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Toward the Institutional Integration of the Core Human Rights Treaties

CRAIG SCOTT

By its nature as a pronouncement of high normative principles, the Universal Declaration of Human Rights (UDHR) did not address the hard questions related to the creation of institutions to begin the process of bridging the gap between statement of ideals and practical realization. However, starting with the grand bifurcation that produced the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) as the two institutionally separated offspring of the UDHR, the UN human rights treaty order has evolved in such a way that the UDHR's inclusion of the entire range of then-recognized human rights in one authoritative instrument has become fragmented. We now have six core conventions each with its own treaty body charged with interpreting and monitoring compliance with its own instrument.¹ This chapter builds on works that seek to make a case for a much less category-bound approach to thinking about human rights.² The theme which unites these works with the present chapter is the need for a conscious and radical breaking down of the normative boundaries among the categories framed by each of the human rights treaties and for a complementary "interactive reformation" of the treaties' institutional orders in order to harness the benefits achievable through dialogue across diverse perspectives in the juridical construction of human rights knowledge.

The argument in the first work, "Reaching Beyond," was that we must strive to make the original promise of the UDHR—that its human rights represent an integrated bundle of fundamental interests—the overarching premise of the current six-treaty order. An analytical shift is required to enable us to search out ways to approach received categories (economic, social, and cultural rights, women's rights, and so on) with a certain wariness of the aptness of those categories and with an associated willingness to cross to and fro among categories. We must further be prepared to engage in category crossing—and category combining—to the point that we begin to defy the categories themselves by developing our shared sense of when it is awkward, usually unhelpful, and often even harmful to understand a given rights claim or context in terms of existing categories. Harm is exacerbated when we approach a right's content as involving only a single category of rights as contained in the one treaty that is subject to interpretation or application.³

In the second work, "Bodies of Knowledge," the context was set by recent recommendations that consolidation of the six treaty bodies into one or two bodies should be on the UN reform agenda. It was argued that harnessing of diversity must be central to any consolidation reforms and that diversity-enhancing initiatives must start immediately with respect to the current six-committee order, in part because practical experimentation with promoting diversity will provide valuable lessons at the institutional design stages of any eventual consolidation project. But the central thrust of the argument was that such an approach was independently desirable quite apart from whether treaty-body consolidation is in the cards. Two premises were — and remain — central. The first is that superior collective judgment is exercised when multiple perspectives are encouraged to interact with each other in coming to grips with any given normative issue or decision. The second is that, in order for diverse perspectives and actors to interact, there must first be a commitment to ensuring diversity within the composition of the membership of collective decision-making bodies. Diversity multiplies perspectives, while the need for decision making necessitates that those perspectives engage each other. Diversity helps oust monological reasoning in favor of dialogical reasoning, making it less likely that reasoning will take place within the four corners of a single person's limited knowledge and more likely that it will take place in the context of the necessity to test one's assumptions and intuitions against those of others. The operative good of a "dialogical universalism" is *knowledge* and the perspectives that adhere to knowledge. In somewhat oversimplified terms, we can think of "social experience" and "disciplinary expertise" as the two main forms of knowledge relevant to the juridical construction of normative knowledge.⁴

"Bodies of Knowledge" noted but bracketed a third form of diversity of knowledge in the human rights treaty context which fuses diversities of expertise and experience, namely, diversity of "normative focus." This term was meant to capture the epistemological perspectives that tend to coalesce around a category of human rights as it gets constructed over time as its own distinct field of knowledge. In this way, we can speak metaphorically, but meaningfully, about the potential of treaty texts to enter into dialogues with one another, dialogues that profit from the interaction of the diverse knowledge(s) each treaty regime has constructed for itself. The present chapter was signaled by the following passage at the end of the introduction in "Bodies of Knowledge":

[A] second proposal . . . could complement [the discussion in "Bodies of Knowledge"]. This is for the human rights committees, through pragmatic acts of institutional co-operation, to consider their six treaties as interconnected parts of a single human rights "constitution" and thereby to consider themselves as partner chambers within a *consolidating* supervisory institution. Through such acts of pragmatic imagination, each committee would be encouraged to place itself within a network of dialogue with the other committees; all would seek to expand their horizons

through harnessing the pool of diverse knowledge represented by their large collective membership and the diversity of normative mandates of the six treaties.⁵

The operative assumption of this passage is that, if diversity is seen as an institutional good because of its role in bringing to bear multiple angles of vision on the exercise of judgment, then it makes sense to look at the treaty body order as a whole and ask whether knowledge-enhancing effects can be achieved by reforming the relations of the committees among themselves. It becomes important to think in terms of the normative focus of each committee's constitutive treaty as having only a partial perspective on human rights which would be enhanced by dialogical engagement with the other committees.⁶ Such dialogical congress can be organized in terms of at least two broad patterns of interaction.

If, for some purposes or in some contexts, the committees began to interact as a kind of quasi-consolidated committee of the whole, then this would have the effect not only of increasing the overall membership pool (to 97) but also of deepening the pool of knowledge. An analysis that is fuller and normatively richer can — or, can potentially — be achieved than is possible from within a single committee with its more limited membership and its more narrowly categorized normative focus. Here, the treaty bodies (or cross-cutting working groups made up of several members from each treaty body) would interact as some kind of organic or seamless whole, consolidated around a common purpose to the point that the boundaries between the institutions functionally dissolve, even if only temporarily and for limited purposes. So, for example, if the six human rights committees were to meet for two days in a joint plenary session to discuss the draft text of a common general comment on the relationship of social vulnerability to human rights violations, we would speak of the committees (and their members) as consolidated for this purpose.⁷

In other contexts there may not be any actual convening of the members of the committees into some kind of committee of the whole, but rather a more notional or virtual dialogue in which each committee takes note of procedural and substantive developments (some routine and some more experimental) that have taken place in other committees and then makes an independent choice as to whether to emulate what is going on in the other committee(s). On this approach, we would think less in terms of (the members of) the committees interacting as a single consolidated collectivity and more in terms of the committees interacting as autonomous bodies with their own institutional perspectives. Such inter-treaty interaction would be premised on institutional sovereignty (both of jurisdiction and of normative focus) remaining intact in a strong sense. The interaction that takes place is in the form of dialogue across palpable boundaries in which each institution seeks either to persuade or to learn from another institution. Each institution has its separate perspective generated by its normative focus and by its

practical experience which it may wish to commend to the other institution(s) or to have enriched by listening to the other institution's perspectives and experience. Jurisdictionally separate institutions are engaging in dialogue (as an *inter-institutional* order), not the membership of the institutions as an amalgamated whole (a *pan-institutional* order).

The first two sections of this chapter discuss various basic possibilities as to *how* such institutional integration could evolve in the near future. The final section then offers some thoughts on what spin-off benefits might be produced by such integration for resituating "economic, social, and cultural rights" in the process of responding to the next generation of monitoring challenges in the rapidly evolving context of economic globalization and transnational reconfigurations in governance structures.

The Role of the Annual Meeting of the Chairpersons in Fostering Evolution of the Human Rights Treaties' Integrated Jurisdictional Order

PICTURING THE SIX-TREATY SYSTEM

A stylized (bordering on caricatured) depiction of the contrast between the state of the current UN human rights treaty order and the as-yet-unrealized potential of institutional integration can be found in Figures 1 and 2. In both diagrams the six treaties are depicted as circles (A–F). Each circle overlaps with the other circles to varying degrees so as to represent the unity of purpose and the shared norms of the treaties as well as the potential for integrated normative analysis to defy the definitional categories of the rights in each treaty. The combined treaty order is shown as embedded in a larger UN human rights system that surrounds the treaties in a cocoon of moral, political, and legal norms. The United Nations Charter and the Universal Declaration of Human Rights are the energy sources for this field. Each treaty has provisions establishing and setting out the authority of its monitoring institution. These provisions are represented as smaller circles located so as to portray each of the six human rights treaty bodies incorporated within its own treaty's normative world. It is with respect to the location of each committee and associated relations with the other committees that Figures 1 and 2 differ.

In Figure 1 (the current treaty order), each committee is shown as lying outside the field of normative overlap. This is suggestive, to an exaggerated extent, of the way each committee has tended to treat its treaty as a self-contained regime relatively unconnected to the other five treaties. Each committee's location on the far edge of each treaty is also suggestive of both its distance from the area of greatest normative overlap (the normative core of the treaty order) and its isolation from the other committees. Six

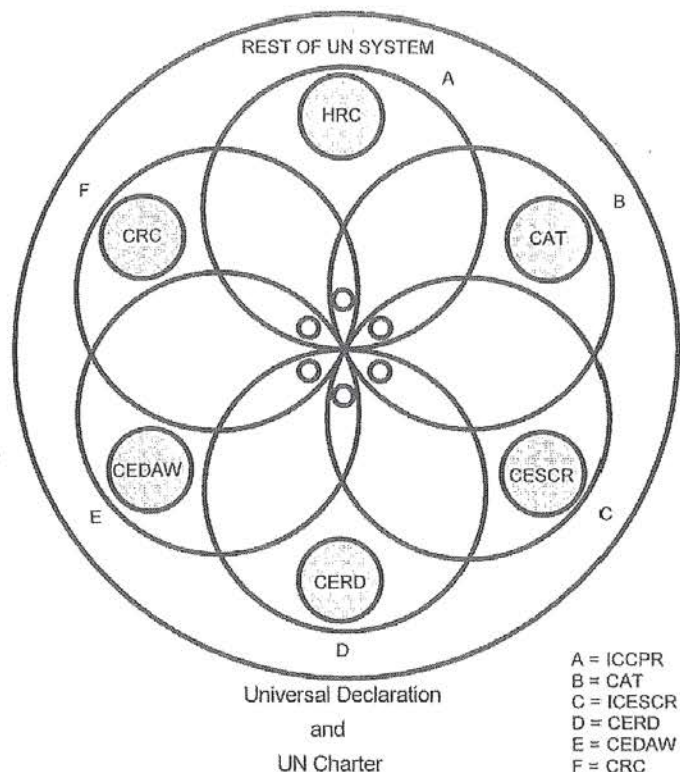


Figure 1. The current core treaty order.

much smaller circles in that area of overlap represent the exception to this Figure 1 state of affairs. These circles represent the chairpersons of the six committees who, as will be discussed in upcoming sections, have been interacting periodically. Except for the occasional individual committee member who may use one or more other treaties as some kind of interactive reference point in the interpretation of her or his own treaty, it is only the chairpersons who currently have the opportunity to participate in a structured pan-institutional context that allows them to view the shared norms of the treaties as fertile ground which is ready for careful cultivation. In contrast, for many of the other members of each committee, this same ground is more likely to be seen as akin to a wild thicket covered in a tangle of branches and thorns—an area to avoid rather than cultivate.

Figure 2 (the potential treaty order) is the diametric opposite to Figure 1. Here, interactive diversity of knowledge is harnessed by mapping institutional arrangements onto the area of greatest normative synergy among the treaties. Not only the chairs (periodically) but also the committees (constantly) interact in such a way that their combined institutional order takes on a shifting amorphous shape. The committees are no longer distinct or distant circles, although the rounded outer curves of this new body are

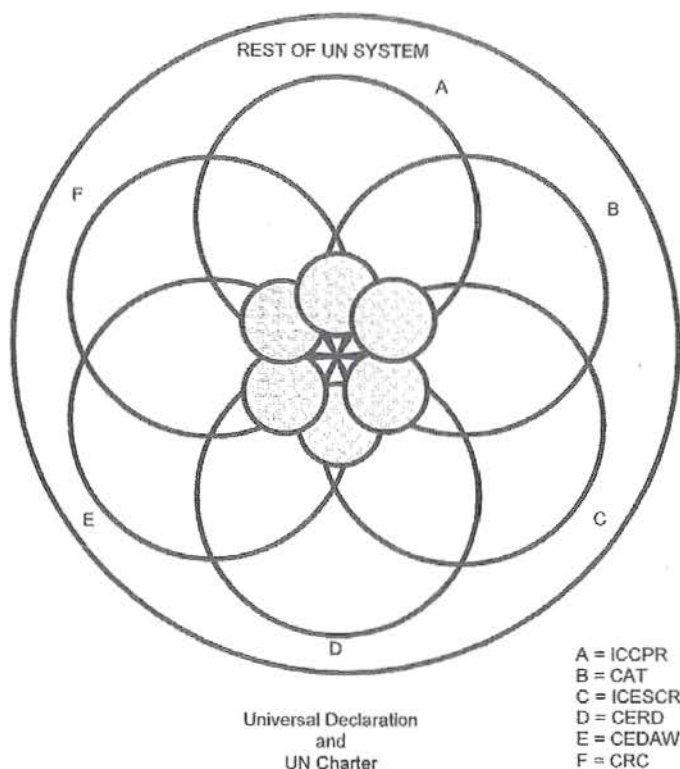


Figure 2. Potential (de facto consolidated) core treaty order.

meant to suggest a certain retention by each committee of considerable ongoing institutional autonomy and of a certain possibility that a given committee can always dislodge (or threaten to dislodge) itself from this consolidated institutional structure if it becomes dissatisfied with how its treaty mandate has fared as a result of the incorporation.

As of 2000, the actual situation has evolved to some point between Figures 1 and 2. A certain, albeit embryonic, institutional integration of the treaty bodies has begun to occur. Much of the cooperation is *inter-institutional* in nature, taking the form of sharing of information and also of tacit emulation, whereby one committee pioneers a procedural innovation and others begin to follow suit.⁸ This is of course testimony to the fact that jurisdictional diversity combined with jurisdictional autonomy can foster productive experimentation, something that would be severely hampered by total consolidation of all six existing committees into one committee.⁹ At least one committee, CEDAW, has designated committee members to be in charge of liaising with the other committees, one committee member for each other treaty.¹⁰ However, there are nascent, albeit fitful, signs of the possible emergence of an *pan-institutional* order, to which we now turn.

THE ROLE OF THE ANNUAL MEETING OF THE CHAIRPERSONS

The most important form of institutional cooperation among the six human rights treaty bodies is the now annual meeting of the six committee chairpersons. It may be viewed as a forum pushing to become an institution, representing a kind of hybrid of the two forms of institutional interaction described above, the inter-institutional and the pan-institutional. The chairpersons first began meeting in 1984, meeting periodically thereafter until the institution of yearly meetings in 1994.¹¹ With each subsequent meeting, the range of other significant actors who attend or make presentations to the chairpersons has grown,¹² to the point that some of the more powerful NGOs have not only attended but have also been permitted to make oral presentations to the chairpersons.¹³ The meeting's Internet-accessible reports to the General Assembly, along with follow-up reports produced by the UN human rights secretariat in response to recommendations of the previous year's meeting, provide helpful overviews of recent developments in the institutional practices of each of the treaty bodies. The chairpersons' reports, especially those up to the end of 1998, contain many specific recommendations directed to all of the committees, mostly recommendations for procedural reform.¹⁴ There are as many, if not more, recommendations directed to other actors within the system, most notably to the UN human rights bureaucracy.¹⁵ The annual meeting is clearly starting to play a kind of clearinghouse role whereby developments and suggestions from each committee are conveyed by that committee's chairperson to the chairpersons of the other five committees, and then the chairpersons acting as a collectivity feed the most meritorious and/or timely ones back to the committees by way of their annual report. The method by which the chairpersons address the committees varies, taking the form sometimes of simple descriptions of what various committees are doing and sometimes, more ambitiously, of joint recommendations.¹⁶

By and large, the chairpersons have concentrated until quite recently mostly on procedural and resource issues of common interest to the committees and have not tended to use their meetings as an occasion for substantive normative cooperation. On occasion, however, they have taken a common normative position on matters of substantive law. At least four of these have related to difficult issues of general treaty law: reservations, succession, denunciation, and interpretively implied powers.

On the question of permissibility and the effects of reservations, solidarity among the committees was demonstrated by the chairpersons' support for the Human Rights Committee's General Comment 24 on reservations.¹⁷ This united front is bound to make it easier for the Human Rights Committee to maintain a strong position on reservations in the face of resistance from states like the United States, France, and the United Kingdom who

have submitted critical comments on the HRC's reasoning in that general comment.¹⁸

On the question of state succession to human rights treaties, the chairpersons at their fifth meeting, in 1994, "expressed the view that successor States are automatically bound by obligations under international human rights instruments from the dates of their independence and that respect of their obligations should not depend on a declaration of confirmation."¹⁹ A year later the Human Rights Committee may well have drawn support from this statement when it took the view in its concluding observations on the report of the United Kingdom relating to Hong Kong that human rights treaty obligations devolved with territory such that China would be bound to respect the ICCPR after its takeover of Hong Kong.²⁰

On the question of the power to withdraw from human rights treaties, the chairpersons in September 1997 stated their view that a state party cannot withdraw from the ICCPR, a response to the announcement only three weeks earlier by North Korea that it intended to denounce the ICCPR.²¹ This view was actually stated *before* the Human Rights Committee itself had had an opportunity to discuss and then pronounce on the subject, which it did two months later in the form of General Comment 26.²² It is also significant from the perspective of the gradual evolution of the interpretive authority of the Chairpersons that their collective view on denunciation applies not only to the ICCPR but also to the two other treaties which, like the ICCPR, do not contain clauses expressly permitting denunciation, namely the ICESCR and CEDAW.

Finally, on the question of implied powers, the chairpersons have articulated what will probably turn out to be the most significant of their series of views on general treaty law. The specific issue that the Chairpersons were considering was, on the surface, the legal jurisdiction of any of the committees to consider the human rights situation of a state when that state has failed to submit a state report. Two committees, the CESCR and CERD, had adopted a practice of considering situations in states whose state report is long overdue "once all alternative approaches have been exhausted."²³ This is one of the best examples of the benefits of jurisdictional experimentalism within the human rights treaty order in that both the UN Commission on Human Rights and the General Assembly had come to endorse these two committees' initiative. Despite such high level political support within the UN, a number of states (and, it seems, some committee members in other committees) had begun to question whether such an approach "might exceed the legal competence of a committee."²⁴ This was the context in which the chairpersons weighed in with their view on whether each committee could examine the situation of a state in the absence of a report. The analysis is quite detailed (relative to the usual style found in the chairpersons' reports) and, on the whole, leans heavily toward the view that the practice is within the competence of the committees.²⁵ However,

the significance of the chairpersons' reasoning lies not in their conclusion on the specific interpretive issue (examining states who have not reported) but rather in the general statement of the principles of interpretation that should be applied to resolve claims to implied jurisdictional powers made by the treaty bodies. The chairpersons' reasoning is potentially transformative in that not only does it lay the basis for the evolution of the jurisdictional powers of each committee, but also it points to the legal basis on which a pan-treaty "constitutional" order could itself institutionally evolve:

The principle which should . . . be applied in responding to a situation which threatened to undermine the entire system for supervising the obligations freely undertaken by States Parties by virtue of their ratification or accession to the relevant treaty was that of ensuring the effectiveness of the regime established by the treaty. In the absence of any provision to the contrary in a treaty, the question was whether or not a particular course of action contributed to the effectiveness of that regime. That approach was analogous to the principle of implied powers, according to which the acceptability of activities not explicitly provided for should be determined in light of the object and purpose of the treaty in question. The International Court of Justice has also noted that, even in the absence of specific enabling powers, an international body may act in ways not specifically forbidden, in order to achieve its purposes and objectives.²⁶

As a legal theory of the interpretive acquisition of jurisdictional powers, the above-stated principles will not take root in a vacuum. Parallel processes of political recognition of any powers the committees claim for themselves will operate in tandem with the more forensic processes of interpretation that produce the claims. Yet, in this one tight paragraph, it may not be an exaggeration to say that the chairpersons have sown the seeds for the institutional evolution of an integrated human rights treaty order.

FROM STRUCTURE TO SUBSTANCE: FOSTERING INTEGRATED NORMATIVE ANALYSIS

The just-given examples dealing with the intersection of general treaty law and the evolution of the human rights committees' jurisdictional competence constitute very significant examples of cross-committee coordination. However, with respect to matters of substantive content of human rights guarantees (as opposed to structural treaty law issues), the chairpersons' contribution has, to date, been considerably less far-reaching. The area of "integration of gender perspectives" represents, so far, the major substantive foray of the chairpersons, being the subject of detailed recommendations by the chairpersons in 1995, repeated in 1996 and embellished in 1997. In 1995, the chairpersons endorsed the output of an expert group meeting on women's rights, including that meeting's lead recommendation, which read as follows:

The treaty bodies shall fully integrate gender perspectives into their presessional and sessional working methods, including identification of issues and preparation of questions for country reviews, general comments, general recommendations, and concluding observations. In particular, the treaty bodies should consider the gender implications of each issue discussed under each of the articles of the respective instruments.²⁷

The endorsement in the 1995 chairpersons' report seemed to produce some effects within both the conventional human rights order and the nonconventional order.²⁸ In 1996 the UN Commission on Human Rights adopted a resolution welcoming the chairpersons' recommendation and went on itself to recommend to all the treaty bodies that their reporting guidelines should be amended to reflect a greater emphasis on gender-specific information.²⁹ During their separate sessions that same year, three committees — the CESCR, CERD, and CRC — signaled that gender perspectives would be a central feature in contemplated revisions of their existing reporting guidelines for state reports.³⁰ One committee, the Human Rights Committee, announced that it would revise its general comment on article 3 of the ICCPR which deals with discrimination against women.³¹ Finally, the secretariat for CEDAW, the Division for the Advancement of Women, "began to develop a methodology by which the treaty bodies might systematically and routinely incorporate a gender perspective in monitoring the implementation of the specific provisions contained in the international human rights instruments."³² Prior to the chairpersons' 1997 meeting, the secretariat's follow-up report to the 1996 meeting took its cue from the chairpersons to assert that "the equal enjoyment by men and women of all human rights is an overarching principle of the six principal human rights treaties" and to suggest that the chairpersons "may wish to consider inviting an interested organization to convene a round-table or expert meeting to assist with the drafting of general comments on gender equality."³³ At their ensuing meeting, the chairpersons discussed whether another expert meeting such as the one whose conclusions the chairpersons adopted in 1995 and 1996 was desirable. The result of their discussion was an invitation to "the relevant United Nations agencies and secretariats to consider the organization of another such meeting."³⁴ Meanwhile, another roundtable had already taken place in the preceding year, organized by the United Nations Population Fund (UNFPA) on the theme of human rights approaches to women's health. The chairpersons used this roundtable as a springboard for recommending both that "a gender dimension be incorporated in the revision [by each committee] of general comments/recommendations and [state reporting] guidelines" and that the treaty bodies "consider issuing general recommendations on health."³⁵ While the chairpersons drew special attention to sexual and reproductive health, their recommendation that health (in general) could be the subject of general comments by all the

committees is an important addition to gender as a cross-cutting normative dimension of all six human rights treaties.³⁶

THE CHAIRPERSONS AS A COORDINATING AND CATALYZING BODY

It would seem apparent enough that the meeting of the chairpersons is slowly developing and pushing for a role as the coordinating, and to some extent catalyzing, mechanism for the institutional integration of relations among the committees. A good example of the chairpersons serving as institutional catalyst, in a way that combines attention to common substantive concerns and the development of its implied jurisdiction, is the following 1995 recommendation regarding the need for a pan-treaty approach to responding to gross violations of human rights:

The chairpersons encourage treaty bodies to continue their efforts to develop mechanisms for the prevention of gross human rights violations, including early warning and urgent procedures. They consider that coordinated action by the human rights treaty bodies in this regard would increase their effectiveness. To this end, they suggest that any action undertaken by one of the treaty bodies be immediately brought to the attention of the other treaty bodies.³⁷

With respect to some of the suggestions (see below) on how consolidation might proceed so as to enhance a diversity-based dialogue, it would seem desirable that the chairpersons act as the institutional hub of the process of consolidation in tandem with whatever political support from the UN political bodies and the UN High Commissioner for Human Rights seems appropriate or necessary to secure. The chairpersons have themselves spoken of their role in terms that hint at this function. In the context of discussing reform of the UN human rights treaty system, they spoke of the need to take advantage of "opportunities to promote continuing reform of the working methods of the different committees," ending with the following succinct observation about their own role: "The chairpersons believed that, meeting together, they could play a part in the process of reform. While ensuring that proper account was always taken of the features specific to each of the six treaty bodies, they could identify problems common to different treaty bodies and help them coordinate their responses."³⁸

Such a relatively minimal role for the chairpersons is consistent with what appears to be, at present, a lack of support for *de jure* consolidation of the treaty bodies into one committee.³⁹ It is also consistent with the kind of process of institutional integration that amounts to a gradual, experimental *de facto* quasi-consolidation — the subject of this chapter.

Related to the development of the chairpersons' capacity to serve as an institutional hub for the human rights treaties is the chairpersons' repeated recommendation, beginning with their 1994 report, to the General Assem-

bly that some “*sui generis* status” be established for the treaty bodies so that the bodies could interact with the rest of the UN system in a more official capacity.⁴⁰ Although this request seems primarily intended to allow *each* treaty body to act independently under the mantle of such status, it would seem just as important from the perspective of integrated institutionalism for the treaty bodies as a collective whole, represented by the chairpersons, to be recognized as having a functional status. Given that it is the meeting of the chairpersons that has begun to take up cudgels on behalf of the treaty bodies as a whole, some recognition needs to be accorded to their meeting as the primary agent in the external relations of the committees.⁴¹ By creating this role in external relations, a dynamic toward enhancing internal cooperation and normative cohesion would thereby also be created. To accomplish this goal, however, some attention arguably needs to be paid to the politics of language. In that regard, the purpose of the next two paragraphs in this subsection is to advance the rather impertinent suggestion that we should consider alternative ways in which to refer to the annual meeting of the chairpersons. This question of the title for the chairpersons’ collective must first be situated in the context of the disparity in the official titles as between five of the six treaty bodies and one of them.

This chapter has been using the terms “human rights treaty bodies” and “human rights committees” interchangeably. This is deliberate, motivated by a conviction that a politics of language is an important way to help dislodge systemic biases.⁴² This concern extends to the subliminal associations generated by institutional appropriation of the term “human rights.”⁴³ In particular, it has long been a problem that the treaty body overseeing the ICCPR was vested by that treaty with the name “*Human Rights Committee*” while each of the other committees have been given names that simply track the focus in their treaty’s title on the set of rights found in that treaty—the “Committee on Economic, Social, and Cultural Rights,” the “Committee Against Torture” and so on.⁴⁴ There is thus good cause for certain symbolic acts in the realm of language that would try to counteract this linguistic covering of the field by the Human Rights Committee. One option would be to convey to the world at large that, within the current (undesirable) fragmented logic of the multiple treaty system, the “Human Rights Committee” is actually the “Civil and Political Rights Committee.” In this somewhat subversive way, we would thereby be trying to encourage a practice of referring to the *six* human rights committees in terms that suggest the unity of purpose of the six treaties taken as a systemic whole and their *shared* claim to be the institutional guardians of human rights. In so doing, the under-inclusiveness of the Human Rights Committee’s own “civil and political rights” mandate in relation to its imperial name (at least that mandate as the Human Rights Committee currently interprets it) would be perceived more clearly.⁴⁵

In a similar vein, it is worth noting that the politics of language—

UN-style — seems to have resulted so far in a second class, “lower case” status for the chairpersons’ forum. Reports to the General Assembly, the agendas that precede the meetings, and other documents currently refer simply to “the persons chairing the human rights treaty bodies.” In view of this practice, the chairpersons might wish to consider pushing the linguistic envelope a bit by referring to themselves in a more symbolically assertive way. At minimum, the annual meeting could be self-styled in capitals as the “Annual Meeting of the Chairpersons of the Human Rights Treaty Bodies,” whichever case the UN bureaucracy chooses to use. An even bolder styling could be “Annual Meeting of the Chairpersons of the Human Rights Committees.” Perhaps the most radical, but most justified, *de facto* reform would be for each committee to give its blessing to constituting — linguistically — an overarching body, the name of which would convey the dual idea of integrated normative mandate and cooperative institutional action. Once constituted by collective recognition of the six treaty bodies, the chairpersons could then begin to seek (implicit and eventually explicit) general recognition by states and the rest of the UN system. The chairpersons’ forum (encompassing its annual meeting and its inter-meeting activities) could in this way metamorphose into something like the “Coordinating Council of the Human Rights Committees” or the “Council of Chairpersons of the Human Rights Committees” — on either score, the CCHRC.

All this being said, there are reasons to be pessimistic about the likelihood that the chairpersons will evolve to any great extent in this direction without a change in outlook in several quarters. Quite apart from the lack of enthusiasm of some of the chairpersons, any move toward consolidation in the near future is likely to be politically resisted, for reasons that include the opposition of some states to the promotion of more effective UN human rights structures as well as legalistic concerns about treating the six treaties as an “objective” legal order (even an *evolving* one) in a situation where some states have ratified fewer than all six treaties. In this respect, it is worth noting that, while the Commission on Human Rights did respond favorably to the chairpersons’ recommendation on cross-treaty integration of gender perspectives, it also added the caveat that “the enjoyment of the human rights of women should be closely monitored by each treaty body *within the competence of its mandate.*”⁴⁶ This passage can easily be read as a shot across the bows of the committees.⁴⁷

But pessimism is not fate. Despite the rather sober thoughts in the preceding paragraph, what follows will assume that the chairpersons can come to assume a role as the hub of institutional reform of the treaty body order. The following proposals, then, assume the proactive involvement of the chairpersons. In tandem with the evolution of the chairpersons as a coordinating and catalyzing institution, a number of avenues of intercommittee dialogical engagement will begin to open up. The following brief discussions of some of the more obvious possible initiatives should not be taken as anything but a

preliminary endorsement of the merits of any given possibility. Most significantly, the merits of one proposal cannot be assessed in isolation from the other proposals. No claim is being made, at this stage, of the degree of compatibility *inter se* of the various proposals. The purpose of what follows is merely to put them on the table as candidates for consideration.

Pan-Institutional Dialogue: Further Basic Experiments in Institutional Design

PUSHING FOR UNIVERSAL RATIFICATION AS A COMPLEMENTARY REFORM

A central recommendation of a 1997 report to the UN on enhancing the long-term effectiveness of the UN human rights treaty system is that the goal of achieving universal ratification of all six core treaties should be pursued with renewed seriousness and vigor.⁴⁸ In this respect, the report was following up on an earlier recommendation in a 1993 report to make the advent of the millennium the target date for universal ratification.⁴⁹ The chairpersons have also been vigorous in endorsing the need for treating universal ratification as a priority for the future treaty system, most recently having referred to universal ratification of the six treaties as “an essential dimension of a global order.”⁵⁰ This phrasing suggests some awareness that a fully “objective” legal order, which as such would be able to lay claim to a status in the world normative order akin to a constitution, is in constant tension with each state’s consent to be bound as the prevailing formal basis for the assumption of treaty obligations *qua* treaty obligations.

From the perspective of *de facto* quasi-consolidation of the human rights treaties as a testing ground for a possible formal consolidation of the committees, universal ratification is important, although probably not indispensable. It is important because the closer we get to universal ratification of all six core treaties, the more easily we can treat the treaties as if they were different chapters of the same overall constitutional document and the different human rights committees as if they were chambers of one overall Human Rights Committee.⁵¹ Most significantly from the perspective of cross-treaty dialogue and cooperation among the committees, any perceived problems of formal jurisdictional divisions become less significant in direct proportion to the decrease in the number of states who are not party to all six treaties.⁵² At the same time, this evolving unity would be achieved while still retaining both the interactive diversity of knowledge of the six committees’ combined membership pool and the ever-present possibility that one or more committees can hold out (more or less explicitly) noncooperation as a way to ensure their treaty’s normative focus is taken seriously in the pan-treaty constitutional order.⁵³

CONSOLIDATED STATE REPORTS AND TAILORED STATE REPORTS

Perhaps the best example of a reform that commends itself on the basis of both efficiency and effectiveness — but which could cut both ways in terms of diversity — would be the consolidation of the current scheme of sending separate reports to each committee into a scheme centered on a single consolidated report that would address all six treaties and would go to all the committees.⁵⁴ A related issue is the proposal that, while a state's first report to any given committee should be comprehensive, its subsequent periodic reports to that committee could be made more focused by having the committee in question signal well in advance (of the reporting deadline) those areas and concerns it wishes to have covered in the state's report.⁵⁵ It is not difficult to see how the two proposals could converge into a single report every five years which would be both consolidated and tailored and which could be subject to follow-up scrutiny at the instance of any one of the committees in the intervening five years before the next report is due.

Consolidation and tailoring have been discussed in some detail in the last several sessions of the chairpersons. The current position seems to be one that is not (at least, not yet) in favor of consolidation but that is in favor of tailoring of periodic reports.⁵⁶ At the September 1998 meeting, the chairpersons expressed their collective view in the following terms:

30. Following the discussion of recent experiences of the respective committees, the chairpersons reiterated their view that it was desirable to strive towards focused periodic reports, adding that account must be taken of the limited scope of the issues covered by some of the treaties.

31. With regard to the frequently expressed idea of consolidating reports in a single global report covering all six human rights treaties, no consensus could be reached. As at the eighth meeting, although the chairpersons considered that such an approach would reduce the number of different reports requested of States parties and would serve to underline the indivisibility of human rights by ensuring a comprehensive analysis of the situation, concerns were expressed in relation to problems resulting from different periodicities of reporting under the treaties and, in particular, the risk that the special attention given to groups such as women and children would be lost in a single comprehensive report.⁵⁷

The consolidated report issue is a prime example of the need for reforms to be looked at as a whole so as to ensure that they proceed apace. Adjustments to one reform proposal can provide the necessary correctives to disadvantages feared for another. Reporting periodicity is a technical problem that, with time, can be easily dealt with. Threats to diversity of focus present a more serious concern.⁵⁸ In the absence of confidence in the other tracks of institutional reform, it is reasonable to oppose a single consolidated report in favor of ongoing separate reports to each committee. However, the more that institutional integration succeeds in showing that integration not

only can but does produce enhancement of normative analysis (that includes bringing the human rights perspectives of less powerful social groups to the center of that analysis) and does not produce the feared (re)marginalization of issues dealing with children, racial discrimination, gender discrimination, and social and economic disadvantage, the more compelling will become the argument for a consolidated pan-treaty report. The achievement of a sustained diversity of experience and expertise within the combined membership of the six committees will be absolutely crucial for such success to be achieved. Also, tailoring of reports could have positive follow-on effects for consolidation; if the committees were collectively to build in principles and procedures designed to ensure nonmarginalization, the kinds of issues on which the committees choose to request focused reporting could alleviate concerns that women's rights or the rights of the poor, for instance, will necessarily be swamped if the tailored reports also become consolidated into a single report. In this respect, in the way they handle the development of *tailored* reports, the committees are in control of their own destiny with respect to the viability and desirability of report *consolidation*.

There is, however, a middle ground possibility that the committees and their chairpersons may wish to consider, perhaps on an experimental basis with a number of willing states. As reflected in the above-quoted conclusions of the chairpersons, it is assumed that tailoring would occur only for *periodic* reports, those subsequent to the initial postratification report of a state party. That initial report would be comprehensive. As for consolidation, the chairpersons seem implicitly to be talking about *all* reports, initial and periodic. However, conceivably, the proposal for consolidated reports could be refined (or clarified) into a proposal that only *periodic* reports be consolidated. In this way, *each* committee would receive a *comprehensive* first report on compliance with its treaty. This approach has the significant benefit of allowing the committee in question (e.g., CEDAW) to develop, as fully as possible, a view of the general situation in each state party with respect to all the rights in its treaty. Such a view would be invaluable in providing a major component of the knowledge base on which that committee can then draw in the future when considering what tailored questions it wishes to put to that state on its consolidated subsequent report(s) to the committees as a whole. A nonconsolidated, nontailored initial report would give each committee a valuable opportunity to prepare the ground for subsequent more focused evaluation of compliance of that state party with the committee's treaty within the larger framework of that state's consolidated, tailored periodic report. Producing a comprehensive initial report for each treaty also has educational benefits for that state. Not only will its officials have to grapple with the full range of its commitments under each treaty but also they will be given the chance to determine for themselves, based on the committee's questions and concluding observations, the areas in which there is a high likelihood that the committee will wish to focus its scrutiny in future.

OVERLAPPING AND COMMON MEETINGS OF THE TREATY BODIES

It seems obvious that placing the committees in closer proximity would assist any efforts at pan-treaty normative dialogue. This means giving consideration to scheduling their meetings in ways that overlap in whole or in part.⁵⁹ This seems to already be on the agenda in view of a suggestion contained in the 1997 follow-up report (to the 1996 chairpersons' meeting) written by the (then) Centre for Human Rights:

In order to enhance awareness of the work of *complementary treaty bodies*, it may be appropriate to reschedule committee sessions so that some of their meetings overlap, for example, the Human Rights Committee with the Committee on Economic, Social and Cultural Rights; the Human Rights Committee with the Committee against Torture; and the Committee on the Rights of the Child with both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.⁶⁰

It is important to inject a note of caution with respect to the above phrasing by the chairpersons. *Every* committee has some complementary relationship with *every other* committee and, just as importantly, it is impossible to say in advance of actual dialogue the nature or extent of such complementarity. In order to facilitate institutional dialogue, the ideal is that a way eventually be found for an overlap of the meetings of all six treaty bodies for at least part of one session a year. Furthermore, as is implicit in the subsections which follow, an overlap of meeting times should be scheduled not simply in order to facilitate *parallel* meetings but also in order to make possible *common* meetings.

COLLABORATIVE NORMATIVE PRONOUNCEMENTS: GENERAL COMMENTS AND "JOINT STATEMENTS"

One obvious objective of cooperation among some or all of the committees could be the preparation of general comments that benefit from dialogue among the committees. In terms of normative elaboration of the content of rights that would especially benefit from diversity of perspective, there are any number of thematic comments that one could envisage, such as the example given earlier of a hypothetical general comment on the relationship of social vulnerability to human rights protections. The issue of gender is already on the agenda. Presumably, each committee other than CEDAW could draft or revise separate general comments on this issue as it pertains to its understanding of the rights in its treaty. Or, some overarching general comment could be drafted cooperatively by the six committees with each committee then having the option to supplement it with a more detailed comment that applies, as it were, the common general comment to the specifics of its treaty.⁶¹

Here again the chairpersons have turned their attention to collaborative pronouncements. In September 1998 they had the following to say:

General comments and the possible use of joint statements

34. The chairpersons took note of the fact that some committees were beginning to make reference to the general comments or equivalent statements of other committees. They encouraged the development of that practice, insofar as the pronouncements of other committees appeared to be relevant and appropriate to the situation at hand. . . .

36. It was agreed that a new genre of "joint statements" would be an appropriate means by which to enable the committees to address issues of common concern without taking such matters to the level of general comments, in relation to which joint approaches would always be difficult to achieve. Such joint statements would enable different treaty bodies to work together to address issues of current importance.⁶²

Only time will tell whether "joint statements" become general comments by another name or whether they will have a normative status that is not at the same "level" as general comments.

Whatever they are called, the advent of collective committee pronouncements is a significant and welcome development from the perspective of normative and institutional integration of the treaty orders. Here it is important to note that the chairpersons' decision to foster "joint statements" was a direct consequence of a concrete proposal put forward at the meeting by the CEDAW Chairperson, Salma Khan, on behalf of her committee. The proposal was for three committees—CEDAW, along with the HRC and the CESCR—to "consider issuing a joint statement on the indivisibility of rights and the centrality of gender awareness as part of the fiftieth anniversary celebration of the Universal Declaration of Human Rights."⁶³ Apart from endorsing the general concept of "joint statements," the chairpersons welcomed this specific initiative: "The chairpersons requested the Division for the Advancement of Women to prepare a draft to be considered by the three chairpersons concerned and then to be put to the respective committees."⁶⁴

Given its theme, it is not immediately apparent why this first joint statement, was limited to three of the six committees. Possibly, a strategic decision was made to start conservatively and try to secure cooperation on a smaller scale rather than encounter logistical difficulties by involving all six chairpersons. Such coordination difficulties could easily occur given that an efficient system of intercommittee coordination is not yet in place. These problems should not be underestimated. When the chairperson of the CESCR took the joint statement, as it had been drafted by the chairperson of CEDAW (and, presumably, found satisfactory by the other two chairpersons), to his own committee for its consideration, three CESCR committee members made useful comments about how to improve the joint statement.⁶⁵ Given that the committees meet at different times of the year, and given that improvements could be suggested by members of all three committees, the potential for much delay (and time and energy on the part of the three chairpersons) in coordinating the final statement, agreeable to all three committees, is considerable. The CESCR handled the matter with considerable institutional magnanimity by, in effect, delegating authority to

their chairperson to produce a final joint comment in consultation with the other two chairpersons that would "duly take into account" their views.⁶⁶ The final joint statement, as it appears in the official CESCR records for that same session, contains one change from the draft joint statement, namely the insertion of a paragraph that seems to represent incorporation of the comments which had been made by CESCR member Philippe Texier.⁶⁷

Mention should finally be made of a positive side to having limited the joint statement to a subset of the committees, namely that it signals the possible flexible use of the joint statement in the future. For example, the HRC, CAT, and CERD could join in one that seems particularly relevant to their combined mandates, such as disproportionate police detention of racialized groups in some countries, leading to a higher risk of torture. While it would be undesirable in the long term for themes (such as indivisibility and gender awareness) that profoundly involve the mandates of all six committees to be addressed in a joint statement by fewer than all six, the flexibility to proceed only with a subset of committees would seem to provide useful room for maneuver and experimentation in a transitional period.

COORDINATED SCRUTINY OF STATE REPORTS

Consideration could be given to cooperative scrutiny of state reports, or at least of those aspects of the report with respect to which the committees can see (or come to see) much overlap and thus many benefits flowing from a diversity of committee perspectives. If a given state is due to report to one committee at roughly the same time as it is reporting to another (for example, Canada reporting to the CESCR and to the HRC within a year of each other), the respective committee members in charge of that report could be asked to consult and to coordinate questions to be asked of the state.⁶⁸ Common questions could be posed on shared concerns.⁶⁹

If scheduling permits, one committee's member who is responsible for a given state can sit in on the report to the other committee and then take that session into account in preparing for the second report. At minimum, she or he can consult the summary records and concluding observations as well as discuss with the other committee's member what the second committee could most usefully focus on in its dialogue with the state.⁷⁰ If reporting can be coordinated enough to allow a state to be reporting to two committees at a time when both committees are meeting in parallel sessions, a decision could be made to have the two committees sit in a joint session for the relevant parts of the report or indeed for the entire report.⁷¹ It is obvious enough that this proposal would be most suitable with respect to states who have decided (or been asked as part of an experimental pilot) to submit consolidated reports, especially if the practice of tailored reports is also adopted for such reports. This would combine the benefits of joint scrutiny with efficiencies produced by the time savings which focused reports should

produce as compared to comprehensive reports. Many of the areas of focus for a single tailored report could reflect advance consultation among all the committees to whom the state is reporting.

STANDING CROSS-TREATY THEMATIC WORKING GROUPS

Standing working groups could be set up with a variety of possible tasks, for example, to help foster dialogue on general comments which committees are considering adopting and on joint statements. One could also envisage other kinds of cross-treaty working groups that would be specifically set up to discuss and propose committee action on cross-cutting normative issues. With the proper support from the Office of the UN High Commissioner for Human Rights and training of committee members, these groups could easily be organized using virtual forms of communication, for instance through Internet website discussion boards or, if not all members have access to the Internet, through e-mail listservs. If it were felt that it would be useful to reflect on the health rights of girl children, for example, a working group could discuss this theme, acting as a kind of think tank for the committees as a whole. If a common period of meeting time for the six committees were scheduled and dedicated for intercommittee work and reflection, these working groups could sometimes meet in person in order to pursue discussions, draft proposals that would go to the respective committees, and produce integrated texts (reports, joint statements, and so on) once all committees have made their input.

OVERLAPPING MEMBERSHIP

One of the most direct ways to foster an inter-treaty dynamic would be to create a situation whereby a number of committee members are elected to more than one committee. One treaty, CAT, already expressly provides for the desirability of crossover membership as a consideration for election to its committee.⁷² There should, accordingly, be no legal problem with overlapping membership on a wider scale within the human rights treaty system given that the express provision in CAT for shared membership with the Human Rights Committee was not viewed as third-party regulation of the ICCPR. All that would be required would be for states themselves to create overlap through their nomination and voting practice.⁷³ Each member elected to more than one committee would be a member of each.

There are any number of reasons why overlapping membership would be fruitful from the perspective of inter-treaty dialogue. The basic point would be that overlapping membership would to some extent ensure that human rights issues are examined by each committee from a broader perspective than tends to be the case when the sole mandate of every committee member is one treaty text. One could contemplate any number of axes. For

example, a person who is a member of both CERD and CEDAW should be institutionally disposed to inject intersectional issues of race and gender into the deliberations of each committee.

Such shared committee members would in many ways be encouraged to act in a fashion that is a classic example of Georges Scelle's *dédoublément fonctionnel* or "double functioning."⁷⁴ Scelle's notion was meant to describe international lawyers, notably legal advisers to states, who have to be normatively faithful both to domestic law and international law, both to the national interest and to the common international interest. In the process, the person who must function in such a double capacity not only becomes skilled at translating one system of legal thought and practice into the terms of the other, but also becomes skilled at mediating the two systems in ways that produce an integrated perspective different from, while still faithful to, both. In the same way, a member of two (or more) human rights committees would have dual (or multiple) normative loyalties which would have to be translated and mediated. In this way, the committee members in question would come to embody a dialogue of treaty texts and the associated normative mandates of those texts.

In relation to the consolidation process, should it ever be desired, a gradual increase in overlapping membership could serve a second function. It could become the primary mechanism whereby *de facto* consolidation of the six treaty bodies takes place without the need for any formal treaty amendments. By the end of the process, if perfectly coordinated by states in electing the committees (admittedly a remote possibility without a parallel understanding being reached among states that would solve the collective action problems), the total number of committee members would be reduced from the current 97 to 23, which is the number of members on the largest committee (CEDAW). All 10 members of the smallest two committees, CAT and the CRC, would also be members of all five other committees. As for the remaining three committees comprised of 18 members each, there would be a buffer of five CEDAW members (23 minus 18) which would allow some members of the HRC, CESCR, and CERD not to be members of one or more of the other three committees and/or allow some members of CEDAW (statistically, up to five) to be members only of CEDAW.

Benefits of Interactive Integration in Relation to the Next Generation of Monitoring Challenges

The foregoing institutional reform suggestions have been schematic. They also probably fall toward the least creative end of a continuum of reform possibilities, but, for that reason, they also represent practical possibilities. In the various reform studies underway at the UN, these and kindred proposals can presumably be scrutinized with a view to assessing their feasibility as well as elaborating them and sharpening their focus.

What remains to be done in this chapter is to provide a series of concrete examples of how the gradual enhancement of interactive diversity of knowledge through institutional integration of the human rights committees can contribute to the perceptive analysis of the types of human rights problems which the UN human rights order must begin — soon — to get its collective mind around. The following examples are purely illustrative and are virtually randomly chosen. No claim is being made that they represent all the types of next-generation challenges posed for international human rights monitoring, although an effort has been made to identify the key ones.

STRUCTURAL SCRUTINY AND PREVENTIVE REMEDIES

An inevitable feature of the monitoring methods of the treaty bodies has been their reactive nature. That is to say, they by and large look at what has already transpired and pass judgment on whether noncompliance with treaty norms has taken place. However, the state report procedure does — increasingly — have a forward-looking element to the extent that the committees offer recommendations about how structural failures can be remedied. With each passing year, such structural-reform recommendations become more clearly and incisively formulated, at least by several of the committees (notably the CESCR, CRC, and CEDAW). Another way, then, of looking at such structural assessments of past conduct is in terms of their potentially far-reaching preventive function: if carried out, future human rights violations should be avoided. Ideally, the committees must begin to address more directly that aspect of state responsibility which requires states not just to prevent specific harms (notably harms of some nonstate actors by other nonstate actors) that are reasonably foreseeable, but also to organize the entire apparatus of government in such a way that human rights violations are approached as something to avoid and not simply something to repair.⁷⁵

Structural scrutiny and associated preventive remedies involve far-reaching inquiries into the interconnectedness of causes and obstacles. Often enough, no small degree of complexity is involved. As such, the benefits of more integrated normative analysis facilitated by interactive institutionalism among the human rights committees would seem obvious. To illustrate this claim, consider that treaty which most people would, at first blush, see as benefiting the least from a quasi-consolidation of the treaty order due to its seemingly narrow focus: the Convention Against Torture (CAT). Yet a Committee Against Torture that focused only or almost exclusively on what goes on within jail cells and (para)military torture chambers would be missing much that is relevant to torture prevention, even if sophisticated procedural safeguards and mechanisms are necessary ways to prevent torture from occurring in these locales. Here I am assuming that the will to torture is intimately connected to the human capacity to dehumanize and to power struc-

tures that nurture and actively exploit this capacity. Take race: how does racism interact with creation and mobilization of the will to torture? Just asking this question is enough to point out how an interface between CAT and CERD should deepen understanding of the "othering" conditions that promote torture.⁷⁶ It would be a two-way street if CAT were to use its concrete focus to produce analyses of how structures of racial and ethnic prejudice fuel torture; CERD could then work with these concrete insights in order to assist, in some dialectical manner, its understanding of the larger phenomena that produce the conditions for racial discrimination. Similar interactive advantages could emerge from CDESCR-CAT cooperation to the extent that the poor may be hypothesized to be the most vulnerable to certain kinds of torture (notably the "casual" police beating) and to recruitment as the frontline instruments of torture. And when it comes to rape in the context of genocide or ethnocide, CAT and CERD would be less likely to see the gendered dimensions as clearly as they might if CEDAW's perspectives were actively in play (rape as torture and rape-torture as an instrument of genocide). And, beyond these examples, the whole question of the structural dimensions of torture and the preventive measures necessary to modify those structures intimately involves perhaps the most structure-influencing of all human rights: the right to education. As phrased in international human rights instruments, the right to education is nonneutral regarding human rights values.⁷⁷ CAT analysis which does not explore education's links to torture would be inadequate from a structural-preventive perspective.⁷⁸

SYSTEMICALLY IMPLIED RIGHTS PROTECTIONS

It is generally not controversial that rights may be implied even if not expressly provided for in a text. For example, as noted earlier, the Human Rights Committee has implied rights related to health and housing into the ICCPR "right to life."⁷⁹ Another example is of the European Court of Human Rights reading a (conditional) right to civil legal aid into the right to a fair trial.⁸⁰ A full list of existing doctrinal examples would be quite long.

However, the tendency is to conceive of the process of implication in terms of a given contended-for right. For example, when in *Johnston v. Ireland* the applicants claimed (unsuccessfully) that the right to divorce was protected by the European Convention on Human Rights, they relied on a series of specific articles in turn: article 12 (the right to marry), article 8 (the right to family life), and article 14 (the right to nondiscrimination in relation to other protected rights).⁸¹ They did not rely on *all three rights in combination* to argue for the implied right. Or, if they did argue in this more holistic way, the court did not understand their argument in this way. Rather, the court examined each article in turn, starting with article 12's right to marry.

An alternative way to proceed when assessing whether a right should or

should not be implied into a treaty is to look at the issue in terms of the treaty as a whole being the normative touchstone rather than the specific rights in seriatim. The UN Charter provides an interesting analogy. The peacekeeping powers of the General Assembly have often been treated less as having been implied into powers already set out in chapter 4 of the Charter and more as having been imagined as an entirely new chapter located between chapters 6 and 7 — “chapter 6½.” That is, they have been systemically implied on the basis of the over-all scheme and purposes of the Charter. On such an approach, implied rights may be found not only *in* given rights but also *between* given rights and in the combined *interstitial zones* of the entire treaty understood as a system of values and interests.⁸²

An example of when such an argument has been employed may help. In the case of *Baker v. Canada (Minister of Citizenship and Immigration)*, decided in July 1999 by the Supreme Court of Canada, one issue was whether the Convention on the Rights of the Child protects a child’s right not to have the child’s parent deported from the child’s state of nationality.⁸³ No provision in the CRC sets out such a right in explicit terms, but two provisions surround the contended-for right. The key provisions within articles 9 and 10 read as follows:

Article 9

1. States Parties shall ensure that a child not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. . . .

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. . . .

To say that these provisions “surround” the right not to have parents deported is to say that neither one of them *on its own* was completely adequate to the task of serving as the basis of the implied right (a child’s right that her or his best interests be given great weight in deciding whether a parent may be deported) that was being argued for. It is with this difficulty in mind that one intervenor in *Baker*, the Charter Committee on Poverty Issues (CCPI), argued that, while neither article 9 nor article 10 is fully apposite when looked at individually, their combined effect is a different story — especially when article 3 of the treaty is taken into account.⁸⁴ At one point, the CCPI factum refers to the oblique approach adopted by the CRC, as part of CCPI’s attempt to interpretively combine articles 3, 9, and 10:

28. The Committee on the Rights of the Child has interpreted articles 9 and 10 as together recognizing a right of children not to have their parents deported. In 1995, the Committee expressed its regret that “refugee or immigrant children born in Canada may be separated from their parents facing a deportation order.” The Com-

mittee also urged that "Solutions should also be sought to avoid expulsions causing the separation of families, in the spirit of article 9 of the Convention."⁸⁵

When paragraph 28 of the CCPI factum refers to articles 9 and 10 "interpreted together," CCPI is in effect saying that the putative implied right lies neither entirely within article 9 nor entirely within article 10. The implied right is justified by viewing the two rights as a mini-system. Put another way, the CRC is looked at as a system whose purposes and textual signals allow for interstitial interpretation such that there should be recognized an implied right *between* article 9 and article 10 — an "article 9½," as it were.

This CRC interpretive example helps make clear how viewing the six treaties as an evolving constitutional whole and the committees as chambers of an integrated institution could produce a much richer tapestry of rights than is possible if each treaty is looked at on its own and if each committee goes about its work in isolation from the others. This is especially the case when we consider the argument that we should constantly draw on the fundamental interests that human rights are meant to protect and thereby engage in interpretation that is more holistic and purposive as opposed to categorical and (unduly) text-bound.⁸⁶ Not only would interpretation of the spaces between rights within a given treaty (as between articles 9 and 10 of the CRC) be conducted in light of the normative cocoon provided by the other five treaties but also we could begin to talk about implied rights in the interstitial zones between treaties themselves.

HUMAN RIGHTS ON THE DIAGONAL: BETWEEN *DRITTWIRKUNG* AND INDIRECT RESPONSIBILITY

"Diagonality" (see Figure 3) attempts to capture the idea of (both conceptual and institutional) joinder of the state and relevant private actors in human rights scrutiny.⁸⁷ Diagonality looks at human rights in terms of fields of responsibility and power relations that engage the conduct (both acts and omissions) of state and nonstate sectors simultaneously, and then links that analysis to appropriate allocation of both legal responsibility and creative (including joint) remedies. Diagonality analysis offers possibilities for rights-based scrutiny that are more structural and comprehensive than is possible according to a stark either/or division of the applicability of rights into the categories "horizontal" versus "vertical." Rights relations are vertical if they involve the obligation of a governing actor (notably the state) toward nonstate actors and horizontal if they involve the claim that rights are applicable in the "private" sector relations between nonstate actors (an axis of applicability which German legal theory has labeled as *drittwirkung*).⁸⁸

It may be a long time before the committees are recognized as having the implied power to directly scrutinize the activities of private actors given the very state-centered (vertical) orientation of the human rights treaty

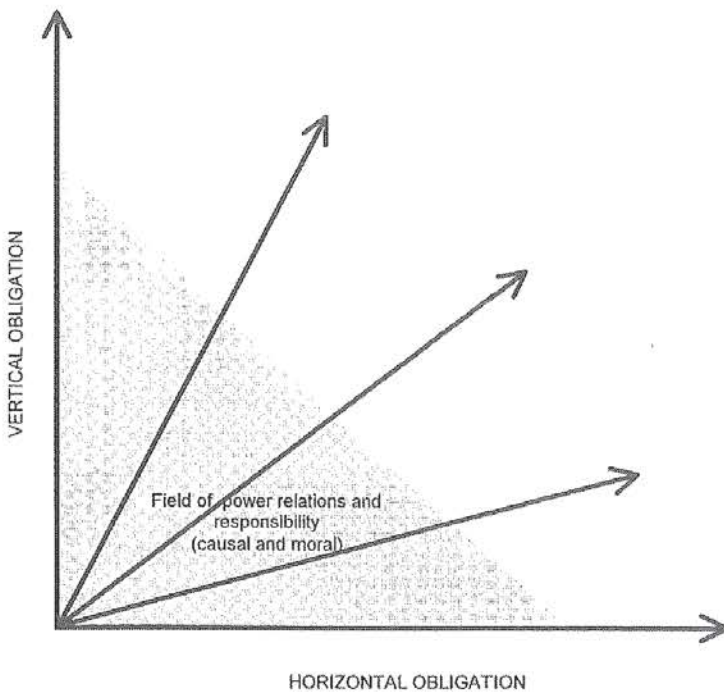


Figure 3. Diagonality vectors representing possible apportionment of shared legal responsibility between public and private actors.

regimes. However, it is a given that the indirect responsibility of states places increasingly onerous obligations on them to regulate the private sector, especially corporate activity given the concentration of power and potential for harm represented by many companies.⁸⁹ Within the analysis of the indirect responsibility of states parties to the treaties, it may become desirable for the committees to request that states provide detailed information on the conduct of all companies in given sectors or even on specified corporations — and perhaps even request that states require companies themselves to prepare reports on conduct which affects some or all of the treaty norms. Without actually joining the nonstate actors (for want of the formal jurisdictional nexus on which to do so), the committees could still “notionally” join those actors so as to be able to assess the remedial measures they should recommend *to states*, including the measures they recommend states take *vis-à-vis* corporations. In a range of situations, the committees could interpret the indirect responsibility of the state to be engaged if it does not regulate certain nonstate actors, notably corporations, in such a way as to place those actors under direct obligations in domestic law to protect certain human rights. With time, one could even foresee the committees encouraging the voluntary appearance of some nonstate actors before the committees in order to enhance the diagonality analysis.

The notion of diagonality may not itself provide a strong reason for institutional interaction among the committees. Rather, it seems only to piggy-back on the other reasons for integration already canvassed. However, diagonality analysis *would* seem more achievable in a situation of institutional integration than in one of institutional isolation. The polycentricity quotient of human rights analysis can be expected to go up in diagonality situations where the competing or complementary rights and duties of different persons are being openly addressed. For example, if diagonality analysis under the CRC were to suggest that all schools should be responsible for preventing or repairing certain harms to children (whether or not the schools are state, private, or hybrid), then certain rights of parents, as found for example in the ICESCR or the ICCPR, become relevant to the analysis. Further, if there are reasons to think that placing certain kinds of financially onerous duties on schools will disproportionately affect specific groups such as residentially clustered racial minorities or single mothers, then CERD and CEDAW must be brought into the foreground of the picture.

Another example is brought to mind by the discussion of child support obligations under article 27 of the CRC in Martha Shaffer's contribution to this volume (see Chapter 7). For ease of reference, the relevant portions of article 27 are reproduced below:

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. . . .

Article 27 is one of the rare examples of diagonality found on the surface of a treaty text. While article 27(2) places a "primary responsibility" on parents to secure "the conditions of living necessary for the child's development," the state has, by article 27(3), general residual duties (a) to assist parents in ensuring an adequate standard of living for their children and (b) to carry out a classic "social and economic rights" function by "in the case of need[] provid[ing] material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

Of interest in the present example is the relationship between this latter duty and the quite specific recovery duty in the first sentence of article 27(4). Shaffer's coverage of the situation in Ontario reveals that this Canadian province appears to have done much on the side of horizontal respon-

sibility for child support. Not only are a range of adult actors caught by duties to provide child maintenance but also a special enforcement unit has been formed to step in to force a delinquent (separated or divorced) parent to pay court-ordered support payments. Especially as the bulk of persons seeking to enforce support obligations for the care of their children are women, this recent law reform can be viewed as simultaneously combining gains in children's rights and in women's rights.

However, assume as a hypothetical that the Ontario regime does not address, *qua* child support regime, the transitional period between the default on the support payments and their eventual recovery by the state's enforcement unit. In that period, the custodial parent may have to turn to social assistance. Now assume that the custodial parent may, in some bureaucratic twist, have trouble being accepted as eligible for social assistance until she proves that she has done all she can do to recover the money from the defaulting former spouse. This problem would be easily rectifiable by requiring the state to issue a certificate that would attest to the fact that the state has taken carriage of the recovery efforts and which would be recognized by social assistance authorities; a seamlessness would thereby be created between the child support regime and the safety net of the social assistance regime.

Yet, assume a second problem that cannot so easily disappear through better public/private documentation coordination, namely, that the social assistance rate is likely to be a lesser rate than the support award. The existence of such a disparity in income would suggest that the state, on these assumed facts, has gone too far toward the horizontal end of the field of responsibility. Both gender and child-centered diagonality analyses suggest that a state must, in the transitional period, assume responsibility to continue the support payments rather than leave the shortfall and add to the burden on the mother (by virtue of having to try to access a separate state bureaucracy each and every time the separated or divorced spouse defaults on child support payments). That is to say, in these circumstances, it is the last clause of article 27(3) that should indicate the necessary axis of responsibility. The state's duty to fulfill, as a secondary duty within article 27's structure, kicks in. The state may of course recover the amount paid for the transitional period from the defaulting spouse, but it should not be able to use that spouse's primary responsibility as an excuse to avoid its own duty to provide material assistance and support directly "in the case of need."⁹⁰ Furthermore, it takes little effort to see how the effects of a transitional gap are exacerbated to the extent that the state has also adopted policies of privatized responsibility across the range of governmental spheres, including by maintaining social assistance rates at levels that independently violate the duty to avoid and eliminate child poverty. The CESCRC's scrutiny of the general (in)adequacy of the state support for economically disadvantaged

children and families would thus be a needed third point in a triangle of scrutiny that the CRC, CEDAW, and CESCR could collectively carry out.

INDIRECT EXTRATERRITORIAL RESPONSIBILITY

Indirect state responsibility has been touched upon above, and mention has been made of the special need for regulation of corporate activity in the name of human rights. As economic globalization spreads and deepens, the time is already upon us when the committees should be considering diagonality across borders. The problematic activity especially of overseas oil and mining companies has become a matter of general knowledge and concern in recent years; for example, the conduct of Unocal in Burma and Texaco in Ecuador has resulted in human rights tort litigation in the courts of the United States.⁹¹ The question is: How far should the UN human rights system move toward positive duties on home states of corporations to protect persons in other states from harms caused either by transnational enterprises (TNEs) or by TNEs in association with the foreign state? Here "home state" is used broadly to cover states in which companies are incorporated *or* otherwise have a meaningful presence, such as being the site of the head office or regional decision-making office.

Immediately, of course, the issue of extraterritoriality comes up. It is one thing to hold a state responsible for human rights harm that its own agents cause abroad.⁹² Many would view it as quite another thing to extend responsibility to states for failing to regulate private actors that cause the harm. This is not the occasion to take a position on the larger issues involved in placing indirect extraterritorial responsibility on states other than to say that at minimum *some* state responsibility (however it ends up being apportioned between home states and host states) is, as an empirical matter, necessary if transnational corporate conduct is not to continue to fall between the normative cracks of globalization. One area in which there already seems to be emergent consensus on home state responsibility to regulate activity of nationals abroad in the name of human rights is with respect to child sex tourism. While most responses, in countries like Australia and Canada, have been to criminalize the individual conduct of the (ab)users of child prostitutes, it is arguably inadequate if those countries do not also regulate the commercial, and consequent mass-tourism, dimension of travel for sex with children by making it contrary to the law for travel agencies, airlines, and others knowingly to facilitate such tourism. When a leading international lawyer based in a sovereignty-sensitive country like Singapore goes on record as arguing for such extended extraterritorial responsibility, there is good reason to believe that transnational regulation of child sex tourism may well prove to be the Trojan horse for a new paradigm of extraterritorial human rights responsibility.⁹³

Take the norm of nondiscrimination as a further example. This is a norm that the human rights treaty bodies have long made clear places positive duties on states with respect to private sector discrimination within their own states.⁹⁴ Thus, for example, a country like Japan is under treaty obligations to regulate sex discrimination in private workplaces. Assume the following seemingly fanciful facts.⁹⁵ Mitsubishi Corporation, a Japanese company, places advertisements in Japanese newspapers that seek to market Mitsubishi's heavy duty air conditioners by using a double entendre on the idea of "air service." The ads feature a Japanese Airlines (JAL) pilot who is asked an ambiguous question about whether he slept in a room with air conditioning or with one of the (female) JAL cabin crew. The union for JAL pilots launch a protest campaign that includes writing to Mitsubishi to complain that the ad "stereotyped and denigrated the cabin crew profession."⁹⁶ After the company dismissed the complaint out of hand, the union approached the Japanese prime minister's office and thus placed the issue on the political agenda. No formal action was taken but, within two weeks, Mitsubishi had agreed to retract the discriminatory ad and to issue a formal apology that was published in full-page ads in four Japanese newspapers and also aired via the broadcast media.

What if neither Mitsubishi nor Japan had acted in response to the complaints and, furthermore, what if there existed no legislative avenue for the JAL employees to seek legal redress for discriminatory treatment by their employer? The nondiscrimination jurisprudence of the Human Rights Committee and of the CESCRC (where workplace discrimination is even more central to the treaty's mandate) would clearly be applicable, and Japan's duty to permit freedom of (corporate) expression would be squarely up against the right of female employees not to be discriminated against. Now, assume — crucially for this example — that the above-described events occurred in Thailand, not Japan. The Mitsubishi ad used Thai Airways employees, not Japan Airlines employees; the ads were placed in Thai not Japanese newspapers; and it was the *Thai Prime Minister's* office that became involved. These three modifications align the example with the facts.⁹⁷ As such, the fictionalized situation (all material facts taking place in Japan) is transformed into a situation of extraterritorial responsibility of Japan for Japanese corporate conduct abroad. In asking whether the treaty nondiscrimination norms should require Japan to regulate Mitsubishi's conduct in Thailand no differently than its conduct in Japan, the analysis would clearly benefit from the interactive insights of a number of the committees both on the desirable content of the nondiscrimination norm and on the larger international law question of the extraterritorial scope of human rights treaties. Not only would CEDAW, the HRC, and the CESCRC have direct contributions to make, but so also would CERD for whom the central question would be whether Mitsubishi had racialized the Thai women (especially were it to turn out that no such ads run in Japan or that the ads that run in

Japan also use Thai employees and not Japanese employees). Quite beyond the substantive benefits of institutional interaction among the committees, any decision to move toward a paradigm of indirect extraterritorial responsibility for transnational corporate conduct would have its authority enhanced significantly if it could be presented as a decision taken by all six committees in their shared perception that they should promote the evolution of a global constitutional order centered on the UN human rights treaties rather than as a decision of one or two committees who could be condemned by states as acting outside their mandate.

GLOBAL CONSTITUTIONAL MONITORING: ACCOUNTABILITY OF INTERSTATE GOVERNING INSTITUTIONS AND REGIMES

The preceding section ended by broaching the subject of global constitutionalism, but global constitutionalism in the context of the world's evolving political economy cannot rest content with a focus only on apportioning *state* responsibility and on seeking to develop some indirect monitoring of transnational *corporate* conduct. *All governing actors and all governance regimes* within the global(izing) order must also eventually be accounted for in the evolution of the normative functions and authority of the UN human rights committees. Much concern is already being directed in contemporary social and political discourse to the problems of (lack of) human rights accountability of international financial institutions (IFIs) such as the International Monetary Fund (IMF) and the World Bank, for the devastating consequences of recent UN Security Council activity notably in respect of sanctions regimes such as that maintained on Iraq, and on the lack of a human rights counterbalance to the rapidly solidifying hegemony of the World Trade Organization (WTO) regime. To date, the human rights treaty bodies cannot be said to have more than hinted at how they conceptualize their authority to monitor these interstate institutions and regimes.⁹⁸

But it is safe to say, I think, that both ideas and intercommittee solidarity must begin to be generated through a collective articulation of a legal theory of *governance responsibility* (as contrasted to the traditional, and ongoing, focus on "state responsibility") according to which states are no more permitted to escape human rights accountability by configuring governance through delegation to the *interstate* level than they should be allowed to shed human rights through delegation by *privatization*.⁹⁹ Given that international organizations and treaty regimes generally retain, at the formal juridical level, their state-centeredness, there should—ultimately—be little doubt about the legitimacy of the human rights committees beginning to address state conduct that takes interstate forms. At minimum, normative pronouncements on human rights violations committed by, for example, the IMF or the Security Council can be presented as preconditions to conclusions about the state responsibility of the states that are members and

decision makers in those institutions. A capacity to focus on global structures and on the human rights obligations of multiple actors represents a possible constitutional future for the UN human rights treaty system, a future that will only be possible if the current fragmented treaty order comes increasingly to be recognized as an integrated (normative and institutional) whole. The trick will be for the UN human rights treaty order to finesse its own state-centered formal foundations as it moves toward this new state of affairs.