilization. This criticism prevented it from taking its place as a full member of the

great power club and caused international suspicion and fears about its rising status (Suzuki 2008). At present, however, China is increasingly in a position to define what it means to be a responsible great power in today's world. Clearly, it is not reasonable to assume that China will promote human rights and democracy as the new standard of civilization or attributes of great power responsibility. As climate responsibility does not collide with China's national interests, it is a plausible candidate for a new standard of civilization in a China-led international society.

Conclusions and Discussion

In this article, I demonstrated that climate responsibility fulfills all three requirements of Schatzki's (1996, 98–110) integrative practice: 1) There is a practical understanding of the causes and effects of climate change, and, at least to some extent, a shared understanding of how to identify those who bear the biggest responsibility to take the required actions against climate change and what would count as a responsible response to climate change. 2) There are collectively agreed-upon rules on how states should distribute and act out climate responsibilities, and some of these rules are formalized in international (soft) law. 3) It has a teleoaffective structure—it is a goal-oriented practice holding its "ends, purposes, projects, and tasks" to avoid the adverse effects of climate change. Climate change mitigation (and reporting on materialized climate actions) is now perceived as a general responsibility held by all states. Hence, climate responsibility is evidently an established international practice, which even the most powerful states must take part in if they wish to be and to be seen as good international citizens. That is why all the participants have continued to take part in the negotiations even if they did not accept or later withdrew from the Kyoto Protocol. None of the participants have simply walked away from the UN climate negotiations, despite the widespread discord and pointed criticism of each other's contributions. The fact that the UNFCCC was negotiated very quickly, in about two years, indicates two points: On the one hand, it demonstrates universal concern over and willingness to tackle climate change. On the other hand, it illustrates that the UNFCCC was not seen as a powerful institution that would somehow hamper states' national interests. In this sense, it is not a big surprise that while the UNFCCC enjoys the near universal participation of international society, later international negotiations on the Kyoto protocol—and especially on the post-Kyoto protocol—were much more difficult and slower processes. As the negotiations aimed to set up legally binding emission reduction targets for individual states, they challenged the established institutions of international society and put states' sovereignty and national interests at risk. At the same time, the difficulties of the post-Kyoto negotiations prove that UNFCCC has gained and is likely to gain more strength in the future. If it was an unimportant and weak practice, why would it be so contested?

As the emergence of climate responsibility indicates a profound normative change in international society, it invites a question: Can climate responsibility be identified as a primary institution of international society? In the light of this paper, climate responsibility indeed seems to fulfill the qualifications of a primary institution as defined by Friedner Parrat (2014): It is a truly international, routinized practice with norms and rules. It is consciously upheld and endorsed by a critical mass of states. And it has remained quite stable over time. It is also embodied in and shapes many global and domestic practices simultaneously. Clearly, climate responsibility remains only an emerging primary institution, as there are still wide disputes about its rules and it clashes with established institutions. It has not managed to construct a thick international society, and many central issues, such as finance and compensation, remain unsolved (see also Palmujoki 2013). From the ES perspective, however, the disputes do not make it weaker, but indicate that climate responsibility is gradually becoming a weightier international practice.

Another critical question is whether or not climate responsibility will develop as a standard of civilization that defines and validates the practices of civilized members of international society as well as of world society in the future. Unfortunately, as James Speth (2008, 211) noted, the "surest path to widespread cultural change is a cataclysmic

event that profoundly affects shared values and delegitimizes the status quo and existing leadership." A fundamental paradigm shift creating the new ecological consciousness and solidarist morals in international society would hence require a disastrous and abrupt climate crisis, as pictured by a Hollywood movie entitled the *Day After Tomorrow*. On the one hand, the securitization of climate change is not necessarily a desirable trend, as it could lead to a more pluralist international society in which more powerful states could use environmental threats as an excuse to interfere in other states' internal affairs. On the other hand, securitization could promote a global we-feeling among political leaders and citizens and gives impetus to global efforts against climate change. If, or when, climate crisis becomes more tangible, and its adverse effects harm people (and nature) around the world, it would not be very difficult to imagine that those who reduce their emissions would be seen as civilized and that those who continue polluting in the business-as-usual style would be seen as uncivilized, respectively (see also Buzan 2014b, 590–91). If climate responsibility acquires a higher normative standing in the world, practices of other international organizations are likely to change as well. For example, the mandate of the UN Security Council could be redefined.

Due to the state-centric features of international society, state agency and that of great powers is an essential force of change in international society. Therefore, the leadership of China and the U.S. will be especially crucial in building the political will needed to strengthen climate responsibility. For a long time, China's conception of climate responsibility was retrospective. It focused exclusively on examining historic responsibility. This view naturally emphasized the historic responsibility of developed countries and assigned less—and even no—responsibility to developing countries, including China. Compared to its standpoints at the UNCHE and the UNCED, China's role within contemporary international climate politics has changed radically. After the Copenhagen Conference, China learned that it is in its interest to respond to climate change and that taking on a more constructive role in international climate negotiations might improve its damaged international image. In particular, severe air pollution has started to cause increasing social discontent in China, and in order to legitimize its position, the Chinese government has had no choice but to take climate change seriously. Moreover, Sino-American climate cooperation provided China with a chance to represent itself as a great power on the international stage. In particular, Barack Obama's climate diplomacy convinced China that great powers have great responsibilities in addressing the problems related to climate change. As a result, China has begun to advocate climate responsibility as an attribute of a great power's responsibility (Kopra 2018). Again, Donald Trump's harshly criticized decision to withdraw the U.S. from the Paris Agreement has had the effect of raising China to a new kind of leadership role in international climate politics. This transformation is likely to elevate China's role in other fields of international society as well. Although China continues to underline its developing country status and holds fast to the CBDR principle, the country increasingly defines itself as a great power in international climate negotiations. It has great potential for acting as a role model when it comes to climate responsibility if it manages to modernize without recklessly increasing GHG emissions. In any event, China plays an increasingly important role in the potential evolution of climate responsibility as a standard of civilization.

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Five New Book Summaries

by Christopher M. Jackson

Global Norms with a Local Face: Rule of Law Promotion and Norm Translation, Lisbeth Zimmermann, Cambridge UP, 2017

In *Global Norms with a Local Face: Rule of Law Promotion and Norm Translation*, Zimmermann sought to answer the question of how external rule of law promotion and local processes interact to "translate" global norms. The central purpose is to challenge the predominant existing theories of norm socialization and localization and elucidate the interactive relationship between international institutions and local actors in promoting rule of law norms. While existing theories primarily address one-sided power dynamics in norm-diffusion, Zimmermann presented the process as two-way, in which feedback from local actors affects the norm "scripts" themselves. The author's main argument is that feedback loops between international and local actors cause external actors to become enmeshed in domestic discourse, frames, and political contestation. This in turn causes them to change their style of interaction and rediscuss norms jointly with domestic stakeholders.

To make this argument, the author considered three instances of international norm translation in the case of Guatemala, a "paradigmatic post-conflict state." These types of norm translation are identified as complete rejection, reshaping through addition or omission, and full adoption as is. First, Zimmermann analyzed the process of translating international children's rights norms (Convention on the Rights of the Child) and found it was an interactive process that led to minor modification—though it remained within the bounds of UNICEF standards. For the convention to be adopted, UNICEF had to bring disparate political groups into dialogue, and frame it within the context of salient political issues at the time, namely security and family rights. Second, the author analyzed translation of global Access to Information (ATI) norms and found they underwent more substantial modification than the Convention on the Rights of the Child. The issue was polarized and received strong support from human rights and transitional justice groups but faced stiff opposition from the military and security establishment. Third, Zimmermann analyzed the translation of scripts on rule of law commissions and found it was a much more interactive process, given the low precision of the scripts. Furthermore, the trial-and-error type of approach to rule of law provided a highly interactive feedback loop to international stakeholders.

In sum, the author contended that this process is modeled in a feedback loop. International actors initially press for full adoption. Such factors as the precision of norms, the style of interaction, and prevalent domestic frames determine how norms are modified or rejected. To conclude, Zimmerman argued that norm diffusion is best conceptualized as a process of appropriation, in which local preferences are paramount to adoption.

International Law as a Belief System, Jean D'Aspremont, Cambridge: Cambridge UP, 2018

In *International Law as a Belief System*, D'Aspremont sought to conceptualize international law and its practitioners as existing within a belief system in which fundamental doctrines and discourse define the community and reinforce its boundaries. The author identified three features of the international legal system that he contended form a belief system. First is ruleness, the idea that fundamental doctrines constitute dogmatic and system-wide rules. Sec-

ond is imaginary genealogy, a fictive history of the origins and development of fundamental doctrines derived from international instruments. Third is self-referentiality, explaining fundamental doctrines by using those doctrines. The combination of these three features creates the image of a composite order and validates behavior and sanctions for breach thereof. The argument put forth by the author is that these features constitute a belief system in which fundamental legal doctrines serve as a source of transcendental validation and reinforcement of the system.

To make the argument, D'Aspremont first considered the fundamental legal doctrines in international law. Though derived from a few international instruments, he posits that they serve as broader validation in legal practice, while also serving to constrain decisions. These fundamental doctrines, dominant in international law, do not naturally coalesce but rather are carefully orchestrated by practitioners. Jus Cogens serve as a justificatory space within the belief system, while customary international law links such orchestrated doctrines together. To conclude the book, the author invites practitioners of international law to unlearn their existing belief system and reimagine legal doctrines as based on actor interactions and processes not captured in the existing fundamental doctrines that define the system.

Grassroots Activism and the Evolution of Transitional Justice: the Families of the Disappeared, Iosif Kovras, Cambridge: Cambridge UP, 2017

In *Grassroots Activism and the Evolution of Transitional Justice: The Families of the Disappeared*, Kovras sought to answer the question of what role victims' groups and specifically families had in contributing to transitional justice norms and institutions. The narrative focuses specifically on the crime of enforced disappearance, which the author defined as the arrest, detention, abduction, or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state. The activation of transitional justice is conceptualized in three distinct phases. An early period, after a negotiated transition when security concerns and amnesties inhibit truth recovery. This is followed by a forensic phase in which recovery and identification of remains is the priority. The broader stage follows the forensic phase and includes criminal investigation of conditions and policies under which disappearances and atrocities occurred. The author argued that these phases are determined solely by the conditions of transition, which are political processes over which victims' groups and families have no control. Furthermore, the type of crime committed by a regime rarely influences the transition policies. However, organized victims' groups, existing prior to transition, can interact with favorable transition policies to trim amnesties, pressure forensic investigations, and judicialize truth-seeking, thus contributing the realization of a broader truth phase in justice.

To make his argument, the author employed a mixed methodology. A new qualitative database of disappearances and missing persons (DIMIDA), begun because of political violence since 1975, is introduced in the early chapters. However, the majority of the narrative is built upon five case studies. In the case of Argentina, the author identified the role of families, especially mothers and grandmothers that organized prior to the end of the dictatorship, as crucial agents of pressure for justice following the transition to democracy. In the case of Lebanon, families were less effective as a persistent fragile security situation and weak institutions marginalized opportunities for mobilization and justice. Cyprus provided a case in which security concerns and institutional silence were eventually overcome by changes in domestic leadership. In the case of South Africa, after transition from Apartheid to democracy, the ruling party had monopolized the problem of the missing, marginalizing the role of the family. The ANC decision not to pursue retributive justice and sacrifice justice for truth was unable to be challenged by individual families. Chile is a case in which the author described justice as "peeling the onion." A central role for judges and justice institutions in the forensic phase

translated into easy access for families and the judicialization of truth in the broader truth phase. In conclusion, the author contended that the broadening of the temporal and conceptual scope of transitional justice opens space for families and victims' groups to operate after the transition from the oppressive regime. However, the inherent tension between stability, legality, and morality affects both the type of transition and the opportunity to pressure for justice.

Humanity at Sea, Itamar Mann, New York: Cambridge UP, 2016

In *Humanity at Sea*, Mann conceptualized the refugee experience as a human rights encounter that challenged existing norms of sovereignty and social contracts. The author contended that refugees are privileged to the "rights of encounter." Those rights do not stem from inclusion in a political community or social contract but arise when individuals make demands in the name of their own humanity, pressing others to respond. This, he argued, creates a moral rather than legal duty for states responding to refugees. They are not bound by international law to rescue drowning strangers. However, there is a moral prescription to do so. Existing international law is based upon the norm of sovereignty by which refugees are not legally protected by authorities. Refugees thus seek to create a moral obligation for their addressees by appealing their conscience and implicating them in their own plight. Such a moral appeal for authorities is based on a normative desire to not collude in the claimants' killing.

To form his argument, Mann charted the human rights encounters of refugees in five cases. In the case of the *Exodus*, Jews departing post-war Europe for Palestine, the refugees appealed to authorities' normative obligations to not return them to Germany and also sought to make a positivist legal claim by establishing their own sovereign state and social contract. The case of the Southeast Asian "boat people" was one in which the claimants asserted their human rights through struggle, departing repressive states to create an obligation for other states to rescue them, thus granting them human rights. The following two cases, though, illustrate government attempts to avoid the human rights encounter by strictly invoking legal principle. In the case of Haitian refugees making for the U.S., authorities sought to avoid the encounter by intercepting them on the high seas and placing the legal onus on the claimants to demonstrate their status as refugees. More than 12,000 were returned to Haiti. In the case of Asian migrants trying to reach Australia, the Australian government sought to avoid encounters by ordering the coast guard to ignore refugee boats. The refugees, however, responded by engaging in self-harm and creating emergencies that fostered a moral humanitarian obligation for the Australian authorities. To finish the narrative the author presented the contemporary case of Libyan refugees attempting to reach Europe, in which legal and political discourse have begun to recognize the asymmetric relationship between claimants and authorities in the human rights encounter. In conclusion, the author calls for rethink of international refugee law, based not solely on sovereignty but on the question of how agents of the state should respond when faced with an unenforceable human rights encounter.

Electing Peace: From Civil Conflict to Political Participation, Aila M. Matanock, Cambridge: Cambridge UP, 2017

In *Electing Peace: from Civil Conflict to Political Participation*, Matanock presented an "External Engagement Theory" of post-conflict peace that challenges the types of commitment problems persistent in post-conflict literature. The central argument of the book is that external actors can minimize their commitment problem in post-conflict settings by including electoral participation provisions in the peace settlements. Electoral provisions for democratic competition, post-conflict, strains the external actors less to provide a prolonged armed presence and naturally facilitates enforcement. The coordination cycles of regular elections provide regular milestones for monitoring, benchmarks for compliance, and increase informa-

tion about the parties' preferences at moments of power distribution. Furthermore, this natural cycle provides a means by which external actors can mentor local counterparts and enforce best practices at a low cost and with a limited threat of resurgent conflict. The theory implies both more robust democracy and enduring peace in such settings.

To development the theory, the author first demonstrated a trend of increasing electoral participation provisions in peace agreements following the Cold War. Next, the author considered the causes of electoral participation provisions. Sufficient nonpartisan external engagement allows the parties in conflict to commit the agreement and positively correlates with the inclusion of electoral participation provisions. Inclusion of such provisions has increased post–Cold War, as interveners have lent more support and resources to democracy promotion rather than geopolitical security concerns. The outcomes the author identified are easier, lowered cost enforcement of agreements, and increased stability. Regular electoral processes reduce private information and provide a mechanism by which to easily sanction rule-breakers. In addressing stabilizing effects, the author rejected hypotheses that contend elections lead to instability. Instead, a stabilizing effect is demonstrated by which resurgent conflict is less likely and peace more durable. In conclusion, Matanock contended that external engagement theory and the inclusion of electoral participation provisions alleviates commitment problems, lowers the need for military invention, and increases the chance of post-conflict demo cratization and durable peace.

New Developments in International Norms and Governance

Edited by Henry F. Carey

I. Torture Committee's Concluding Observations and Decisions

II. Organizational Matters Before Torture Subcommittee

III. Procedures of the Human Rights Treaty Bodies for following up on Concluding Observations, Decisions and Views

IV. Operations of the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review

V. Principles and Practical Guidance on Protection of the Human Rights of Migrants in Vulnerable Situations

VI. Special Rapporteur Report on Trafficking in Persons, especially Women and Children on her Mission to the United States of America

VII. Committee Statements on Occasion of Seventieth Anniversary of the Universal Declaration of Human Rights

VIII. Information received from the United States of America on Follow-Up to the Concluding Observations

IX. Sustainable Development Goals and Realizing the Right to Work

X. Draft Guidelines for States on Effective Implementation of the Right to Participate in Public Affairs

I. Committee against Torture's Organizational Decisions, CAT/C/SR.1535

Report on follow-up to concluding observations under article 19 of the Convention . . .

1. **The Chair** invited Mr. Hani to present the progress report on follow-up to article 19.

2. **Mr. Hani** (Rapporteur for follow-up to concluding observations) said that between its 59th and 60th sessions, the Committee against Torture had received 11 follow-up reports concerning nine States parties. Generally speaking, States parties had complied with the reporting procedure, and some reports had even been submitted before the deadline, which demonstrated an eagerness to comply with the procedure. In accordance with paragraph 27 of the Guidelines for Follow-up to Concluding Observations, letters had been sent to the approximately 17 States which were over three months late in submitting their reports. Lastly, the Committee's database had been updated with additional information from States parties, observations from civil society and other stakeholders, in addition to the aforementioned letters.

3. **The Chair**, recalling that in 2015 the follow-up guidelines had been revised to invite States parties not only to respond to follow-up recommendations, but also to submit implementation plans for the remaining recommendations in the concluding observations, asked whether any States had yet presented such implementation plans.

4. **Mr. Hani** said that indeed that was the case. Moreover, there was interest on part of the Office of the High Commissioner for Human Rights (OHCHR) in following up on the process. The Tunis bureau of OHCHR had included the implementation plan within the follow-up procedure. It was hoped that some States parties would eventually incorporate the implementation plans into their follow-up reports.

5. **Ms. Belmir** said that in the meetings between the Committee and States parties, the issue of the follow-up procedure had not often been raised. The most important aspect was that States should respond within the prescribed time frame, a point which had not been sufficiently stressed. Perhaps greater emphasis could be placed on the relationship between the recommendations made by the Committee and the answers given by States parties.

6. **Mr. Hani** said that the situation varied from one country to another. The 2015 guidelines assessed the relevance of the information provided, as well as the extent to which implementation had been achieved in each State…

7. **The Chair** invited Mr. Machon to present the progress report on follow-up to article 22.

8. **Mr. Machon** (OHCHR, Rapporteur for follow-up to decisions on complaints submitted under article 22 of the Convention), introducing the report on information received from States parties and complainants since the conclusion of the 59th session, said that in *Tahir Hussain Khan v. Canada* (communication No. 15/1994), the complainant had received a temporary residence permit and was eligible to apply for permanent residence, whence the recommendation to close the follow-up dialogue with a note of satisfactory resolution.

9. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 327/2007

10. **Mr. Machon** (OHCHR) said that in *Regent Boily v. Canada* (communication No. 327/2007), the State party had reportedly approved the complainant's request by way of adopting the Act on International Transfer of Offenders. The Secretariat thus recommended continuing the follow-up dialogue and sending a letter by the Special Rapporteur on Follow-up requesting the State party to specify the measures taken to implement the Committee's decision, following the adoption of the aforementioned Act.

11. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 441/2010

12. **Mr. Machon** (OHCHR) said that in *Oleg Evloev v. Kazakhstan* (communication No. 441/2010), the Committee had urged the State party to conduct a proper, impartial and independent investigation into the acts of torture committed against the complainant. A pretrial

investigation was currently under way, and the State party had made a commitment to report on its outcome. The Secretariat therefore recommended continuing the follow-up dialogue and asking the State party for updates on the progress of the investigation.
13. **Ms. Gaer** said that perhaps the recommendation could be made more proactive if the Committee established a deadline for an update on the investigation, thereby strengthening the procedure. Sixty days from 9 May 2017 seemed acceptable, since the State party had already been sent the relevant material on 10 April 2017.
14. **The Chair** suggested that such a deadline could be applied to all cases, and not just *Oleg Evloev v. Kazakhstan*.
15. **Mr. Machon** (OHCHR) asked whether the Committee thought a 30- or 90-day deadline would be preferable.
16. **The Chair** said that, in order to ensure consistency with the language normally used in decisions on individual communications, 90 days would be reasonable.
17. **Ms. Gaer** said that, since the Committee would be meeting again in 90 days, 60 days was a better option in that context.
18. **The Chair**, agreeing with Ms. Gaer's argument, said that the Committee adopted the recommendation of the Secretariat with the amendment proposed.

Communication No. 477/2011
19. **Mr. Machon** (OHCHR) said that in *Aarrass v. Morocco* (communication No. 477/2011), the Rapporteur, upon the recommendation of the Secretariat, had registered a new complaint in the light of the deterioration of the complainant's conditions since his transfer to Tifelt 2 Prison on 10 October 2016. The Secretariat thus recommended continuing the follow-up dialogue and requesting a meeting with the Ambassador and Permanent Representative of Morocco to the United Nations Office at Geneva to discuss the possible measures by the State party's authorities to implement the Committee's decision. Thus far, efforts to arrange a meeting with the Ambassador had not been successful; if the meeting could not be arranged by the end of the 60th session, perhaps during the 61st session a meeting could be arranged between the Chair, the Follow-up rapporteur and the Ambassador.
20. **Mr. Bruni** said that, because the complainant was in very poor health, interim measures of protection had been requested at the time of registration of the communication.
21. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 490/2012
22. **Mr. Machon** (OHCHR) said that in *E.K.W. v. Finland* (communication No. 490/2012), the Secretariat, which had sent two reminders to provide comments, had not been very successful in obtaining updates from the complainant's counsel. Hence, it recommended continuing the follow-up dialogue, with the possibility of sending a third reminder to the complainant's counsel.
23. **Ms. Gaer** said that she was disappointed with that outcome. Although the Committee had adopted its decision two years earlier, it had received no word on the complainant's status to date. The State party or the complainant's counsel should have been able to provide information as to what had happened to the complainant. The Finnish authorities in Geneva should be asked for a response and be given a time frame within which to provide it.
24. **The Chair**, agreeing with Ms. Gaer's argument, said that the Committee adopted the recommendation of the Secretariat with the amendment proposed.

Communication No. 497/2012
25. **Mr. Machon** (OHCHR) said that in *Rasim Bayramov v. Kazakhstan* (communication No. 497/2012), the complainant had been subject to a forced confession in the context of a criminal investigation. In 2014, the Committee had urged the State party to conduct a proper, impartial and independent investigation into those responsible for the complainant's treatment.

In 2016, the complainant had contracted tuberculosis while in prison and had subsequently died in the prison hospital, which made his mother the beneficiary of the remedy requested by the Committee.

26. Although the State party had not provided much assistance on the matter, a note verbale, which needed to be reflected in paragraph 21 of the follow-up report (CAT/C/60/3), had made it known that the investigation had been terminated without a satisfactory outcome because of a lack of evidence against three suspects in the complainant's case. The State party could therefore not overturn the deceased complainant's criminal conviction. For those reasons, the Secretariat recommended continuing the follow-up dialogue and requesting a meeting with the Permanent Representative of Kazakhstan to the United Nations Office at Geneva at the 61st session in order to seek additional updates.

27. **The Chair** said that the Permanent Representative had actually made a commitment to encourage the authorities to look into the matter again to see whether it would be possible to overturn the conviction, resume the investigation and provide a more adequate remedy to the complainant's mother.

28. **Ms. Gaer** said that, despite the fact that the Committee had asked the State party to provide remedy by way of investigation, reparation, and preventive measures, in view of the complainant's death in prison, it was clear that such remedy had not been adequately provided. It seemed that the Committee should do more than simply continue the dialogue with the State party; it would be worth stressing that the State party had an obligation to furnish compensation and rehabilitative care. It would be interesting to know what its plans were in that regard. However, it was unclear how to put the issue forward without reducing the value of a life to a monetary amount.

29. **The Chair** said that, more than simply continue the dialogue, the Committee had done everything possible to effect changes. It had pressed the Permanent Representative to review the decisions with which it disagreed and had expressed its dissatisfaction with the amount awarded to the complainant's mother as compensation.

30. *The Committee adopted the recommendation of the Secretariat, taking into account the additional remarks which had been made.*

Communication No. 503/2012

31. **Mr. Machon** (OHCHR) said that in *Boniface Ntikarahera v. Burundi* (communication No. 503/2012), the Committee had urged the State party to conduct an investigation to prosecute the alleged perpetrators of acts of torture. A judge had opened an inquiry, which had included a medical examination of the complainant, but the complainant's health remained precarious. There was a pending request for the State party's observations on a submission by the complainant transmitted on 28 March 2017. For those reasons, the Secretariat recommended continuing the follow-up dialogue and reverting to an assessment of implementation at subsequent sessions.

32. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 523/2012

33. **Mr. Machon** (OHCHR) said that in *X. v. Finland* (communication No. 523/2012), the Committee had concluded that the deportation of the complainant to Angola would amount to a breach of article 3. Since the complainant had received a renewable residence permit, the Secretariat recommended closing the follow-up procedure, with a note of satisfactory resolution, subject to the comments of the complainant's counsel; no such comments had been received thus far. Should the complainant again be subjected to a new decision on his forcible removal from Finland, he might resubmit a complaint to the Committee.

34. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 562/2013

35. **Mr. Machon** (OHCHR) said that in *J.K. v. Canada* (communication No. 562/2013), the Committee had concluded that the complainant's removal to Uganda would constitute a breach of article 3. It urged the State party to refrain from forcibly returning the complainant to his country of origin. The Secretariat recommended continuing the follow-up dialogue, sending a reminder for comments by the complainant and, subject to the complainant's comments, eventually closing the follow-up dialogue with a note of satisfactory resolution.

36. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 580/2014

37. **Mr. Machon** (OHCHR) said that *F.K. v. Denmark* (communication No. 580/2014) was a case which had essentially been re-registered in 2016 because of the unsatisfactory implementation of the Committee's initial conclusion. The new complaint had included a request for interim measures and a reiteration of the request for the observance thereof. In April 2017, the State party had submitted that the complainant's additional comments had not given rise to further observations. The Secretariat thus recommended continuing the follow-up dialogue.

38. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 606/2014

39. **Mr. Machon** (OHCHR) said that in *Naâma Asfari v. Morocco* (communication No. 606/2014), the Committee had decided that the State party had the obligation to provide compensation and rehabilitation, to initiate an impartial and thorough investigation of the alleged events, and to refrain from any pressure, intimidation or reprisals. The Court of Cassation had referred the complainant's case to the Court of Appeal in late summer 2016, and the State party had informed the Committee that it would no longer exchange information on follow-up unless the current domestic procedures were terminated. Since the investigation of the complainant's allegations of torture remained pending, the Secretariat recommended continuing the follow-up dialogue and requesting a meeting with the Ambassador and Permanent Representative of Morocco to the United Nations Office at Geneva to discuss measures the State party's authorities could take to implement the Committee's decision.

40. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 628/2014

41. **Mr. Machon** (OHCHR) said that in *J.N. v. Denmark* (communication No. 628/2014), the complainant's counsel had expressed satisfaction that he had been granted asylum. The Secretariat thus recommended closing the follow-up dialogue, with a note of satisfactory resolution.

42. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Communication No. 634/2014

43. **Mr. Machon** (OHCHR) said that in *M.B., A.B. et al. v. Denmark* (communication No. 634/2014), the Committee had concluded that the State party had an obligation to refrain from forcibly removing the complainants from its territory. In 2017, the Danish Refugee Appeals Board had reopened the complainants' asylum cases for review, but the Board had ultimately ordered the complainants to leave Denmark. Initially, the Secretariat had recommended continuing the follow-up dialogue. However, taking an approach similar to that in *F.K. v. Denmark*, the complainants' counsel had recently requested the registration of a new case because of the unsatisfactory implementation of the Committee's decision. It would thus be helpful to hear the Committee's preference as to how to proceed, whether to address the matter in the context of follow-up or to adhere to the precedent set by *F.K. v. Denmark* and register a second complaint.

44. **Mr. Hani** said that, since comments from the complainants were pending, it would be acceptable for the Committee to decide on the matter at its subsequent session, when it would have received those comments.
45. **The Chair** said that the Committee would act in accordance with Mr. Hani's suggestion.

Communication No. 682/2015
46. **Mr. Machon** (OHCHR) said that in *Abdul Rahman Alhaj Ali v. Morocco* (communication No. 682/2015), because the complainant had been in pre-trial detention since 2014, the Committee had urged the State party to either release him or try him if charges were brought against him in Morocco. By January 2017, the State party had not yet implemented the Committee's decision. In March 2017, while on a hunger strike to protest his detention, the complainant had been visited by plain clothes police officers, who had proceeded to coerce him into signing an acceptance of extradition to Saudi Arabia. In the light of the gravity of the complainant's subsequent allegations of psychological torture, the Committee's rapporteurs had urged the State party to provide the necessary clarifications on the complainant's situation. To date, the State party had not responded to that request. The Secretariat thus recommended continuing the follow-up dialogue and requesting a meeting with the Ambassador and Permanent Representative of Morocco to the United Nations Office at Geneva in order to discuss the possible measures by the State party's authorities to implement the Committee's decision.
47. **The Chair** said that the Committee adopted the recommendation of the Secretariat.

Report on follow-up to reprisals
48. **The Chair** invited Mr. Bruni to present the progress report on follow-up to reprisals.
49. **Mr. Bruni** (Rapporteur on reprisals) said that the only case of reprisals concerning the reporting procedure involved Burundi. At the Committee's review of the State party's report in 2016, four lawyers had presented information on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Burundi. On the very day of the presentation, the Public Prosecutor of Bujumbura had ordered the Bar Association to disbar the four lawyers for their involvement in public uprisings against the President in 2015. The Bar Association had replied that, given the principle of presumption of innocence and the insufficient evidence of their involvement in the riots, the lawyers could not be disbarred.
50. The Public Prosecutor had thus turned to the Court of Appeal, which on 16 January 2017 had issued its decision, permanently disbarring three of the four lawyers and suspending the fourth for one year. The authorities' immediate action against the lawyers had suggested a link between their collaboration with the Committee, whereby they had provided information unfavourable to the Government. After contacting the Secretariat, the Chair and he had sent a second letter to the Ambassador of Burundi (the first one had resulted in what was, in effect, no response), detailing the conclusions of the Committee, noting the appeals process which had led to the disbarring of the four lawyers and pointing out the apparent connection between the lawyers' work with the Committee and their disbarment. The Government had been asked to provide the Committee with an explanation of the matter; no deadline had been given for such explanation, as it had been hoped that the goodwill of the Government would impel it to be forthcoming. The letter had been sent on 21 February 2017, and thus far no response had been received.
51. **Ms. Gaer** said that it might be advisable to notify the Secretary-General of the matter so that it might be included in his report. It might also be useful to notify the Special Rapporteur on the Situation of Human Rights Defenders or the Special Rapporteur on the Independence of Judges and Lawyers, for example. It would be interesting to know, moreover, whether the four lawyers were safe.

52. **Mr. Touzé**, expressing his agreement with Ms. Gaer, said that, since several United Nations bodies were concerned with Burundi, it would be a good idea to coordinate all their efforts, rather than have each approach the issue individually. Ms. Gaer had suggested notifying the Secretary-General, but there was also a commission of inquiry which unfortunately was unable to operate as it should; perhaps it, too, could be notified. It could thus be useful to organize a meeting among all those bodies in order to find a common solution.
53. **The Chair** said that the Committee would consider that proposal during its 61st session.
54. **Mr. Bruni** said that he believed that the Special Procedures were aware of the situation. He would remind the Secretariat of the Committee's decision to inform the Secretary-General for the purposes of his report. In addition, despite its lack of access to the State authorities, the commission of inquiry should also be formally notified of the case. The four lawyers in question were safe because they did not live in Burundi, but rather, in neighbouring countries; they were in contact with official international NGOs, which provided a channel by which the lawyers could transmit information which could be useful to the Committee.

II. Organizational Matters Before Torture Subcommittee, CAT/C/SR.1531

1. **Sir** Malcolm **Evans** (Chair of the Subcommittee on Prevention of Torture), presenting the Subcommittee's 2016 annual report (CAT/60/3), said that, though there had not been any new ratifications, a number of countries had made the commitment to ratify the Optional Protocol to the Convention against Torture by the end of 2017. It was worth highlighting that Africa now had the largest share of States parties. Seven new members had joined the Subcommittee at the beginning of 2016.

2. Regarding country visits, the Subcommittee had significantly changed its approach as it had stopped differentiating between different types of visits. It was currently carrying out 10 visits per year, which was as many as could feasibly be accomplished with the resources and time available. Once again, the Subcommittee had found itself forced to suspend a visit—in the event, to Ukraine—owing to an inability to access places of deprivation of liberty in a useful manner. However, the visit had been resumed and completed in September 2016 following a dialogue with the State party. Visits were not an end in themselves; rather, they were the beginning of a relationship between the Subcommittee and the State party. There was a growing trend among States to give their consent for the visit report to be made public; just under two thirds of reports were available on the Subcommittee's website. That impressive rate notwithstanding, the Subcommittee was concerned at the number of States, listed in paragraph 21 of the annual report, that had not responded to their respective visit report. It should be noted, however, that some overdue States had contacted the Subcommittee via other means. Due to the sheer volume of work, the Subcommittee would be requesting an additional week of meeting time to be granted for the 2018–2019 biennium.

3. Some 57 of the 83 States parties had informed the Subcommittee of the establishment of their national preventive mechanism, but over 20 had failed to comply with their obligation under article 17 of the Optional Protocol in a timely manner. In response, the Subcommittee had decided to post a list of States that were more than three years behind, making it clear that the only way to be removed from the list was to set up a national preventive mechanism. The Subcommittee expected for the first time to be able to remove some States from the list at its next session.

4. The donations to the Special Fund, while naturally very welcome, remained insufficient to sustain the Fund in future. Pointing out that the Subcommittee had done away with the section of the annual report that had traditionally been devoted to substantive issues, chiefly because of word limits, he announced that the Subcommittee was considering moving towards more formal papers similar to general comments.

5. **Mr. Bruni** asked how the Subcommittee, bolstered by a decade of experience, would assess the national preventive mechanisms, specifically with regard to whether they met expectations, how efficient they were and whether they were helpful in the context of country visits.

6. **Ms. Racu** asked what the Subcommittee's approach was to visiting places of detention in de facto territories like Transnistria.

7. **Mr. Hani** asked whether there were plans to set up a system to assess and rank national preventive mechanisms. Recalling that the Committee was revising its general comment on article 3 of the Convention, he wished to know whether the Subcommittee and national preventive mechanisms might play a role in monitoring the situation of persons subject to removal from one country to another.

8. **Ms. Gaer** commended the Subcommittee on achieving such a milestone. Recalling that the Committee sometimes conducted visits to countries under the confidential inquiry procedure, asked how the Subcommittee viewed coordination between the two bodies in order to avoid overlapping visits.

9. **The Chair** said that there was scope to further deepen the relationship between the two bodies. Position papers and general comments were an obvious area of cooperation; in fact, the bodies might even consider creating joint working groups. It was vital that they should

have coordinated views on key issues. Why had the Subcommittee decided to stop producing the annual visit programmes? Was that not less transparent?

10. **Sir** Malcolm **Evans** (Chair of the Subcommittee on Prevention of Torture) said that the Subcommittee had always been of the view that it was not its role to give formal accreditation to national preventive mechanisms. However, it had produced considerable guidance on the matter, as well as self-assessment questionnaires, and maintained a dynamic relationship with most national preventive mechanisms that enabled it to know what their shortcomings were. National preventive mechanisms were very responsive to the Subcommittee's feedback and frequently contacted it with questions on practical issues.

11. The Subcommittee occasionally encountered the problem of places of detention that were difficult to reach because they were located in areas not under the direct control of the State. It had indeed happened in the Republic of Moldova, where the Subcommittee had not visited places in Transnistria because other activities had been going on at the same time. During the visit to Ukraine, the Subcommittee had met with the de facto authorities in the area of Donetsk about visiting places of detention there. The Subcommittee took as broad as possible an approach to its mandate.

12. The Subcommittee had discussed with national preventive mechanisms their role in the context of returns. Its view, which some mechanisms also held very strongly, was that involving them in such cases would undermine their functional independence. However, that was not to say that they did not play a role in the evaluation of removals: in much of Europe, the courts legitimately used reports by national preventive mechanisms to help assess the situation in countries of return. The matter was under active discussion in various quarters.

13. Certainly, the question of how best to use available resources and avoid overlap and duplication with other bodies was increasingly pressing. The reason that it had been difficult for the Subcommittee to take a hands-off approach to countries with which the Committee was engaged was simply that it was not informed of the States subject to a confidential inquiry. He was eager to explore ways of overcoming such hurdles. One of the advantages of moving towards general comments was the ability to take a more coordinated approach to and ensure greater alignment on substantive issues.

The Subcommittee still agreed on a pre-ordered programme of visits in June each year. However, for operational reasons it had become increasingly difficult and constraining to announce all the visits at once, so they were now announced in tranches.

III. Procedures of the Human Rights Treaty Bodies for following up on Concluding Observations, Decisions and Views, HRI/MC/2017/4

1. At their twenty-eighth meeting, held from 30 May to 3 June 2016, the Chairs of the human rights treaty bodies discussed the need to compare practices and further improve the procedures for following up on concluding observations, decisions and Views. Also at that meeting, they decided to include the issue of follow-up procedures in the agenda of their twenty-ninth meeting, to be held in June 2017. The Secretariat prepared the present note to serve as a basis for discussion at that meeting.

2. While it is recognized that the treaty bodies have engaged in a variety of follow-up activities, including country inquiries, workshops at the national and regional levels and country visits, the focus of the present note is essentially on the existing written follow-up procedures adopted by a number of treaty bodies regarding: (a) the concluding observations adopted after the relevant committee has reviewed the reports of States parties; and (b) the decisions and Views adopted on individual complaints. The note contains an overview of the policies and practices on follow-up procedures currently in place and information on how these procedures compare with each other.

II. Background

3. The human rights treaty bodies have regularly underscored the need to improve the procedures for following up on concluding observations, decisions and Views. Notably, at the second inter-committee meeting, held in June 2003, it was recommended that all treaty bodies should examine the possibility of introducing procedures to follow up their recommendations (see A/58/350, annex I, para. 42). That recommendation was reiterated at subsequent inter-committee meetings. In 2009, at the tenth inter-committee meeting, it was reaffirmed that follow-up procedures were an integral part of the reporting procedure and recommended that all treaty bodies should develop modalities for follow-up procedures (see A/65/190, annex I, para. 40).

4. Also at the tenth inter-committee meeting, it was suggested that the procedures could consist of one or more mandate holders assessing the information provided by States parties and developing, as necessary, pertinent criteria for analysing the information received. Moreover, a working group on follow-up was established with a view to improving and harmonizing the procedures. In 2011, the working group held its first meeting, at which points of agreement on follow-up to concluding observations, decisions on individual complaints and inquiries were reached (see HRI/ICM/2011/3HRI/MC/2011/2, para. 61). The points of agreement were submitted to the Chairs of the treaty bodies at their twenty-third meeting, held in June 2011, for approval and subsequent endorsement. The Chairs adopted the document with a minor amendment (see A/66/175, para. 4).

III. Procedures for following up on concluding observations

5. All treaty bodies request States parties to provide, in their periodic reports, information on the implementation of recommendations made in previous concluding observations. In addition, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on Enforced Disappearances have adopted formal procedures to follow up on the implementation of specific concluding observations or decisions on cases brought under the individual complaints procedures.

6. Follow-up practices and procedures developed by each treaty body, including the criteria for identifying follow-up recommendations and the modalities for assessing follow-up reports, differ from one committee to another. In general, committees appoint a rapporteur or a coordi-

nator on follow-up who is responsible for assessing the follow-up reports of the States parties and presenting them to their committee. The rapporteur assesses the follow-up report, taking into account the information submitted by civil society organizations, national human rights institutions and United Nations entities and agencies, when available. Some members of treaty bodies have undertaken visits to States parties, at the invitation of Governments, in order to follow up on the report and on the implementation of concluding observations…

Follow-up procedures for individual complaints

A. Overview

50.Eight treaty bodies currently deal with individual communications: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child. All of them monitor and encourage the implementation of their decisions on individual complaints of human rights violations. Among them, six (the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances) have formal follow-up procedures to assess compliance with decisions. To a large extent, those procedures have been harmonized.

51. At its thirty-ninth session, in July 1990, the Human Rights Committee established the mandate of Special Rapporteur for follow-up on Views (see A/45/40 (vol. II), annex XI). The Committee against Torture and the Committee on the Elimination of Racial Discrimination commenced their follow-up procedure in May 2002 (see A/57/44) and August 2005 (see A/60/18) respectively. In September 2013, the Committee on the Rights of Persons with Disabilities initiated its follow-up procedure. No committee, however, has yet adopted procedural guidelines on how to assess the information received from States parties and complainants under the follow-up procedure. The lack of a written methodology affects the consistency and sustainability of the procedure owing to the turnover of committee rapporteurs and Secretariat staff.

B. Proposed remedies following the finding of violations

52. Upon finding a violation, all committees dealing with individual communications request the States parties concerned to provide information on the steps taken to implement the recommendations within a particular period. The requests appear at the end of the dispositive part of the decisions of all committees. While these technical paragraphs are standard for each committee, they differ from one another.

53. The committees recommend various types of remedies to redress human rights violations. The most common is compensation (the amount is never specified). The committees may also recommend release, investigation, retrial, non-removal of the victim or amendments to legislation, among other options. The remedies suggested to the State party by the Committee on the Elimination of Discrimination against Women, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of Persons with Disabilities differ somewhat from those suggested by the other committees. While the Committee on the Elimination of Racial Discrimination and the Committee against Torture only suggest a remedy for the particular victim of the violation, the Committee on the Elimination of Discrimination against Women, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of Persons with Disabilities (and more recently and gradually, the Human Rights Committee) set out recommendations relating to the victim, including on compensation, as well as more general recommendations to prevent and rectify the violation.

54. At times, as in the case of Human Rights Committee and the Committee against Torture,

the recommendations are not very detailed and, for example, refer broadly to the provision of an adequate or an effective remedy. Often, however, the recommendations are more specific, and request, for example, the payment of adequate compensation, early release, the refraining from forcible removal of the victim, a retrial or amendments to legislation

C. Rapporteurs on follow-up

55. The Human Rights Committee, the Committee against Torture, the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of Racial Discrimination each elect, from among their members, a Rapporteur or Special Rapporteur on follow-up to Views. The Committee on the Elimination of Discrimination against Women designates two Rapporteurs on follow-up.

D. Analysis of follow-up information

56. All of the committees adopt follow-up decisions based on an analysis of follow-up information provided by States parties and/or complainants. The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities have a formal follow-up procedure to assess compliance with decisions.

57. In March 2017, the Human Rights Committee introduced a new, simplified grading system that did away with subgrades and whereby: A—response largely satisfactory; B—action taken, but additional information of measures required; C—response received, but actions or information not relevant or do not implement the recommendation; D—non-cooperation with the Committee and no follow-up report received after reminders; and E—response indicates that the measures taken are contrary to the Committee's recommendation. The system used by the Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances, however, still includes subgrades.

E. Phases of follow-up procedures on individual communications

58.The standard follow-up process typically has the following major phases, although there are some differences among committees in terms of the deadline for submission of information, the assessment of information etc. (see annex II):

(a) When it finds a violation of the Convention, the committee gives the State party a set time limit (between 90 and 180 days) to provide information on measures taken to comply with the committee's recommendation;

(b) If information is received from the State party, it is routinely transmitted to the author, who is given a specified time (generally, two months) to comment on the State party's submission;

(c) Once information has been received from the author, the Rapporteur on follow-up to Views prepares summary of the State party's response and the author's comments and makes a recommendation to the committee, in plenary, on the follow-up measures to be adopted;

(d) If the committee does not receive a reply from the State party within a reasonable time after the deadline, the Rapporteur, through the secretariat, sends up to three reminders to the State party. If the State party does not reply despite the reminders, the Rapporteur requests a meeting with the representative of the State party in Geneva;

(e) Upon receipt of a response by the State party and the author, the Rapporteur presents his or her report on follow-up, including recommendations on further action, to the committee;

(f) The committee sends a letter to the State party and, if appropriate, to the Rapporteur on follow-up, who holds meetings with representatives of the State party in Geneva in order to share the committee's concerns about the implementation of its Views, listen to the position of the State party in that regard and find possible ways of assisting the State party to implement those Views;

(g) Implementation of the general recommendations contained in the Views of the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Per-

sons with Disabilities and the Committee on Enforced Disappearances is monitored under the follow-up procedure, unless the committee concerned decides otherwise or decides not to pursue the matter. General recommendations are also examined during the consideration of the next periodic report of the State party. However, the Committee may continue to consider general recommendations as a part of its procedure on follow-up to Views;

(h) Generally, the follow-up procedure is carried forward by the Rapporteur and the committee, in plenary, until such time as a decision is taken not to pursue the matter further.

F. Confidentiality and publication online

59. The Human Rights Committee and the Committee against Torture consider interim follow-up reports in public session, while the Committee on the Rights of Persons with Disabilities, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women hold such meetings in private. All committees consider that information provided in the context of follow-up to their decisions is public. Although the submissions are not accessible to the general public, including on the website, the follow-up reports on Views are posted on the web pages of the committees. The report of the Rapporteur also includes summaries of submissions by States parties. All committees include summaries of interim follow-up information in their annual reports.

IV. Operations of the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review, A/HRC/35/18

1. In its resolution 6/17, the Human Rights Council requested the Secretary-General to establish a voluntary fund for financial and technical assistance in order to provide, in conjunction with multilateral funding mechanisms, a source of financial and technical assistance to help countries implement recommendations emanating from the universal periodic review in consultation with, and with the consent of, the country concerned. In its resolution 16/21, the Council requested that the Voluntary Fund be strengthened and operationalized in order to provide a source of financial and technical assistance to help countries, in particular least developed countries and small island developing States, to implement the recommendations emanating from their review. The Council also requested that a board of trustees be established in accordance with the rules of the United Nations.

2. The Voluntary Fund was established in 2009. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has continued to provide financial and technical assistance to States that have requested or consented to receiving such support. Support has been provided in the spirit of the founding resolution of the universal periodic review, in which it is stated that the objectives of the review include the improvement of the human rights situation on the ground (Human Rights Council resolution 5/1, annex, para. 4 (a)), the fulfilment of the State's human rights obligations and commitments (ibid., para. 4 (b)) and the enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned (ibid., para. 4 (c)).

II. Operationalization of the Voluntary Fund

A. Board of Trustees of the Voluntary Fund

3. The members of the Board of Trustees of the United Nations Voluntary Fund for Technical Cooperation in the Field of Human Rights also serve as the Board of Trustees for the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review (see A/HRC/29/22, para. 4). They are tasked with overseeing the management of the latter Fund. The members are Marieclaire Acosta Urquidi (Mexico), Lin Lim (Malaysia), Valeriya Lutkovska (Ukraine), Christopher Sidoti (Australia) and Esi Sutherland-Addy (Ghana). The Board elected Mr. Sidoti as Chair for the period 30 June 2016 to the end of the Board's seventh session, held in Geneva in March 2017; at that session, the Board elected Ms. Acosta Urquidi as Chair.

4. In close consultation with the various sections of OHCHR, the Board of Trustees focuses its attention on broadly guiding the operationalization of the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review by providing policy advice.

5. Since the submission of the previous report, the Board of Trustees has undertaken a field mission to the OHCHR office in Guatemala, in October 2016, and has held its regular annual session, its seventh, in Geneva in March 2017. At that session, the Board had strategic discussions with the relevant OHCHR officers on follow-up support to identify strategic options for OHCHR provision of technical assistance and cooperation aimed at assisting States to implement more effectively recommendations emanating from the universal periodic review and other international human rights mechanisms at the country level. The Board will develop the strategic options over the next six months for further consideration at its next session.

6. During the session, the Board of Trustees acknowledged the results achieved by its follow-up support strategy focusing on national follow-up mechanisms and processes at the country level. It highlighted the need for OHCHR to articulate a strategic vision for follow-up support focusing on and leading to better implementation on the ground of recommendations emanating from international human rights mechanisms. The Board strongly encouraged OHCHR to explore ways of providing more focused technical assistance and cooperation aimed at as-

sisting States to implement specific key human rights recommendations and address specific issues, in accordance with the priorities established in the framework of the OHCHR Management Plan 2018-2021, which is currently under development.

B. Strategic vision

7. As noted in previous reports (A/HRC/26/54, A/HRC/29/22 and A/HRC/32/28), OHCHR has been developing the capacity to provide increased support to States in their efforts to implement the outcome of the universal periodic review and other international human rights mechanisms. That effort has been anchored in a holistic and integrated approach that allows OHCHR to provide technical assistance and support that takes into account the recommendations of the universal periodic review, the treaty bodies and the special procedures. Such an integrated approach provides States with a significant opportunity to address the key human rights issues identified in the recommendations emanating from international human rights mechanisms.

8. OHCHR has been making every effort to render its follow-up support more proactive, systematic and results-oriented. To that end, it has been engaging States in their efforts to implement the recommendations of international human rights mechanisms by providing support directly through its field presences or by ensuring the integration of support in United Nations country team programming on follow-up.

9. Thus far, OHCHR has focused its support on establishing or strengthening national mechanisms and processes for follow-up. Key elements identified for more effective follow-up at the national level include a well-functioning inter-institutional body, an implementation action plan that clearly identifies achievable results and priorities, national government agencies responsible for implementation, and indicators and timelines against which to measure impact. OHCHR has made every effort to maximize its effectiveness. Support from the Voluntary Fund to strengthen national follow-up mechanisms and processes has been closely aligned and coordinated with the support provided to States under the treaty body capacity-building programme on national mechanisms for reporting and follow-up.

10. OHCHR has been increasingly providing support to address key thematic human rights issues identified in recommendations from international human rights mechanisms as priority issues for implementation on the ground.

11. In order to provide more effective support to States in implementing their human rights commitments and obligations, OHCHR will continue to adapt and revitalize its strategic vision to support States in the preparation of their national reports and the implementation of the recommendations emanating from the universal periodic review.

12. In line with the terms of reference of the Voluntary Fund, it is essential to ensure that the universal periodic review outcomes are well integrated and mainstreamed into the United Nations Development Assistance Frameworks, the integrated strategic frameworks in peacekeeping missions and in national development plans, and that the information on review outcomes is widely disseminated.

13. A thorough analysis of the universal periodic review outcomes and those of other human rights mechanisms, such as the concluding observations of treaty bodies, the findings and recommendations of special procedures and the findings of commissions of inquiry mandated by the Human Rights Council, may also serve as a tool for conflict prevention, providing an indication of potential risk factors and necessary measures to be taken by the international community to adequately address them.

14. In addition, it should be highlighted that the universal periodic review outcomes may constitute an essential element to be considered in relation to implementation of the Sustainable Development Goals. Hence, follow-up support through technical assistance and cooperation to States should be aimed at fully integrating the universal periodic review outcomes into national frameworks and processes for the implementation of the Sustainable Development Goals . . .

15. Since the establishment of the Voluntary Fund in 2009, 13 countries have made financial contributions: Australia, Colombia, Germany, Kazakhstan, Morocco, the Netherlands, Norway, Oman, the Republic of Korea, the Russian Federation, Saudi Arabia, Spain and the United Kingdom of Great Britain and Northern Ireland. Table 2 provides an overview of all contributions received from the establishment of the Voluntary Fund to 31 December 2016.
16. It is expected that, as the revitalized OHCHR strategic vision for follow-up support focuses on providing support to States in implementing key thematic priority recommendations in a holistic and integrated manner, the demand from States for financial support from the Voluntary Fund will continue and indeed increase. Hence, it is critical to extend the donor base and obtain additional funding in order to make a sustained impact at the country level in providing technical assistance and support to States for more effective implementation of recommendations emanating from international human rights mechanisms.

V. Conclusions

17. The primary responsibility for implementing recommendations of international human rights mechanisms at the country level rests with States. Hence, securing the political will of States and enhancing their ability to bring about tangible results is vital to meeting the key objective of the universal periodic review, namely, improving the human rights situation on the ground. With a view to achieving that objective, the Voluntary Fund has continued to serve as a valuable source of support for countries in the implementation of the recommendations emanating from their universal periodic review and from other international human rights mechanisms such as treaty bodies and special procedures.
18. The focus of OHCHR support has been on building the capacity of States to implement more effectively the recommendations of international human rights mechanisms, particularly by providing support for the establishment or strengthening of national follow-up mechanisms and processes, including inter-institutional bodies such as national mechanisms for reporting and follow-up.
19. OHCHR support to help national follow-up mechanisms and processes function more effectively has continued to gain traction. That support to national mechanisms for reporting and follow-up will continue in close coordination with the OHCHR treaty body capacity-building programme. Support from the Voluntary Fund will focus on assisting States to fulfil their commitments to implement priority thematic human rights recommendations accepted during their universal periodic review and those from other international human rights mechanisms.
20. OHCHR will continue to strive to share with States and other United Nations partners several tools that are available to help integrate and mainstream the recommendations of international human rights mechanisms into their respective programmes, such as the United Nations Development Assistance Frameworks and national development action plans.
21. It is worth noting that OHCHR, with the advice of the Board of Trustees of the Fund, constantly reviews and updates its strategic vision for follow-up support in order to provide more effective support to States in an effort to facilitate results on the ground in terms of the promotion and protection of human rights. While OHCHR continues to take a holistic and integrated approach to its follow-up support, it seeks, through the use of money from the Voluntary Fund, to: (a) provide capacity-building to States for them to prepare meaningful national reports on implementation, through the provision of training across the spectrum of the government actors concerned; and (b) enable States to meet their commitments by focusing on supporting them to implement key thematic priority recommendations. In that regard, it is important to integrate recommendations from international human rights mechanisms into the national planning processes; to utilize international human rights recommendations for early warning and conflict prevention by integrating them into the Human Rights Up Front initiative; and to ensure that the recommendations become a crucial element in the implementation of the Sustainable Development Goals by integrating them into the relevant national implementation frameworks and action plans.

22. It is also important to encourage and secure the active participation of other stakeholders in the follow-up process, as that is key to achieving a sustained impact. Hence, various stakeholders should be able to benefit, either directly or indirectly, from the Voluntary Fund by becoming involved in the technical cooperation and assistance programme for the States that are beneficiaries of the Fund.
23. In order to provide technical support and assistance for follow-up more effectively, it is imperative that more contributions be made to the Voluntary Fund. With additional resources, the Fund will be able to support OHCHR to ensure the sustainability of support to States in implementing the recommendations of the international human rights mechanisms.

V. Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations, A/HRC/34/31

1. The present report is submitted pursuant to Human Rights Council resolution 32/14, in which the Council requested the United Nations High Commissioner for Human Rights, as Co-Chair of the Global Migration Group Working Group on Migration, Human Rights and Gender Equality, to continue to develop principles and practical guidance on the protection of the human rights of migrants in vulnerable situations within large and/or mixed movements, on the basis of existing legal norms, and to report thereon to the Human Rights Council at its thirty-fourth session.

2. Accordingly, on 27 October 2016, the Office of the United Nations High Commissioner for Human Rights (OHCHR) addressed a note verbale to Member States and intergovernmental and non-governmental organizations, seeking their views and information on the issue. Written submissions were received from States, intergovernmental organizations, non-governmental organizations and individual experts.[1]

3. The Global Migration Group Working Group on Migration, Human Rights and Gender Equality, led by the High Commissioner as Co-Chair, is developing the principles and guidelines through a human rights-based, multi-stakeholder, expert process, which is open to the involvement of all relevant actors.[2] This initiative reflects the primary stated purpose of the Global Migration Group, which is "to promote the wider application of all relevant international and regional instruments and norms relating to migration" and "to encourage the adoption of more coherent, comprehensive approaches to the issue of international migration."[3]

4. The draft principles and guidelines have already been referenced in reports to the Human Rights Council and General Assembly (see A/HRC/33/67, and A/71/285, para. 106). States have acknowledged and called for the continuation of the process of developing the principles and guidelines (see the New York Declaration for Refugees and Migrants, para. 51 and Council resolution 32/14).

5. In view of considerations of space, the present report provides an introduction and 20 draft principles, as derived from international human rights law. The report should be read in conjunction with the related conference room paper outlining a set of draft guidelines, which complement each principle.[4] The principles and guidelines are currently in draft form and the present document is being presented as a progress report, pursuant to the request of the Human Rights Council. Since many terms used in global discussions in this area have required clarification, a limited glossary of key terms used in the report and the principles and guidelines has been included in the annex to the present document. . . .

6. In the New York Declaration for Refugees and Migrants, the General Assembly recognized the complex reasons for contemporary movement: "Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and

1. In addition to submissions from a large number of non-governmental organizations and individual experts, submissions were received from the following States; Australia, Cuba, Ghana, Iraq, Italy, Japan, Lebanon, Mexico, Peru, Qatar, Serbia, Slovakia, Slovenia, Sweden, Turkey and the European Union. The submissions can be found on the migration page of the OHCHR website at www.ohchr.org/EN/Issues/Migration/Pages/largeandormixedmovements.aspx.

2. Members of the Working Group on Migration, Human Rights and Gender Equality include the International Labour Organization (ILO), the International Organization for Migration (IOM), OHCHR, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime, the United Nations University, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) and the World Health Organization. The group is co-chaired by OHCHR and UN-Women.

3. See www.globalmigrationgroup.org/system/files/uploads/documents/Final_GMG_Terms_of_Reference_prioritized.pdf and www.globalmigrationgroup.org/what-is-the-gmg.

4. Each principle is illustrated by a set of related practical interventions, "promising practices," which are examples of measures that have been implemented by States and other stakeholders and are intended to encourage practical action to give effect to the principles and guidelines.

abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change) or other environmental factors. Many move, indeed, for a combination of these reasons."[5] The Secretary-General has also noted in this regard that the gradual expansion of refugee protection notwithstanding, many people are compelled to leave their homes for reasons that do not fall within the refugee definition in the Convention relating to the Status of Refugees (see A/70/59, para. 18).

7. While migration can be a positive and empowering experience for individuals and communities and can benefit countries of origin, transit and destination, it is clear that precarious movements of people are a serious human rights concern (see A/HRC/31/35). Although they might fall outside the specific legal category of refugee, migrants may need particular attention to be paid to the respect, protection and fulfilment of their human rights. Some will need specific protection as a result of the conditions they are leaving behind, the circumstances in which they are compelled to move and in which they are received, and/or according to specific characteristics such as age, gender, disability or health status. It is these people on the move and these situations of movement that are the focus of the current principles and guidelines. . . .[6]

8. The concept of a "migrant in a vulnerable situation" may be understood as a range of factors that are often intersecting, can coexist simultaneously and can influence and exacerbate each other. Situations of vulnerability may change over time as circumstances change or evolve. The factors that create a vulnerable situation for migrants might be what drives their migration from their countries of origin, occurs in transit and/or is related to a particular aspect of a person's identity or circumstance. Thus, vulnerability in this context can be understood as situational (external) and/or embodied (internal). . . .[7]

9. The drivers for "non-voluntary" precarious movements are multiple and often intertined, and should be assessed on an individual basis. They can include poverty, discrimination, lack of access to fundamental human rights, including education, health, food and water, and decent work, as well as xenophobia, violence, gender inequality, the wide-ranging consequences of natural disaster, climate change and environmental degradation, and separation from family. The New York Declaration for Refugees and Migrants emphasizes in addition that many people move, indeed, for a combination of these reasons.

A vulnerable situation occurring in the context of the circumstances encountered by migrants en route, at borders and at reception

10. People are often compelled to utilize dangerous means of transportation in hazardous conditions and to resort to the use of smugglers and other types of facilitators, which can place them in situations of exploitation, at risk of trafficking in persons and other abuse. Such a journey can be marked by hunger, deprivation of water, a lack of personal security and lack of access to medical care. Many migrants can spend long periods of time in transit countries, often in irregular and precarious conditions, unable to access justice and at risk of a range of human rights violations and abuses. The inadequate and often harsh conditions in which they are received at borders can also violate rights and further exacerbate vulnerabilities. Responses, such as the arbitrary closure of borders, denial of access to asylum procedures, arbitrary push-backs, violence at borders committed by State authorities and other actors (including criminals and civilian militias), inhumane reception conditions, a lack of firewalls, and denial of humanitarian assistance, increase the risks to the health and safety of migrants, in violation of their human rights.

5. See also the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change.

6. For further background on the rationale for the principles, see A/HRC/33/67.

7. It is important to note that migrants often show considerable resilience and agency throughout their migration. The vulnerable situations that migrants face have often been created for them by others through law, policy and practice. A human rights-based approach to migrants in a vulnerable situation would therefore seek to ensure that responses aim above all to empower migrants, rather than stigmatizing them and denigrating their agency. See, for example, A/HRC/33/67, paras. 9–12 and A/71/285, paras. 59–61.

A vulnerable situation related to a specific aspect of a person's identity or circumstance
As they move, some people are more at risk of human rights violations than others owing to their persisting unequal treatment and discrimination based on factors including age, gender, ethnicity, nationality, religion, language, sexual orientation or gender identity, or migration status, singly or in combination. Certain people, such as pregnant women, persons in poor health, including those with HIV, persons with disabilities, older persons, or children (including unaccompanied or separated children), are more at risk because of their physical and/or psychological condition. . . .
11. Principles and practical guidance
12. There is an international legal framework that specifically protects the rights of all migrants. However, more precise understanding of the human rights standards for migrants in vulnerable situations, as well as of how States (and other stakeholders) can operationalize those standards in practice, is lacking. The principles and guidelines are accordingly an attempt to provide guidance to States and other stakeholders on how to implement obligations and duties to respect, protect and fulfil the rights of migrants who are moving in vulnerable situations, including within large and/or mixed movements.
13. The principles are drawn directly from international human rights law and related standards, including international labour law, refugee law, criminal law, humanitarian law, the law of the sea, customary international law and general principles of law, including in relation to specific groups in such movements, such as children, persons with disabilities, women at risk, older persons, and lesbian, gay, bisexual, transgender and intersex individuals. The guidelines elaborate international best practice related to each principle in order to assist States (and other stakeholders) to develop, strengthen, implement and monitor measures to protect migrants in vulnerable situations. The guidelines are derived from international human rights law and other relevant branches of law, authoritative interpretations or recommendations by the international human rights treaty bodies and the special procedure mandate holders of the Human Rights Council, as well as other expert sources where relevant.[8] It should be noted that the principles and their associated guidelines are interrelated and inform each other; as such the principles and guidelines should be read holistically.

III. The Principles[9]
The proposed text of the draft principles is as follows:
Principle 1. Ensure that human rights are at the centre of addressing migration, including responses to large and/or mixed movements of migrants.
Principle 2. Counter discrimination against migrants in all its forms.
Principle 3. Protect the lives and safety of migrants and ensure rescue and immediate assistance to all migrants facing risks to life or safety.
Principle 4. Ensure access to justice for migrants.
Principle 5. Ensure that all border governance measures protect human rights, including the right to freedom of movement and the right of all persons to leave any country, including their own, recognizing that States have legitimate interests in exercising immigration controls.
Principle 6. Ensure that all returns are only carried out in full respect for the human rights of migrants and in accordance with international law, including upholding the principle of non-refoulement, the prohibition of arbitrary or collective expulsions and the right to seek asylum.

8. The guidance of the international human rights treaty bodies and the special procedure mandate holders of the Human Rights Council is legally binding to the extent that their work is based on binding international human rights law and enjoys the collaboration of States in the system; and also by the authority given on the one hand to the treaty bodies by their creation in accordance with the provisions of the treaty that they monitor, and on the other the authority provided to the special procedure mandate holders by the Human Rights Council. The recommendations of the treaty bodies and special procedure mandate holders are also considered authoritative by prominent international and regional judicial institutions.

9. The sources of international and regional law listed in the footnotes to each principle are further supplemented by various general comments of the human rights treaty bodies, United Nations resolutions and international and regional case law, which are not listed here for reasons of space.

Principle 7. Protect migrants from all forms of violence and exploitation, whether inflicted by institutions or officials, or by private individuals, entities or groups.
Principle 8. Uphold the right of migrants to liberty and prohibition of arbitrary detention through making targeted efforts to end immigration detention of migrants. Never detain children on account of their migration status or that of their parents.
Principle 9. Ensure the widest protection of the family unity of migrants, facilitating family reunification and preventing arbitrary or unlawful interference in the right of migrants to the enjoyment of private and family life.
Principle 10. Guarantee the human rights of all children in the context of migration and ensure that they are treated as children first and foremost.
Principle 11. Protect the human rights of migrant women and girls.
Principle 12. Ensure the enjoyment of the highest attainable standard of physical and mental health of all migrants.
Principle 13. Safeguard the right of migrants to an adequate standard of living.
Principle 14. Guarantee the right of migrants to work in just and favourable conditions.
Principle 15. Protect the right of migrants to education, including primary, secondary and higher education and vocational and language training.
Principle 16. Uphold migrants' right to information.
Principle 17. Guarantee monitoring and accountability in all responses to migration, including in large and/or mixed movements of migrants.
Principle 18. Respect and support the activities of human rights defenders and others working to rescue and provide assistance to migrants.
Principle 19. Improve the collection of disaggregated data on the human rights situation of migrants, while ensuring the right to privacy and protection of personal data.
Principle 20. Build capacity and promote cooperation amongst and between all relevant stakeholders to ensure a gender-responsive and human rights-based approach to migration governance and to understand and address the drivers of the movement of migrants.

Glossary
An **asylum seeker** is any person who has applied for protection as a refugee and is awaiting the determination of their status.
Border Governance: Legislation, policies, plans, strategies, action plans and activities related to the entry into and exit of persons from the territory of the State, including detection, rescue, interception, screening, interviewing, identification, reception, detention, removal, expulsion, or return, as well as related activities such as training, technical, financial and other assistance, including that provided to other States.[10]
Firewalls: Measures to effectively separate immigration enforcement activities from public service provision by State and non-State actors and from labour law enforcement, as well as from criminal justice measures for victims of crime, so as not to deny human rights to persons in an irregular status.[11] They are "designed to ensure, particularly, that immigration enforcement authorities are not able to access information concerning the immigration status of individuals who seek assistance or services at, for example, medical facilities, schools and other social service institutions. Relatedly, firewalls ensure that such institutions do not have an obligation to inquire or share information about their clients' immigration status."[12]

10. See Recommended Principles and Guidelines on Human Rights at International Borders.

11. See François Crépeau and Bethany Hastie, "The case for 'firewall' protections for irregular migrants: safeguarding fundamental rights," *European Journal of Migration and Law*, vol. 17, Nos. 2–3 (2015); European Commission against Racism and Intolerance, general policy recommendation No. 16 on safeguarding irregularly present migrants from discrimination; and ILO, *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments* (2016), paras. 480–482. See also European Union Agency for Fundamental Rights, "Apprehension of migrants in an irregular situation—fundamental rights considerations" (2012).

12. See Crépeau and Hastie, "The case for 'firewall' protections" p. 165.

Human Rights Defenders: A term used to describe people who, individually or with others, act to promote or protect human rights. There is no specific definition of who is or can be a human rights defender.[13] A person or group need not necessarily self-identify as a human rights defender to constitute one. In the present principles and guidelines, "human rights defender" should be read as specifically including those working with migrants, including providing humanitarian assistance.

Large Movements: "Whether a movement is characterized as 'large' depends less on the absolute number of people moving than on its geographical context, the receiving States' capacities to respond and the impact caused by its sudden or prolonged nature on the receiving country."[14] "'Large movements' may be understood to reflect a number of considerations, including: the number of people arriving, the economic, social and geographical context, the capacity of a receiving State to respond and the impact of a movement which is sudden or prolonged. The term does not, for example, cover regular flows of migrants from one country to another. 'Large movements' may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes."[15]

Migrants: In the present principles and guidelines, an international migrant (or migrant) refers to "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence."[16] There is no universal, legal definition of a migrant.

The term "migrant" within the present principles and guidelines refers throughout to a migrant in a vulnerable situation.[17]

Mixed Migration: The term describes the cross-border movements of people with varying protection profiles, reasons for moving and needs, who are moving along the same routes, using the same transport or means of travel, often in large numbers.[18] There is no official or agreed definition of mixed migration.

Non-Refoulement: The prohibition of refoulement under international human rights law generally applies to any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the individual would be in danger of suffering torture or other irreparable harm in the place to which he or she is to be transferred or removed.[19] As an inherent part of the prohibition of torture and other forms of ill-treatment, the principle of non-refoulement is characterized by its absolute nature.[20]

A **refugee** is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail

13. The fourth preambular paragraph of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms refers to "individuals, groups and associations . . . contributing to the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals."

14. See A/70/59, para. 11.

15. New York Declaration for Refugees and Migrants, para. 6.

16. See Recommended Principles and Guidelines on Human Rights at International Borders, chap. I, para. 10. IOM defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (a) the person's legal status; (b) whether the movement is voluntary or involuntary; (c) what the causes for the movement are; or (d) what the length of the stay is. Some categories of migrants are defined in international instruments, particularly "migrant worker" or "migrant for employment," which are defined in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 2 (1); ILO Migration for Employment Convention (Revised) No. 97 (1949), art. 11; ILO Migrant Workers (supplementary provisions) Convention, No. 143 (1975), art. 11. UNHCR always refers to refugees and migrants separately, to maintain clarity about the causes and character of refugee movements and not to lose sight of the specific obligations owed to refugees under international law.

17. For an explanation of the term "migrant in a vulnerable situation," see paras. 12–15 of the report.

18. See A/HRC/31/35, para. 10.

19. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; and Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation on States parties to the Covenant, para. 12.

20. See A/70/303, paras. 38 and 41.

himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such [persecution] . . . is unable or, owing to such fear, is unwilling to return to it."[21]

Separated Children: Children who have been separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. Children may become separated at any point of their migration.[22]

Statelessness: A stateless person is defined in article 1 (1) of the Convention relating to the Status of Stateless Persons as someone who is "not considered as a national by any State under the operation of its law."[23]

Unaccompanied Children: Children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. Children may become unaccompanied at any point of their migration.[24]

Xenophobia: The term has commonly been used to describe attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the reality or perception that they are outsiders or foreigners to the community, society or national identity.[25] There is no universal, legal definition of xenophobia.

21. See Convention relating to the Status of Refugees, art. 1. A (2).

22. See Committee on the Rights of the Child, general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 8.

23. The International Law Commission has considered the definition in article 1 (1) of the Convention to form part of customary international law (see A/61/10, Chap. II Natural Persons, Art. 8, Commentary (3), page 49). See also UNHCR, *Handbook on Protection of Stateless Persons Under the 1954 Convention relating to the Status of Stateless Persons* (Geneva, 2014).

24. See Committee on the Rights of the Child, general comment No. 6, para. 7.

25. See ILO, IOM and OHCHR, "International migration, racism, discrimination and xenophobia" (2001), p. 2.

VI. Special Rapporteur Report on Trafficking in Persons, especially Women and Children on her Mission to the United States of America

Forms and manifestations of trafficking in persons

1. The United States faces challenges as a destination, transit and source country for trafficked men, women and children, including lesbian, gay, bisexual, transgender and intersex individuals, migrant workers and unaccompanied migrant children, runaway youth, American Indian and Alaska Natives and persons with disabilities. In some places, African American women and girls are disproportionately affected by trafficking in persons.[26] Both nationals of the United States and migrants, mainly from Central America and South-East Asia, are trafficked within and into the United States. China, Guatemala, Honduras, Mexico and the Philippines are the most common countries of origin for trafficking victims.[27] According to national hotline data from 2016, the states of California, Texas, Florida, Ohio and New York had the highest number of trafficking cases.[28] The close proximity to international borders and large immigrant populations are some of the factors that make these regions more vulnerable to trafficking in persons.

2. The economic prosperity of the United States promotes mobility within the country and draws migrants in search of better livelihoods. However, economic inequality and social exclusion, discrimination, organized crime, including drug trafficking, and insufficient labour protections create vulnerability to human trafficking.

3. While many workers have found employment that matches their qualifications and aspirations, some have been compelled to work in precarious or informal employment, on short-term or part-time contracts or on temporary visas if they are migrants, rendering them vulnerable to human trafficking. Traffickers' modus operandi typically involves deceptive and fraudulent practices by some recruitment agents and employers relating to the nature and type of the employment offered. Many workers find themselves in a situation akin to debt bondage, trying to repay exorbitant debts owed to traffickers for their journey once promises of well-paying employment have turned into exploitative situations. The retention of passports and wages, as well as threats of deportation, are common forms of controlling migrant workers in certain sectors.

1. Trafficking for the purpose of sexual exploitation

4. From 2007 to 2016, 31,659 potential sex trafficking cases were identified in the United States through the national hotline/textline.[29] In 2016, 73 per cent of reported cases of human trafficking concerned sex trafficking.[30]

5. Adults, predominantly women, and children are compelled to engage in prostitution or sex work by family members, individuals with whom they are romantically involved, gangs or others who have forced them into prostitution or sex work or lured them with the false promise of a job, including via online advertisements. Persons trafficked for the purpose of sexual exploitation may be either United States citizens or foreign nationals. Sex trafficking often occurs in fake massage parlours, escort service agencies, brothels, private homes, on the street or at hotels or motels.

6. There are also reports that Native Americans are disproportionately at risk of being trafficked, especially for the purpose of sexual exploitation.[31] The influx of young, unaccompanied men working in high-paying oil jobs, for example in the Bakken Shale region (North Dakota), coincides with the increased trafficking of Native American women and children, notably by women from the reservations.

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26. Mayor's Taskforce on Anti-Human Trafficking, "Human trafficking in San Francisco report 2016," p. 41.

27. Polaris, "2016 Statistics from the National Human Trafficking Hotline and BeFree textline."

28. Ibid.

29. Ibid.

30. Ibid.

31. See www.womenspirit.net/sex-trafficking/.

2. Trafficking for the purpose of labour exploitation

7. Victims of trafficking for the purpose of forced labour and labour exploitation make up 14 per cent of trafficking cases reported via the national hotline/textline.[32] The victims are mainly from Jamaica, Mexico, Peru, the Philippines and South Africa, held temporary, non-immigrant visas (mostly A-3, B-1, G-5, H-2A, H-2B, J-1 and H-1B) and were employed in agriculture, landscaping, hospitality, restaurants and domestic work, among others.[33] Labour exploitation is, at times, accompanied by sexual abuse.

8. First-hand information was also received about victims exploited through precarious or informal employment, subjected to the reduction or non-payment of salaries, made to work long hours and given no rest days. Some recruitment agencies take advantage of the vulnerable situation of migrant workers to offer low wages and benefits and to charge future employees a recruitment fee, which can include migration or settlement expenses. As a result, migrant workers may find themselves in an inextricable situation where reporting violations of their rights, or returning voluntarily to their home country, is impossible due to the debts they have incurred.

9. Most temporary work visas tie a migrant worker to a single employer. As a result, if a worker leaves his or her job, he or she loses his or her legal status to work in the country and becomes at risk of deportation. This situation can be exploited by traffickers as a means of controlling their victims. In fact, 40 per cent of labour trafficking cases reported via the national hotline/textline are linked to temporary visas.

3.Trafficking for the purpose of domestic servitude

10. The United States hosts about two million domestic workers.[34] An estimated 95 per cent of domestic workers are women and 46 per cent are foreigners.[35] As their work is performed in private households, including those of diplomats and international civil servants, where oversight is—by nature—limited, domestic workers are vulnerable to trafficking for the purpose of domestic servitude.

11. The majority of the 16 potential victims identified by one non-governmental organization (NGO) between 1 August, 2014 and 31 July, 2015 were located in the north-eastern United States; they were all female and 25 per cent of them were Filipina.[36] One survivor described how she had been brought to the United States by international civil servants—with the promise that she could attend school while helping them—but found herself working long hours without a wage; her passport was confiscated and her interactions with the outside world were monitored. She was finally rescued after a neighbour signalled her presence to the police.

12. Many victims of trafficking for the purpose of domestic servitude are recruited through family or community ties. Employment agencies, in source countries and the United States, also play a role in the trafficking of domestic workers. Victims face abuse and exploitation that further contributes to the trafficking situation, including breaches of contract, non-payment of salaries and deductions of recruitment and permit fees from their already meagre wages. Many domestic workers also experience physical and mental abuse at the hands of their employers and their families, as well as threats of deportation.

13. If domestic workers with A-3, G-5 or NATO-7 visas, which tie their immigration status to a single employer, leave an abusive situation, they become undocumented and risk deportation. Furthermore, traffickers frequently use victims' unfamiliarity with United States laws to

32. Polaris, "Hotline statistics."

33. Labour Trafficking cases in the United States reported to the National Human Trafficking Hotline and BeFree Textline from 1 August 2014 to 31 July 2015; Polaris, "Labor trafficking in the U.S.: a closer look at temporary work visas."

34. Heidi Shierholz, "Low wages and scant benefits leave many in-home workers unable to make ends meet," Economic Policy Institute Briefing Paper No. 369, 25 November 2013, pp. 4 and 23.

35. Linda Burnham and Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work* (National Domestic Workers Alliance, 2012).

36. Polaris, "Labor trafficking."

make them believe there is danger in reporting their trafficking situation to law enforcement officers or seeking help.

4. Other forms of trafficking

14. There are also cases of trafficking involving unaccompanied migrant children who, after being processed by the agencies of the Department of Homeland Security and the Department of Health and Human Services, have been placed with family members in the United States. Some of these children have been trafficked for the purpose of sexual and labour exploitation by members of criminal networks who posed as family members or forced them into begging or drug smuggling.

15. A potential case of trafficking for the purpose of organ removal was also brought to the attention of the Special Rapporteur. The victim had been brought into the United States after marrying a man who was living in the country; she escaped from a moving car that was taking her to a hospital where she was due to have her kidney involuntarily removed.

16. Cases of trafficking in persons with disabilities for the purpose of sexual exploitation, forced labour and others also exist. In such cases, traffickers—who may also be family members—steal their victims' social security and disability benefits.

B. Post-visit information about the criminalization of irregular migration and the impact on trafficked persons[37]

17. Post-visit legal reforms related to immigration may affect the human rights of trafficked persons. These measures include the Executive Order on border security and immigration enforcement improvements, signed by President Donald Trump on 25 January 2017, which confirms the detention of individuals apprehended on suspicion of violating immigration law pending the decision of their removal or immigration relief. The Special Rapporteur cautions that the routine detention of migrants, including possible victims of human trafficking who have been classified as smuggled and processed for removal in the absence of accurate identification of trafficking grounds, may amount to "penaliziing victims] solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation or working without documentation."[38]

18. Another source of concern is the Executive Order on protecting the nation from foreign terrorist entry into the United States. By limiting the refugee resettlement programme, the Order places women and men at risk of human trafficking. In this context, the Special Rapporteur will pay close attention to the enforcement of the Executive Order on enforcing federal law with respect to transnational criminal organizations and preventing international trafficking, signed on 9 February 2017, which includes specific provisions related to trafficking in persons, in order to ensure that its implementation does not adversely affect trafficking victims.

37. For reasons related to the internal deadline for this report, information on post-visit developments was only gathered until 15 March, 2017.

38. Trafficking Victims Protection Act (2000), section 102 (19).

VII. Joint meeting of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights on the Occasion of the Seventieth Anniversary of the Universal Declaration of Human Rights

1. **Ms. Bras Gomes** (Chair of the Committee on Economic, Social and Cultural Rights) said that the statement "all human beings are born free and equal in dignity" reflected the vision of a world in which everyone could live free from fear and want. That aspiration, which was manifest in the universality, indivisibility and interdependence of all civil, cultural, economic, social and political rights, had acquired a renewed sense of urgency on the seventieth anniversary of the Universal Declaration of Human Rights. The world was undoubtedly more willing to uphold rights than when the Universal Declaration had been adopted, thanks to the unflagging commitment of individuals and organizations that stood up for rights in their communities and beyond. However, material and other forms of deprivation persisted amid the affluence of the twenty-first century. Inequalities within and between countries continued to grow, and the benefits of development were not equitably shared. Conflicts destroyed lives and undermined hope for a better world. Climate change had a particularly adverse impact on the most vulnerable groups, such as migrants and refugees. Men and women seeking a safe haven and better opportunities for their children were faced with closing borders. The principles, values and aspirations of the Universal Declaration of Human Rights, which had been further materialized in the rights enshrined in the two Covenants and the other core human rights treaties, should guide States parties in upholding human dignity.

2. The United Nations High Commissioner for Human Rights had been unable to attend the meeting in person because he had commitments abroad. However, he had sent a recorded video message.

3. **Mr. Al Hussein** (United Nations High Commissioner for Human Rights), in the video message, said that the universality of human rights bound humanity together, despite differences, in the conviction that all human life was valuable and that all persons were equal in rights and dignity. It was that universality which had given the Universal Declaration of Human Rights such deep resonance since 1948. No other document in history had been translated into so many languages, bringing hope to people all over the world and was the closest example of a global constitution for mankind.

4. The Vienna Declaration and Programme of Action had taken the fundamental notion of universality a step further by acknowledging that all human rights were indivisible, interdependent and interrelated. The division into two Covenants had been a response to political pressure during the cold war and did not correspond to any sound logic. Civil and political rights, economic, social and cultural rights, and the right to development built upon each other and advanced together. Even if people's right to speak out and protest was recognized, they were not truly free if they were constrained by lack of education or inadequate living conditions. Moreover, wealthy people were not living well if they lived in fear of arbitrary detention by their government. The joint celebration by the two Committees of that unity of vision sent a strong message of their shared determination to uphold the Universal Declaration of Human Rights.

5. **Ms. Gilmore** (United Nations Deputy High Commissioner for Human Rights) said that the current meeting was historic in factual and symbolic terms. The two Committees were tasked with monitoring the implementation of two Covenants that established the mutuality of a panoply of rights. Seven decades after its adoption, the Universal Declaration continued to issue a clarion call for all persons to be recognized as equal in dignity and rights. If such rights were guaranteed comprehensively and universally, the outcome would be utter freedom from fear and want.

6. The Declaration had been drafted by people from cultures and traditions around the world. It embodied rights found in all major legal and religious traditions, such as African traditions of interdependence and collective responsibility, and reflected Qur'anic references to the universal dignity of humankind and to justice and responsibility for future generations.

7. The Declaration had risen as a phoenix from the ruins of cruel assaults and suffering inflicted by human beings on each other. Remarkable leaders had ensured that the text would stand the test of time. The Chinese diplomat Chang Peng-chun had advocated for the inclusion of values from both eastern and western cultures. Hansa Mehta of India had influenced the wording of article 1, which stated that all human beings were equal in dignity and rights, by arguing against the use of the word "men," which would imply that women were excluded. Begum Ikramullah of Pakistan had opposed Member States that had claimed that the Declaration was based on western standards, by defending the universality of the principle of equality in marriage; she had also spoken out strongly against child marriage. Charles Malik of Lebanon had helped to shape the Declaration's ethical basis. Latin American States had advocated for international application of rights and specifically for social and economic rights, with the strong backing of Saudi Arabia. The Soviet Union had advocated for racial equality. Hernán Santa Cruz of Chile had described the result as a consensus about the supreme value of the human person, a value originating not in the decision of a worldly power, but in the fact of existing. She wondered whether such a document could be drafted by Member States today.
8. Many countries had rightly viewed the human rights principles enshrined in the Declaration as powerful support for the liberation movements that were fighting to end colonialist exploitation throughout the world. Human rights were not an instrument for domination by any power. On the contrary, they served to uphold the freedom of people everywhere. Human rights empowered people to demand governments that served them rather than dominating them, economic systems that enabled them to live in dignity instead of exploiting them, and decision-making systems that were participatory rather than exclusionary.
9. The two iconic Committees had helped States to formulate national constitutions and legislation, to abolish the death penalty and to outlaw austerity measures. Their work had led to the development of the nine core international human rights treaties. They had tackled challenges that required universal solutions rooted in the indivisibility of rights. They had addressed the rights of migrants, the right to privacy in the digital age, the human rights ramifications of environmental degradation and climate change, and human rights in the context of the Sustainable Development Goals. They had also provided Member States with the tools necessary to uphold their peoples' human rights.
10. The milestones of 2017 included: the irreversible advance of women's suffrage and the birth of Mandela 100 years previously; the assassination of Martin Luther King 50 years previously; the adoption of the Vienna Declaration and Programme of Action and the establishment of the Office of the United Nations High Commissioner for Human Rights (OHCHR) 25 years previously; and the adoption of the Rome Statute of the International Criminal Court and the Declaration on Human Rights Defenders 20 years previously.
11. A great deal had been achieved but much remained to be done. It was not a time for optimism or hope so much as a time for courage. It was essential to stand up for universal, indivisible, interdependent and inalienable human rights for the sake of all.
12. **Mr. Abdel-Moneim** (Committee on Economic, Social and Cultural Rights) said that the two Covenants represented one bird and the two Committees were the wings that enabled the bird to fly. All governmental and civil society human rights bodies were comparable to birds and also needed wings to fly. It was wrong to cut those wings in the name of so-called reform.
13. **Ms. Jelić** (Human Rights Committee) said that, despite many challenges, the Universal Declaration remained crucial not only for the universal human rights protection system but also for regional systems. It was a cornerstone of all legal human rights instruments and provided fundamental support for all individuals, who shared the inherent value of human dignity. The Declaration was a highly accountable legal source and had been accorded legal authority by the two international Covenants.
14. The Universal Declaration had also been recognized as an inspiration and legal basis in the preamble to the European Convention for the Protection of Human Rights and Fundamental

Freedoms. It was of special significance for countries in transition, for which realization of the rule of law, democracy and human rights standards presented a challenge. For instance, it was treated in her own country, Montenegro, as valid positive law in addition to the Covenants, which were directly applicable. Eleanor Roosevelt, who had submitted the Universal Declaration to the General Assembly, had underscored the importance of readiness for the fight for human rights, which called for assertiveness and responsibility.

15. **Ms. Shin** (Committee on Economic, Social and Cultural Rights) said that the Universal Declaration was an amazingly progressive and forward-looking document. She wished to pay special tribute to the countless human rights defenders around the world, both individuals and NGOs, who had promoted human rights through their arduous and lengthy struggle, protecting voiceless people against threats and intimidation. In March 2017 the Committee on Economic, Social and Cultural Rights had issued a statement entitled "Human Rights Defenders and Economic, Social and Cultural Rights," in which it had recognized the invaluable contribution of civil society, NGOs and human rights defenders to the realization of human rights. As the first treaty body to provide NGOs with the opportunity to present written and oral statements on States parties under review, that Committee greatly appreciated the role of human rights defenders. The statement reminded States parties of their responsibility to ensure that human rights defenders were effectively protected against all forms of abuse, violence and reprisals while carrying out their work. Given the recent surge in restrictions on their activities, States should take concrete action to provide human rights defenders with an enabling environment and adopt relevant laws and policies so that they could continue their valuable work to protect and promote human rights in accordance with the Universal Declaration of Human Rights.

16. **Mr. Shany** (Human Rights Comm[ittee) said that the Universal Declaration, which at the time had been aspirational in nature, aiming to introduce a common standard of achievement and to inform the contents of the programmatic provisions of the Charter of the United Nations, had succeeded in giving the international human rights movement a sense of direction, and a grand vision that anticipated many of the subsequent developments, including the adoption of the two Covenants in 1966, which built upon the Declaration, further elaborated its provisions and established the two monitoring bodies. The Declaration and the ideals it stood for, in particular the inherent dignity and the equal and inalienable rights of all members of the human family, also served as the basis for the seven other core United Nations treaties, and the development of the Charter-based bodies and regional human rights instruments and mechanisms.

17. One of the most important aspects of the Declaration had been the combined proclamation in one instrument of civil and political rights and economic, social and cultural rights. Despite the rhetoric of indivisibility, the two groups of rights had been divided into two treaties with two separate monitoring mechanisms. The 2020 review of the implementation of General Assembly resolution 68/268 concerning the strengthening of the treaty body system would provide a unique opportunity to reflect on whether it was time to return to the ethos of 1948 and to introduce a coordinated Covenant review process, which might, for instance, facilitate a two-Committee review of the entire human rights record of the States parties to the Covenants on the basis of a consolidated list of issues. Such an approach would underscore the indivisibility of human rights and create a stronger and more prominent review process. If successful, it could be the first step towards the eventual consolidation of the two treaty bodies, whose approach to promoting human rights had become closer over time. The Committee on Economic, Social and Cultural Rights had overcome the issue of justiciability and was beginning to review individual communications, and the Human Rights Committee was developing additional jurisprudence based on duties to protect and fulfil, dealing progressively with background conditions for full implementation of human rights.

18. However, the Committees' ability to fully realize the promise of the Universal Declaration and to effectively fulfil their roles under the Covenants depended on their ability to maintain the support of constituencies, first and foremost the individuals whose rights they defended, but also States, the United Nations and OHCHR, which provided invaluable material and logistical support. The current situation was still precarious. Despite the huge progress in acceptance of human rights, and in the development of sophisticated legal doctrines and mechanisms of protection, United Nations Member States were still content to leave the treaty bodies with limited legal powers. Moreover, they failed to provide them with the resources they required to fulfil their mandate, a situation that reflected not only monetary belt-tightening but also skewed priorities. As long as that unhappy state of affairs continued, the full potential of the two treaty bodies would remain underrealized, despite the dedication of the excellent professional support staff. In addition, the Universal Declaration's goal of attaining universal respect for and observance of human rights and fundamental freedoms would sadly remain beyond the treaty bodies' reach.

19. **Mr. Kedzia** (Committee on Economic, Social and Cultural Rights) said that the impact of a commemoration, such as that of the Universal Declaration, was measured not only in terms of its contribution to memory but perhaps primarily in terms of its contribution to the future. The former Secretary-General Kofi Annan, addressing a meeting of the Commission on Human Rights in 1998 to mark the fiftieth anniversary of the Declaration, had stated that, in light of the experience of the international community during the past 50 years, the guiding idea for the forthcoming decades should be prevention.

20. He highlighted the importance of the joint meetings held during the past 18 months of the Committees that served as guardians of the two Covenants. They were a symbol of the universality and indivisibility of human rights. Treaty body strengthening in line with General Assembly resolution 68/268 remained crucial. However, action should also be taken to ensure the sustainability of both international human rights treaties and the treaty body system. The Committees could contribute enormously to that discussion.

21. One of the main tasks of the United Nations system as a whole was to promote follow-up to the treaty bodies' conclusions, recommendations and views. The system must be encouraged to engage in every conceivable manner in the follow-up procedure. In his view, the strongest link between the two Committees was a growing awareness of the adverse impact of corruption on human rights and the need to develop effective means of combating such corruption.

22. **Ms. Waterwal** (Human Rights Committee) said that the treaty bodies had a collective responsibility not only to monitor the rights enshrined in the two Covenants but also to raise peoples' awareness of their rights. One important procedure supported by the Centre for Civil and Political Rights was follow-up to concluding observations. States parties were required, within one year of an interactive dialogue with a treaty body, to report on the implementation of three or four urgent recommendations. Committee members, acting in their own capacity, visited States parties, where officials and NGOs were informed about recommendations and the need to raise awareness of human rights in general. They gave interviews, lectured at universities and shared information during workshops with NGOs. She wished to know whether the Centre for Civil and Political Rights had undertaken research on the added value of the informal procedure and, if so, what conclusions it had reached. She hoped that the Centre would continue to support the work of the Human Rights Committee. The current historic meeting afforded the two Committees an opportunity to pledge their continued commitment to enabling people to enjoy their human rights and fundamental freedoms throughout the world.

23. **Ms. Gilmore** (Deputy High Commissioner for Human Rights) welcomed the Committees' vision of an integrated structure that could promote, symbolically and materially, the mutuality of the two core human rights treaties.

24. The goal of strengthening rather than eroding the Committees in the years ahead presented a major challenge. Lack of financial resources restricted their potential and was a

source of grave frustration, both for the treaty bodies and for OHCHR. There was a pernicious and intentional effort under way in the United Nations system to counter the authority of the treaty bodies and to minimize the scope of their responsibilities. The source of that political agenda should not be underestimated. She urged the Committees to join OHCHR in a concerted effort to challenge the conflicts of interest of the General Assembly. They should oppose the convenient narrative that the requirements and demands of the treaty bodies had been invented by OHCHR.

25. She reiterated that the time had come to take firm and determined action. It was essential to address the unhealthy concentration of power, to deal with the treaty bodies' inadequacies in the context of that inequality, and to compensate for missed opportunities to uphold rights. It was time to support the land rights of indigenous people, to defy State authorities that sought to silence journalists, to stress that reproductive health and rights were integral to the dignity of women and girls, and to involve young people in decision-making.

26. The purpose of celebrating seven decades since the adoption of the Universal Declaration was to ensure further progress in the next seven decades. She commended the Committees' partnership with OHCHR staff and looked forward to continuous courageous cooperation in defence of human rights.

27. **Mr. Iwasawa** (Chair, Human Rights Committee) expressed the hope that the current meeting marked the beginning of an overarching effort by the two Committees to work together seamlessly and vigorously in support of the Universal Declaration. They must speak out for the rights of others and their voices would be louder if they spoke together.

VIII. Information received from the United States of America on Follow-Up to the Concluding Observations, CCPR/C/USA/4/Add.1

1. Although there remain matters regarding the interpretation or application of the Covenant on which the United States and members of the Committee are not in full agreement, in the spirit of cooperation the United States provides the following more recent information to address a number of the Committee's concerns, whether or not they bear directly on States Parties' obligations arising under the Covenant.

Paragraph 5

2. The Committee's follow-up requests focus on conduct during international operations in the context of armed conflict, and particularly detention and interrogation in the aftermath of the September 11 terrorist attacks. The United States reiterates its long-standing and fundamental disagreement with the Committee's view regarding the application of ICCPR obligations with respect to individuals located outside the territory of the United States.[39] However, in the spirit of cooperation, the United States has endeavored throughout the periodic reporting process to provide details on how the United States has conducted and will continue to conduct thorough and independent investigations of credible allegations of crimes committed during such international operations and of credible allegations of mistreatment of persons in its custody, as well as on final decisions regarding any prosecution of persons for such crimes when such disclosure is appropriate. We hope that the Committee is able to recognize that although the public disclosure of government information is often in the public interest, refraining from releasing information concerning specific individuals can also be appropriate, especially when privacy or other human rights interests counsel against disclosure.

3. In further response to the Committee's request in subparagraph (a), the United States reaffirms and continues to uphold the bedrock principle that torture and cruel, inhuman, or degrading treatment or punishment[40] are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity, and the United States has many protections against torture and cruel, inhuman, or degrading treatment or punishment. Torture is contrary to the founding principles of our country and to the universal values to which the United States holds itself and others in the international community. All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo, are carried out in accordance with all applicable international and domestic laws. Paragraph 177 of our Fourth Periodic Report summarized Executive Order 13491, *Ensuring Lawful Interrogations*.[41] The National Defense Authorization Act for Fiscal Year 2016 ("2016 NDAA") codified many of the interrogation-related requirements included in the Executive Order, including requirements related to Army Field Manual 2-22.3.[42] It also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

4. In addition to the Army Field Manual, the U.S. Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations

39. The Committee is aware of the United States' position on the territorial scope of a State Party's obligations under the ICCPR, based on the ordinary meaning of Article 2(1), as discussed during the U.S. presentation at the Committee's 110th session and in previous exchanges and submissions. See also Observations of the United States of America on Human Rights Committee General Comment No. 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant, dated December 27, 2007, paragraphs 3-9 (hereinafter "U.S. Observations on General Comment No. 31"), available at http://2001-2009.state.gov/s/l/2007/112674.htm; and Observations of the United States of America on the Human Rights Committee's Draft General Comment No. 35: Article 9, June 10, 2014, *reprinted in* Digest of U.S. Practice in International Law 2014, p. 179, at paragraph 5, available at www.state.gov/documents/organization/244445.pdf.

40. The United States' ratification of the ICCPR is subject, inter alia, to the following reservation: "[t]hat the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

41. Executive Order 13491, *Ensuring Lawful Interrogations*, 74 FR 4893, Jan. 27, 2009, available at www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf.

42. The Army Field Manual 2-22.3 is available at www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/fm2_22x3.pdf.

and detention operations. For example, Department of Defense Directive 3115.09[43] requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate. Additionally, Department of Defense Directive 2311.01E[44] requires that "[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command," including "[a] possible, suspected, or alleged violation of the law of war, for which there is credible information." All reportable incidents must be investigated and, where appropriate, remedied by corrective action.

5. U.S. law provides several avenues for the domestic prosecution of U.S. Government officials and contractors who commit torture and other serious crimes overseas. For example, 18 U.S.C. § 2340A makes it a crime to commit torture outside the United States.[45] Similarly, under the provisions of the Military Extraterritorial Jurisdiction Act (MEJA), persons employed by or accompanying the Armed Forces outside the United States may be prosecuted domestically if they commit a serious criminal offense overseas.[46] In addition, U.S. nationals who are not currently covered by MEJA are still subject to domestic prosecution for certain serious crimes committed overseas if the crime was committed within the special maritime and territorial jurisdiction of the United States — which includes, among others, U.S. diplomatic and military missions overseas and at Guantanamo Bay. As another example, the Uniform Code of Military Justice is available to punish members of the U.S. armed forces for violations of the law of war.

6. Regarding the conviction and sentencing of four former security guards for Blackwater USA that were previously reported in our October 9, 2015 reply (paragraph 3), the U.S. Court of Appeals for the District of Columbia Circuit overturned the conviction of Nicholas Abram Slatten on August 4, 2017, and ordered a new trial, finding that the trial court had abused its discretion in denying Slatten's motion to sever his trial from that of his three co-defendants. It also concluded that the imposition of a mandatory 30-year minimum sentence on the other three defendants violated the Eighth Amendment prohibition against cruel and unusual punishment and remanded their cases for resentencing.

7. The U.S. Government has investigated numerous allegations of torture or other mistreatment of detainees. For example, prior to August 2009, career prosecutors at the Department of Justice carefully reviewed cases involving alleged detainee abuse. These reviews led to charges in several cases and the conviction of a Central Intelligence Agency (CIA) contractor and a Department of Defense contractor.[47] And, as previously reported, in 2009, the U.S. Attorney General directed a preliminary review of the treatment of certain individuals alleged to have been mistreated while in U.S. Government custody subsequent to the September 11 attacks. The review considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes. That review of the alleged mistreatment of 101 individuals, led by a career federal prosecutor and now informally known as the Durham Review, generated two criminal inves-

43. Department of Defense Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, Nov. 15, 2013, www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/311509p.pdf.

44. DoD Directive 2311.01E, DoD Law of War Program, May 9, 2006 ("DoD Directive 2311.01E"), available at www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101e.pdf.

45. "Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." 18 U.S.C. § 2340A(a).

46. 18 U.S.C. ch. 212.

47. See Fourth Periodic Report of the United States of America to the United Nations Human Rights Committee, paragraphs 533–534, and United States Written Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report (July 13, 2013), paragraphs 41 and 46, on these cases and others.

tigations. The Department of Justice ultimately declined those cases for prosecution because the admissible evidence would not have been sufficient to obtain and sustain convictions. See United States' follow-up response dated March 31, 2015 (paragraph 5), and follow-up reply dated October 9, 2015 (paragraph 4). John Durham, the career prosecutor who led this extraordinarily thorough review, had access to all of the information that the Senate Select Committee on Intelligence (SSCI) reviewed when the Committee members wrote their full report, which included information about all of the detainees mentioned in the SSCI report. In addition, Mr. Durham and his team interviewed a substantial number of witnesses in the United States and abroad, and reviewed other evidence. Finally, before the SSCI report was released, Mr. Durham's team reviewed the Senate Select Committee's report as it existed in 2012 to determine if it contained any new information that would change his previous analysis, and determined that it did not.

8. In addition to the Department of Justice, and in further response to the Committee's subparagraph (a) request, there are many other accountability mechanisms in place throughout the U.S. Government aimed at investigating credible allegations of torture and prosecuting or punishing those responsible. For example, the CIA Inspector General conducted more than 25 investigations into misconduct regarding detainees after 9/11. The CIA also convened six high-level accountability proceedings from 2003 to 2012. These reviews evaluated the actions of approximately 30 individuals, around half of whom were held accountable through a variety of sanctions.

9. In addition, the U.S. military investigates credible allegations of misconduct by U.S. forces, and multiple accountability mechanisms are in place to ensure that personnel adhere to laws, policies, and procedures. The Department of Defense has conducted thousands of investigations since 2001 and it has prosecuted or disciplined hundreds of service members for misconduct, including mistreatment of detainees. Convictions can result in, among other punishments and consequences, punitive confinement, reduction in rank, forfeiture of pay or fines, punitive discharge, or reprimand. Individuals have been held accountable for misconduct related to the abuse of detainees by personnel within their commands. These individuals include senior officers, some of whom have been relieved of command, reduced in grade, or reprimanded.

10. The U.S. law, policy, and procedures that we have described in the preceding paragraphs apply to U.S. Government personnel, including persons in positions of command. Persons in positions of command are not exempt from the requirement to comply with the law, nor are they exempt from investigations based on allegations of wrongdoing. As noted above, it is sometimes not appropriate to highlight the cases of particular individuals.

11. In relation to the Committee's subparagraph (a) inquiry regarding judicial remedies available to detainees in U.S. custody at Guantanamo, the United States notes that all Guantanamo detainees have the ability to challenge the lawfulness of their detention in U.S. federal court through a petition for a writ of habeas corpus. Detainees have access to counsel and to appropriate evidence to mount such a challenge before an independent court. The United States has the burden in these cases to establish its legal authority to hold the detainees. Detainees whose habeas petitions have been denied or dismissed continue to have access to counsel pursuant to the same terms applicable during the pendency of proceedings. Additionally, in February 2014, the U.S. Court of Appeals for the D.C. Circuit held that detainees at Guantanamo can use a petition for a writ of habeas corpus to challenge certain "conditions of confinement" where such conditions would render that custody unlawful.[48]

12. In response to the Committee's subparagraph (b) inquiry regarding the responsibility of lawyers who provided legal advice for government actions following the 9/11 attacks, the United States reported in paragraph 13 of its response dated March 31, 2015, the final decision of the Department of Justice (DOJ) on January 5, 2010, made by a career DOJ official

48. *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

with more than four decades of DOJ service, following an investigation conducted by the DOJ Office of Professional Responsibility into the "Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists."

13. With respect to the Committee's views and recommendation under subparagraph (c) concerning command responsibility, the United States notes its explanation provided in paragraph 12 of its follow-up response of March 31, 2015, regarding how the Uniform Code of Military Justice and other U.S. federal criminal law, as well as comparable state law, hold persons in the chain of command responsible for crimes committed by subordinates.

14. With respect to persons subject to the Uniform Code of Military Justice, the failure of persons in positions of command to take necessary and reasonable measures to ensure that their subordinates do not commit violations of international humanitarian law is made punishable through its punitive articles. For example, the Uniform Code of Military Justice makes punishable violations of orders, including orders to take necessary and reasonable measures to ensure that subordinates do not commit violations. The Uniform Code of Military Justice also makes punishable dereliction in the performance of duties, even if such dereliction was through neglect or culpable inefficiency.

15. Additionally, in some cases, the responsibility for offenses committed by a subordinate may be imputed directly to persons in positions of command. As noted in paragraph 12 of the U.S. response of March 31, 2015, Article 77 of the Uniform Code of Military Justice makes any person subject to the Uniform Code of Military Justice punishable as a principal, including any such person in position of command, who (1) aids, abets, counsels, commands, or procures the commission of an offense, or (2) causes an act to be done which, if done by that person directly, would be an offense. As a principal, the person is equally guilty of the underlying offense as the one who commits it directly and may be punished to the same extent.

16. With respect to the Committee's comment in subparagraph (d), the Committee previously acknowledged that the United States provided the declassified executive summary, totaling more than 500 pages, of the Senate Select Committee on Intelligence (SSCI) Report on the CIA's former Detention and Interrogation Program, which has been made available to the public, and also that the Durham investigation team reviewed a draft of the classified SSCI report in 2012 and did not find any new information that they had not previously considered during their investigation, as indicated in paragraph 4 of our reply dated October 9, 2015, and further confirmed in paragraph 8 above.

Paragraph 10

17. There have been no new developments to report regarding legislation related to requiring background checks for all private firearm transfers response to subparagraph (a) of the Committee's requests.

18. Federal agencies increased the number of active records available in the National Instant Criminal Background Check System Indices (NICS Indices) between December 31, 2015, and July 31, 2017, by 493,737 records—a six percent increase. States increased the number of active records they make available in the NICS Indices by nearly 35 percent between December 31, 2015, and July 31, 2017. The total number of active records in the NICS Indices increased by approximately 18 percent between December 31, 2015, and July 31, 2017. The Department of Justice has also provided incentives for schools to invest in safety and helped provide them with a model for how to develop emergency management plans.

19. Most recently, in response to an unacceptable level of gun violence that continues to plague the City of Chicago, the Attorney General outlined on June 30, 2017, the creation of the Chicago Gun Strike Force. The Crime Gun Strike Force is a permanent team of special agents, task force officers, intelligence research specialists, and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Industry Operations investigators who are focused on the most violent

offenders, in the areas of the city with the highest concentration of firearm violence. The Strike Force became operational June 1, 2017, and consists of 20 additional permanent ATF special agents, six intelligence specialists, 12 task force officers from the Chicago Police Department, two task force officers from the Illinois State Police, and four National Integrated Ballistics Information Network specialists. The Attorney General further announced the reallocation of federal prosecutors and prioritization of prosecutions to reduce gun violence, as well as further efforts working with law enforcement partners to stop the lawlessness.[49]

20. The United States wishes to clarify a misunderstanding of our earlier response regarding Stand Your Ground laws that is apparent from the Committee's request under paragraph (b). The review of Stand Your Ground provisions of state law, as previously reported, was not undertaken by the U.S. Government, but rather by the U.S. Commission on Civil Rights, which is an independent, bipartisan agency established by Congress to investigate, report, and make recommendations to the President and the Congress on civil rights matters. The information we reported regarding the focus of the Commission's independent review and the expectation of a final report was based on publicly available statements by participants in the Commission hearings. The United States has no role in or control over this independent undertaking. Also, our previous reports and responses, including paragraph 22 of our March 31, 2015 response, have made clear the respective roles of federal, state, and local governments and laws under our federal system of government, including criminal laws and rules governing self-defense. In our federal system, these laws are the province of state and local governments.

21. As a final note, the United States wishes to remind the Committee of the long-standing position of the United States regarding the scope of a State Party's ICCPR responsibility with respect to the private conduct of non-State actors, both in relation to gun violence and the exercise of self-defense, as noted in our response dated October 9, 2015, paragraph 10.[50] Likewise, the United States does not share the Committee's view as to the applicability of such concepts as "necessity" and "proportionality" in relation to assessing the use of force or self-defense for purposes of Articles 6 and 9 of the ICCPR. These concepts are derived from domestic and regional jurisprudence under other legal systems and are not broadly accepted as legally-binding internationally, nor supported by either the Covenant text or its *travaux preparatoires*.[51]

Paragraph 21

22. The United States continues to ensure that operations at the Guantanamo Bay detention facility are consistent with its international obligations.[52]

23. In response to subparagraph (a) of the Committee's request, since our follow-up reply on October 9, 2015, 73 more detainees have been transferred from Guantanamo Bay, listed by date of announcement by the Department of Defense (DoD)[53] as follows: one Mauritanian to Mauritania (October 29, 2015); one U.K. national to the United Kingdom (October 30, 2015); five Yemenis to the United Arab Emirates (November 15, 2015); two Yemenis to Ghana (January 6, 2016); one Kuwaiti to Kuwait (January 8, 2016); one Saudi to Saudi Arabia (January

49. See Department of Justice Press Release dated June 30, 2017, available at www.justice.gov/opa/pr/attorney-general-jeff-sessions-we-cannot-accept-these-levels-violence-chicago.

50. See also the USG Observations on General Comment No. 31, supra note 1, paragraphs 10–18; and the USG Observations on Draft General Comment No. 35, supra note 1, paragraphs 10–18.

51. See USG Observations on Draft General Comment No. 35, supra note 1, paragraphs 31 and 35, addressing the Committee's application of such concepts in relation to its interpretation of the term "arbitrary" under Article 9, as well as the discussion below in relation to Article 17.

52. As previously observed in response to General Comment No. 31, supra note 1, paragraphs 24–27; and Draft General Comment No. 35, supra note 1, paragraphs 19–23, international humanitarian law (IHL) is the *lex specialis* with respect to the conduct of hostilities and the protection of war victims. Although the United States agrees as a general matter that armed conflict does not suspend or terminate a State's obligations under the Covenant within its scope of application, we do not believe that the Committee's recommendations with respect to law of war detentions and related operations accord sufficient weight to this well-established principle. As further stated in paragraph 24 of the United States' one-year follow-up report and previous submissions, the United States continues to have legal authority under the law of war to detain Guantanamo detainees while hostilities are ongoing.

53. Department of Defense news releases are available at www.defense.gov/News/News-Releases/.

11, 2016); 10 Yemenis to Oman (January 14, 2016); one Egyptian to Bosnia Herzegovina (January 21, 2016); one Yemeni to Montenegro (January 21, 2016); two Libyans to Senegal (April 4, 2016); nine Yemenis to Saudi Arabia (April 16, 2016); one Yemeni to Montenegro (June 22, 2016); one Yemeni to Italy (July 10, 2016); one Yemeni and one Tajik to Serbia (July 11, 2016); 12 Yemenis and three Afghans to the United Arab Emirates (August 15, 2016); one Mauritanian to Mauritania (October 17, 2016); one Yemeni to Cape Verde (December 4, 2016); four Yemenis to Saudi Arabia (January 5, 2017); eight Yemenis and two Afghans to Oman (January 17, 2017); and one Saudi to Saudi Arabia and one Afghan, one Russian, and one Yemeni to the United Arab Emirates (January 19, 2017). There are currently 41 detainees held at Guantanamo.

24. Also, in response to the Committee's subparagraph (a) request, initial Periodic Review Board (PRB) hearings for each detainee at Guantanamo eligible for review were completed as of September 8, 2016. The final determinations for these hearings have been made public. The PRB determined that continued detention of 38 detainees was no longer necessary to protect against a continuing significant threat to the United States. Thirty-six of these detainees have been transferred from Guantanamo and two remain at Guantanamo. The PRB designated 26 detainees for continued law-of-war detention. These 26 detainees are subject to subsequent full reviews by the PRB on a triennial basis. They also receive file reviews every six months to determine whether any new information raises a significant question as to whether a detainee's continued detention is warranted. If such a significant question is raised, the detainee promptly receives another full review. The PRB is currently conducting file reviews for all eligible detainees and subsequent full reviews as warranted. Further information, including periodic updates on PRB hearings and determinations, is posted by the Periodic Review Secretariat at www.prs.mil/.

25. Of the 41 detainees who remain at Guantanamo, five detainees are currently approved for transfer; 10 detainees are currently facing charges, awaiting sentencing, or serving criminal sentences in the military commissions; and the remaining 26 detainees continue to be eligible for review by the PRB.

26. In response to the Committee's subparagraph (b) request concerning the status of military commission prosecutions, proceedings are currently pending before military commissions against Khalid Sheikh Mohammed and four other alleged co-conspirators accused of planning the September 11 attacks, as well as against Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri for his alleged role in the 2000 attack on the USS Cole, and Abd Al Hadi Al-Iraqi for conspiring with and leading others in attacks on U.S. and coalition service members in Afghanistan, Pakistan, and elsewhere from 2001 to 2006.[54] Several individuals have been convicted through military commission proceedings (either through trial or guilty pleas) and are awaiting sentencing, serving sentences, or have completed their sentences. One conviction was vacated on appeal to the U.S. Court of Appeals for the D.C. Circuit after the defendant had been released;[55] another conviction has recently been upheld by the D.C. Circuit and is now being considered for review by the U.S. Supreme Court;[56] and appeals in two cases are pending before the U.S. Court of Military Commission Review.[57]

27. In further response to the Committee's subparagraph (b) and (c) observations and recommendations, the United States has explained the legal grounds for detentions at the Guantanamo Bay detention facility and disagrees with the premise of the Committee's recommendation and

54. Unlike the alleged plotters of the September 11 attacks and Al-Nashiri, the charges against Al-Iraqi were referred to a military commission not authorized to issue a capital sentence.

55. *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled in part*, *Al Bahlul v. United States*, 767 F.3d 1, 11–17 (D.C. Cir. 2014) (en banc).

56. *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam). As of this writing, Bahlul has petitioned the Supreme Court for review.

57. See *In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016) (denying petition for writ of mandamus to the U.S. Court of Military Commission Review).

follow-up requests that prosecution or immediate release of detainees is required.[58] As addressed in our Fourth Periodic Report and subsequent follow-up responses, the United States has authority under the 2001 Authorization for Use of Military Force (2001 AUMF), as informed by the laws of war, to detain individuals who were part of, or substantially supported, the Taliban, al Qaeda, or associated forces that are engaged in hostilities against the United States or its coalition partners. The U.S. Supreme Court has recognized that the capture and detention of enemy belligerents in order to prevent their return to the battlefield has long been recognized as an "important incident[] of war," *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (internal quotations omitted), and the United States' authority to detain under the 2001 AUMF has been upheld by U.S. federal courts in habeas corpus proceedings. Accordingly, the United States continues to base its domestic legal authority to detain the individuals held at Guantanamo Bay on the 2001 AUMF, as informed by the laws of war.

Paragraph 22

28. The United States has provided information on how the U.S. Constitution and domestic laws ensure the protection of the law against arbitrary and unlawful interference with privacy in conformity with its obligations under Article 17. These protections apply to any person located within United States territory in the conduct of surveillance activities, whether at the federal or state level and regardless of purpose or context. In response to the Committee's subparagraph (a), (b), and (f) assessments, and as previously stated, the United States fundamentally disagrees with Committee's view regarding the application of ICCPR obligations with respect to individuals located outside the territory of the United States.

29. The United States also disagrees with the Committee's view regarding the applicability of such concepts as "necessity" and "proportionality" in relation to interpreting the meaning of either "lawful" or "arbitrary" in the context of Article 17 of the ICCPR.[59] As we have previously responded, these concepts are derived from domestic and regional jurisprudence under other legal systems, are not broadly accepted internationally, go beyond what is required by the ICCPR, and are not supported by either the text of Article 17 or the Covenant's *travaux préparatoires*. In further response to the Committee's subparagraph (a) request, legal provisions governing access to personal data in the United States, whether for criminal justice or national security purposes, are clear and comprehensive. They adhere to the fundamental guarantee in the Fourth Amendment to the U.S. Constitution, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Although the Fourth Amendment generally does not apply to searches of non-U.S. persons located abroad,[60] it does typically govern searches of non-U.S. persons and their property if they are located in the United States,[61] including searches through electronic surveillance.[62]

30. The United States has also provided information on Presidential Policy Directive 28, Signals Intelligence Activities (PPD-28), which applies important protections to personal information regardless of nationality. The scope of these protections includes signals intelligence activities conducted outside the United States. With respect to subparagraph (a)-(b), the

58. Also as stated in paragraph 30 of its one-year follow-up report and previously, all current military commission proceedings incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 and other applicable law, and are further consistent with those in Additional Protocol II of the 1949 Geneva Conventions.

59. See paragraph 33 of the United States' one-year follow-up response dated March 31, 2015; see also paragraph 18 and footnote 19 of the United States' Reply to the Special Rapporteur for Follow-up dated October 9, 2015.

60. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

61. See *id.* at 278 (Kennedy, J., concurring).

62. See generally *Katz v. United States*, 389 U.S. 347 (1967).

Committee appears, from its earlier follow-up questions, to have the impression that PPD-28's safeguards are "administrative measures."[63] To be clear, in the United States, "[a] presidential directive has the same substantive legal effect as an executive order,"[64] which has the full force and effect of law. In addition, presidential directives, like executive orders, "remain effective upon a change in administration."[65] Thus, as applied to the Executive Branch generally and to intelligence agencies conducting signals intelligence activities specifically, the measures required by PPD-28 have the force of law, and remain in effect.

31. As discussed more fully in previous submissions, the Foreign Intelligence Surveillance Act ("FISA") governs, among other things, electronic surveillance, physical search, and access to personal data for foreign intelligence in the United States. FISA was first enacted in 1978, and it "embodie[d] a legislative judgment that court orders and other procedural safeguards are necessary to [e]nsure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the Fourth Amendment."[66] All parts of the statute (including all subsequent amendments) are public and are contained within Title 50 of the U.S. Code.[67] Section 702 of FISA authorizes the acquisition of foreign intelligence information through targeting of non-U.S. persons located outside the United States, with the compelled assistance of U.S. electronic communications service providers.[68] It contains extensive legal constraints, oversight requirements, and other privacy safeguards. Multiple layers of oversight by all three branches of government ensure that this activity is carefully undertaken in strict compliance with legal requirements. As the Privacy and Civil Liberties Oversight Board (PCLOB) found, Section 702 collection targets specific persons about whom an individualized determination has been made that the person is likely to use a selector (e.g., email address or phone number) to communicate a category of foreign intelligence information approved by the Foreign Intelligence Surveillance Court (FISC). Such collection is not "mass surveillance" or "bulk collection."[69] Recently, partly in response to a report by its Inspector General, the National Security Agency (NSA) reported compliance issues to the FISC regarding so-called "upstream" collection. This resulted in modifications to the Section 702 targeting procedures and minimization procedures that narrow the communications the NSA collects under Section 702. The government has released a great deal of information regarding this change, including an explanatory statement from the NSA, the revised targeting and minimization procedures approved by the FISC, and the FISC opinion addressing the change.[70]

32. In further response to the Committee's requests under subparagraphs (a), (b), and (c) regarding the implementation, application, and effectiveness of the USA FREEDOM Act of 2015 (the Act) in ensuring the protection of the law against arbitrary and unlawful interference with privacy, we note that the Act was enacted in June 2015, and contains a number of provisions that modify U.S. surveillance authorities and other national security authorities through legislation, and increase transparency regarding the use of these authorities described in our October 2015 reply to the Committee.[71] As described in that reply, the Act prohibits bulk collection by the U.S. Government under Title V of FISA (also referred to as Section 215),

63. See Deputy Special Rapporteur's letter following the Committee's 114th session in July 2015 at p. 2.

64. *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order* [OLC opinion January 29, 2000], available at www.justice.gov/sites/default/files/olc/opinions/2000/01/31/op-olc-v024-p0029_0.pdf.

65. Ibid.

66. *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984) (quoting Senate Report No. 95-701, at 13 (1978)).

67. See 50 U.S.C. §§ 1801, et seq.

68. Large amounts of information about the operation and oversight of Section 702 is publicly available. Numerous court filings, judicial decisions, and oversight reports relating to the program have been declassified and released on the ODNI's public disclosure website, www.icontherecord.tumblr.com. Moreover, Section 702 was comprehensively analyzed by the PCLOB, in a report which is available at www.pclob.gov/library/702-Report.pdf.

69. www.pclob.gov/library/702-Report.pdf.

70. Links to these documents are available at https://icontherecord.tumblr.com/post/160561655023/release-of-the-fisc-opinion-approving-the-2016.

71. See paragraphs 20-24 of the United States' response dated October 9, 2015.

the FISA pen register and trap and trace provision, and through the use of National Security Letters. In addition, the Act replaces the NSA bulk telephony metadata program under FISA with a new mechanism, under which the U.S. Government may only make targeted requests for telephone records held by communication service providers pursuant to individual orders from the FISC, rather than requesting such records in bulk. In furtherance of transparency, the government has released a report by NSA's Civil Liberties and Privacy Office that describes in detail how it is implementing the Act.[72] NSA's minimization procedures that apply to records obtained under the Act have also been released.[73]

33. One particular element of increased transparency is the Act's codification and expansion of a previously existing policy commitment to report publicly certain statistics concerning the use of critical national security authorities, including FISA, in an annual report called the *Statistical Transparency Report Regarding Use of National Security Authorities (Annual Report)*.[74] The Fourth Annual Report, covering calendar year 2016, was published in April 2017 and, where these statistics are available, provides a compendium of four years' worth of informative data concerning the exercise of FISA authorities, both before and as amended by the Act. This includes Title IV and Title V authorities to obtain data from third parties upon the issuance of an individualized order by the FISC.

34. The Act also provides that recipients of certain national security orders and directives may publish statistical information regarding the number of orders and directives received under particular categories.[75] To protect intelligence sources and methods, these numbers must be published in numerical ranges. The public can view such reports by visiting web pages set up by service providers to make such statistical information available.

35. Another transparency mandate under the Act is the requirement that the Director of National Intelligence (DNI), in consultation with the Attorney General, conduct a declassification review of each decision, order, or opinion issued by the FISC and the Foreign Intelligence Court of Review (FISC-R) that includes a significant construction or interpretation of any provision of law, and to make publicly available to the greatest extent practicable any such decision, order, or opinion.[76] Where declassification is not possible for national security reasons (the Act provides for a formal waiver process), then an unclassified summary must be prepared. Several FISA opinions, orders, and related court documentation have already been publicly released.[77]

36. The Act also provides for the designation of amici curiae from a panel of not fewer than five individuals jointly established by the FISC and FISC-R. The court is to designate an amicus curiae to assist the FISC in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate.[78] It may also designate an amicus curiae to provide technical assistance and in any instance where the court deems appropriate. An amicus curiae designated to assist the court is to provide, as appropriate, legal arguments that advance the protection of individual privacy and civil liberties; information related to intelligence collection or information technology; or legal arguments or information regarding any other area relevant to the issue presented to the

72. Transparency Report: The USA FREEDOM Act Business Records FISA Implementation (Jan. 15, 2016), available at www.nsa.gov/about/civil-liberties/reports/assets/files/UFA_Civil_Liberties_and_Privacy_Report.pdf.

73. www.nsa.gov/about/civil-liberties/reports/assets/files/UFA_SMPs_Nov_2015.pdf.

74. See paragraph 37 of the United States' one-year follow-up response dated March 31, 2015, referencing the first Annual Report, issued in June of 2014. All Annual Reports are publicly available at https://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2016.

75. 50 U.S.C. § 1874.

76. 50 U.S.C. § 1872.

77. See, *e.g.*, https://icontherecord.tumblr.com/post/143070924983/release-of-three-opinions-issued-by-the-foreign.

78. 50 U.S.C. § 1803(i).

court. The FISC has published a list of individuals authorized to appear as amici curiae,[79] and has already made several appointments in specific cases.[80]

37. In subparagraph (d), the Committee observed and recommended that the United States refrain from imposing mandatory data retention requirements on third parties. The United States has taken this recommendation under consideration and wishes to inform the Committee that it respectfully declines its adoption. Such data retention requirements, where applicable, are exercised pursuant to U.S. law consistent with our obligations under Article 17.

38. With respect to the Committee's request under subparagraph (e) for information on access to remedies, to supplement previous responses, U.S. law provides a number of avenues of redress for individuals who have been the subject of unlawful electronic surveillance for foreign intelligence purposes. Under FISA, an individual who can establish standing to bring suit would have remedies to challenge unlawful electronic surveillance under FISA. For example, FISA allows persons subjected to unlawful electronic surveillance to sue U.S. Government officials in their personal capacities for money damages, including punitive damages and attorney's fees.[81] Such individuals could also pursue a civil cause of action for money damages, including litigation costs, against the United States when information about them obtained in electronic surveillance under FISA has been unlawfully and willfully used or disclosed.[82] In the event the government intends to use or disclose any information obtained or derived from electronic surveillance of any aggrieved person under FISA against that person in a judicial or administrative proceeding in the United States, it must provide advance notice of its intent to the tribunal and the person, who may then challenge the legality of the surveillance and seek to suppress the information.[83] Finally, FISA also provides criminal penalties for individuals who intentionally engage in unlawful electronic surveillance under color of law or who intentionally use or disclose information obtained by unlawful surveillance.[84]

39. In addition to avenues for redress under FISA, the Computer Fraud and Abuse Act prohibits intentional unauthorized access (or exceeding authorized access) to obtain information from a financial institution, a U.S. Government computer system, or a computer accessed via the Internet, as well as threats to damage protected computers for purposes of extortion or fraud. Any person who suffers damage or loss by reason of a violation of this law may sue the violator (including a government official) for compensatory damages and injunctive relief or other equitable relief regardless of whether a criminal prosecution has been pursued, provided the conduct involves at least one of several circumstances set forth in the statute.[85]

40. Title I of the Electronic Communications Privacy Act (ECPA), also known as the Wiretap Act, is the principal statute regulating the domestic interception of wire, oral, and electronic communications.[86] Title II of ECPA, also known as the Stored Communications Act, regulates the government's access to stored electronic communications, transactional records, and subscriber information held by third-party communication providers.[87] Both the Wiretap Act and the Stored Communications Act allow, under certain circumstances, any person who suffers damage or loss by reason of a violation of either law to sue a violator for compensatory damages, injunctive relief, and reasonable attorney's fees.[88] Additionally, any person who is

79. www.fisc.uscourts.gov/amici-curiae.

80. For example, this publicly released case involved an amicus curiae, who made legal arguments to advance the protection of individual privacy and civil liberties: www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf.

81. 50 U.S.C. § 1810.

82. 18 U.S.C. § 2712.

83. 50 U.S.C. § 1806.

84. 50 U.S.C. § 1809.

85. 18 U.S.C. § 1030.

86. 18 U.S.C. §§ 2510–2522.

87. 18 U.S.C. §§ 2701–2712.

88. See 18 U.S.C. §§ 2520, 2707.

aggrieved by any willful violation of the Wiretap Act or the Stored Communications Act may commence an action against the United States to recover money damages.[89]

41. Additionally, individuals have sought, and in some cases have obtained, judicial redress for allegedly unlawful government access to personal data through civil actions under the Administrative Procedure Act (APA), a statute that allows persons "suffering legal wrong because of" certain government conduct to seek a court order enjoining that conduct.[90] For example, a recent challenge under the APA resulted in a decision by a federal appeals court holding both that bulk collection of telephone metadata under Title V of FISA could be challenged as exceeding, and did in fact exceed, the U.S. Government's authority under the statute.[91] That bulk telephone metadata collection program was terminated in the USA FREEDOM Act of 2015, as discussed above.

89. 18 U.S.C. § 2712.

90. 5 U.S.C. § 702.

91. *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015). Other courts, agreeing with the U.S. Government, have reached contrary rulings on both points. See *Klayman v. Obama*, 957 F. Supp. 2d 1, 19–25 (D.D.C. 2013) (finding that plaintiffs could not bring suit under the APA alleging violations of the statute, but could bring suit alleging violations of the Fourth Amendment), *vacated*, 800 F.3d 559 (D.C. Cir. 2015); *In re Application of the FBI*, No. BR 13–109, 2013 WL 5741573, at *3–9 (FISC Aug. 29, 2013) (holding that the program was consistent with the statute).

IX. Sustainable Development Goals and Realizing the Right to Work

III. The 2030 Agenda for Sustainable Development and the Right to Work

1. The 2030 Agenda for Sustainable Development, in a significant departure from the Millennium Development Goals that preceded it, is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law, and is grounded in the Universal Declaration of Human Rights and international human rights treaties, among other instruments.[92] The Sustainable Development Goals seek to realize the rights of all; States have committed, in the 2030 Agenda, to leaving no one behind and to reaching the furthest behind first.[93] As previously noted by OHCHR in its position paper "Transforming Our World: Human Rights in the 2030 Agenda for Sustainable Development", the Sustainable Development Goals offer a new, more balanced paradigm for more sustainable and equitable development in that, while the Millennium Development Goals addressed only a narrow set of economic and social issues, the Sustainable Development Goals include 17 goals and 169 targets covering a wide range of issues that effectively mirror the human rights framework. Moreover, the targets of the Goals reflect the content of corresponding human rights standards, even though they are not framed explicitly in the language of human rights. The 2030 Agenda and the political commitments contained in it therefore complement the human rights framework by affirming many existing norms and setting out a road map to achieve them.

2. With regard to work, States pledged in the 2030 Agenda to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work and to work to build dynamic, sustainable, innovative and people-centred economies, promoting youth employment and women's economic empowerment, in particular decent work for all. These pledges are complemented by a commitment to adopt policies that increase productive capacities, productivity and productive employment. Sustainable Development Goal 8, on promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, is the most comprehensive goal applicable to the right to work, in particular the targets 8.3, 8.5, 8.6, 8.8, 8.9 and 8.b.

3. A number of other Sustainable Development Goals and targets are of broader relevance to the right to work. The realization of this right has a clear and direct impact on the achievement of Goal 1 (on ending poverty in all its forms everywhere) and Goal 2 (on ending hunger, achieve food security and improved nutrition and promoting sustainable agriculture). With regard to health, target 3.4 aims at reducing premature mortality from non-communicable diseases through prevention and treatment and the promotion of mental health and well-being, while target 3.9 aims at reducing the number of deaths and illnesses from hazardous chemicals. Such objectives are directly linked to the duty of States to ensure safe and healthy working conditions. With regard to education and its role in promoting the realization of the right to work by building a skilled workforce, targets 4.3 and 4.4 are pertinent, as they aim, respectively, to ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education and to increase the number of youth and adults who have relevant skills for employment, decent jobs and entrepreneurship. In the light of the gender disparities that persist in labour force participation and employment (see A/HRC/34/29, para. 15), the achievement of Goal 5 (on achieving gender equality and empower all women and girls), particularly targets 5.4, 5.5 and 5.a, would do much to foster the realization of the right to work, as would Goal 10 (on reducing inequality within and among countries) with its targets addressing laws, policies and practices, social, economic and political inclusion, equality of opportunity, and the reduction of inequalities of outcome, as enshrined in targets 10.2, 10.3 and 10.4.

92. General Assembly resolution 70/1, para. 10.

93. Ibid., para. 4.

4. In considering the relationship between the realization of the right to work and the implementation of relevant targets of the Sustainable Development Goals, it is important to recognize that, to the extent that they are implemented consistently with international law, including human rights norms and standards,[94] the Goals and targets are a useful framework for supporting States in respecting, protecting and fulfilling the right to work. Certain targets provide for many elements of an enabling environment for the realization of the right to work: article 6(2) of the International Covenant on Economic, Social and Cultural Rights provides for, in addition to technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment, under conditions safeguarding the fundamental political and economic freedoms of the individual. Part of creating an enabling environment involves legislative, policy and other measures to give effect to the duty to respect, protect and fulfil the right to work.[95] In this respect, targets 8.3 (on development-oriented policies), 8.8 (the protection of labour rights and the promotion of safe and secure working environments for all workers), 8.9 (developing and implementing policies to promote sustainable tourism that creates jobs and promotes local culture and products) and 8.b (global strategy for youth employment and implementation of the ILO Global Jobs Pact) are especially relevant.

5. Some of the normative content of the right to work is reflected in the targets, as are several State obligations. Under the International Covenant on Economic, Social and Cultural Rights, the overarching obligation is for States to ensure the progressive realization of the right to work.[96] This is echoed in target 8.5, while the targets relating to the protection of labour rights and the promotion of occupational health and safety also align with the normative content of the right to work.

6. Non-discrimination, equality and inclusion are an integral part of several goals and targets: the objectives of achieving equality overall and gender equality specifically underpin Goals 5 and 10, respectively. Target 8.5 (on full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value) requires the elimination of discrimination in remuneration and access to employment. Several dimensions of inclusion, particularly economic, social and political inclusion, equality and non-discrimination are features of a number of targets, including targets 10.2, 10.3 and 10.4.

7. The Sustainable Development Goals and, necessarily, their targets are universal and interlinked with a view to supporting a coordinated, comprehensive approach. In the 2030 Agenda, the General Assembly clearly noted that the interlinkages and integrated nature of the Goals were of crucial importance in ensuring that the purpose of the new Agenda was realized. This reflects the interdependence and indivisibility of the human rights on which the 2030 Agenda is based.

8. In this context, interesting examples can be considered. Since 2005, in India, the Mahatma Gandhi National Rural Employment Guarantee Act has provided a minimum of 100 days of guaranteed wage employment in any financial year to every rural household whose adult members volunteer to do unskilled manual work. Through this process, the Act address the linkage between the right to work, the right to food and the right to life enshrined in the Constitution of India.

IV. Leaving no one behind

9. Adopting a human rights-based approach to the implementation of the targets of the Sustainable Development Goals insofar as this relates to vulnerable and marginalized individuals, groups and populations is a fundamental element of contributing to the realization of the right to work.

94. See General Assembly resolution 70/1, para. 18.

95. See Committee on Economic, Social and Cultural Rights general comment No. 18 (2005) on the right to work, paras. 24–28.

96. Ibid., para. 19.

A. Women

10. According to ILO, the significant progress in women's educational achievements has not yielded a corresponding improvement in their position at work, and women continue to experience greater challenges in gaining access to work than men; specifically, "barriers to participation, persistent occupational and sectoral segregation and a disproportionate share of unpaid household and care work prevent them from enjoying equal access to opportunities."[97] Moreover, access to employment has not necessarily meant access to decent work, and women remain at greater risk of unemployment.[98] The gendered nature of the global workforce has meant that women are concentrated and overrepresented in lower paying occupations and positions (such as domestic work), in non-standard employment and in the informal sector, where social protection tends to be limited or non-existent (see A/HRC/34/29).

11. With regard to working conditions, the global gender pay gap is estimated to be around 23 per cent, with women earning, on average, 77 per cent of men's wages.[99] ILO notes in this regard that the lack of data disaggregated by sex inhibits an accurate assessment of this disparity.[100] Working mothers also experience a "wage penalty," earning less than women without dependent children, while working fathers tend to earn a "fatherhood bonus," becoming higher earners when they have children. This premium on fatherhood may even be exceptionally high for men, depending on their education level, ethnicity, heterosexual marital status and professional or managerial status.[101] In a recent report, the United Nations High Commissioner for Human Rights noted the vulnerability of women working in manufacturing and other sectors in export-processing zones to violations of their labour rights, observing that, often, in order to attract investors, States adopt specific regimes for export-processing zones whereby labour law does not apply, either partially or fully, and that reports of low wages, long working hours, unpaid overtime, sexual harassment and other forms of violence in export-processing zones are rife (A/HRC/34/29, para. 49).

12. A human rights-based approach to addressing gaps in the realization of women's right to work entails, among other steps, the establishment of a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment for women by ensuring equal pay for work of equal value.[102] It also includes the review of law and policy frameworks and labour practices to ensure the adoption of measures necessary to align them with human rights norms and standards pertaining to the right to the right to work in this area. Furthermore, as the Committee on Economic, Social and Cultural Rights noted in its general comment No. 18 (2005), States should take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection. The key objectives of these measures should be the elimination of structural, social and other barriers to women's access to decent work and retention of employment, and just and favourable working conditions.

B. Persons with disabilities

13. There are approximately 470 million persons with disabilities of working age around the world. Many find it hard to gain access to decent work, and are often forced to seek employment in the informal sector. As well as experiencing discrimination and marginalization in employment, they also have limited enjoyment of other rights essential for the realization of the right to work, such as the rights to education, legal capacity and access to information. An estimated 82 per cent of persons with disabilities in developing countries live below the pov-

97. ILO, *Women at Work: Trends 2016*, Geneva, 2016, p. 5.

98. Ibid., p. 12.

99. Ibid., p. xvi.

100. ILO, *Fundamental principles and rights at work: From challenges to opportunities*, Geneva, 2017, para. 65.

101. ILO, *Women at Work* (see footnote 12), p. 58.

102. Committee on Economic, Social and Cultural Rights general comment No. 18 (2005) on the right to work, para. 13. See also CEDAW/C/THA/CO/6-7, para. 37 (c).

erty line, and are among the most vulnerable and marginalized.[103] There is, therefore, a strong link between disability and poverty.

14. Persons with disabilities face barriers of access that include the denial of reasonable accommodation, meaning an adjustment or modification required in the work environment or application process to enable a person with a disability to enjoy equal employment opportunities. This is a key part of States' obligations to ensure non-discrimination and equality, and that no one is left behind. Access to decent work is also impeded by widespread perceptions that persons with disabilities are unable to work or are eligible only for specific jobs, or for work in segregated environments.[104]

15. Many persons with disabilities consequently rely on disability benefits (where they are offered). Many States have, however, gradually reduced social protection programmes, including those targeting persons with disabilities, through austerity measures, and are continuing to do so. Social support and assistance have been reduced, and eligibility criteria for social assistance have been tightened, while conditionalities have been increased and more severe sanctions for non-compliance introduced (CRPD/C/GBR/CO/1, para. 58). Measures of this type have significantly increased the risk of further marginalization of and poverty among persons with disabilities, and could drive some into hazardous and exploitative work.

16. The implementation of Sustainable Development Goal 8 and other relevant goals and targets must be informed by the human rights framework, including the Convention on the Rights of Persons with Disabilities and the International Covenant on Economic, Social and Cultural Rights. The respective treaty-monitoring bodies provide guidance on what the right to work and just and favourable conditions of work for persons with disabilities entail. According to key guidance in this area, workers with disabilities should not be segregated in sheltered workshops, should benefit from an accessible work environment and should not be denied reasonable accommodation, such as workplace adjustments or flexible working arrangements. States should also take steps to ensure that workers with disabilities enjoy equal remuneration for work of equal value and to eliminate wage discrimination due to a perceived reduced capacity for work.[105]

C. Migrants in an irregular situation

17. Although reliable data are not readily available, estimates indicate that around 10 to 15 per cent of all international migrants, or 30 million people, are in an irregular situation. Irregular migrants are often vulnerable for a number of reasons, many of which are related to their irregular situation. They are frequently not permitted to work, although, in practice, many do work irregularly and mostly in the informal sector. Irregular migrants are also at high risk of exploitation, particularly given that the sectors in which many work are often unprotected and unregulated, such as the construction, agriculture, food processing and fisheries industries. Their conditions of work are frequently harsh and inhumane, with little provision for occupational health and safety, while many experience abuse, including physical abuse and sexual and gender-based violence.[106]

18. As well as typically earning lower wages compared to nationals and other migrants in similar occupations, legal requirements may limit the ability of migrants in an irregular situation to seek alternative employment, and may actively tie them to a particular employer, which violates the right to freely choose or accept employment. These challenges may be compounded when such migrant workers feel unable to assert their rights and seek the protections available

103. ILO, *The right to decent work of persons with disabilities*, Geneva, 2007.

104. Netherlands Human Rights Institute, Annual status report 2016, "Poverty, social exclusion and human rights."

105. See Committee on Economic, Social and Cultural Rights general comment No. 23 (2016) on the right to just and favourable conditions of work (E/C.12/GC/23), para. 47 (c).

106. OHCHR, *Behind closed doors: Protecting and promoting the human rights of migrant domestic workers in an irregular situation* (New York and Geneva, 2015), p. 3.

to other workers out of fear of detection and possible consequences.[107]

19. The implementation of the Goals and targets of the 2030 Agenda for Sustainable Development relating to the protection of labour rights should involve, in accordance with human rights norms and standards, the adoption of legal and practical measures to prevent discrimination against irregular migrants, the removal of laws and rules that make access to basic services conditional on the production of documents that irregular migrants cannot obtain, and ensuring that irregular migrants have full, non-discriminatory access to appropriate administrative and judicial remedies. It should also entail the development of specific national strategies or plans of action to realize the rights to health, housing, education, social security and decent work of all migrants, ensuring that they pay due attention to the situation of irregular migrants.[108]

20. One positive example of awareness-raising made by the European Union Agency for Fundamental Rights is the Task Force on Combating Human Trafficking, established by the Government of Austria, which provides migrant domestic workers with information about their rights in their first language when applying for a visa.

D. Youth

21. Access to decent work for young people is a global problem. Seventy three million young people worldwide are seeking employment; in Europe, the unemployment rate for those under 25 is 2.6 times higher than for the rest of the population.[109] According to the European Youth Forum, young people often lack the experience they need to be competitive in the global labour market and in Europe, and few employers are willing to engage and invest in young and inexperienced workers. To gain the necessary experience, many have to accept unpaid internships, which excludes the most marginalized who cannot afford to work for free. In this regard, the European Youth Forum has called upon States to regulate internships and to ban unpaid ones to ensure fair access for all young people, regardless of their socioeconomic background. Moreover, cuts to education, especially to support services, made by many States in response to the financial crisis that broke out in 2008, are said to have further reduced access to quality education for many disadvantaged children, and considerably limited their access to decent work.[110]

22. Some States have lowered labour standards and social protection for private actors employing young people**.** The European Committee on Social Rights has criticized States for proposing special apprenticeship contracts that have in effect create a distinct category of workers excluded from the general range of protection offered by the social security system.[111] Some States have set the minimum wage for young people substantially lower than that of the general population,[112] despite indications that, in many States, the legal minimum wage is insufficient to secure an adequate standard of living.[113] Some States have also restricted the social security benefits that young people may receive.[114]

23. Key measures that should be taken in this context include national policies relating to adequate education and vocational training with a view to promoting access to employment opportunities, particularly for young women.[115] As pointed out by the Committee on Economic, Social and Cultural Rights, all workers should be protected against age discrimination, and young workers should not suffer wage discrimination by, for example, being forced to accept low wages that do not reflect their skills. The Committee also emphasized that the excessive

107. Ibid.

108. Ibid., p. 135.

109. Council of Europe, "Youth human rights at risk during the crisis," 3 June 2014.

110. European Youth Forum, *Excluding Youth: A Threat to Our Future*, 2016.

111. Council of Europe, "Youth human rights at risk" (see footnote 24).

112. Ibid.

113. Youth Employment UK, "Living, a wage, and young people," 2016.

114. Joseph Rowntree Foundation 'Young People and Social Security: An International Review (York, October 2015).

115. Committee on Economic, Social and Cultural Rights general comment No. 18 (2005) on the right to work, para. 14.

use of unpaid internships and training programmes, as well as of short-term and fixed-term contracts that negatively affect job security, career prospects and social security benefits, is not in line with the right to just and favourable conditions of work.[116]

24. Given the multifaceted aspects of employment, in Finland, the Ministry of Economic Affairs and Employment and other ministries are developing, under the Youth Guarantee scheme, "one-stop-shop" service points, the aim of which is to bring together service providers and to increase cooperation between administrative bodies.

E. Older persons

25. The number of persons aged 60 and over is rising at an unprecedented rate, and is expected to increase from the estimated number of 962 million for 2017 to 1.4 billion by 2030.[117] By 2050, all regions of the world (except Africa) will have nearly a quarter or more of their populations at ages 60 and above.[118]

26. Older persons face numerous challenges in their access to the right to decent work, such as age-based discrimination in both the job market and at work. Older people may face prejudice when applying for jobs, seeking promotions or undertaking training, or may be subject to harassment in the workplace. One common complaint made to national human rights institutions by ageing and older persons was that of having been refused employment, interviews or other opportunities to find work because of their age.[119]

27. Most older women are excluded from formal social security and health insurance schemes, as they are linked to paid, formal-sector employment. In developing countries, the great majority of women work all their lives in the informal sector or doing unpaid activities. In developed countries, older women are more likely than men to be poor. On average, in European Union countries, older women have a poverty risk rate of about 22 per cent, compared to a rate of 16 per cent for older men. They are less likely to receive a large contributory pension since they are more likely to have stopped working at some point over their lifetime to take on the responsibilities of child rearing, and are also more likely to have received lesser wages for their work than men.

28. The protection of the right of older persons to work hinges to a great extent on measures to address discrimination in access to work and in the workplace. The measures should be coupled with interventions to address gender discrimination, and other forms of discrimination that have an impact on access to employment and the enjoyment of the right to just and favourable working conditions. States should give due consideration to establishing non-contributory pensions as a means of ensuring the right to social security for older women and compensating them for their years of unpaid or inadequately paid work. In order to ensure equal access by older women to a social pension, however, special measures should be taken to overcome possible barriers caused by structural discrimination, such as lack of access to adequate documentation and identification, difficulties approaching administrations, or lack of gender-sensitive social services (A/HRC/33/44, paras. 51-57).[120]

29. According to information received from the European Union Agency for Fundamental Rights, some States (such as Denmark) have abolished the upper age limits for employment, thereby allowing those who were above the limit beforehand to continue to work or to seek employment. Furthermore, dismissal or the withholding a job offer on the basis of a person's age would constitute age discrimination. Several European States have also made financial incentives available to employers for hiring older workers.

116. Committee on Economic, Social and Cultural Rights general comment No. 23 (2016) on the right to just and favourable conditions of work, para. 47 (b).

117. Department of Economic and Social Affairs, World Population Prospects: 2017 Update.

118. Ibid.

119. Ibid.

120. See also Committee on Economic, Social and Cultural Rights general comment No. 19 (2007) on the right to social security (art. 9), para. 32.

V. Issues relevant to the implementation of the right to work and the Sustainable Development Goals

A. Adequate and accessible social security

30. The right to decent work includes adequate and accessible social protection. This is also included in Sustainable Development Goal 1 (on ending poverty in all its forms everywhere), which includes target 1.3 that requires States to implement nationally appropriate social protection systems and measures for all, including floors. Under article 9 of the International Covenant on Economic, Cultural and Social Rights, States are required to ensure the right to social security, which includes both social insurance and assistance.[121]

31. The politically determined trend currently witnessed in many States to reduce the role of the State, including in response to the recent debt crisis, however, has led to a reduction in social security, particularly assistance. States have both reduced the amount received by recipients and/or reduced coverage by making eligibility rules tighter (see A/HRC/17/34 and E/2013/82). Measures taken have also increased sanctions for non-compliance with specific conditions. In addition, politicians and the media increasingly stigmatize those on benefits, thereby discouraging many from claiming their entitlements.[122]

32. In its general comment No. 19 (2007), the Committee on Economic, Social and Cultural Rights stated that Governments should ensure that social security is financially accessible, namely, affordable. This includes social insurance. However, low and irregular wages, exacerbated by the "flexibilization" of labour markets worldwide, make it difficult for many to contribute to social insurance schemes.[123] Women are particularly disadvantaged by interrupted work histories due to traditionally assigned caregiver roles.[124]

33. States should also ensure accessible and adequate social protection in accordance with human rights law and the ILO Recommendation No. 202 concerning National Floors of Social Protection. Inadequate and/or inaccessible social protection systems, including those that can stigmatize recipients can "entrench socio-economic inequalities."[125] States should thus continually assess the goods and services people need to able to move out of poverty, and to monitor them accordingly.

B. Informal economy

34. Target 8.3 of the Sustainable Development Goals calls upon States to support decent job creation. The informal economy, which is generally neither taxed nor monitored by any form of government, however, is growing. Workers in the informal economy are typically excluded from various legal protections. They often earn lower average wages, and are rarely provided with social security coverage or any other form of social protection by their employers or the Government, such as health care, pensions, education, skill development, training or child care. They may also be outside the reach of health and safety standards, and their work place may be unsafe, hazardous or unhealthy.

35. Labour market discrimination in the formal job market often forces certain groups, such as indigenous peoples, persons with disabilities, women, and particular ethnic groups, into working in the informal economy. Given the lack of protection in the informal economy and low wages, this often entrenches their poverty and marginalization even further, and makes them more likely to be left behind.

36. The informal sector could expand further owing to future employment developments, such as non-standard forms of employment facilitated by increases in digital technology, or a drop in the availability of more traditional jobs, especially for the low-skilled. While the rise in non-

121. Ibid.

122. Frances Ryan, "On Benefits and Proud: The show where 'deserving taxpayers' stalk 'proud benefit claimants,'" *NewStatesman*, 15 October 2013.

123. Sandra Fredman, "Engendering socio-economic rights," *South African Journal of Human Rights*, vol. 25, part 3 (2009), p. 412.

124. See ILO, "Gender equality at the heart of decent work," International Labour Conference, 98th session, 2009.

125. Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), pp. 226 and 232.

standard forms of employment can be seen as an opportunity, unless properly regulated, it may jeopardize the 2030 Agenda for decent work.[126]

C. Precarious contracts

37. Target 8.8 of the Sustainable Development Goals urges States to protect labour rights. Efforts in many countries to dismantle or limit regulation aimed at protection workers right have, however, resulted in reduced protection of workers, increasing the number of insecure or precarious contracts. Such a deregulation has also been pushed by international financial institutions, which have also promoted precarious contracts and facilitated dismissals as part of austerity-related law reforms.[127]

38. According to trade unions, deregulation has resulted in contracts where employers are not required to provide any minimum working hours, while employees must be available for work as and when required. Such contracts are used by employers to avoid recruitment and agency costs, and are associated with low pay, income insecurity and insufficient working hours, despite the obligation of employees to be continuously available for work. Deregulation can limit other work possibilities, and the ability to earn enough to cover the costs of living.[128] Other casual contracts might provide for minimal hours but may be subject to last-minute changes and reductions. Such insecure contracts are likely to increase in the future with the rise of the "gig economy."[129]

39. The above-mentioned types of contracts are said to place workers at a higher risk of poverty.[130] Given "the market power of employers over employees [,]employers are able to glean all the flexible benefits associated with zero-hours contracts; whilst all the financial and security risks are transferred to the workers."[131] They therefore undermine the realization of the Sustainable Development Goals and violate the right to decent work, as contained in the International Covenant on Economic, Social and Cultural Rights.[132] This has also led to calls for a different assessment of the implications of the indicators under Goal 8: "High levels of underemployment and precarious work mean that the standard unemployment rate is inadequate as a sole measure of the condition of the labour market."[133]

40. The establishment of ombudspersons can be helpful for the resolution of work-related grievances, including on salaries and benefits. In Australia, the Fair Work Ombudsman helps employers and employees to resolve workplace issues, and provides clear information on their rights and obligations. The Ombudsman of the Republic of Latvia has been constantly involved in the protection of the interests of persons at risk of poverty, including the "working poor" and those suffering from insufficient minimum wages and unfair remuneration.

D. Occupational health and safety

41. Target 8.8 of the Sustainable Development Goals also calls upon States to promote safe and secure working environments. Despite this, continuing deregulation has led many Governments to remove "red tape" around health and safety regulations that are often perceived as unfairly hindering business and restricting economic growth. In reality, the economic burden of poor occupational safety and health practices is estimated at 4 per cent of global gross

126. ILO, *Non-standard employment around the world: understanding challenges, shaping prospects*, Geneva, 2016.

127. Stefano Sacchi, "Conditionality by other means: EU involvement in Italy's structural reforms in the sovereign debt crisis," *Comparative European Politics*, vol. 13, No. 1 (2015), pp. 82–83 and 89. See also A/HRC/34/57.

128. Trades Union Congress, Ending the abuse of zero-hours contracts—TUC response to BIS consultation, Equality and Employment Rights Department, London, March 2014.

129. Forms of work in the "gig economy" include "crowdwork" and "work-on-demand via apps," under which the demand and supply of working activities is matched online or via mobile apps. See Valerio De Stefano, "The rise of the 'just-in-time workforce': on-demand work, crowdwork and labour protection in the 'gig-economy,'" ILO, Conditions of Work and Employment Series No. 71, 2016.

130. Netherlands Human Rights Institute, Annual status report 2016: "Poverty, social exclusion and human rights."

131. Trades Union Congress, Ending the abuse of zero-hours contracts (see footnote 43).

132. See Committee on Economic, Social and Cultural Rights general comment No. 23 (2016) on the right to just and favourable conditions of work (art. 7).

133. Kristy Jones, *Tough Jobs: The Rise of an Australian Working Underclass*, Construction, Forestry, Mining and Energy Union, September 2016.

domestic product each year.[134] Unhealthy and/or hazardous working conditions significantly undermine people's ability to work and to provide for themselves and their families.

42. In addition to ensuring adequate regulation, States should also guarantee appropriate inspection and monitoring systems. Article 9 of the ILO Occupational Safety and Health Convention, 1981 (No. 155) specifies that "the enforcement of laws and regulations concerning occupational safety and health and the working environment shall be secured by an adequate and appropriate system of inspection" and "the enforcement system shall provide for adequate penalties for violations of the laws and regulations." Such systems should be adequately combined with prevention policies aimed at helping employers and workers to avoid or eliminate the risk of occupational accidents and diseases. There are also many other ILO conventions governing labour inspections, such as the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

43. While target 8.8 calls upon States to protect labour rights, it only urges States to "promote safe and secure working environments for all workers." This falls short of human rights standards and the numerous ILO conventions and recommendations specifically dealing with occupational safety and health.

E. Trade unions

44. While the Sustainable Development Goals, and in particular target 8.8, acknowledge the importance of protecting labour rights, there is no mention of the role of trade unions. Moreover, many States, often strongly encouraged by international financial institutions, have implemented austerity-related labour measures aimed at weakening trade unions, targeting collective bargaining systems by, inter alia, limiting extension agreements between different sectors (see A/HRC/34/57). They have undermined collective labour rights, including the right to form and join trade unions (A/HRC/34/57, para. 29). In some cases, Governments have imposed stricter regulation of the content of collective agreements, procedures for bargaining, and regulation of trade unions.[135] Multilateral financial institutions have also conditioned loans on recipient States, thereby weakening labour protections, denying workers a voice in the process and moving employment towards informality (A/71/385, para. 85).

45. Trade union protection is a key factor in ensuring access to decent work and equality. Unions can assist women workers, especially household, domestic or migrant workers, in claiming their labour rights by providing access to online information, and offer opportunities to organize online to improve laws, wages and working conditions and report abuses.[136] There is an historic link between strong trade unionism and more equal societies.[137]

46. Trade unions have also adapted to the changing nature of employment and helped to address issues relating to self-employed workers. With the emergence of new forms of work, it is important to have a democratic process of dialogue between workers and employers to mediate control of the gains of production.[138]

47. To achieve the Sustainable Development Goals and ensure that no one is left behind, States must guarantee conditions necessary for workers to join and form trade unions. It is essential that trade unions be able to operate freely. Building a future economy where the benefits of work and profit are shared requires legal reform in support of effective trade unions.[139]

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134. ILO, Occupational Safety and Health, available at www.ilo.org/empent/areas/business-helpdesk/WCMS_DOC_ENT_HLP_OSH_EN/lang--en/index.htm.

135. Jones, *Tough Jobs* (see footnote 48).

136. United Nations Non-Governmental Liaison Service, Recommendations on Women's Human Rights and Gender Equality, Policy Brief #7.

137. Lydia Hayes and Tonia Novitz, *Trade Unions and Economic Inequality*, Institute of Employment Rights, 2014. See also A/HRC/34/57, para. 11.

138. See ILO, *The Future of Work We Want: A global dialogue*, Geneva, 2017.

139. Hayes and Novitz, *Trade Unions and Economic Inequality* (see footnote 52).

VI. Participation and accountability

48. The 2030 Agenda for Sustainable Development is an agenda "of the people, by the people and for the people," in which States committed to instituting a revitalized Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity, focused in particular on the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people.[140] This pledge evokes a fundamental human rights norm, that of participation, which recognizes that stakeholders have a right to participate meaningfully in the development, implementation and monitoring of policies that affect them.[141]

49. The principle of participation has a distinct application for the collective dimension of the right to work, particularly the right to form and join trade unions. As noted by ILO, the right to organize and bargain collectively provides an essential foundation for social dialogue, effective labour market governance and the realization of decent work.[142] Social dialogue includes all types of negotiation, consultation or exchange of information between or among representatives of Governments, employers and workers on issues of common interest relating to economic and social policy.[143] It should ensure the inclusion of representatives of groups that are underrepresented in formal work, such as women, migrants, older persons and persons with disabilities, and a number of prerequisites need to be fulfilled in order to support robust social dialogue mechanisms and processes. These include strong, independent representative workers' and employers' organizations with the necessary technical capacity and access to relevant information, respect for the fundamental rights of freedom of association and collective bargaining, political will and commitment to engage in good faith in social dialogue on the part of all parties, and appropriate institutional support.[144] Crucially, through social dialogue and collective bargaining, workers and their organizations improve their working conditions and wages and, in many instances, have successfully expanded the scope of collective bargaining to include questions of workers protection, such as safety and health at the workplace and social security schemes, workers' education and training, and even the participation of workers in the management of enterprises.[145]

50. Social dialogue also allows for accountability and may be an important means for holding States accountable for delivering on their obligations with regard to the right to work. In the specific context of the Sustainable Development Goals, OHCHR has urged States to establish a participatory national follow-up and progress review process, which should be based on the relationship between Governments and the people. The country-led component for accountability should be built on existing national and local mechanisms and processes, with broad, multi-stakeholder participation, and should establish benchmarks, review the national policy framework, chart progress, analyse lessons learned, consider solutions and ensure that policies and programmes are on the right track for meeting the Goals and targets of the 2030 Agenda. Finally, national reviews of progress in the implementation of the Goals should also integrate reports and recommendations of existing human rights review processes, as well as information from existing national mechanisms for oversight and review on matters relating to the Goals, including the parliament or other legitimate decision-making body, local government authorities and national human rights institutions.[146]

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140. General Assembly resolution 70/1, para. 52.

141. Committee on Economic, Social and Cultural Rights general comment No. 18 (2005) on the right to work, para. 42.

142. ILO, *Fundamental principles and rights at work: From challenges to opportunities*, Geneva, 2017, para. 12.

143. See ILO, *Social dialogue: Finding a common voice*, Geneva (undated).

144. Ibid.

145. Ibid.

146. OHCHR, Integrating Human Rights into the Post-2015 Development Agenda, Follow-up and Review: Ensuring Accountability for the SDGs, available from www.ohchr.org/Documents/Issues/MDGs/Post2015/AccountabilityAndThePost2015Aagenda.pdf.

51. National human rights institutions can play an important role in monitoring the right to work. In the United Kingdom of Great Britain and Northern Ireland, the Equality and Human Rights Commission is an independent and non-departmental public body that has the power to intervene in court proceedings in human rights and equality cases. The Commission has moreover developed a measurement framework covering six domains, including work. Indicators include earnings, occupational segregation and levels of employment, which overlap with, and help to reinforce, the aims of Sustainable Development Goals 5 (target 5) and 8 (target 5). . . .[147]

147. See www.equalityhumanrights.com/en/britain-fairer.

X. Draft Guidelines for States on Effective Implementation of the Right to Participate in Public Affairs A/HRC/39/28

The present draft guidelines, submitted to the Human Rights Council pursuant to its resolution 33/22, provide a set of orientations for States on the effective implementation of the right to participate in public affairs. The draft guidelines refer to a number of basic principles that should guide the effective implementation of the right to participate in public affairs. Various dimensions of that right are covered, with a focus on participation in electoral processes, in non-electoral contexts and at the international level, and recommendations have been formulated. . . .

III. Dimensions of the right to participate in public affairs: forms and levels of participation

A. Participation in elections

1. Article 21 of the Universal Declaration of Human Rights highlights the role of periodic and genuine elections in ensuring that everyone is able to participate in the public affairs of his or her country. Article 25 (b) of the International Covenant on Civil and Political Rights provides citizens with the right and the opportunity to vote and to be elected at genuine periodic elections which are to be by universal and equal suffrage and are to be held by secret ballot, guaranteeing the free expression of the will of the electors. Elections lie at the heart of democracy, and remain the primary means through which individuals exercise their right to participate in public affairs.

2. In addition to allowing rights holders to take part in the conduct of public affairs as voters or candidates for election, thereby permitting participation through chosen representatives, certain electoral processes enable direct participation, as in the case of referendums. Genuine electoral processes are also essential to ensure accountability of representatives for the exercise of the legislative or executive powers.

3. International law does not impose any particular electoral system and there is no "one size fits all" model or solution to guarantee successful electoral processes. States enjoy a large margin of appreciation in this context. However, genuine elections should be held in an environment of general respect for and the enjoyment of human rights, on an ongoing basis, without discrimination and without arbitrary or unreasonable restrictions.

4. ICTs may provide tools to improve participation in elections and enhance their transparency. States considering the introduction of technological innovations in order to improve participation in electoral processes should do so only after broad outreach and consultations with all stakeholders, as well as comprehensive and consultative feasibility studies, have been conducted. Digital innovations may be best introduced as a solution to problems that might hinder the credibility of the process or the acceptance of results, not as an end in itself.

5. The following recommendations should contribute to addressing the obstacles some individuals and groups, in particular women, facing discrimination or marginalization may encounter in the exercise of their right to vote and to stand for election and to ensuring more inclusive electoral processes.

Practical recommendations

6. States should develop an effective legal framework for the exercise of electoral rights, including with respect to the electoral system and electoral dispute mechanisms, in compliance with their international human rights obligations and through a non-discriminatory, transparent, gender-responsive and participatory process.

7. States should take proactive measures to strengthen the representation and equal participation of women, and groups that are discriminated against, in electoral processes. These include the following:

(a) Where such measures can be shown to be necessary and appropriate, States should introduce and effectively implement quota systems and reserved seats in elected bodies for

women and underrepresented groups, after an in-depth assessment of the potential value of different kinds of temporary special measures, including of their possible impact in the particular local context and of potential, unintended side effects;

(b) When appropriate, States should adopt other temporary special measures to increase the participation of women, including: training programmes that build their capacity to be candidates; adjustments to campaign finance regulations that level the playing field for women candidates; financial incentives for political parties that achieve preset targets for gender-balance among their nominated or elected candidates; and parental health programmes supporting women's participation in public and private life;

(c) When binding quotas or reserved seats are introduced, effective and transparent mechanisms for monitoring compliance and the imposition of sanctions for non-compliance should be envisaged.

8. Any legal or policy measure to increase the representation of women and groups that are discriminated against should be accompanied by initiatives to challenge discriminatory attitudes and practices, including harmful gender stereotypes, and negative assumptions around the capacity of women, young people, minorities and persons with disabilities to contribute to public affairs.

9. Training for journalists and other media workers should be promoted in order to challenge gender stereotyping and misrepresentation of women in the media, and to sensitize the media and the electorate on the need and benefits of women in leadership positions.

10. Public-service broadcasting and media regulations should provide for equitable opportunity for all candidates to have access to significant airtime and space in the public media during electoral campaigns.

11. Within the confines of their electoral systems, States should ensure equal conditions for independent candidates to stand for elections and not impose unreasonable requirements on their candidacies.

12. States should remove unreasonable barriers to voter registration, including onerous or burdensome administrative requirements for accessing the necessary documentation to exercise the right to vote, particularly for women, minorities, indigenous peoples, those living in remote areas and internally displaced persons.

13. States should take measures to protect the safety of candidates, particularly women candidates, who are at risk of violence and intimidation, including gender-based violence, during the electoral process.

14. States should amend their national legal provisions that limit the right to vote on grounds of legal capacity and adopt the legal measures necessary to ensure that all persons with disabilities, especially those with intellectual or psychosocial disabilities, may exercise their right to vote.

15. States should take measures to ensure full accessibility for persons with disabilities in all aspects of the electoral process by, inter alia:

(a) Guaranteeing the free expression of the will of persons with disabilities as electors and to that end, for those who cannot exercise their right to vote independently, and at their request, allowing assistance in voting by a person of their own choice;

(b) Ensuring accessible voting procedures and facilities, and when full accessibility cannot be guaranteed, providing reasonable accommodation in order to ensure that persons with disabilities can effectively exercise their right to vote;

(c) Providing training for electoral officials on the rights of persons with disabilities in elections;

(d) Ensuring that electoral and voting materials are appropriate, accessible to the diversity of persons with disabilities and easy to understand and use.

16. States should consider aligning the minimum voting age and the minimum age of eligibility to stand for elections, to encourage the political participation of young people.
17. States should not exclude persons in pretrial detention from exercising the right to vote, as a corollary of the right to be presumed innocent until proven guilty according to law.
18. States should not impose automatic blanket bans on the right to vote for persons serving or having completed a custodial sentence, which do not take into account the nature and gravity of the criminal offence or the length of the sentence.
19. When appropriate, States should remove the practical obstacles that may hinder the exercise of the right to vote by persons serving a custodial sentence.
20. States should facilitate the independent scrutiny of voting and counting, including by providing access to places of voting, counting and tabulation of results.
21. Electoral management bodies should be able to function independently and impartially, irrespective of their composition. Such bodies should be open, transparent and maximally consultative in their decision-making and provide access to relevant information for all stakeholders.
22. States should ensure that their legal framework provides for the right of candidates to effectively challenge elections results and for remedies that are prompt, adequate and effective, and enforceable within the context of the electoral calendar.
23. States should consider, on the basis of appropriate national consultations and consultations with host States, and taking into consideration all relevant factors, allowing citizens who are abroad or temporarily out of the country to exercise their right to vote.
24. States should consider extending the right to vote to non-citizens after a period of lawful and habitual, long-term residence, at least for local elections.

B. Participation in non-electoral contexts

25. In its general comment No. 25 (1996), the Human Rights Committee states that the conduct of public affairs is a broad concept that covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. In that same general comment, the Committee also recognizes the right to participate directly in the conduct of public affairs.
26. There are several ways in which the right of direct participation in the conduct of public affairs can be exercised. Direct participation may take place when, for example, rights holders choose or change their constitutions or decide public issues through a referendum.
27. In general comment No. 25, the Human Rights Committee recognizes that direct participation is engaged in by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community, and in bodies established in consultation with government. In addition, participation in the conduct of public affairs can be realized by exerting influence through public debate and dialogue with elected representatives or through the capacity of rights holders to organize themselves.
28. The consultation process conducted in preparation for the present draft guidelines revealed that a number of direct participation initiatives, which contribute to and complement participation through elected representatives, are being implemented around the world.
29. Participation in decision-making processes may happen at different levels, from provision of information, through consultation and dialogue, to partnership or co-drafting. These levels relate to the degree of involvement or the "intensity" of participation of rights holders in the different steps of the decision-making process (i.e., agenda setting, drafting, decision-making, implementation, monitoring and reformulation).
30. Modalities of participation, namely, the tools to facilitate participation, such as websites, campaigns, multi-stakeholder committees, public hearings, conferences, consultations and working groups, may vary in function of the level of participation and the step of the decision-making process. While participation should be secured at all stages of decision-making, no specific set of modalities can be recommended in all contexts.
31. The following recommendations provide States with some guidance on how to ensure that rights holders can participate and exercise a meaningful influence in decision-making that may affect them.

Practical recommendations

(a) Institutional framework to ensure participation in the decision-making of public authorities

32. Formal permanent structures should be developed to ensure that participation in decision-making processes is widely understood, accepted and routinely realized by both public authorities and rights holders. Such structures may include a coordinating body for participation in the Government, participation coordinators or facilitators in ministries, joint public-civil society councils, committees or working groups and other bodies, or framework agreements between public authorities and civil society actors to support participation.

33. Formal participation structures should be accessible to and inclusive of individuals and groups that are marginalized or discriminated against, including those from disadvantaged socioeconomic backgrounds, in particular women and girls. Specific permanent mechanisms for the participation of groups that have been historically excluded, or whose views and needs have been inadequately addressed in decision-making processes, such as indigenous peoples, minorities, and persons with disabilities, should be developed.

34. To ensure that these structures and mechanisms provide meaningful opportunities for participation, they should, at minimum:

(a) Be co-designed with relevant rights-holders;
(b) Impartially channel the views of the rights holders concerned into actual decision-making processes;
(c) Be provided with an adequate budget and human resources with expertise on the different groups for which participation needs to be encouraged and enabled;
(d) Be accessible, inclusive, gender-responsive and representative.

35. When decision-making processes may have an impact on children, States should ensure that the right of children to express their views freely and to be heard is guaranteed, including by establishing child-friendly, age-appropriate, gender-sensitive, inclusive and safe mechanisms for their meaningful engagement.

36. In peace processes and post-conflict and humanitarian situations, States should consider establishing formal structures for the participation of those individuals and groups that are or have been most affected by the conflict, such as children, young people, minorities, persons with disabilities, internally displaced persons, refugees and women and girls, in the development, implementation and monitoring of all relevant legislation, policies, services and programmes. Any such structures should be designed to give effect to the right of those individuals to make a free and informed choice on sustainable solutions concerning them.

37. The institutional framework for participation should make it possible, at all times, to create and use new modalities of participation, including through the use of ICT.

38. The performance of participatory frameworks, including structures and procedures, should be regularly evaluated and assessed in order to adjust and improve them and build in innovative ways of and opportunities for participation, on the basis of the needs of affected rights holders.

(b) Measures to ensure meaningful participation at different stages of decision-making

39. The following recommendations provide guidance for the relevant public authorities of States on ensuring meaningful participation before, during and after decision-making.

Participation before decision-making

40. Rights holders should be given the opportunity to participate in shaping the agenda of decision-making processes in order to ensure that their priorities and needs are included in the identification of the subject matter and content for discussion. This can be done, for example, through online consultations, public hearings or forums, or working groups or committees composed of representatives of public authorities and members of the society. Where working groups or committees are established, the relevant public authorities

should adopt transparent and inclusive criteria and processes for the representation of members of disadvantaged groups.

41. Elected representatives should play a critical role in supporting these processes, including through their participation and their representation of the constituencies to which they are accountable.

42. Rights holders who are directly or likely to be affected by, or who may have an interest in, a proposed project, plan, programme, law or policy should be identified and notified. Notification should be provided to all such rights holders in a timely, adequate and effective manner. In addition, the participation of any other rights holders wishing to participate should be facilitated. When decisions have countrywide or very widespread impact, for example during constitution-making and reform processes, everyone should be identified as potentially affected.

43. Information regarding the decision-making process should contain clear, realistic and practical goals in order to manage the expectations of those participating. Information about the process should include, as a minimum, the following elements:

(a) The type or nature of the decision under consideration. This includes clarity of the subject matter, information on the rationale behind the decisions to be made and the kind of decision(s) that should be taken at each stage of the process;
(b) The range of options to be discussed and decided at each stage, including problems, alternatives and/or solutions, and the possible impact of their outcomes;
(c) The timelines for participation at each stage of the process, which should be adjusted depending on the specific circumstances (e.g., according to the complexity of the issue at stake or the number of rights holders affected by the decision) and should provide sufficient opportunity for rights holders to properly prepare and submit constructive contributions;
(d) The identification of public officials and institutions involved and their capacity to deliver (i.e., their respective roles and various tasks at each stage of the process);
(e) The identification of the public authority responsible for making the decision;
(f) The procedures envisioned for the participation of rights holders, including information regarding:
    (i) The date on which the procedure will begin and end;
    (ii) The time and venue, including information on accessible infrastructure, of any envisaged participatory processes;
    (iii) The modalities and rules of the conduct of the participatory process;
    (iv) The public authority or official body to which comments or questions can be addressed or from which additional information on the decision under consideration can be requested, and the procedure and time frame for the transmittal of their response.

44. Rights holders should be able to access adequate, accessible and necessary information as soon as it is known, to allow them to prepare to participate effectively, in accordance with the principle of maximum disclosure.[148]

45. Relevant information should be proactively disseminated by making it available in a manner appropriate to local conditions and taking account of the special needs of individuals and groups that are marginalized or discriminated against.[149] This should include:

(a) Providing information free of charge or at reasonable cost and without undue restrictions on its reproduction and use both offline and online;
(b) Providing both technical information for experts and non-technical summaries for the general public;
(c) Disseminating information in clear, usable, accessible, age-appropriate and culturally appropriate formats, and in local languages, including indigenous and minority languages.

148. See para. 22 above.

149. See para. 20 above.

This may entail publications in Braille, easy-to-read and plain language formats;

(d) (Disseminating the relevant information as widely as possible, including through the website of the relevant public authority or authorities if that method is effective. Other dissemination channels may include local print media, posters, billboards, mass media (television or radio) and other online sources;

(e) Considering adopting the method of individual notification where appropriate and with due regard to personal data protection.

Participation during decision-making

46. Rights holders should be able to participate in the decision-making process from an early stage, when all options are still open. This entails, for example, that public authorities refrain from taking any formal, irreversible decisions prior to the commencement of the process. It also requires that no steps be taken that would undermine public participation in practice, for example large investments in the direction of one option, or commitments to a certain outcome, including those agreed with another organ of the State, a non-State actor or another State.

47. Any revised, new or updated draft versions of documents relating to the decision(s) should be made public as soon as they are available.

48. Sufficient time for rights holders to prepare and make their contributions during decision-making processes should be provided. This entails, for example, ensuring that opportunities to participate do not exclusively, or in large part, fall during periods of public life traditionally considered as holidays, such as religious festivals, national holidays or major vacation periods in the State concerned.

49. Rights holders should be entitled to submit any information, analyses and opinions directly to the relevant public authority, either electronically or in paper form. Opportunities to provide comments should be easily accessible, free of charge and without excessive formalities.

50. The possibility to submit written comments through online tools should be combined with opportunities for in-person participation. To this purpose, States should consider establishing, for example, multi-stakeholder committees and/or advisory bodies and organizing expert seminars and/or panels and open plenary sessions to allow meaningful participation in all stages of public decision-making processes. Where such structures are established, transparent and inclusive criteria and processes for the representation of members of disadvantaged groups should be adopted.

51. Participatory events should be free of charge and held in venues that are neutral and easily accessible, including for persons with disabilities and older persons. States should also provide reasonable accommodation, as needed. Depending on local circumstances and the decision concerned, in-person participation may be supplemented with online tools, where relevant.

52. The weight given to contributions received through online platforms should be equal to that given to comments received offline.

53. The technical capacities and expertise of public officials responsible for the conduct of participatory processes should be strengthened, including in the areas of information collection, meeting facilitation, strategy formulation, action planning and reporting on outcomes of the decision-making process.

54. Appropriate data collection and management systems for collecting, analysing, deleting and archiving inputs received both online and offline should be developed, and transparency in how those systems are designed and used, and how data is processed and retained, should be ensured.

Participation after decision-making

55. The outcome of the participation process should be disseminated in a timely, comprehensive and transparent manner, through appropriate offline and online means. In addition, the following should be provided:

(a) Information regarding the grounds and reasons underlying the decisions;
(b) Feedback on how the contributions of rights holders have been taken into account or used, what was incorporated, what was left out and the reasons why. For example, a report can be published, together with the decision(s) made, which may include the nature and number of inputs received and provide evidence of how participation was taken into account. This requires that adequate time be allocated between the end of the participatory process and the taking of the final decision.
(c) Information on available procedures to allow rights holders to take appropriate administrative and judicial actions with regard to access to review mechanisms.

56. Opportunities should be available for those who participated to assess the participatory process in order to document lessons learned for future improvement. To this end, relevant public authorities should consider conducting surveys or focus group discussions, including through the creation of dedicated websites, by phone or in person, in order to collect information on various aspects of participation at all stages of the decision-making process. States should ensure that the information collected in this context is representative of the diversity of all rights holders who participated.

57. In order to allow meaningful participation in assessing the decision-making process, States should provide information on the process, including the following:

(a) The number, and format, of communications used to notify rights holders;
(b) The resources allocated to the process;
(c) The number of people who participated at the various stages of the decision-making process;
(d) Disaggregated data on those participating, with due regard to personal data protection;
(e) Participation modalities;
(f) Accessibility and reasonable accommodation measures.

58. Participation in the implementation of decisions made should be ensured. Accessible and user-friendly information should proactively be disclosed at all implementation stages. This may be achieved, for example, through the creation of dedicated websites and/or email alerts and the organization of events, conferences, forums or seminars.

59. When appropriate, States should consider establishing strategic partnerships with civil society actors, while respecting their independence, to strengthen participation in the implementation of decisions made.

60. Participation and transparency in monitoring the implementation of decisions made should be ensured. Appropriate frameworks should be developed to evaluate States' performance in relation to the implementation of relevant laws, policies, projects or programmes. The frameworks should include objective, measurable and time-bound performance indicators, including on rights holders' participation in tracking implementation activities. Progress reports on implementation should be made public and disseminated widely, including through the use of ICTs and the organization of conferences, forums and seminars.

61. Rights holders should have access to key information to allow effective participation in monitoring and evaluating progress in the implementation of decisions. Information on the implementation process should include the following:

(a) The identification of the authority in charge of the implementation process and its contacts;
(b) The resources, financial and non-financial, to be used for implementation;
(c) Whether the implementation involves a public-private partnership, and if such is the case, all information on the role and contacts of the private actor(s) involved;
(d) Opportunities for participation in the implementation process.

62. Participation in monitoring and evaluation should be considered as a continuum and include the use of social accountability tools, such as social audits, public expenditure tracking surveys, community score cards, social audits, transparency portals, community media and public hearings.

Information and communications technology to strengthen equal and meaningful participation

63. ICT participation tools should be human rights compliant by design, and participation through the use of ICTs should follow the same principles of offline participation.[150] This entails ensuring that the development and deployment of ICTs, including new data-driven technologies for participation, is guided and regulated by international human rights law, with particular regard to gender equality, in order to avoid any adverse human rights impact on individuals and groups that are marginalized or discriminated against, whether the impact is intentional or unintentional.

64. Effective measures to close the digital divides should be developed and implemented, especially for women, persons with disabilities, older persons, persons living in rural areas and indigenous peoples. In this context, proactive measures should be adopted to make ICT widely available, accessible and affordable, including in remote or rural areas, and without discrimination of any kind. This should include, for example, supporting the reduction and, as far as possible, the removal of social, financial and technological barriers restricting public access to the Internet, such as high connection costs and poor connectivity.

65. The involvement of different stakeholders, including civil society actors and business enterprises, in the design, development and use of ICTs for participation should be promoted. In this context, due regard should be given to the Guiding Principles on Business and Human Rights.

66. ICTs should be used to create spaces and opportunities for rights holders to participate meaningfully in a variety of activities that extend beyond communication and information-sharing. Technology should provide real opportunities to influence decision-making processes, for example with regard to submitting, and commenting and voting on, legislative and policy proposals. Where appropriate, States should consider providing additional, complementary offline opportunities for participation.

67. Existing ICT tools for participation should be translated into multiple local languages, including languages spoken by minorities and indigenous peoples, and should ensure their accessibility for persons with disabilities.

68. Media education and digital literacy programmes should be included in formal and non-formal curricula to allow meaningful participation online. For example, these programmes should focus, where relevant, on technical fundamentals of the Internet and develop critical thinking to help rights holders to identify and evaluate information and content from different sources.

69. Media and ICT education curricula should address issues related to hate speech, xenophobia, sexism and harmful gender stereotypes, racism and any other form of intolerance as factors that further exacerbate the marginalization and exclusion of some individuals and groups from public life. The role of civil society actors, including the media, in delivering positive counter-narratives online, including against hate speech, should be supported.

70. Comprehensive and forward-looking media and ICT literacy training programmes for public officials responsible for implementing participatory processes should be developed and delivered in order to take full advantage of the potential of ICTs.

C. Right to participate in public affairs at the supranational level, including in international organizations

71. The Human Rights Committee, in its general comment No. 25, recognized that the right to take part in the conduct of public affairs also covers the formulation and implementation of policy at the international and regional levels. Despite the importance of participation at the international level, the workings of international organizations continue to be opaque for most people.[151]

150. See chap. II.

151. In the context of the present draft guidelines, the terms "international organizations", "participation at the international level" and "international meetings and forums" should be understood as including the regional level.

72. Decision-making at the regional and international levels may have a significant effect on the realization of human rights, as such decision-making has an impact on national legislation, policies and practices. It is thus necessary that such decisions are made in a transparent and accountable manner, with the participation of those who will be affected by those decisions, and in an environment respectful of public freedoms, which are fundamental and should also be protected at the international level. Civil society actors choosing to participate in regional and international meetings must be safe and not be subject to acts of reprisal.
73. Those who participate at the supranational level often bring local and national concerns to the attention of the international community, thus connecting the international and local levels. For example, civil society actors have been instrumental in raising awareness at the regional and international levels of the rights of groups that are marginalized or discriminated against, and in empowering and giving voice to them. Such participation has also contributed to challenging social norms and the organizational culture of regional and international organizations.
74. The forms and modalities of the participation of rights holders at the international level might vary according to the format and rules of the international forum concerned, and the nature and phase of the process. Participation may be ensured through different means, including the granting of observer, consultative or participatory status; advisory committees open to relevant stakeholders; forums and dialogues; webcasting of events; and general calls for comments. For rights holders to participate effectively at the international level, access to information is indispensable.

Practical recommendations
75. States should respect, protect and facilitate the rights to freedom of expression and to freedom of peaceful assembly and of association in connection with the exercise of the right to participate at the international and regional levels.
76. Participation of civil society actors in meetings of international organizations, mechanisms and other forums, at all relevant stages of a decision-making process, should be allowed and proactively encouraged.
77. Access to international and regional forums should be provided without discrimination of any kind.
78. States should end all acts of intimidation and reprisals against civil society actors engaging or seeking to engage with international forums, and/or participating in any related event. When acts of intimidation or reprisals take place, States should investigate all allegations, provide effective remedies and adopt and implement preventive measures to prevent their recurrence Understanding and addressing gender-specific forms of reprisal is key in this context.
79. States should establish objective, consistent and transparent criteria for expeditiously granting to civil society organizations observer, consultative or participatory status in international organizations. Organizations having their requests rejected should be provided with the reasons and a means to appeal to a higher or different body.
80. States should refrain from unduly preventing civil society actors from obtaining accreditation with international organizations, arbitrarily withdrawing accreditation or regularly deferring examination of requests for accreditation.
81. Permanent structures for the continuous participation of civil society actors in international forums should be established, for example through the creation of civil society platforms. These structures should be created through impartial, non-discriminatory, transparent and participatory processes, and should be particularly accessible to and inclusive of individuals and groups facing discrimination.
82. The use of innovative, cost-efficient and practical approaches, including through the use of ICTs (e.g., webcasting, videoconferencing and other online tools), should be encouraged in order to foster greater and more diverse participation of civil society actors at the international level.
83. States should facilitate the timely issuance of visas for those wishing to participate in international forums.
84. Funds should be made available to facilitate meaningful and equal participation in inter-

national forums, particularly by women human rights defenders and small, community-based civil society organizations.

85. The capacity of rights holders to participate meaningfully in international forums should be strengthened, in particular among those who are less proficient in procedures governing participation at the international level, such as grass-roots and local civil society organizations working with individuals or groups that are marginalized or discriminated against.

86. States should encourage international forums to develop and make widely available a clear and transparent set of policies and procedures on participation in order to make access more consistent and reliable. Criteria for accreditation to meetings should be objective and broad, and registration procedures should be easy to understand and accessible.

87. Participation of rights holders in meetings in international forums should include access to relevant information, such as documents, drafts for comments and websites relevant to the decision-making process, the possibility to circulate written statements and to speak at meetings, without prejudice to the ability of international forums to prioritize their business and apply their rules of procedure. Any criteria for assessing the appropriateness of materials must be made public and any objection process should be transparent and allow sufficient time for the affected civil society organization to respond.

88. States should request international forums to proactively make available information related to decision-making processes, through the use of ICTs or other appropriate means, in a timely manner and in all official languages of the international organization or forum concerned. Access-to-information policies for international organizations should be adopted through resolutions and other governance mechanisms and be in line with international human rights law.

89. The designation of information officers or contact persons in international organizations charged with facilitating the flow of information to rights holders should be encouraged.

90. States should effectively disseminate, in accessible formats and local languages, the outcomes of decisions made at international forums, including recommendations emanating from United Nations bodies and entities involved in monitoring the implementation of States' obligations under international human rights law.

United Nations–NGO Accreditation Regimes: A Comparative Profile

by B.D. Mowell

The United Nations facilitates various types of formalized interaction with international civil society; perhaps the best known example is the NGO consultative status program within the Economic and Social Council (ECOSOC). This study sought to determine the prevalence of the ECOSOC consultative status program compared to case studies of five other UN–NGO accreditation regimes, as well as the degree of overlap between the ECOSOC program and the alternative NGO regimes. Findings confirm the dominance of the ECOSOC consultative status program within the UN–NGO dynamic and reveal that most civil society organizations participating in the ECOSOC program do not participate in other UN accreditation regimes.

Introduction

Since its inception, the UN has pursued association with international civil society, the most formal and organized manifestations are nongovernmental organizations (NGOs). The UN–NGO dynamic has progressively expanded with various formalized NGO accreditation regimes implemented within different UN organs. The word accreditation is used not in reference to a form of endorsement or legitimation bestowed by the UN upon NGOs for their works, but with regard to the provision by the UN of an officially sanctioned status ostensibly permitting various types of formalized interaction between the UN and those NGOs deemed suitable candidates.

The term nongovernmental organization and the acronym NGO were coined by the UN at the time of its founding due to the need to differentiate between state actors and intergovernmental organizations (IGOs) as opposed to non-state organizations with international interests/influence, and by the 1970s the terms had entered common use by the general public (Willetts 2011). NGOs can be regarded as a more formal and organized representation of civil society. Whereas the broader concept of civil society could be perceived to consist of most or all of a population and the entirety/diversity of the views the population contains, NGOs are formally organized segments of a population coordinated behind the goal of furthering an agenda on behalf of a defined constituency (Mowell 2018). NGOs have been described as the best-organized elements of civil society and, accordingly, possessing a better chance of influencing state and international agendas (Riddell-Dixon 2008).

Various definitions of NGOs and descriptions of their goals illuminate why the UN sought association with the organizations. Edwards (2009) regarded NGOs as organizations endeavoring to improve society and to facilitate political, social, or economic change through activism. The World Bank (2002) offered a similarly sympathetic view of NGOs as "private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide social services or undertake development." As the numbers of international NGOs burgeoned in the 1990s, many of the organizations sought to assume roles as stakeholders in global problem solving and international governance via contributing to policymaking (DeMars and Dijkzuel 2015; Bunea and Thompson 2015; Tallberg 2012). Increased association with civil society organs, such as NGOs, can also potentially bolster pluralism and democratic tendencies within IGOs

through facilitating increased information exchange between sources of international governance and the general public and also in helping to hold IGOs, such as the UN, accountable via observer and participant roles (Kotzian 2015).

The primary vehicle facilitating the UN–NGO dynamic has historically been the UN Economic and Social Council (ECOSOC) program in which formal affiliation is extended to a diverse range of NGOs via consultative status. Other NGO affiliation regimes also exist at the UN, though little research has been done in terms of assessing and comparing the UN–NGO dynamic across the different formal avenues of affiliation or the association of international NGOs with international organizations in general (Barnett and Finnemore 2004). Additionally, most studies of NGOs within the UN or broader international dynamic have concentrated upon one or a small number of organizations (as case studies) and/or a single, narrow issue area (Clark, Friedman, and Hochstetler 1998). This foundational study seeks to compare the prevalence and overlap of formal NGO accreditation regimes at the UN via comparative analysis of the UN–ECOSOC consultative status program with brief case studies of five other formal UN–NGO affiliation programs. The significance of this research lies not only in the fact that it is among the first published studies of the prevalence of NGO accreditation regimes within the UN dynamic but also its contribution to the as yet modest body of literature exploring macro-scale patterns of NGO activism within IOs and the international arena.

Research Parameters

Statistics were obtained from the UN's Integrated Civil Society Organizations (ICSO) online database, which is the most comprehensive available data source addressing UN connectivity with NGOs. An empirical qualitative approach and descriptive statistics were utilized to construct a macro-scale comparative analysis of NGO accreditation regimes as reflected in UN/ICSO data. The statistics collected and analyzed present an accurate snapshot of levels of NGO affiliations with regard to the ECOSOC consultative status program and five other affiliation/accreditation regimes at the time the research was conducted.

ECOSOC Consultative Status

The nature of NGO involvement with the UN has evolved over time, with the ECOSOC established in 1946 by Article 71 of the UN Charter as the primary catalyst for interaction. Article 71 states that ECOSOC

> may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned. (United Nations 2019)

A highly diverse and ever-expanding range of NGOs including those with an international, state-specific and even sub-state focus are represented within the UN–ECOSOC consultative status program, reflecting an institutional commitment to expanded association with international civil society and concomitant flexibility on the part of the NGO Committee regarding matriculation into the program.

ECOSOC accredits NGOs according to three gradations of influence that determine degree of access/input: general consultative status, special consultative status, and roster consultative status. The type of accreditation determines the right and ability to circulate documents, access to informal preparatory meetings, observation of various proceedings, and the opportunity to speak at certain functions (UN 1999). General status is afforded to the relatively small number of organizations that are global in scope, directly involved with most areas of ECOSOC activities, and are perceived to be capable of making "substantive and sustained" contributions. As of March 2019 of 5,163 NGOs holding consultative status only 138 or 2.7 percent held this level of accreditation. Among other privileges, general status allows orga-

nizations to submit written statements of up to 2,000 words to ECOSOC bodies on subjects in which the organization has specialized knowledge. Many of the organizations that hold general status are among the world's best known and most respected NGOs including Greenpeace, Oxfam International, and Rotary International for example.

Organizations with special status are those with operations in multiple countries, have expertise in a less diverse range of issues with which ECOSOC is concerned but are potentially capable of making contributions in several such areas. Special status classification affords less influence/access than general status and NGOs holding this accreditation level may not propose items for the provisional agenda of ECOSOC or one of its bodies but are allowed to submit written statements of up to 500 words (Cassese 1979). As noted in Table 1, special status is by far the most common accreditation level among organizations in consultation with ECOSOC, with 4,053 organizations or 78.5 percent holding the latter designation.

Roster status is for those organizations that are often less international in scope, usually focused on a narrow issue area and can potentially make an occasional useful contribution in their area(s) of expertise. Organizations with roster status may only submit written statements if specifically invited to do so by the UN and the NGO's representatives may only attend public meetings directly relevant to their field of specialization. Roster status is the second most common type of ECOSOC consultative status with some 972 (18.8 percent) organizations holding this level of accreditation. Just as NGOs can be downgraded from inactivity or lose consultative status entirely, they may also petition to upgrade their status to gain greater access within ECOSOC and each year numerous organizations apply to transition from roster to special (most commonly) or special to general status.

Table 1. NGOs in Consultative Status with UN ECOSOC

Accreditation Level	March 2019
General Status	138 (2.7%)
Special Status	4,053 (78.5%)
Roster Status	972 (18.8%)
Total	5,163

Other UN–NGO Accreditation Regimes

While the flagship vehicle for the UN–NGO dynamic is the ECOSOC consultative status program, other venues also exist, often specific to a particular purpose or event. In some instances, NGOs are extended standing so they may participate in a special summit or symposium, in which case the accreditation is temporary, ending with the event's conclusion. An example of such a temporary accreditation regime was that associated with the World Summit on Sustainable Development (WSSD), which took place in South Africa in August–September 2002 and formally accredited over 700 participating organizations. An additional and smaller-

scale example of temporary accreditation specific to a project or summit is the UN's recurring conference related to Small Island Developing States (SIDS). At the third SIDS conference held in Samoa in 2014, in addition to the representatives of states in attendance, twenty-three NGOs were formally accredited as participants.

Other potentially more abiding forms of UN–NGO affiliations also exist, perhaps the best examples of which are the programs related to the Commission on Sustainable Development (CSD), the Department of Public Information (DPI), and the Financing for Development Office (FDO). Established by the General Assembly in 1992, the CSD has since its inception sought to engage with as diverse a range of stakeholders as possible, including hundreds of NGOs that have interest in its mission. The DPI was established in 1946 to promote awareness of UN programs, often via establishing various constituencies internationally, including collaborations with over 1,500 NGOs, many of which have a formal affiliation with DPI. FDO was established within the UN Department of Economic and Social Affairs in 2003 to provide sustained support and follow-up for initiatives related to international development, one element of which is the NGO Committee on Financing for Development, which accredits organizations both as full and associate members.

Analysis of the five other UN–NGO affiliation programs revealed them to have modest participation compared to the ECOSOC consultative status program. However, it should be noted that each of the five regimes outside ECOSOC deals with a narrower policy niche than the flagship ECOSOC forum, which was intended to be more general in scope. As indicated in Table 2, among the case studies of the five affiliation regimes, the DPI (Department of Public Information) program for NGOs had by far the most region-specific entries at 868 (entries with no region specified were not included in the data table and were generally negligible in number), most of which were from organizations headquartered in Anglo-America (404 or 46.5%) or Europe (222 or 25.6%). The DPI program appears to present organizations with opportunities for engagement throughout the year, whereas the other four non-ECOSOC affiliation regimes, even if theoretically ongoing in a couple of cases (CSD and FDO), seem to be primarily focused around periodic summits or other special events, thus providing a more limited dynamic for interaction.

Of the remaining affiliation programs, the summit-specific civil society accreditation regime of WSSD (World Summit on Sustainable Development) had the second-largest number of region-specific entries with 603, most of which were from Anglo-America (142 or 23.5%), followed closely by Asia (136 or 22.6%) and Europe (134 or 22.2%). The CSD (Commission on Sustainable Development) program had the third-largest number of entries at 425, the largest numbers were from Anglo-American (116 or 27.3%) or Asian (91 or 21.4%) organizations. The FDO (Financing for Development Office) program contained only 177 total entries, most commonly from African (63 or 35.6%) or European (38 or 21.5%) organizations. The narrowest in geographical or circumstantial focus of any of the five programs was SIDS. The ICSO database yielded only fifteen entries for SIDS (Small Island Developing States), most commonly from Latin America and the Caribbean (six or 40.0%) reflecting the presence and influence of Caribbean microstates and small states within the program.

While these five NGO affiliation programs are distinct from the ECOSOC consultative status regime, the degree of overlap between organizations with consultative status and those participating in any of the alternative affiliations was initially unclear. Although the initial expectation was that overlap would exist in that most organizations participating in these five programs would also hold consultative status with ECOSOC, this does not appear to be the case according to the data collected from the ICSO web site. As noted in Table 3, the largest number of entries for ECOSOC–CS organizations was in the DPI program. The latter had 393 ECOSOC–CS organizations as affiliates, by far the highest ratio (393:868 or 45.3%) relative to the total number of entries among any of the five NGO affiliate programs but still not an indication that most DPI organizations also hold ECOSOC–CS. Ratios of the number

of ECOSOC–CS organizations relative to total number of entries for each of the four other alternative accreditations were much lower, confirming that most organizations within each of these alternative NGO affiliation programs do not also hold ECOSOC consultative status simultaneously: CSD 114:425 (26.8%), FDO 32:177 (18.1%), WSSD 98:603 (16.3%), and SIDS 1:15 (6.7%).

Table 2. UN–NGO Affiliation Regimes (outside ECOSOC) by World Region

Region	CSD	DPI	FDO	WSSD	SIDS	Totals
Africa	49	44	63	117	1	274
Asia	91	94	20	136	2	343
LA & Car	73	59	18	51	6	207
LDC Totals	**213(50.1%)**	**197(22.7%)**	**101(57.1%)**	**304(50.4%)**	**9(60.0%)**	
Anglo Am	116	404	28	142	2	692
Europe	77	222	38	134	3	474
Oceania	19	45	10	23	1	98
MDC Totals	**212(49.9%)**	**671(77.3%)**	**76(42.9%)**	**299(49.6%)**	**6(40.0%)**	
Overall Total:	**425**	**868**	**177**	**603**	**15**	**2088**

Whereas the ECOSOC consultative status program is broader and more diverse in its range of policy foci, as noted each of the alternative affiliation programs is markedly narrower in scope and in potential applicability to the operational parameters of NGOs. However, the narrow focus of other such NGO affiliation programs may actually appeal to certain NGOs with highly specialized interests compared to the more general forums of ECOSOC–CS, to which such specialized (e.g., oriented toward development financing) NGOs may feel they have less to contribute. In short, participation in the ECOSOC consultative status program does not appear to overlap with all other UN–NGO affiliation programs.

Table 3. Overlap Between UN-NGO Accreditation Programs—Numbers of NGOs in Alternative Accreditation Programs Which Also Hold ECOSOC Consultative Status

Other UN Accreditation	General Status	Special Status	Roster Status	Totals
CSD	6	33	75	114
DPI	41	258	94	393
FDO	0	25	7	32
WSSD	2	77	19	98
SIDS	0	1	0	1
Totals:	49	394	195	638

Evidence of this can also be seen in the data collected for the CSD (Commission on Sustainable Development) program in Table 3. In no other instance in this study did entries for ECOSOC affiliates with roster status substantially outnumber those holding special status

within a category. As special status is by far the most common accreditation status within the ECOSOC affiliation program (see Table 1—78.5 percent held special status and 18.8 percent held roster status), organizations holding that level of accreditation would presumably always outnumber those with other accreditation levels. Yet within the CSD program, seventy-five (65.8 percent) of 114 ECOSOC–CS organizations held roster status. Roster status is for organizations with a specialized and limited scope, circumstances that seem to apply to each of the five non-ECOSOC affiliation programs to varying degrees at least in comparison to the potentially broader parameters of the ECOSOC–CS regime. In four of the five non-ECOSOC affiliation programs, the percentage of roster status organizations is higher than the ECOSOC–CS average of 20.9 percent, intimating that these alternative UN-accreditation programs may appeal to NGOs with more specialized parameters.

Summary and Conclusion

Analysis of statistics in the UN ICSO database supports the perception that the ECOSOC consultative status program is the principle vehicle for formal UN affiliations compared to five other established NGO programs. Whereas over 5,163 organizations held consultative status with ECOSOC at the time of writing, the number of formal UN affiliations reported in the five alternative affiliation regimes analyzed ranged from a low of fifteen (Small Island Developing States conference/initiative) to a high of 868 (UN Department of Public Information). Data also revealed a lack of significant overlap between participation in the ECOSOC consultative status program and participation in other formal UN–NGO regimes. Among the five alternative accreditation regimes analyzed, NGOs accredited to the UN Commission on Sustainable Development had the highest percentage of overlap with only 26.8 percent of the organizations also holding ECOSOC consultative status and those NGOs accredited to the Small Island Developing States initiative having the least overlap with 6.7 percent simultaneously holding consultative status.

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My Experience Working with the UN, the OAS, IFES, IRI, USAID, and other International Organizations on Haiti's Elections, from 1987 to 2000

by Jean Paul Poirier

Historical Context

Haiti has the distinction for defeating the Napoleonic Armies[1] and for being the first black republic.[2] Although this was a historic undertaking, it led to many difficulties in the development of the burgeoning nation.[3] That the war against France virtually destroyed the capital Port-au-Prince, as well as the infrastructure of the economy, which was mostly oriented in providing sugar and other agricultural goods to France, was a crippling consequence.[4] The fact that most developed nations boycotted the new nation in its early stages[5] also contributed to the slow development of the new republic. As Hauge stated, "A symbiotic relationship developed between the two most powerful groups in Haiti, the military and the merchant elites." He further added, "By 1938 Haiti had transferred more than 30 million Francs to France." The alliance between the military and the merchant elites was countered in 1957 by Dr. François Duvalier coming to power, and retained his power by creating his own personal armed militia, the feared Tonton Macoutes.[6] This violent and brutal force assisted Duvalier in maintaining a reign of terror, depleting the country of many of its elites who took refuge in the U.S., Canada,[7] and France. At Duvalier's death in 1971,[8] he was succeeded by his son Jean Claude, aged nineteen years old. As Wenche brought forth, "Jean Claude reestablished the traditional relationship between the state and Haiti's elites and in doing this lost support of the old Duvalierists."

Although Haiti gained considerable economic support during Jean Claude's tenure, he lost his grasp on power though a number of factors, including the development of popular and peasant organizations in the 1980s,[9] It all came to a head when Pope Jean Paul II's famous phrase "Il faut que sa change,"[10] rocked Duvalier's regime to its core. On 7 February 1986, all these factors led to the departure of Jean Claude Duvalier from power strongly explored in this CBC report in 1986.[11] The void in power was soon filled by the National Governing

1. Phillipe R. Girard, The Slaves who Defeated Napoleon: Toussaint Louverture and the Haitian War of Independence, 1801–1804, University of Alabama Press, 2011.

2. Declaration of Independence, January 1, 2004, UK Archives.

3. Mats Lundahl. "Haitian Underdevelopment in a Historical Perspective," Journal of Latin American Studies, Volume 14, Issue 2 (November 1982), pp. 465–75.

4. Colin McKey. "The Economic Consequences of the Haitian Revolution," Thesis for Robert D. Clark Honors College, June 2016.

5. Wenche Iren Hauge. "Haiti: A Political Economy Analysis," Norwegian Institute of International Affairs, May 2018.

6. www.britannica.com/topic/Tontons-Macoutes.

7. Histoire de l'Immigration Haitienne a Montreal, *archipel.uqam.ca/11427/1/M15471.pdf.*

8. *www.nytimes.com/topic/person/francois-duvalier.*

9. Robert Maguire and Scott Freeman (eds.). Who Owns Haiti?: People, Power, and Sovereignty. Gainesville: University Press of Florida.

10. www.nytimes.com/1983/03/10/world/pope-in-haiti-assails-inequality-hunger-and-fear.html

11. Jean-Claude Duvalier's last days in Haiti (1986). www.youtube.com/watch?v=J1gDMfPeivE.

Council (CNG),[12] which was mandated to lead the country to democratic elections. A new constitution[13] was drafted by the elected Constituent Assembly.[14] The constitution was enacted by referendum on 29 March 1987. One of the first acts of the CNG after the promulgation of the Constitution was to name the Provisional Electoral Council on 29 May 1987.

Bienvenu En Haiti

In May 1987, little did I know or research the events going on in Haiti. I had been fully aware of the upheaval in the Philippines as a friend had been the lead Canadian Broadcasting Corporations' journalist covering the events around the departure of President Ferdinand Marcos and his family. At the same time, similar chaos had been unfolding in Haiti.[15]

I was offered a job by PricewaterhouseCoopers (PwC) being the new lead consultant on a power sector utility Électricité d'Haïti (ED'H for Haiti Electric Utility) management restructuring program financed by the World Bank.[16] I packed my bags and at the Port-au-Prince Airport was met by the PwC responsible partner. The weather was quite warm and not too humid. I will always remember my arrival at the El Rancho Hotel,[17] where I was greeted by none other than Joseph Namphy, who I would soon find out was the brother of the president of the CNG, a military-dominated, transitional government. They had been ruling Haiti by force in the wake of longtime dictator Jean-Claude Duvalier's 7 February 1986 departure from Haiti, after the twenty-nine years that he and his father François had ruled the country. After check-in, I was led to my room and turned on the TV. I was astonished to see a NHL hockey game in progress. Little did I know the chaos and culture shock I was to experience the next day.

After breakfast, the PwC partner, picked me up and drove to the downtown office. Along the way, I was to see some of the ramshackle slums of Port-au-Prince. Everything was dirty, unpainted, and run-down. At the office, I was introduced to the staff and to my predecessor, who briefed me on the state of the consulting project. He also invited me to dinner the next night at his residence. I remember being served an avocado, which I proceeded to eat whole, never having seen a raw avocado before. We concluded after dinner that the residence was going to be available in two weeks, after their departure, so I naturally agreed to take over the lease.

The work at ED'H was quite interesting, as PwC was in the process of installing a new tailor-made, financial and commercial computer system, using a most up to date Wang minicomputer system. I also was introduced to the general manager and finance manager. Right away, I got along well with the GM but somehow was unable to develop a positive relationship with the finance manager. Therefore, I knew I had to make a quick positive impression to gain management's confidence. The accounting manager was developing the budget for the next financial year, and to my astonishment he was reading the draft budget to the directors and manager like a litany, nobody but him having a copy. Quickly, I obtained a copy from the accounting manager's assistant and proceeded to enter it into a spreadsheet. At the next budget meeting, I provided all members of the management team with their individual copy, much to the surprise of the accounting manager. This led to a highly productive session with managers giving quality input on the budget.

Another early memory is the meeting one Saturday morning by the GM and IT Consultant to the ED'H office. Apparently, the IT manager had manipulated several electrical customer accounts, including that of his mother. This meant instant dismissal for cause. So we

12. Helen Scott. "200 Years of U.S. Imperialism: Haiti Under Siege," International Socialist Review Issue 35, May–June 2004. www.isreview.org/issues/35/haiti_under_siege.shtml.

13. Constitution of Haiti 1987, http://pdba.georgetown.edu/Constitutions/Haiti/haiti1987.html.

14. *www.cidh.org/annualrep/86.87eng/chap.4c.htm.*

15. www.nytimes.com/1986/02/08/world/duvalier-flees-haiti-end-family-s-28-years-power-general-leads-new-regime-20.html.

16. http://documents.worldbank.org/curated/en/184101468249876563/pdf/PUB6113000Hait0c0expenditure0review.pdf, pp. 50–57.

17. www.nh-hotels.com/hotel/nh-haiti-el-rancho.

changed all the passwords of the entire staff. On Monday, the IT manager was quite surprised not to log-in to his terminal and obviously knew what that meant. He was never seen again.

The next few months were interesting, for more reasons than work. Apparently, the interim president had made changes to the Electoral Law[18] that displeased many factions. They caused havoc in the city by setting up roadblocks and attacking cars. One day we were let off early at the office, and I was to escort one of the new secretaries to her home nearby. Not two blocks from the office, I glanced at someone who was running toward the car with a large steel pipe. Thankfully, I swerved, and he only hit the A pillar, sparing the windshield. The rest of that trip is but a blur in my memory. Further unrest led to the office being closed for much of the next two months. This was quite stressful to me, as I had been told nothing of the turmoil to be expected by the PwC Montreal office during recruitment.

Elections 101

During this time, the Provisional Electoral Council (CEP) was busy setting up its offices and getting to the tasks of organizing the elections. One day I was asked to attend a meeting at the U.S. Agency for International Development (USAID) regarding the upcoming elections and the management of the accounting needs of a Costa Rica-based agency[19] that was providing technical assistance to the CEP. It was led by a former education minister of Guatemala. I agreed that PwC would handle the stated requirements. Little did I know how deep into the electoral process this work would propel me.

The supervision of the Electoral Restructuring Project and the Elections Management would soon overwhelm me, requiring me to put in seventy-hour weeks, much to the delight of my boss, the PwC partner. The Guatemalan consultant was unable to fulfill his mandate, USAID requested that PwC increase its involvement in the elections process. The next few months proved to be quite tumultuous as I was drawn in deeper into the electoral process. Essentially, the Elections Project was to provide the Electoral Council with any and all reasonable services and goods required. I was drafted into the confidential council meetings and asked to provide a wide range of goods and services, from buying Polaroid film for ID badges to renting twenty SUVs to arranging for helicopter service[20] for a few days from Miami. This kept me quite busy, as I had to learn USAID's procurement regulations along the way. This involved many meetings, including one with the minister of finance regarding a security guarantee for the rental of the SUVs. He offloaded the task to his assistant who reluctantly agreed to provide the State Financial Guarantee.

Ironically, some of the procurements were not so successful. The Polaroid film was not compatible with the cameras used by the council. However, two days before the election, some foreign observers noted that the film they had received was not compatible with their cameras. Communication proved that by pure coincidence, the exchange of the two formats of film meant that both the council's and the observer's needs were met. Also, the helicopter was denied permission by the Haitian military to fly over Haitian soil. The compensatory payment to the helicopter company was approved by USAID.

Two nights before the election the U.S. Mission hosted a reception at the U.S. embassy residence. I lot of my fellow foreign election workers and observers were present. At one point, a tall gentleman approached, addressed me by name and complimented me on the work I had put in the make the elections a success. I thanked him. A few minutes later I asked a USAID staff member about the identity of that gentleman. He said, "Oh, that's the U.S. ambassador." I was dumbfounded.

18. www.cidh.org/countryrep/Haiti88eng/conclusions.htm, pp. 50–57.

19. Ibid. pp. 48–53.

20. www.latimes.com/archives/la-xpm-1987-11-28-mn-5979-story.html.

All in all, the elections would have gone on as planned had it not been for a commando of thugs in disguise, thought to be highly trained military personnel, who ransacked and destroyed many polling stations as well as killing quite a few voters who were lined up to vote. The chaos was so widespread that the Electoral Council called off the elections by noon on Election Day.[21]

The next day was one of eerie calm in Port-au-Prince. I was escorted to USAID by armoured vehicle. We checked the location of the various consultants. We found the Guatemalan ex-minister holed up at the Holiday Inn downtown. He was quite terrified as he had heard sustained gunfire during the previous day. We escorted him to the USAID office for debriefing. Also, the head of the provincial office from the west region called me, stating that he was in hiding and requesting permission to escape the city with one of the rented SUVs. Fearing for his life, I agreed that he could use the SUV for the required time.

The Haitian government decreed that the disruptions had been the work of dissident mercenaries and that all election offices would be closed for security reasons. The council was dissolved[22] and would be reconstituted at a later date.

At USAID, I was thoroughly briefed and officials were quite upset and angry at the obvious military acquiescence of the attacks. I was clearly instructed to secure as much of the purchased equipment as possible. This proved quite difficult as most electoral office sites were guarded by the Haitian military.

Through all this, I managed to squeeze in my wedding one week after the elections. All the PwC staff was elated to attend a Haitian wedding. In view of the public tension from the aborted election, it was quite subdued. The honeymoon for one week in Hawaii was quite welcome. I had even scored two, first class tickets from PAN-AM.

Returning to Port-au-Prince, I was beset by regret over the failed elections. I had done my utmost for them to be successful. And I began to feel a sense of responsibility over the people who were murdered. Had I not worked so hard, the elections would not have been ready on time, and the massacre would have been avoided.

The government soon reconstituted a council,[23] termed permanent, although the method of formation did not follow the 1987 constitution. The new council took possession of all the electoral offices, assuring a notable military presence at each one. Elections would be held in a period not exceeding six weeks.

One incident that shook me was while going by the main council offices on my way to the electric utility offices, I spotted one of the SUVs I had rented. Curious, I saw there was nobody nearby and stopped and inspected the vehicle. It appeared intact. About one minute later, several soldiers approached the vehicle and asked me for identification. After reporting to base by radio, I was "invited" to follow them in to the Central Council offices, where I was met and questioned about the missing equipment and vehicles. Obviously, those present were aware of who I was and my role as consultant to the previous council. And as I only had knowledge of the one vehicle and did not know its whereabouts, I answered that I was unaware of the location of the equipment or vehicles. I was dismissed and was free to go about my business. I quickly reported this incident to USAID who instructed me to stay away from the area for my personal safety. USAID terminated all semblance of elections support shortly thereafter.

Elections were held in January and results were quickly announced. Leslie François Manigat was sworn in as president[24] and parliament was convened. To all keen observers this whole process had been a sham and wholly orchestrated by the military including President/General Henri Namphy. The international community cut off most economic

21. Ibid.

22. www.cidh.org/annualrep/86.87eng/chap.4c.htm, para 128.

23. Interamerican Commission of Human Rights, "Report on the Situation of Human Rights in Haiti," Sept. 7, 1988. www.cidh.org/countryrep/Haiti88eng/TOC.htm, para 153–57.

24. www.universalis.fr/evenement/6-24-janvier-1988-election-de-leslie-manigat-a-la-presidence-de-la-republique/.

aid to Haiti during the Manigat presidency. He faced a legislature made up largely of former Duvalierists and armed with strong powers under a constitution approved in March. Skeptical Haitians suspected Manigat would be a puppet of the army leaders who opposed civilian rule. Supporters of Manigat believed he was strong enough to resist the military and receive the support of legislators.

Manigat's task as president was compounded by Haiti's extreme poverty and social divisions. In addition to the lack of foreign aid, Manigat received little support from the legislators.

The Manigat government was overthrown by Namphy after about nine months and the military assumed absolute power. This was succeeded by several other coups where General Prosper Avril took power.

Temporary Exile

During the time of the Manigat presidency, I returned to ED'H and assumed my duties. After two years of difficult stewardship, there was an upheaval in management, leading to my disenchantment with the system, as this turmoil had severely curtailed the electrical utility's ability to exert proper management control. When the former GM approached me with an offer to join him in a project to solidify electrical supply to the neighboring Dominican Republic,[25] I quickly agreed. The project was well financed and a 40 MW barge was prepared for service in less than ten months. After commissioning the barge, all consultant personnel were given severance, as the Finnish supplier had decided to take over the project and manage it as of December 1989.

Siren Call

After my return to Haiti, some twelve hours by car, due to frequent stops and searches in nearly every town, I set about celebrating Christmas. At a local restaurant, an agricultural consultant acquaintance remarked that if I was in Haiti, there must be elections upcoming. On Boxing Day, I was asked by the USAID deputy director to drop in for a meeting. As I had previously worked with the deputy director's daughter on a computer assignment, I knew him well.

At USAID, I was escorted to a room with a long slim table. One the other side were approximately ten people, most of whom I had met in my previous USAID work. I was asked to describe my role in the previous, aborted election after which I was briefed on the new proposal. I was to act as a consultant to the Permanent Council[26] that President Prosper Avril had named in the summer of 1989 and which had yet to make any progress. I was to begin this mandate the next week, after New Year's Day.

My first contact with the new council was facilitated by a USAID official who offered my services to help in organizing the next elections. As several staff had worked on the previous elections process in 1987, I soon established trust and credibility. Of particular note was Jacques Jovin, a representative from the Protestant churches in Haiti. We discussed at length on the elections process methodology and other matters. However, soon in the process, an acquaintance confided that he had been contacted by President Avril's office to run as a candidate in the forthcoming elections and guaranteed a victorious campaign. I reported this to the USAID Director Gerald Zarr and Ambassador Alvin P. Adams. Soon thereafter, I was called to a meeting with both UN Resident Representative Reinhart Helmke and U.S. Ambassador Alvin Adams. At this meeting, my information was confirmed that other sources also had been approached and guaranteed parliamentary seats. At the same time, President Avril had written to the UN Secretary General Koffi Annan requesting technical assistance in organizing the elections. In a matter of a few weeks the response was delivered to the UN Mission in Haiti.

25. Wartsila DR Project, www.wartsila.com/dom/en/about/history.

26. Prosper Avril. Livre Noir de l'Insécurité, pp. 300–01.

One morning around 6:00 a.m., I received a call from Helmke to meet him at his office at 8:00 a.m. This call coincidentally spooked my wife, who inquired as to why I had received this call. I told her this was a routine meeting, and they had forgotten to inform me.

At that meeting, Helmke showed me the original letter received from Annan and addressed to President Avril. In that letter, the secretary general chided Avril for his handling of the human rights in Haiti and refused the technical assistance request. President Avril never saw the letter. Several days later, Avril was seen being escorted to a U.S. military aircraft by the U.S. ambassador,[27] who had been nicknamed "Bourik Chage," Haitian Kreyòl for the "laden mule that goes on forever."

At the time, I would estimate about 85 percent of the population and consultants had a negative opinion as to whether elections could be held in Haiti in 1990. In short order, a grouping of civil society notables was formed to ponder on the route going forward. This led to the constitutional provision of the presidential vacancy being filled by the president of the Supreme Court. Several judges of the court had clear ties to the previous Duvalier regime, so consensus fell on Justice Ertha Pascal-Trouillot,[28] considered independent and impartial.

She quickly formed her cabinet, which included my acquaintance who had tipped me off on the elections scam, as defense minister. The Elections Council was disbanded, and the new members were chosen from the original 1987 council.[29] Several members were replaced by former election officials. The council elected Jean Robert Sabalat as president, the very individual I had helped escape retribution after the 1987 elections massacre. Staff was quickly recruited and included many former workers from the 1987 staff. Of note, the operations manager was a former cleric who had managed the Artibonite Regional Office in 1987, Luciano Pharaon. I was introduced by the USAID director as an initial contribution by USAID to encourage the setup of elections in 1990. The welcome was heartwarming, as I knew most of the members from my 1987 work, and President Sabalat openly welcomed me as an "old friend." Most of the other CEP had quietly disappeared three years earlier.

President Pascal-Touillot lost no time in asking Secretary General Kofi Annan for assistance in organizing the elections. As a start, a high-level mission[30] was dispatched to Haiti to analyze the possibilities, including the former head of the Electoral College of Nicaragua, the UN technical elections manager, a former Haitian Council member, and several other technicians. At the same time, USAID had extended my contract for a period of six months.

Ironically, the members of this mission had their first informal meeting at dinner, which I hosted at my residence. Events were occurring so fast, that to this day, I do not remember why this dinner came to be, other than my desire to be helpful. On that afternoon, Horacio Boneo of the UN and I sat at my dinner table and reviewed plans I had made for the upcoming elections. We estimated that elections could be held in a timeframe of six months. A timeline was reviewed and amended, the budget was generally accepted and through all this I cooked dinner, the main dish being my version of green pepper steak.

The next day, the mission went about its work, and in less than two weeks we had a recommendation to President Pascal-Trouillot. To my satisfaction, 90 percent of its content confirmed my initial plan that had been submitted to USAID and the U.S. ambassador.

UN Bureaucracy

In June, the UN sent two staff members to assist in organizing elections. In essence, they were to lead the process with the CEP, as the council was called. In practice, these technicians were tasked with analyses by Director Pharaon and myself. We assumed offices in what

27. www.nytimes.com/1988/09/19/world/man-in-the-news-artful-career-officer-prosper-avril.html.

28. https://lenouvelliste.com/article/189075/ertha-pascal-trouillot-la-premiere-femme-presidente-dhaiti.

29. www.haiti-reference.com/pages/plan/politique/elections/cep_1987-2000/.

30. https://uca.edu/politicalscience/dadm-project/western-hemisphere-region/haiti-1908-present/.

was described to us as Jean Claude Duvalier's bedroom at a guest villa (Villa D'Accueil) kept for visiting dignitaries and officials during the Duvalier regime.

A quite ironic incident happened during this frenzied period. I was asked by CEP President Sabalat to finalize the elections budget for presentation to a group of U.S. Department of State officials one Monday. At the same time, I was asked by Director Zarr to brief a couple of USAID Washington officials on the elections plan and budget. In the afternoon, they had a meeting with CEP President Sabalat and asked that I accompany them. As the quests were being screened through security, I rushed and handed the budget to CEP President Sabalat. Shortly afterward, they were introduced to the council and sat down to a cordial meeting. Sabalat handed them a copy of the budget, which they perused and then handed to me as a USAID consultant, not knowing that I had prepared the document.

Shortly thereafter, a U.S. NGO, the International Foundation for Electoral Systems (IFES)[31] was awarded a contract to manage the remaining electoral assistance. Several conditions were that they would continue with the previous elections consultant, i.e., me. The office was officially set up and several people hired.

Elections planning and preparation continued unabated and candidate registration was forthcoming. The council seemed to slow down activities, which to technical personnel made no sense as there were no major problems. My position as budget advisor to the CEP and concurrently to my employers USAID and the U.S. embassy meant that I wielded considerable influence, although to me, everything seemed to be overwhelming. As I had a rather large house with four bedrooms, one of the UN consultants wishing to reduce his living expenses as well optimize his work time, rented room and board from me. Our stress levels went down as we worked out some procedures in the evening while relaxing. This was to prove a significant negative factor for the CEP.

Actually, as budget allocations were being made, less and less discretionary financial resources were left in the budget. The axe soon fell as the council made a plea to the U.S. ambassador for more funds. Present at the meeting were U.S. Ambassador Adams, Steve Kashkett, Adams' principal political advisor, CEP President Sabalat, Marc Antoine Noel, another of the nine CEP members, and myself. The U.S. ambassador politely responded that the request would be analyzed because resources were tight. After the meeting, I stayed behind to confer with the Adams and Kashkett. His candid comments indicated the request seemed bogus, and he would not offer any more assistance. Kashkett and I agreed.

Betrayal

Very shortly, IFES consultant Jeff Fischer came to Haiti and conferred with the CEP. That afternoon Fischer took me aside and bluntly told me the council was complaining about my interference in election matters.[32] I was given ten minutes to clear my office. I returned home, stunned and downtrodden. I had worked for USAID for eight months with no problems, and now after seven weeks under IFES, I was now considered a liability. The ambassador was incensed at IFES' decision and insisted that I be generously compensated. He saw this as a retaliation for the budget snub to the CEP. In the end, IFES gave me the equivalent of four months salary, having worked for them less than two months. The UN consultant, who was renting rooms from me, Ralph Haag, was also let go, and CEP President Sabalat also wanted Pharaon to be fired. Only the intervention of Marc Antoine Noel, another CEP member, prevented this by telling Sabalat that Pharaon was the top Haitian official and was essential to the process.

For the remainder of the elections process, I stayed at home and met with Adams and Kashkett on a weekly basis. The council received no new U.S. funds. Ironically, I received daily visits from election officials and civil society leaders at my home, wanting guidance on the process. This included the operations manager, computer systems suppliers, and members of the Haitian Business Council.

31. IFES Haitian Election Project Final Report, p. 5.

32. Ibid.

Some time after my dismissal, I was invited to a friendly lunch at the French ambassador's residence. France had just announced it was providing a $2 million contribution to the CEP.[33] Over lunch, I told the ambassador that a good portion of his country's contribution would be absconded by CEP members. He was not surprised.

Shortly thereafter, a terrorist bombing caused a few casualties following the final rally of Jean-Bertrand Aristide, the CEP announced that a delay in holding elections would place Election Day on 7 December 1990.[34] Most technicians were dumbfounded as they saw no technical reasons for this delay.

During one of my weekly visits to the U.S. embassy, Kashkett asked me my estimate of who would win the presidential elections. After some reflection, I responded that former Priest Jean Bertrand Aristide would win with at least 60 percent of the vote.[35] I also told him that without massive donor support, I gave Aristide a maximum of six months in power.[36]

Having devoted most of my year to the election process, I was suddenly called to Canada as my father was taken quite ill. I left immediately and returned after my father was out of danger, ironically one week after the first round of elections was over.

A New Hope

Inauguration Day, 7 February 1991, was a regal affair. Aristide held a fiery speech in which he called for the elite to assist in the building of a nation that had been divided for too long. In an apparent snub to the previous administration, he received the presidential sash from a peasant woman and not from former President Trouillot.[37]

With Aristide firmly in power, strong support for the fledgling democracy was essential. Too many of the previous regimes had gone the dictatorial route, so safeguards needed to be established. Therefore, institutions such as the Supreme Court and the auditor general positions were key.

What happened in the early days was unfortunate. First, Aristide named several of the key CEP directors to lush positions in the Diplomatic Corps.[38] For some, such as Emmanuel Ambroise, named ambassador to Canada, it seemed a just reward after a lifetime of public service. To others, such as CEP President Sabalat, named ambassador to France, it seemed like a reward for service rendered to Aristide's party. In order to forestall protest objections, all ambassadorial posts were presented to the Senate as a group.

During this time, I was working with several engineers on a realistic plan for ED'H. One of these engineers was also a member of the Haitian Communist Party led by René Théodore. During one of our work sessions, the party leader and a senator joined us for a discussion. I mentioned to the senator that the ambassadorial nominations seemed premature, as some of the candidates had yet to receive their "clearance" from the auditor general's office. He agreed and brought this objection to the senate, causing some consternation in the nomination process. Defiantly, Aristide withdrew Sabalat's name from the ambassadorial position[39] and two weeks later named him minister of foreign affairs in his cabinet. This upset the balance of power and led to protests. Recalcitrant factions called for cool heads to prevail, but Aristide increased the tone of his rhetoric using the "Pere Lebrun" or tire collar approach to all opponents. This practice of burning opponents alive had first surfaced during the uprising that led to Duvalier's demise fours years earlier.

33. National Democratic Institute. "The 1990 General Elections in Haiti," p. 36.

34. Henry F. Carey. "Electoral Observation and Democratization in Haiti," in Kevin Middlebrook (ed.), Electoral Observation and Democratic Transitions in Latin America (San Diego: Center for US–Mexican Studies, 1998), pp. 143–66.

35. Donald C.F. Daniel, Bradd C. Hayes, with Chantal de Jonge Oudraat. The Coercive Inducement and the Containment of International Crises (1999), p. 151.

36. Amy Wilentz, "Return to the Darkest Days, Human Rights in Haiti after the Coup," p. 1.

37. Transfer of Presidential Sash by Peasant Woman to Aristide.

38. Henry F. Carey, "Electoral Observation and Democratization in Haiti," CEP officials named to diplomatic posts, note 19.

39. Ibid.

In short order, Aristide was removed from power in a seeming bloodless coup on 30 September 1991.[40] A Military Junta led by General Raoul Cédras took power and established martial law. This was to last some four years and many sympathizers of Aristide were murdered and tortured.

Democracy Enhancement

During this time, USAID wanted to reinforce the civil society checks and balances on the Aristide regime and financed the Democracy Enhancement Project to foster dialogue and train people from all walks of life in the rule of law and political advocacy. Led by America's Development Foundation,[41] over four years they trained a large number of civil society members to be vocally and substantially critical of any untoward actions by members of the government or elected officials. I was chosen as the financial director and served until the project's end in 1995. The DEP was to start its operation on 1 October 1991. Among the DEP's main critics was the military junta that saw the presence of this project as an unwanted impediment to its free rule of the country. The junta had to be warned several times that the DEP was not to be disturbed. As the project had yet to formally start operations, the principal staff of the project were quietly evacuated to the U.S. This was to last for five months, and when operations started in earnest, the first project was the establishment and support of a volunteer human rights legal aid. Named L'Amicale des Juristes[42] and led by Rene Julien and Camille Leblanc, it defended people in cases of arbitrary arrest and was quite successful over time. Also supported was the Centre Eocumenique des Droits de l'Homme (CEDH) led by Jean Claude Bajeux, a former priest, and Micha Gaillard, the son of a prominent intellectual writer. A training program was set up to educate a vast number of people from all walks of life in the principles of democracy and political advocacy. During the project's four-year duration, a Federation of Municipalities was supported and established. This federation was the brainchild of Evans Paul, the mayor of Port-au-Prince. During this time, I lost several friends and colleagues who collaborated with the DEP on various attacks from police and paramilitary groups.

In 1994, a group of mediators led by Jimmy Carter and General Colin Powell,[43] assisted by Robert Pastor, negotiated the peaceful surrender of the military junta. Although I was briefed on the meetings by a participant in the talks, I do not feel comfortable in relaying the details of these talks. The gist was that the junta surrendered several days after and were led into exile.

New Elections

In order to assure the smooth re-integration of Haitian President Jean-Bertrand Aristide, President Bill Clinton was present during Aristide's return. Members of the DEP project adapted with some difficulty to the new reality, as we had been under high stress and tension for the four previous years. Ironically, there was an incident when the U.S. military in charge of re-establishing main utilities in Haiti gave a briefing at USAID.[44] I was stunned by the in-depth knowledge of ED'H that the presenting officer professed. After the briefing, the head of the Democracy Office at USAID confided that she had given the officer my Utility Status Report prepared four years earlier.

The main order of the day was organizing the elections less than one year after the "re-establishment of democracy." Although Aristide argued that he should be allowed to complete

40. Amy Wilentz, Return to the Darkest Days: Human Rights in Haiti after the Coup, p. 1.

41. www.sourcewatch.org/index.php/America's_Development_Foundation.

42. https://lenouvelliste.com/article/100945/vers-la-relance-des-activites-de-lamicale-des-juristes.

43. www.nytimes.com/1994/09/17/us/showdown-with-haiti-overview-holding-off-clinton-sends-carter-nunn-powell-talk.html.

44. www.globalsecurity.org/military/library/report/1996/op-restore-democracy_uphold.htm.

a five-year mandate, in country, national and international officials and observers retorted that he had been recognized as the legitimate president of Haiti during the years in exile.

The DEP was contacted by the Carter Center to provide technical assistance to its "Mission to Haiti" in June 1995.[45] The mission consisted only of Carter Centre Administrative Director Robert Pastor so our assistance was welcomed. Being the only member of the DEP with electoral experience, I was dispatched to assist Pastor. The weekend was a whirlwind of eighteen–twenty hour days. As the Pastor Report speaks for itself, I will endeavour to highlight only a few of the main points. On election day, we split up the voting place assignments between us. The day of the election went well and vote tallies were quite orderly. However, around 10:00 p.m., we received a call that something untoward was happening at the Port-au-Prince regional office. Pastor and I immediately left for the office and witnessed strange behavior. Although a senior CEP member was escorting us through the office, we observed CEP staff marking up formerly blank ballots. This behavior was noted throughout the building. As we were not allowed to take pictures, we mentally noted the actions. After nearly one hour, we returned to Pastor's hotel where he proceeded to call U.S. Observation Mission Chief Mark Schneider, bureau chief of the Latin America and Caribbean office at USAID in Washington at 3:00 a.m. The intervention had little impact on U.S. acknowledgement of the success of the elections. The next day, as an additional intervention, Pastor met at 9:00 a.m. with Aristide where he conveyed the substance of our observations. During Pastor's meeting with Aristide, I waited patiently in the outer office and dozed off from a lack of sleep. The Carter Center report was published shortly thereafter[46] to sharp criticism from the Clinton administration.

Going Forward

The DEP was wrapped up in the next year and was succeeded by a follow project with entirely new personnel. In August 1996, I was struck with an unusual bug that resulted from coffee poisoning and hospitalized me for nearly one week. It was after that when I noticed a job posting for the elections coordinator position at USAID. As I saw the posting some four hours prior to the closing date, I immediately prepared my job application. After several weeks, I was called to a job interview at USAID. From my previous experience with elections, I was successful in obtaining the job. However, I received a strange warning during the interview. I was told to refrain from any contact with the Carter Center or Pastor if I was successful in obtaining the position.

My two-year stint at USAID went quite well, managing grants given to the U.S. National Democratic Institute, the International Republican Institute, and IFES. Although an official protest was filed by IFES against my appointment, due to my firing by IFES some six years earlier, I started my appointment in September 1996. I reiterated my impartiality to IFES President Richard Soudriette during one of his visits to Haiti. The organizations proved quite capable and were generally very receptive to my comments and suggestions. Being familiar with the staff involved from previous work, we engaged in substantially productive elections work during the 1997 legislative elections. I also represented USAID Haiti at the Washington presentation of a new book on elections in post-conflict democracies.[47]

One ugly incident that happened during a weekly project meeting was when the representative of IRI openly accused the representative of NDI of sleeping with one of Aristide's close advisors. As a reaction to this accusation, I requested as meeting chair that the comment be retracted. As the IRI staffer refused, I withdrew from the meeting along with my USAID colleague and immediately reported the incident to the USAID director. She met with the IRI

45. www.cartercenter.org/documents/1248.pdf.

46. Ibid.

47. Krishna Kumar (ed.), Postconflict Elections, Democratization and International Assistance (Boulder, CO: Lynne Rienner, 1998.

representative, as well as the regional IRI delegate who had been in Haiti that week. Quite emphatically, she warned IRI to retract the statement and present an apology or risk the grant being terminated. IRI refused. Upon consultation with LAC Director Schneider, the USAID director was told to drop the issue, as the political fallout from the U.S. could be worse than the incident. Shortly thereafter, my contract with USAID was not renewed.

Renewed Hope

As a new legislative and presidential election was planned for 1999, I was contracted to establish a budget for the upcoming elections by IFES, which I prepared according to input from IFES staffers. This was reviewed and accepted by IFES headquarters.

I was soon contacted by my colleague and friend Luciano Pharaon to assist in setting up an operations team for the upcoming elections. Infighting in the CEP, again reformulated in 1999, led to delays in planning an organizing the elections. Early in 2000, we had all the necessary structure and resources to start the process. First was the candidate and voter registration. For some reason, IFES staff were reticent to share the contents and quantity of voter registration materials with the operations team. Since I had consulted in 1999 with a local computer company to develop an innovative and thoroughly modern national ID and voter registration system, IFES may have expected me to torpedo their rudimentary voter registration system.

As registration approached, the materials finally arrived in Haiti and quantities were revealed.[48] I compared the estimates of the voting population in 1999 with the 1997 figures, and I noted the numbers were unchanged. In my previous elections consulting work in 1990, I had scrupulously analyzed the correlation of population to voting population and had established relevant aging of the population. As Haiti's population was quite young, the number of voters attaining voter registration at age of eighteen was quite high. According to my 2000 calculations, this resulted in a voter population that had been underestimated by close to 600,000 or nearly 20 percent by the IFES staffer. This registration system was new and included pictures of the voters, many civil society observers were sceptical of the feasibility of the new system. I was quite aware of this and tried to convey the risks associated with the lack of registration materials. The operation manager quickly saw the downside and joined in getting the CEP to react. However, the registration period was quite near, and I sensed the entire elections process could be compromised. Also during this period, the administrative director of the CEP allowed my contract to lapse.

Career Gamble

Feeling free as a concerned elections expert, I thought of a way to push the registration issue. In the previous DEP, I had contact and credibility with the Haitian Association of Journalists, to whom the project had given a small technical grant. I called one of my journalist friends and told him I would be holding a press conference in two days on a sensitive subject regarding the elections.

The conference was attended by nearly twenty journalists. I explained the consequences of the lack of registration materials in detail. That noon, the news was a headline including the mention of my initials (JPP), which coincidentally were the same as that of a highly visible and disruptive youth group.

In the meantime, Pharaon had pleaded for my return to work, and the administrative director had agreed to pay me unofficially. I reluctantly returned to work but in a low-key manner. Candidate voting ballots still had to be verified and our first attempt was unsuccessful as too many errors were creeping in. We decided that I would concentrate on the legislative and mayoral ballots. The other staff would vet the local ballots. In all, nearly 1,600 ballots were verified over a two-week period. In all, two ballots were found to be erroneous, compared to over 250 in the 1995 elections.

48. www.oas.org/sap/docs/permanent_council/2000/cp_doc_3383_00_eng.pdf, p. 15.

Through all this, I received a call while vetting ballots. A very polite voice requested whether I would be available for a meeting with President Preval and Prime Minister Jacques Edouard Alexis that afternoon. I had no choice but to agree and in a panic move went straight to my apartment for a change to a suit and tie. As usual, I kept my passport in my back pocket in case I was deemed "persona non grata" by the officials.

After being been driven to the National Palace in the printer's nondescript SUV, I registered with palace security and was escorted to a second floor waiting room. Waiting nervously, I was fully conscious that I was about to put my entire career's credibility on the line. After about fifteen minutes, the door opened, I was expecting an assistant to escort me to the president's office. I was stunned to see President Preval himself greet me and usher me to the next room where Alexis was waiting. The president began by stating that he had heard my press conference and wanted to know more about the issue.[49]

I thanked him and slowly explained the problems I had discovered. After about two hours of discussion, he requested I put the misgivings in writing and deliver the report to him. I thanked him and promised the report would ready in a few days. Anticipating a firestorm of protest from IFES and other international agencies, the same driver took me to the U.S. embassy where I was greeted by a political attaché whom I had met previously. I explained I had just had a high-level meeting with President Preval and he had asked me to flesh out the issues. She responded that the embassy was aware of my meeting. I detailed the issues and she responded sympathetically. I vowed to give her a confidential copy of my report for embassy use only.

Several days later, I produced a full color report, complete with Haitian Kreyòl citations containing ten recommendations and delivered it personally to the Palace Security office. A secretary came down and took possession.

Several days later Pharaon told me of a Saturday evening meeting with the president to which I was requested to attend. As I had no official status, I was silent throughout the meeting. Attending were IFES, the Organization of American States (OAS) delegation, UN technicians, and several other government officials, including the prime minister and finance minister.

The president slowly read off the ten points in my report, not revealing the source of this document. After each point, participants were invited to share their comments. Although at first IFES was quite dismissive of the report, others including the UN were highly supportive. As the evening was getting late, the president suggested that we convene on Sunday morning for breakfast at the palace to come up with solutions. IFES was the only dissenting party, openly stating that Sunday was their only day off, and they planned to go to the beach—they were quickly shamed by the other parties for being so bold.

On Sunday morning, we were escorted to a brightly lit room for a breakfast that the president proudly proclaimed came from his palace chicken coup. His professional agricultural background shone through. After breakfast, the eager group of attendees quickly came up with solutions to the ten points and promised to provide financing. Only one point, the computerization of voter registers, was dismissed, as it would require nearly $2 million to complete.

The next day, I was welcomed at the CEP with handshakes and hugs by the very same people who had banished me less than two weeks before. They got word that I had convinced the president to make the changes and mistakenly somehow thought that I was very influential. Election preparation and voter registration would resume some two weeks after IFES had provided the additional materials.

After a clumsy comment about Haitians, the IFES project manager[50] was declared persona non grata and given forty-eight hours to leave the country. In a note addressed to me, she blamed me personally for the expulsion, of which I had no knowledge until two days after the fact.

49. www.latinamericanstudies.org/haiti/adviser.htm.

50. Ibid.

Boom and Bust

Enthusiasm filled both the CEP and political parties. The legislative election day was to be 21 May. More than 4.2 million voters (60 percent of those registered) voted that day, the highest in Haitian history.[51] Observers lauded the elections preparation and professionalism without precedent. I personally attended about twenty poll closings and saw no flaws. The next morning I was awakened very early and told there were problems downtown. I rushed downtown and upon arrival at the CEP offices was flabbergasted by the sight of thousands of ballots strewn in the street in front of the CEP office. I was so shocked that I locked myself out of the pickup truck I was driving. I immediately tried to find out what had transpired. Before I could get my bearings, I had a Canadian Broadcasting Corporation microphone stuck in my face. After assurances from CEP officials, I stated that the ballots had already been counted, tally sheets certified, and staff had mistakenly thrown them out on the street instead of storing them in the warehouse. I stated that in the worse case, only elections in Port-au-Prince would have to be redone. I was subjected two other interviews by the Associated Press later on that day.[52]

My CBC interview, including comments on redoing elections in Port-au-Prince was broadcast, after editing, that evening. I received a call from a presidential aide who was furious at what I had allegedly said. I vowed to get the original tape from CBC staff, which I did two days later and was vindicated.

More turmoil was to ensue shortly after. I had prepared tally sheets for all senatorial elections, leaving the others to other staffers. The sheets included the name of all candidates. Upon discussing with a CEP colleague, he remarked that my sheets were erroneous, only the top four candidates' results were to be tallied. I protested and was quickly drowned out. Sensing manipulation, I left in a huff and gave my resignation.

Having obtained all senatorial results, I completed the sheets privately with all candidates and leaked these to the Haiti Democracy Project in Washington.[53] They never found out who had sent these.

I received a surprise visit at my unofficial office on Delmas Street one day. Along with my long-time confidant and friend was a distinguished visitor, Orlando Marville,[54] head of the OAS delegation to Haiti. We discussed the situation and the upcoming boycott of the results by the opposition parties, the U.S., Canada, the OAS, and the UN. The OAS and the UN concluded that former President Aristide persuaded or forced President Preval to only count the top four positions in the Senate election, thereby excluding about a quarter or a third of the Haitian electorate. Aristide pursued the technique of many illiberal democracies, to obtain a super majority in the Senate to facilitate constitutional amendments and protect the elected ruling party leaders from losing their criminal immunity. I remarked that only nine election seats were disputed and that close to 1,600 people had been elected on 21 May among the five levels of elections in Haiti's hyper-federal system. It would be a shame to nullify what had been the best election in Haitian history and, instead, should have only led to those nine Senate seats to be recounted with the ballots that Preval and Aristide had ordered not be counted. The crisis led the mounting protests that would lead to Aristide's exile in four years at the end of what would be his four-year term.

I made plans to take a long vacation. In Miami, I rented a convertible and relaxed for a few days. Finding it agreeable, I sought to buy an older convertible and was soon headed to Canada. The summer of 2000 was the best on record in Canada, going sixty full days with no rain.

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51. www.counterpunch.org/2004/10/11/the-untold-story-of-aristide-s-departure-from-haiti/.

52. Jean Paul Poirier, Haiti. Associated Press and CBC.

53. Haiti Democracy Project, "Results 1990," www.haitipolicy.org.

54. www.oas.org/sap/docs/permanent_council/2000/cp_doc_3383_00_eng.pdf.

Financial Woes

In August, I was contacted by Pharaon, who requested that I rejoin the CEP in Haiti. I initially refused, feeling betrayed by the Senate kafuffle. However, the financial pressure was mounting, and I later agreed to give technical assistance from Canada. I prepared the polling stations lists for the presidential elections and sent them by e-mail. I was duly paid by wire transfer. Requesting my presence in Haiti, Pharaon insisted the administrative director[55] would pay me full international rate for my work in the presidential elections. I agreed to return to Haiti the next week. My invoicing was defined on deliverables, and work proceeded accordingly without a hitch. In late October, all work was completed, and I sent in my final invoice. This was disputed by the administrative manager. I waited for the presidential elections and expected Aristide to win yet again and expecting him to be a worse president the second time, I made plans to leave Haiti forever.

I requested that Pharaon drive me to the airport and bid farewell to Haiti, after thirteen long and memorable years. My outstanding invoices were his to collect. I said farewell to no one else. That led to speculation among acquaintances that something untoward had happened. I reassured a long-time friend and colleague Micha Gaillard that I was fed up and wished to relax with my parents in Canada.

Prologue

In February 2001, I was contacted by Stanley Lucas of the International Republican Institute (IRI, of the U.S. National Endowment for Democracy), who invited me to Washington for a meeting of opposition parties to discuss the prerequisites for an acceptance of the disputed May elections in Haiti.[56] At the same time, I was contacted by Pharaon asking advice on how to solve the quagmire. I sent him a list of eight points that would be required to solve the issue.[57]

Misjudging the distance, I spent twenty-two of the next twenty-fours driving to Washington, arriving two hours before the meeting. I gave verbal advice and after the two-hour meeting drove back to Canada. The gospel truth. I was later quite satisfied that the agreement reached in Haiti included six of the eight points in my submittal to Pharaon.

55. www.oas.org/xxxiiga/francais/documentos/rapport_haiti.htm.

56. Lucas was implicated in The New York Times in the successful effort in 2004, by advising former military in their armed rebellion against Jean-Bertrand Aristide.

57. www.theguardian.com/commentisfree/cifamerica/.../haiti-oas-election-runoff.


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