



**Giving Meaning and Effect to Human Rights:  
The Contributions of Human Rights  
Committee Members**

**Gerald L. Neuman**

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## **Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members**

Gerald L. Neuman<sup>1</sup>

(draft book chapter, to appear in a volume edited by Daniel Moeckli and Helen Keller on the two human rights covenants)

### **Abstract**

*This essay discusses the multiple roles played by the members of the Human Rights Committee in giving effect to the rights guaranteed by the International Covenant on Civil and Political Rights. It argues that the most important contribution the members make to the human rights project consists in their credible, professional elaboration of those rights, particularly by means of the Committee's Views and General Comments, as emphasized by the International Court of Justice in the Diallo case. While the Committee members should be open to learning from the insights of other treaty bodies, they should resist urgings toward a simplistic harmonization. The texts and interpretations of other 'core' human rights treaties must be used with care in the members' independent exercise of their own interpretive function.*

This essay discusses the role of the members of the Human Rights Committee (HRC, or Committee) in the implementation of the International Covenant on Civil and Political Rights (ICCPR), and the human rights project as a whole. Initially, that requires a discussion of the functions of the Committee as an overall institution, and then the essay concentrates on the contributions of the members, individually and collectively. It emphasizes the collective activity of authoritatively interpreting the rights within their mandate as the members' most important contribution.

### **1. The Functions of the Human Rights Committee**

The HRC is the independent expert body created by the ICCPR for monitoring compliance by states parties with their obligations under the treaty. Its overbroad name reflects a historical moment when no other treaty bodies were contemplated. Although some of the rights protected by the ICCPR are also addressed in other human rights treaties at the global level, certain key rights are substantively guaranteed to everyone only by the ICCPR, such as freedom from detention, freedom of expression, and political participation.

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<sup>1</sup> J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School. Although the author was a member of the Human Rights Committee from 2011 to 2014, this essay does not speak on behalf of the Committee.

The HRC has three principal activities: the examination of states' reports, the decision of individual communications, and the writing of General Comments. Each of these activities has evolved over the lifetime of the Committee. This essay will mostly address their operation from the perspective of 2011-2014, my term on the HRC. The three activities have contrasting natures, in terms of how publicly they are performed and their generality or specificity. State reporting is a major public event for the HRC, although some preparatory and deliberative phases take place in closed meetings, and each dialogue covers a wide range of civil and political rights issues in the particular reporting state. Communications involve claims of violation by a specific individual or group of individuals against a particular state, and are processed in confidence; in fact, even the existence of the communication is generally unknown to the rest of the world until the case has been decided and published.<sup>2</sup> General Comments address recurring legal issues of substance or procedure under the ICCPR, without being focused on any particular state, and over the years the HRC has increased the transparency of its process for generating General Comments. It now receives several rounds of public input, and deliberates on the text in open session.

Like any other international organization, the HRC has a variety of other auxiliary functions in support of the three main tasks. These functions include adopting procedural rules and practices, drafting an annual report, and maintaining relations with the United Nations and other human rights institutions. There is also one potentially significant task assigned by the ICCPR that actually lies dormant, the resolution of interstate disputes regarding violations of the treaty;<sup>3</sup> no state has ever launched such a proceeding. Unlike some of the other treaty bodies, the HRC very rarely issues public statements about human rights crises unconnected to a pending state report or communication, and it does not operate an 'urgent action' procedure for self-initiated investigations.

The periodic reporting process is the primary mode of interaction between states and the HRC required by the ICCPR. States' written reports on their implementation of the treaty lead to a live and public dialogue between the states and Committee members. As the process has evolved, it has encompassed earlier written and oral input to the HRC from NGOs, national human rights institutions, and various UN agencies. Increasingly, states agree to file written answers to a list of questions posed in advance by the HRC, instead of a comprehensive written report, as the foundation for the public dialogue.<sup>4</sup> The dialogue not only takes place before civil society observers and is documented, but (when resources permit) is webcast to reach a wide audience, particularly in the state's own territory. Since 1992, the dialogue has led to the HRC's collectively deliberated Concluding Observations, which welcome positive developments in the reporting period and then set forth a series of concerns about possible or definite noncompliance

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<sup>2</sup> HRC, Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.10 (2012), Rule 102.

<sup>3</sup> Article 41, International Covenant on Civil and Political Rights, 1966, 999 UNTS 171.

<sup>4</sup> This optional substitute is known as the List of Issues Prior to Reporting (LOIPR), or more recently as the 'simplified reporting procedure,' see GA Res. 68/268, 9 April 2014, paras. 1-2.

with the state's ICCPR obligations, and recommendations for how the state should address these problems. During the Cold War period, individual members were able to make observations at the end of the dialogue, but the members from the socialist states successfully blocked any collective evaluation of states' compliance.<sup>5</sup> The HRC now makes collective observations, and follows up on them, within one year for a few selected recommendations, and in connection with the next periodic report for the full set.

The reporting system currently serves a number of overlapping purposes, depending on the quality of the state's participation. The activity of generating the report should focus the attention of state organs on their ICCPR obligations and on the needs expressed by civil society; the constructive dialogue between the state and the HRC gives the state the opportunity to educate the Committee and the world at large on its efforts to comply, and to receive legal guidance and advice from the HRC; the transparency of the dialogue, especially if webcast, offers the state's populace a different perspective on their government; the HRC's acceptance of NGOs can bolster the legitimacy of their activities and their issues; the HRC's Concluding Observations offer a form of public accountability for violations; the Concluding Observations give the HRC an opportunity to indicate its interpretation of the ICCPR; and the follow-up activities create a further forum for civil society engagement.

The HRC can consider individuals' communications only if the relevant state has ratified the (first) Optional Protocol to the ICCPR, as roughly two-thirds of the parties to the ICCPR proper have done thus far.<sup>6</sup> It has been suggested that the optional character of the procedure facilitated the HRC's ability to make findings of violations in its decisions (known as 'Views') during the Cold War years, because the members from socialist states did not seek to undermine a mechanism to which their states were not parties.<sup>7</sup> The communications process serves a variety of purposes -- most obviously, extending a forum where individuals can seek vindication of their claims; but also bringing neglected issues to the HRC's attention; operating as an adjunct to the monitoring function of the state report; and giving the HRC the opportunity to expound its interpretation of the ICCPR in a more definite way than Concluding Observations on state reports usually allow. The HRC also engages in public follow-up on its Views, pressing for implementation of its recommendations.

A key limitation of the HRC's role is that its evaluation of state reports and its final decisions on communications do not produce legally binding outcomes.<sup>8</sup> Most of the

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<sup>5</sup> See, e.g., C. Tomuschat, *Human Rights: Between Idealism and Realism* (2003), 147-149.

<sup>6</sup> Optional Protocol to the International Covenant on Civil and Political Rights, 1966, 999 UNTS 302.

<sup>7</sup> Bouziri, 'Problèmes particuliers rencontrés dans les premières années d'activité du Comité', in N. Ando (ed), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (2004) 79, at 98. (Mr. Bouziri was an HRC member from 1979 to 1986).

<sup>8</sup> The HRC has held, however, that its requests to states to avoid inflicting irreparable harm on the author of a communication, such as execution or deportation to a country where the author fears torture, pending resolution of the communication are legally binding, because the state would be rendering the communications procedure futile

Concluding Observations on state reports do not purport to express definitive conclusions. Each set of Concluding Observations includes series of paired ‘concern’ paragraphs and ‘recommendation’ paragraphs; usually the concerns involve possible violations, or even regrets about matters that they recognize as suboptimal, such as reservations to the ICCPR that could be withdrawn. Occasionally the concern paragraph will forthrightly describe a legal rule or practice as incompatible with the treaty. The recommendations are ordinarily proposed measures for dealing with the concern, which are not necessarily the only measures that would suffice, although sometimes the recommendation may openly assert that a rule incompatible with the treaty must be amended. Whether tentative or certain in phrasing, the Concluding Observations are not legally binding under the ICCPR.

In Views on communications, the HRC’s resolution of the dispute does include definite findings of violation or non-violation. The Views also point out the state’s obligation to provide reparations for the violations, with details whose status as recommendations or legal conclusions is less clear.<sup>9</sup> Neither the findings of violation nor the remedial indications are legally binding under the Optional Protocol to the ICCPR authorizing the communications procedure.

Although the reporting procedure and the communications procedure do not result in legally binding outcomes for the state involved, they exert a softer normative force for compliance, and they also generate indirect effects on the implementation of the ICCPR. State authorities may be persuaded by the HRC’s findings, and reexamine individual decisions or policies. Views and Concluding Observations can reinforce internal political forces and social movements arguing for reform. The HRC’s follow-up processes call upon states to document and explain their measures of implementation. At the international level, a treaty body must be understood as an element in a broader network, where the outputs of the treaty body motivate or are utilized by other institutions that play different roles. The HRC’s findings possess an authority and objectivity that can be combined with the political power or financial resources of other external actors to induce change. The HRC’s legal interpretations of the ICCPR provide an objective framework for criticizing the state’s failure to respect human rights.

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by acting irreversibly before the Committee has expressed its views on the state’s obligations. See, e.g., HRC, *Yuzepchuk v. Belarus*, Views of 24 October 2014, UN Doc. 112/D/1906/2009, para. 6.4.

<sup>9</sup> The HRC’s listing of forms of reparation in Views may be understood as conclusions on the exact remedy that the violations require, or as recommended measures to remedy the violations, or as being sometimes one and sometimes the other. See, e.g., HRC, Summary Record, UN Doc. CCPR/C/SR.3134 (31 Oct. 2014), 3 (abbreviated and approximate summary of discussion); Scheinin, ‘The Human Rights Committee’s Pronouncements on the Right to an Effective Remedy – An Illustration of the Legal Nature of the Committee’s Work under the Optional Protocol’, in N. Ando, *supra* note 7, 101, at 108-110; cf. Neuman, ‘Bi-Level Remedies for Human Rights Violations’, 55 *Harvard International Law Journal* (2014) 323 (examining remedies from a theoretical perspective). Moreover, the Views rarely include reasons in their remedial paragraph.

The HRC has characterized its elaboration of the meaning of the ICCPR as ‘authoritative,’ a term that is subtly different from ‘binding.’<sup>10</sup> The International Court of Justice expressed its appreciation of the HRC’s role in a well-known judgment applying the ICCPR:

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its ‘General Comments’.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of the treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.<sup>11</sup>

In other words, when the HRC performs its task properly, its consistent interpretations provide focal points around which interpretation of the ICCPR should coalesce.

From my own perspective, this interpretive function constitutes the most important contribution of the HRC to the implementation of the ICCPR. In saying this, I do not mean to minimize the value of the other functions, but rather to emphasize the need for authoritative elaboration. Covenant rights cannot be left to the chaos of self-serving interpretations by each indifferent or complacent state. The HRC’s interpretations are foreshadowed in Concluding Observations, articulated in holdings on communications, and summarized in General Comments.

General Comments usually provide a synthesis or progressive codification of the HRC’s interpretation of a particular substantive article of the ICCPR, based primarily on its past experience in communications and concluding observations. Some General Comments address cross-cutting issues, and others have addressed HRC procedures. In the past, General Comments often requested states to include particular information in their reports, but this function may be fading as advance lists of issues replace comprehensive reports. General Comments may include both passages that elaborate obligations and passages that set forth recommended means of avoiding violations; the use of the verb ‘should’ often, but not always, indicates a recommendation, in contrast with the mandatory ‘must.’ General Comments guide states and the HRC’s own conduct in drafting Concluding Observations and Views. Nonetheless, the HRC

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<sup>10</sup> HRC, General Comment No. 33, UN Doc. CCPR/C/GC/33 (2008), para. 13.

<sup>11</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, ICJ Reports (2010) 636, at 664.

may further develop its jurisprudence without first amending or replacing an older General Comment.<sup>12</sup>

The importance of the HRC's interpretive function varies somewhat in the different regions. It is most crucial in regions that lack independent human rights tribunals, and for countries that are not parties to relevant regional treaties. In the Council of Europe, which has a thick set of human rights institutions and a well-established if overburdened court with mandatory jurisdiction, the HRC's role is supplementary. The HRC has filled in some gaps in the coverage of the European Convention on Human Rights,<sup>13</sup> and has occasionally led the way in interpretation of particular rights, such as conscientious objection to military service as an element of religious freedom.<sup>14</sup> The HRC also provides a global corrective to certain region-specific interpretations, such as the excessive margin of appreciation that the European Court of Human Rights affords to limitations on non-Christian religious practices.<sup>15</sup> In the Americas, where most states are now subject to the jurisdiction of a regional court that borrows freely from European and global sources and exercises considerable interpretive freedom of its own, the HRC's role may have become supplementary as well. Nonetheless, for non-parties to the American Convention on Human Rights, most prominently the United States of America, the ICCPR reporting system provides an essential impartial global forum for accountability.<sup>16</sup> In Africa, where the regional human rights convention expressly encourages use of global human rights instruments in its interpretation, the HRC influences the articulation of human rights standards both directly under the ICCPR and indirectly through the regional convention,

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<sup>12</sup> For example, in 1996 the HRC's General Comment No. 25 had identified 'established mental incapacity' as a permissible basis for denying the right to vote. After the advent of the Convention on the Rights of Persons with Disabilities (CRPD), the HRC declined to amend or replace its old General Comment, but rather took into account some of the insights of the CRPD Committee and adopted Concluding Observations that articulated a stricter standard for (but not an absolute ban on) finding an inability to vote. See, e.g., HRC, Concluding observations on the third periodic report of Hong Kong, China, UN Doc. CCPR/C/CHN-HKG/CO/3 (2013), para. 24; HRC, Summary Record, UN Doc. CCPR/C/SR.2978 (28 March 2013), para. 14.

<sup>13</sup> For example, the Seventh Protocol to the European Convention contains a weakened version of the right to criminal appeal, with an exception that allows appeals to be restricted to pure issues of law; HRC Views finding violations by Spain of the stronger provision in Art. 14(5) ICCPR led the legislature to adopt legal reforms broadening the right of appeal. See International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (2004), 9-10.

<sup>14</sup> See ECtHR, *Bayatyan v. Armenia*, Appl. No. 23459/03, Judgment of 7 July 2011, at paras. 105-109 (Grand Chamber) (changing the court's interpretation of Art. 9 ECHR in relation to conscientious objection, in parallel to the HRC's change in interpretation of Art. 18 ICCPR).

<sup>15</sup> Compare, e.g., HRC, *Bikramjit Singh v. France*, Views of 1 Nov. 2012, UN Doc. CCPR/C/106/D/1852/2008 (protecting Sikh male student's right to wear religiously required head covering in public school), with ECtHR, *Jasvir Singh v. France*, Appl. No. 25463/08, Inadmissibility decision of 30 June 2009 (finding denial of such right within France's margin of appreciation); see Neuman, 'Human Rights and Constitutions in a Complex World', 50 *Irish Jurist* (2013) 1, at 7-8.

<sup>16</sup> Perhaps I should mention here that in the HRC, members are recused from participation in examining the state report of their country of nationality, as well communications brought against it, in contrast to the mandatory inclusion of national judges in cases before the European Court of Human Rights. See Rules 71(4), 90(1)(a). The United States is not a party to the Optional Protocol.

although great challenges of implementation remain.<sup>17</sup> Moreover, the new African Court on Human and Peoples' Rights has already invoked the HRC's General Comments in some of its judgments,<sup>18</sup> and has exercised its explicit authority to find a violation of the ICCPR in a case.<sup>19</sup>

## 2. The Committee and Its Members

According to the ICCPR, the Human Rights Committee 'shall consist of 18 members.'<sup>20</sup> The Committee *is* its members, taken together. In addition, the ICCPR requires the UN Secretary-General to 'provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.'<sup>21</sup> The result of this arrangement is that personnel of the UN human rights bureaucracy (currently the Treaty Bodies Division of the Office of the High Commissioner for Human Rights (OHCHR)) furnish vital support and assistance to the work of the HRC, and the Conference Management division of the United Nations supplies other facilities, such as interpretation, translation, and publication services.

In a broad sense, the Committee could be said to include the members, the human rights officers, and the Conferences Services personnel, just as the International Court of Justice (ICJ) could be said to include the judges and the entire Registry, from the legal officers to the security division and the medical unit.<sup>22</sup> Unlike the ICJ, however, the HRC does not have formal authority over any of the people who assist it – they are all part of the UN Secretariat.<sup>23</sup> The HRC proper is an independent treaty-based body outside the UN hierarchy, but dependent on the UN for financial and human resources. The Committee members have a close working relationship with their own Secretary and other helpful people from the Treaty Bodies Division, and a much more arms-length relationship with others, including Conference Services, whose translation and publication services actually consume the great majority of the treaty body budget.<sup>24</sup> This unfortunate structure weakens the HRC.

The Committee proper, then, consists of the members, nationals of eighteen different states that are parties to the ICCPR. They attend the HRC's three sessions per year, and they also perform preparatory work between sessions, in addition to the full-time jobs that support them. They are elected by the states parties for staggered four-year terms, with consideration

<sup>17</sup> See F. Viljoen, *International Human Rights in Africa* (2007), 345.

<sup>18</sup> African Court on Human and Peoples' Rights, *Konaté v. Burkino Faso*, Appl. No. 004/2013, Judgment of 5 Dec. 2014; African Court on Human and Peoples' Rights, *Mtikila v. United Republic of Tanzania*, Appl. Nos. 009/2011, 011/2011, Judgment of 14 June 2013.

<sup>19</sup> See *Konaté*, supra note 18; African Court on Human and Peoples' Rights, *Thomas v. United Republic of Tanzania*, Appl. Nos. 005/2013, Judgment of 20 November 2015.

<sup>20</sup> Art. 28 ICCPR.

<sup>21</sup> Art. 36 ICCPR.

<sup>22</sup> See ICJ, Report of the International Court of Justice: 1 August 2013-31 July 2014, UN Doc. A/69/4 (2014), 61.

<sup>23</sup> See Opsahl, 'The Human Rights Committee', in P. Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 369, at 388-391.

<sup>24</sup> See, e.g., United Nations High Commissioner for Human Rights, *Strengthening the United Nations treaty body system* (2012), at 26 (describing treaty body costs for 2010 and 2011 as \$39.3 million for human rights personnel, including members' travel, and \$72 million for conference services).



given to ‘equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.’<sup>25</sup> The regional distribution is not rigid, but the diversity of the HRC’s membership serves it well. From recent experience I would report that the members interact as equals and without the factionalism that characterized the HRC’s Cold War period. Nearly all the HRC members have been lawyers, though with different career paths, including academia, the judiciary, foreign ministries, and NGO service. Their legal experience, which the ICCPR encourages but does not require, contributes to the quality of the HRC’s work; so do other skills, such as diplomacy, which academics often lack, in dialogue with recalcitrant states, or in sometimes awkward relations with UN structures. The HRC could benefit from greater gender diversity in its membership, an issue that the two Covenants do not expressly address.<sup>26</sup>

The members contribute through a division of labor within the Committee. Every two years since 1987, the HRC has elected a new Chairperson from a different region than the previous one, though not in a strictly regular rotation. Along with three Vice-Chairpersons and a Rapporteur (for the Annual Report), the Chairperson participates in the Bureau to handle certain administrative matters. Special Rapporteurs are appointed for two-year terms to perform certain specialized functions, such as the follow-up procedures. The heaviest load is carried by the Special Rapporteur for New Communications and Interim Measures, who is on call for urgent decisions year-round. An average member in an average session is likely to play multiple roles, as rapporteur for one state report, task force member on another, rapporteur for a few communications, and more generally by actively participating in deliberations on concluding observations, communications, the pending draft general comment, and the HRC’s working methods.

The HRC’s Views, Concluding Observations, and General Comments are all the product of deliberations by the plenary Committee.<sup>27</sup> Concluding Observations and General Comments are adopted by consensus. Views on individual communications, however, may be adopted by majority vote if consensus cannot be reached, and this is the one area where the HRC’s rules provide for the publication of separate individual opinions (concurring or dissenting).<sup>28</sup>

Members write separately, alone or with others, for a variety of reasons. The HRC has a fairly restrained culture of dissent, and members do not write every time they disagree with some

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<sup>25</sup> Art. 31(2) ICCPR.

<sup>26</sup> See, e.g., Edwards, ‘Universal Suffrage and the International Human Rights Treaty Bodies: Where are the Women?’, in M. Bassiouni and W. Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (2011) 151; GA Res. 68/268, 9 April 2014, paras. 12-13.

<sup>27</sup> Some of the inadmissibility decisions may be drafted by a Special Rapporteur or Working Group, and adopted by the Committee without discussion if no member raises a concern. See Rules of Procedure, *supra* note 2, Rule 93(3).

<sup>28</sup> *Id.* Rule 104.

aspect of the majority opinion.<sup>29</sup> Separate opinions may argue for a different evaluation of the facts, or may articulate a different legal approach, with regard to substance, methodology, or procedure. Sometimes concurring opinions explain more fully reasoning that may be latent in a terse majority opinion, or emphasize one of the rationales that contributed to a compromise formulation. On a few occasions, concurring members have written in order to respond to the arguments of a dissenting opinion. Separate opinions bring internal debates into the open, which may prompt wider discussion, and they record arguments that may prove influential when a related issue arises in a later case. The individualized style of many separate opinions has potential to persuade a variety of audiences that the concise institutional style of HRC majority opinions may lack.

In the HRC, the members write the General Comments. They possess the legal expertise to draft, and they would not delegate the task to the Secretariat or to outside agencies or NGOs as some other treaty bodies have done.<sup>30</sup> Serving as rapporteur on a General Comment is a huge time commitment, both during and between sessions. The rapporteur produces the initial draft, and shepherds the evolving text through the stages of discussion. The procedure for adopting General Comments has become highly consultative, and the HRC receives very useful suggestions from states and other stakeholders, but the members must be persuaded of their merit, and each paragraph of the text is adopted by consensus.

Members play diverse roles in another respect. One former member, Martin Scheinin, has emphasized three ideal types of the Committee member, which he and a co-author call the Captain, the Fire Brigade, and the Icebreaker.<sup>31</sup> The captain emphasizes maintaining stability on a forward course, as if the Committee were a massive vessel that could not make sharp turns or reduce speed quickly. The fire brigade responds to burning injustices, and rushes to extinguish them by any means that work. The icebreaker leads the way through blocked seas, creating the single channel that states must follow to reach the treaty's goal. Scheinin makes evident his sympathy with the fire brigade.

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<sup>29</sup> During 2011-2014, somewhat under 40% of the Views included at least one separate opinion, concurring or dissenting (author's calculation). Far fewer inadmissibility decisions inspire separate opinions. The number of separate opinions on Views, written or joined, varied greatly among members during this period, from zero to forty-eight (an outlier). I do not distinguish here between concurring and dissenting opinions, because members may disagree sharply on issues of interpretation in cases where they agree that the provision at issue has been violated.

The HRC's rate of separate opinions is much lower than that of the European Court of Human Rights, but far higher than that of the Committee on the Elimination of Racial Discrimination (CERD), which did not see its first separate opinion until 2013. See White and Boussiakou, 'Separate Opinions in the European Court of Human Rights', 9 *Human Rights Law Review* (2009) 37 (finding 80% of Chamber and Grand Chamber judgments from 1999 to 2004 non-unanimous); Wildhaber, 'Opinions dissidentes et concordantes de juges individuels à la Cour Européenne des Droits de l'Homme', in R.-J. Dupuy (ed), *Mélanges en l'Honneur de Nicolas Valticos: Droit et justice* (1999), 529 (giving earlier statistics); CERD, *TBB Turkish Union in Berlin-Brandenburg v. Germany*, Opinion of 26 February 2013, UN Doc. CERD/C/82/D/48/2010.

<sup>30</sup> See, e.g., Doek, 'The CRC: Dynamics and Directions of Monitoring its Implementation', in A. Invernizzi and J. Williams (eds), *The Human Rights of Children: From Visions to Implementation* (2011) 99, at 106.

<sup>31</sup> See Slotte and Scheinin, 'Captain, Fire Brigade or Icebreaker? Political Legitimacy as a Rationale in Human Rights Adjudication', in T. Kurtén and L. Hertzberg (eds), *Legitimacy: the Treasure of Politics* (2011) 89.

I agree that the HRC benefits from having members with diverse approaches and strategies, and I recognize the fire brigade type as making an essential contribution, challenging the others to perceive new problems and find new solutions. My own view is that the HRC also needs counterweights to the fire brigade, and I note Scheinin's observation that the fire brigade concentrates on putting out the fire, leaving it to civilians to clean up 'the mess left behind.'<sup>32</sup> If we depict the members' roles in such terms, then I would add here the need for Chess Players, who can listen to the fire brigade's suggestion, but who think several moves ahead, and consider the specific and systemic consequences of employing the proposed method and its alternatives.

Another useful type, who would also double in one of the other capacities, is the Historian: the HRC has been fortunate in having a few long-serving members who could shed light not only on past events, but on why they occurred. Regrettably, the Secretariat has not been in a position to perform that function. Historians are not necessarily resistant to change, but are knowledgeable about the Committee's past. The value of institutional memory provides an argument against rigid term limits for treaty bodies, which benefit from both infusion of new perspectives and an insider's understanding of the treaty body's history.

### 3. The Interpretative Function of the Members

The members understand that their task is to apply the ICCPR. Unlike some other human rights tribunals,<sup>33</sup> they are not given competence to adjudicate claims brought under other human rights treaties, either global or regional. The doctrine of the indivisibility of human rights does not confer omnicompetence on treaty bodies. Neither does it imply that whatever violates one substantive provision of one human rights treaty should also be regarded as violating some substantive provision of every other human rights treaty.

At the same time, application of the ICCPR may require the Committee to give attention to other treaties, or even customary international law. For example, Article 4 of the ICCPR authorizes and restricts derogations from certain provisions of the ICCPR in times of public emergency, while expressly specifying that derogating measures must remain consistent with the state's other obligations under international law. The Committee could not give proper effect to that restriction on derogation without taking into account the state's obligations under treaty-based or customary international humanitarian law.<sup>34</sup>

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<sup>32</sup> *Ibid.*, at 109.

<sup>33</sup> See Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 3(1) (extending jurisdiction to disputes regarding either the Charter or 'any other relevant Human Rights instrument ratified by the States concerned.');

*Konaté*, supra note 18 (applying both the ICCPR and the Charter).

<sup>34</sup> See HRC, General Comment No. 29, UN Doc. HRI/GEN/Rev.9 (2008) (Vol. I), 234, paras. 9-10.

More broadly, the HRC faces recurring questions about the relationship between rights guaranteed by the ICCPR and the obligations of states under other human rights treaties. In 2013-2014, the Committee engaged in an explicit debate on the effect of other ‘core’ human rights treaties – either the texts of the treaties themselves or the interpretations by the respective treaty bodies – on the interpretation of the ICCPR.<sup>35</sup> Committee members were in general agreement that dialogue with other treaty bodies was important, and that the HRC should be open to learning from the insights of other treaty bodies. No member proposed that the HRC should automatically and unquestioningly adopt other treaty bodies’ interpretations of their respective treaties as settling the meaning of the ICCPR.

The HRC’s conversation took place in the context of the issues that arise repeatedly in its work, but also in the context of contemporary debates related to OHCHR’s report on ‘strengthening the United Nations treaty body system.’<sup>36</sup> (It deserves notice that OHCHR’s self-interested formulation made the ‘system’ the object of the strengthening, rather than the treaty bodies.) The report insisted, for example, that treaty bodies ‘need to ensure consistency among themselves on common issues in order to provide coherent treaty implementation advice and guidance to States.’<sup>37</sup> The calls for consistency and coherence could be read as seeking either absence of conflict or achievement of uniformity.

To my own understanding, direct contradiction between treaty bodies, in the sense of the HRC’s concluding that the ICCPR obliges a state to perform an action that another treaty body regards as a violation of its respective treaty, or vice versa, amounts to a very serious problem to be avoided if possible. Avoiding such contradictions may not be possible, however, if the other treaty body does not take ICCPR obligations adequately into account. Specialized treaty bodies may lack legal expertise, and they may pay insufficient attention to the rights of others that come into conflict with the rights within their specialized mandate. Of course, the HRC may also have misperceived empirical realities that the other treaty body understands better, or may have neglected the perspective of a disadvantaged group whose situation prompted the creation of the other treaty. The HRC needs to examine both possibilities, by means that may include actual

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<sup>35</sup> The conversation included a discussion in open session as part of the HRC’s improvement of its working methods, on 28 March 2014, and an earlier preliminary discussion by the ten HRC members who attended an informal retreat in the Hague in April 2013. The March 2014 meeting is summarized in abbreviated and approximate form in HRC, Summary Record, UN Doc. CCPR/C/SR.3066 (28 March 2014); there is no public record from the April 2013 retreat, although its content was briefly discussed at the HRC’s meeting with the states parties to the ICCPR in July 2013, summarized in HRC, Summary Record, UN Doc. CCPR/C/SR.3000 (22 July 2013), paras. 32-48.

<sup>36</sup> See OHCHR, *supra* note 24; GA Res. 68/268, 9 April 2014 (adopting outcome).

<sup>37</sup> See OHCHR, *supra* note 24, at 25; *ibid.* at 68 (‘ensuring consistency of jurisprudence among treaty bodies’). As another example, the so-called Poznan formula for uniformizing procedural rules of treaty bodies by enhancing the role of joint meetings of the committees’ chairpersons (see OHCHR, at 31; GA Res. 68/268, 9 April 2014, para. 38) shifts power from the members to OHCHR. The Treaty Bodies Division drafts proposals for procedural changes and can present them with insufficient prior notice at the chairpersons’ intersessional meetings, which are then under pressure to act.

dialogue with the other treaty body, but it cannot automatically yield to the expertise or choices of the other body.

‘Consistency’ in a stronger sense, however, is a different issue. Even with regard to civil and political rights listed in the ICCPR, other ‘core’ treaties (by text or interpretation) may impose stricter or more specific standards, more detailed implementing measures, or more extensive positive obligations. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), provides an instructive example. UNCAT could be considered as a kind of ‘implementing treaty’ for Article 7 ICCPR, which prohibits torture and cruel, inhuman or degrading treatment or punishment. UNCAT’s preamble refers to Article 7 ICCPR as one of its predecessors, and it emphasizes the states parties’ desire to ‘make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.’<sup>38</sup> Article 1 UNCAT provides a definition of torture for the purposes of UNCAT – without prejudice to wider definitions elsewhere – and there follow a series of preventive, repressive and remedial obligations, some quite detailed, to increase effectiveness. Cruel, inhuman or degrading treatment is handled more succinctly in Article 16 UNCAT, without providing a definition, and expressly imposing a subset of the obligations listed for torture, again without prejudice to other instruments.

The Human Rights Committee has considered UNCAT as useful guidance with respect to the implementation of Article 7 ICCPR, but not as wholly determining the meaning of Article 7 obligations within the framework of the ICCPR.<sup>39</sup> It would be excessive and formalistic to consider every detailed regulation listed in UNCAT as a mandatory component of the state’s duties of implementation under Article 2 ICCPR in combination with Article 7. The HRC also does not rely exclusively on the definition of torture in Article 1 UNCAT, or the scope given to other ill-treatment in Article 16 UNCAT, both of which restrict UNCAT obligations to acts committed ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’ That aspect of the definition is relevant to the range of detailed obligations in UNCAT. In contrast, the HRC understands the rights in Article 7 ICCPR as ‘amenable to application between private persons’ in a manner that generates positive obligations for the state to prevent and punish private torture or ill-treatment.<sup>40</sup> Thus, even a treaty as closely linked to the ICCPR as UNCAT needs to be used with care in interpreting the ICCPR itself.<sup>41</sup>

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<sup>38</sup> UNCAT, 1984, 1465 UNTS 85, Preamble.

<sup>39</sup> See, e.g., HRC, *Giri v Nepal*, Views of 24 March 2011, UN Doc. CCPR/C/101/D/1761/2008, para. 7.5.

<sup>40</sup> See, e.g., HRC, General Comment No. 31, UN Doc. HRI/GEN/Rev.9 (2008) (Vol. I), 244, para. 8.

<sup>41</sup> Similarly, the HRC has not mechanically incorporated all the obligations set forth in the Convention on the Rights of the Child, as defining the child’s right to protection by the state under Articles 23 and 24 ICCPR. Instead, it has characterized that Convention as ‘a valuable source informing the Committee’s interpretation of the Covenant.’ HRC, *Blessington and Elliot v. Australia*, Views of 22 Oct. 2014, UN Doc. CCPR/C/112/D/1968/2010, para. 7.11.

It would admittedly simplify the work of the Secretariat and provide uniform advice to states if the HRC and other treaty bodies always gave identical answers to questions about the permissibility of particular practices. A state party to the ICCPR would have understandable objections, however, if the result were that it became bound *de facto* by the content of another treaty that it had not ratified, or if the HRC's communications procedure became the vehicle for bringing complaints under the other treaty when the state had not accepted the other treaty's optional procedure. And, as illustrated by UNCAT, identical interpretation would sometimes reduce protection under the ICCPR.

Using the text of another 'core' treaty to shed light on provisions of the ICCPR differs from using other treaty bodies' *interpretations* of their treaties for that purpose. Generally speaking, states parties have agreed to be bound by the texts of treaties, and the wording of the texts is stable over time.<sup>42</sup> Interpretations by other treaty bodies, in contrast, are not formally binding, and they change over time, not necessarily in a predictable direction. The HRC has found the interpretations by other treaty bodies of their treaties informative,<sup>43</sup> but it has not tried to emulate all their innovations. To maintain dynamic consistency would not only be taxing; it would also mean abandoning the HRC's own credibility as authoritatively interpreting the ICCPR.

In the context of the present symposium, particular interest attaches to the relationship between the two Covenants, in light of the indivisibility of civil and political rights on the one hand, from economic, social and cultural rights on the other. The interplay between the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>44</sup> differs from the relationship between the two Covenants and later treaties. Neither Covenant can be understood as generally implementing the other. There are a variety of relationships among the rights in the two Covenants, and there are two conspicuous instances of overlapping rights: the right to form and join trade unions is mentioned in both Article 22 ICCPR and Article 8(1)(a) ICESCR, and the generally phrased nondiscrimination norm in Article 26 ICCPR shares content with the ancillary norms of nondiscrimination with regard to ICESCR rights expressed in

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<sup>42</sup> Qualifications to this proposition include the fact that not all states parties to the ICCPR may have ratified another treaty; that some ratifications are accompanied by reservations; and that different language versions of treaties exist. In fact, later translations of both Covenants into Chinese may have been substituted for the original ones, see Sun, 'The International Covenant on Civil and Political Rights: One Covenant, Two Chinese Texts?', 75 *Nordic Journal of International Law* (2006) 187; Seymour and Wang, 'China and the International Human Rights Covenants', 47 *Critical Asian Studies* (2015) 514.

<sup>43</sup> See, e.g., HRC, General Comment No. 35, UN Doc. CCPR/C/GC/35 (2014) (citing General Comments of both the Committee on the Rights of the Child and the Committee Against Torture, among other sources, in construing Art. 9 ICCPR).

<sup>44</sup> ICESCR, 1966, 993 UNTS 3.

Articles 2(2) and 3 ICESCR.<sup>45</sup> Nonetheless considerable differences remain in the rights enumerated by the Covenants and their interpretations by the respective bodies.

One might usefully contrast the prohibition of arbitrary interference with the home under Article 17 ICCPR and the right to adequate housing under Article 11(1) ICESCR. The CESCR has elaborated the right to adequate housing in its General Comment 4 (1991) as including obligations to take necessary steps toward ensuring shelter for everyone that is ‘adequate’ in numerous dimensions, including legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location ‘which allows access to employment options, health-care services, schools, child-care centers and other social facilities’; and enabling the expression of cultural identity.<sup>46</sup> While fulfilling this ambitious conception of adequacy was subject to the ICESCR mandate for progressive achievement, some dimensions of the right had more immediate consequences. One such consequence noted in General Comment 4 and more fully expounded in General Comment 7 (1997) involved protection against ‘forced evictions.’<sup>47</sup> The CESCR pointed out that ‘forced eviction’ is a term of art, referring not to all compelled relinquishment of housing for any reason, but rather ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’, and does not include ‘evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.’<sup>48</sup> That conformity implies both procedural and substantive limitations on the process of lawful eviction, and also:

Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. *Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.*<sup>49</sup>

That is, under Article 11 ICESCR, a person may sometimes be lawfully evicted from a particular housing unit, but the state must then ensure that the person’s right to adequate housing, as understood by CESCR, is respected.

The Human Rights Committee has examined the phenomenon of eviction from informal settlements in connection with several state reports, and has expressed concerns and made some

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<sup>45</sup> The HRC clarified in *Broeks v. The Netherlands*, Views of 9 April 1987, UN Doc. CCPR/C/29/D/172/1984, and a companion case that the prohibition of sex discrimination in Art. 26 ICCPR was autonomous rather than limited to discrimination with regard to other rights under the ICCPR, and that it applied to unemployment benefits.

<sup>46</sup> CESCR, General Comment No. 4, UN Doc. HRI/GEN/Rev.9 (2008) (Vol. I), 11.

<sup>47</sup> CESCR, General Comment No. 7, UN Doc. HRI/GEN/Rev.9 (2008) (Vol. I), 38.

<sup>48</sup> *Ibid.* at para. 3.

<sup>49</sup> *Ibid.* at para. 16 (emphasis added).

recommendations.<sup>50</sup> The HRC did not make precise findings in Views on that subject until 2012. The authors in *Naidenova et al. v. Bulgaria* were Roma residents of a longstanding informal settlement constructed on municipal land, which the city sought to reclaim after acquiescing in their presence for several decades.<sup>51</sup> The NGOs that briefed their case raised claims of both arbitrary and unlawful interference with their homes under Article 17 ICCPR, as well as claims of discrimination based on their Roma ethnicity.<sup>52</sup> Among the arguments, counsel urged that the threatened evictions would violate the right to adequate housing under Article 11 ICESCR and CESCR's General Comments, and therefore were unlawful within the meaning of Article 17 ICCPR.<sup>53</sup> Counsel also argued that the right to adequate housing in the ICESCR was similar to the prohibition of arbitrary interference with the home in Article 17 ICCPR, and that the factors articulated in CESCR General Comment 7 showed that the threatened eviction should be condemned as arbitrary.

The HRC unanimously concluded that carrying out the threatened evictions as planned would be arbitrary under 17 ICCPR, but did not endorse the strong form of the NGOs' arguments. The HRC wrote narrowly in its first Views on the subject of eviction from unlawfully occupied property. The HRC agreed that the dwellings were the residents' 'homes' within the meaning of Article 17, despite the fact that they did not own the land on which they had built. The HRC's own analysis avoided using the term 'forced eviction,' and did not equate the meaning of Article 17 with the meaning of ICESCR or the CESCR General Comment. The analysis emphasized a series of factors that, taken together, rendered the city's conduct unreasonable, including the lengthy acquiescence in the presence of the settlement, the fact that the land was publicly owned, the absence of any pressing need to change the status quo, and the unavailability of satisfactory replacement housing. The HRC did not determine how it would rule if any of these factors had been different, but left those issues for analysis in future cases.<sup>54</sup> It also avoided saying that the residents were immediately entitled to 'adequate' housing as defined by CESCR.

The *Naidenova* case could be seen as the HRC's effort to explore independently the content of a prohibition of arbitrary interference with the home in the context of unauthorized occupation of land. Counsel had called to the HRC's attention CESCR's interpretation of the other Covenant, and the HRC took into account the insights expressed by CESCR but also the

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<sup>50</sup> See, e.g., HRC, Concluding observations of the Human Rights Committee: Kenya, UN Doc. CCPR/CO/83/KEN (2005), para. 22.

<sup>51</sup> HRC, *Naidenova et al. v. Bulgaria*, Views of 30 October 2012, UN Doc. CCPR/C/106/D/2073/2011.

<sup>52</sup> The HRC found the discrimination claims inadmissible because the evidence submitted insufficiently substantiated them, and also observed that these claims seemed not to have been exhausted in the domestic proceedings. *Naidenova*, para. 13.6.

<sup>53</sup> *Naidenova*, para. 3.4. Article 5(4) of the Bulgarian Constitution gives duly ratified treaties force of law superior to statute. It does not expressly give the General Comments of treaty bodies force of law.

<sup>54</sup> In a later decision on another communication brought against Bulgaria by the same NGOs, the HRC found the claim inadmissible for lack of substantiation after the authors failed to provide information the Committee had requested regarding such factors as the length of the occupancy and the public or private ownership of the land. See HRC, *S.I.D. v. Bulgaria*, Inadmissibility decision of 21 July 2014, UN Doc. CCPR/C/111/D/1926/2010.



difference in the two committees' mandates. For example, from the perspective of a treaty body monitoring progressive realization of the right to adequate housing, it might be appropriate to infer strict obligations on a state that has neglected implementation of the right and subsequently confronts the need to demolish unsanitary and dangerous structures, or seeks to protect the interests of private owners whose land has recently been occupied. At the same time, a treaty body that has a different monitoring task, focused on a prohibition of arbitrary interference with the home, may justifiably base its evaluation on a narrower view of the duties involved, within the framework of a different treaty. If the period of occupation has been short, or if the reason for removing the occupiers from the land is compelling, it may be reasonable within the framework of the ICCPR for a state with limited resources to expel them from their current home without prioritizing them for housing that meets CESCR's standards of adequacy. Such divergence, if it occurred, would express no disrespect for CESCR's interpretation of its own Covenant, but rather the HRC's respect for the limits of its own competence. The right to adequate housing and the right against arbitrary interference with the home may be interrelated, but they are not identical.

Some may regard the foregoing as an unduly modest vision of the task of the HRC and its members. Some authors have argued that the subsequent 'core' human rights treaties should be considered as incorporated into the ICCPR, or more comprehensively that states' obligations under relevant economic, social and cultural rights should be enforced as part of compliance with an ICCPR right.<sup>55</sup> I do not believe that the HRC can implement this program. The HRC would require a large increase in financial and human resources to perform adequately the role contemplated by this comprehensive approach. If the HRC were perceived as arrogating that task to itself, the General Assembly would cut its resources, not increase them.

Even the current modest role, performed across the range of civil and political rights guaranteed by the ICCPR, constitutes a major contribution to the global human rights project. The Human Rights Committee is known for its impartial, credible, professional exposition of the content of its Covenant. Among all the tasks that the members accomplish, that is their most important contribution.

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<sup>55</sup> See, e.g., Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration,' 2014 *European Journal of Human Rights* 447, at 463-464. Given that Art. 26 ICCPR contains an autonomous guarantee of equality, it is likely that the requisite linkage could always be found.