Treaty Interpretation at the Human Rights Committee: Reconciling International Law and Normativity

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The Human Rights Committee, the expert body overseeing states' compliance with the International Covenant on Civil and Political Rights ("ICCPR"), is a key institution in the international human rights architecture. The Committee's work requires constant interpretation of the ICCPR's human rights guarantees. While international law dictates how to interpret treaty provisions, including those of the ICCPR, the Committee does not consistently follow the international law of treaty interpretation. Rather, normativity plays an influential role in the Committee's interpretations. This approach is not uniformly negative; it has both costs and benefits. To minimize the costs, however, this Article identifies a path by which the Committee could both comply with the international law of treaty interpretation and influence the normative development of human rights obligations. Adoption of this path would strengthen the Committee's legitimacy and impact, key considerations at a time when human rights are under strain.

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INTRODUCTION

Shortly after the World War II, the nations of the world came together to adopt the Universal Declaration of Human Rights, the foundation of the modern international human rights system.[1] The system now boasts nine core human rights treaties,[2] including the International Covenant on Civil and Political Rights ("ICCPR")[3] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[4] which, in company with the Universal Declaration, form the International Bill of Rights.[5] Tied to these nine treaties are ten committees that oversee states' compliance with their treaty obligations.[6] Prominent among these is the Human Rights Committee, which oversees compliance with the ICCPR's obligation to guarantee such fundamental rights as freedom of expression, freedom of religion or belief, the right to vote, and the rights of criminal defendants.[7]

As explained more fully below, the Committee's oversight includes reviewing reports from states parties on their human rights practices, issuing general comments on the meaning of particular rights, and

[1] U.N. OFF. OF THE HIGH COMM'R HUM. RTS. [OHCHR], THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: FACT SHEET NO. 30 (REV. 1), at 3, 5 (2012), https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet30Rev1.pdf [https://perma.cc/Y9J5-M8BZ] [hereinafter TREATY SYSTEM FACT SHEET]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (proclaiming the Universal Declaration of Human Rights).

[2] *See generally* OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 1-2, 4-18 (describing the origins and content of "the nine core international human rights treaties currently in force and their optional protocols").

[3] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[4] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[5] *See* OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 7.

[6] *See id.* at 19-20. For a helpful overview of the work of the treaty bodies, see *id.* at 21-36.

[7] *See id.* at 19; ICCPR, *supra* note 3, arts. 9, 14-15, 18-19, 25. For an overview of the ICCPR and the Human Rights Committee, see OHCHR, CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE, FACT SHEET NO. 15 (REV. 1) (2005), https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1en.pdf [https://perma.cc/3E2J-96T3] [hereinafter HRC FACT SHEET].

deciding individual claims of human rights violations.[8] In each of these activities, the Committee regularly engages in treaty interpretation.[9] Surprisingly, however, the Committee's interpretive efforts do not consistently comply with the international law of treaty interpretation. Instead, interpretation at the Committee is significantly influenced by normative ends. While this approach has its upsides — for example, it contributes to the normative development of human rights law — it also comes with costs, including to the rule of law and the Committee's legitimacy.

Drawing on my brief term on the Human Rights Committee,[10] this Article focuses a critical eye on the Committee's approach to treaty interpretation, revealing its departure from international law.[11] In doing so, the Article is sensitive to the fact that the international human rights system currently faces significant challenges. Human rights violations remain widespread.[12] Some countries seek to weaken human rights

[8] *See infra* text accompanying notes 36–44.

[9] *See infra* note 37 and accompanying text.

[10] I was elected to a brief, expiring term on the Human Rights Committee in 2020, the sixth U.S. member to serve on the Committee, beginning with Thomas Buergenthal in 1995. *Membership of the Human Rights Committee 1977 to 2020*, OHCHR, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FDocuments%2FHRBodies%2FCCPR%2FMembership%2FMembership1977_2022.docx&wdOrigin=BROWSELINK (last visited Oct. 8, 2021) [https://perma.cc/DP4H-P89Y] (listing Thomas Buergenthal, Louis Henkin, Ruth Wedgewood, Gerald Neuman, and Sarah Cleveland as prior U.S. member of the Committee).

[11] For a similar evaluation of treaty interpretation at the Committee on Economic, Social and Cultural Rights ("CESCR"), see Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 930-47 (2009). Mechlem finds that the CESCR, like the Human Rights Committee, has neglected the VCLT's approach to treaty interpretation, leading "to unconvincing results that have harmed the value, credibility and usefulness of the [Committee's legal] work." *Id.* at 931.

[12] *See* Bastian Herre & Max Roser, *Human Rights*, OUR WORLD IN DATA, https://ourworldindata.org/human-rights (last visited Oct. 11, 2022) [https://perma.cc/W45G-TU3V]. *But cf.* Christopher J. Fariss, *Respect for Human Rights Has Improved over Time: Modeling the Changing Standard of Accountability*, 108 AM. POL. SCI. REV. 297, 299 (2014) (asserting "that human rights practices [regarding political repression] have improved over time," notwithstanding continued violations, as "[t]he standard of accountability" has risen over time).

norms and institutions.[13] Many are skeptical of the value or universality of human rights.[14] And, in too many instances, human rights have become a zero-sum game in which advocates promote certain rights at the expense of others.[15] In this challenging context, it is important to remember Professor Karima Bennoune's admonition "that human rights law specialists need to spend at least as much time defending human rights law . . . as they do criticizing it."[16]

Consistent with this counsel, this Article not only documents the Committee's embrace of normativity and corresponding failure to follow the international law of treaty interpretation, but also charts a path forward in which the Committee could more fully comply with international law and engage in normative development of ICCPR rights. Adoption of such an approach promises to strengthen the Committee's legitimacy and impact at a critical time for human rights.

The Article begins in Part I by emphasizing the strength of the Committee and the value of its work. Part II briefly explains the international law of treaty interpretation codified in the Vienna Convention on the Law of Treaties. Part III explores treaty interpretation at the Human Rights Committee by analyzing two controversial interpretations I encountered as a member of the Committee: one regarding the scope of ICCPR obligations and the other concerning the right to life.[17] This Part concludes that the Committee's

[13] *See* Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1, 3 (2017).

[14] *See, e.g.*, John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 201, 240 (2010) (noting that the universality of human rights "is invariably subject to the criticism that human rights instruments impose standards that prioritize Western values").

[15] *See* HUM. DIGNITY, PUNTA DEL ESTE DECLARATION ON HUMAN DIGNITY FOR EVERYONE EVERYWHERE, ¶ 9 (2018), https://www.dignityforeveryone.org/wp-content/uploads/sites/5/2019/02/Punta-del-Este-Declaration.pdf [https://perma.cc/BCU9-F6JA] (promoting a focus on human dignity as a way to correct the problem of advocates "claiming rights for some but not others").

[16] Karima Bennoune, *In Defense of Human Rights*, 52 VAND. J. TRANSNAT'L L. 1209, 1209 (2019).

[17] *See* Hum. Rts. Comm., Evaluation of the Information on Follow-Up to the Concluding Observations on Honduras, ¶ 17, U.N. Doc. CCPR/C/130/2/Add.3 (Feb. 22, 2021) (evaluating Honduras's compliance with Committee recommendations related to the right to life; adopted during the Committee's 130th session, October 12 to November

interpretive approach departs from the international law of treaty interpretation for normative ends.[18] Recognizing that there are both pros and cons to this approach, Part IV offers a way forward that would allow the Committee to both comply with the international law of treaty interpretation more fully and influence normative development.

I. A VITAL ACHIEVEMENT

The very existence of the Human Rights Committee is a significant achievement. True, states do not always timely submit their human rights reports — whether initial or periodic — to the Committee.[19] Roughly one-third of the states parties to the ICCPR have not accepted the Committee's jurisdiction to hear individual communications.[20] And compliance with the Committee's concluding observations on reports[21]

6, 2020); Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 3042/2017 (A.S., D.I., O.I. & G.D. v. Italy), U.N. Doc. CCPR/C/130/D/3042/2017 (Apr. 28, 2021) [hereinafter A.S. v. Italy] (discussing the scope of ICCPR obligations).

[18] *Cf.* Mechlem, *supra* note 11, at 936 (concluding that treaty interpretation by CESCR "seems to be driven by good intentions" rather than the VCLT); Tobin, *supra* note 14, at 202 (noting that the human rights treaty bodies have, "at times, [ ] been accused of" "offer[ing] interpretations that reflect personal preferences").

[19] *See* U.N. Secretary-General, *Status of the Human Rights Treaty Body System: Rep. of the Secretary-General*, Annex II at 8, U.N. Doc. A/74/643 (Jan. 10, 2020) [hereinafter *Status of the Human Rights Treaty Body System*] (reporting that as of October 31, 2019, 8.7 percent of states parties to the ICCPR were overdue on their initial reports and 26 percent were overdue on their periodic reports, for a total of 34.7 percent of states parties that were behind on their reporting obligations); *id.* at 8-9 (reporting, as of the same date, that a number of initial and periodic reports were more than 10 years overdue).

[20] *See id.* at 4 (recording that as of October 31, 2019, 173 states were parties to the ICCPR, 116 of which had ratified the first optional protocol and thereby accepted the Committee's jurisdiction to hear individual communications).

[21] For example, between 2018 and 2020, only seven of 42 states received an A grade (largely satisfactory) for their reported compliance with key concluding observations. *See Progress as States Work to Implement Human Rights Committee Recommendations*, OHCHR (Dec. 9, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/Human-Rights-Committee.aspx [https://perma.cc/6P59-CYR4]. "The proportion of B grades increased steadily between 2018 and 2020," but even in 2020 only 43 percent of the states reviewed received a B (partially satisfactory). *Id.* That leaves a portion of states whose reported compliance was judged to be less than partially satisfactory. *See id.*

and views on individual communications is lower than one would hope.[22] Yet the recognition that states' compliance with human rights is properly subject to independent evaluation and direction is itself significant. Moreover, states do report to the Committee on their human rights practices,[23] with non-governmental organizations supplementing those reports.[24] Two-thirds of the states parties to the ICCPR accept the Committee's jurisdiction to hear individual human rights complaints.[25] And states do comply with the Committee's observations and views,[26]

[22] *See, e.g.*, DAVID C. BALUARTE & CHRISTIAN M. DE VOS, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS 118-20, 130-31 (David Berry, James A. Goldston & Robert O. Varenik eds., 2011) (finding a 12 percent compliance rate, with caveats, based on Human Rights Committee data reported in 2009; discussing the prior study that found a 21 percent rate; and describing the implementation rate for Committee decisions as grim); Kate Fox Principi, *Implementation of Decisions Under UN Treaty Body Complaint Procedures – Do States Comply? How Do They Do It?*, 37 HUM. RTS. L.J. 1, 4 & n.26, 5, 9, 12 (2017) (citing past studies that found a compliance rate for Human Rights Committee decisions on individual communication of between 12 percent and 21 percent, while calculating a compliance rate of 23 percent for all treaty bodies combined, with the possibility that these percentages undercount both compliance and broader human rights impact). *But cf.* YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 118-19, 155 (2014) (recognizing that judgment-compliance is relevant to and does "generat[e] legitimacy" for courts, but arguing against a focus on mere "judgment-compliance" when assessing court effectiveness both because the real-world impact of judgments turns on "the contents of the judgment in question and the nature of the remedies it prescribes" and because judgment-compliance obscures certain objectives behind the creation of international tribunals such as "changing the practices of third parties, resolving disputes, and advancing regime goals").

[23] Between 2014 and 2018, for example, the Human Rights Committee received 71 state reports. *See Status of the Human Rights Treaty Body System*, *supra* note 19, at 11 (14 in 2014, 17 in 2015, 17 in 2016, 13 in 2017, and 10 in 2018).

[24] *See, e.g.*, OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 43 (describing the role of civil society organizations in the treaty bodies' review of state reports); Mechlem, *supra* note 11, at 923 (noting that, in reviewing state reports, "the treaty bodies receive information from other sources, including nongovernmental organizations, UN agencies, other intergovernmental organizations, academic institutions, and the press").

[25] *See supra* note 20.

[26] *See, e.g.*, OHCHR, HRC FACT SHEET, *supra* note 7, at 29-30 (discussing the positive impact of the Committee's work); Principi, *supra* note 22, at 4-9 (discussing both the rate of state compliance and ways in which states have complied).

even though none of the Committee's outputs is expressly legally binding.[27]

Even when states do not comply, the Committee's work is meaningful. Human rights violations remain disturbingly commonplace.[28] As a member of the Human Rights Committee, I found reviewing communication after communication of alleged human rights abuses — too often by states with little regard for individual rights and little interest in changing — to be a heavy task. The cases involve torture, enforced disappearance, fines for peaceful assembly, arrest for sharing religious beliefs, and a host of other violations. But reviewing these cases also left me with gratitude that there is an institution to which otherwise powerless individuals may turn to obtain judgment, if not satisfaction, against states. If nothing else, these judgments affirm the dignity of the victim and expose the abuse of state power. Consequently, whatever its limitations, the Human Rights Committee plays an important role in respecting human rights.

Moreover, the Committee itself is an impressive institution. The Committee has been in operation since its first session in 1977.[29] Its mandate is among the broadest of all the treaty bodies.[30] With its 18 members,[31] the Committee brings together significant human rights

[27] *See, e.g.*, BALUARTE & DE VOS, *supra* note 22, at 125-26 (noting that "UN treaty body decisions . . . are not legally binding" but "the treaty bodies have continued to advance the principle that states parties nevertheless have a good faith duty to comply with their decisions"); Mechlem, *supra* note 11, at 924 (observing "that governments and especially NGOs perceive . . . concluding observations as something akin to judgments," even though they "are not binding").

[28] *See supra* note 12 and accompanying text.

[29] *See CCPR – International Covenant on Civil and Political Rights: 1 Session* in *UN Treaty Body Database*, UNITED NATIONS HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2&Lang=en (last visited July 14, 2022) [https://perma.cc/8WNB-UNKR].

[30] *See* Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 341, 342 (J.A. Frowein & R. Wolfrum eds., 2001) (asserting that "the Committee has the broadest subject-matter jurisdiction" of the treaty bodies, since the Committee on Economic, Social, and Cultural Rights, which has an equally broad mandate, is not technically a treaty body).

[31] ICCPR, *supra* note 3, art. 28.

expertise from around the globe.[32] While Committee members differ in their views, sometimes strongly, in my experience members are respectful and cohesive. Certain members are more engaged and more influential — the two are often tied — but the office of each member is respected, and each is free to contribute.

Beyond the members themselves, the Committee is supported by an expert team of lawyers and administrators from the Human Rights Treaty Division of the Office of the High Commissioner for Human Rights.[33] Although consistently understaffed, this team does remarkable work.[34] The team is critical to receiving, processing, and drafting responses to individual communications of human rights abuses.[35] It also supports the Committee's other functions.[36]

With this critical support, the Committee performs three primary functions, each of which involves treaty interpretation.[37] First, under the ICCPR, "States Parties . . . undertake to submit reports on the measures

[32] The Human Rights Committee particularly boasts legal expertise, which positions it "very well to apply legal rules of interpretation." Mechlem, *supra* note 11, at 918; *see id.* at 917 (observing that "[t]raditionally, the [treaty] body most dominated by lawyers has been the" Human Rights Committee); *see also* OHCHR, HRC FACT SHEET, *supra* note 7, at 12 ("Most [Human Rights] Committee members (past and present) have a legal background, whether from the judicial bench, as a practitioner or in academia.").

[33] INT'L SERV. FOR HUM. RTS. ACAD., UNDERSTANDING THE TREATY BODIES, https://academy.ishr.ch/learn/treaty-bodies/the-role-of-ohchr-1 (last visited Aug. 23, 2022) [https://perma.cc/VH9R-LMQE].

[34] *Id.*

[35] *Id.*

[36] *See id.*

[37] *See, e.g.*, Birgit Schlütter, *Aspects of Human Rights Interpretation by the UN Treaty Bodies*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 261 (Helen Keller & Geir Ulfstein eds., 2012) (noting that views issued on individual communications, general comments, as well as concluding observations and subsequent follow-up all involve treaty interpretation); OHCHR, HRC FACT SHEET, *supra* note 7, at 30 (asserting "[w]hether in its consideration of States parties' reports, its adoption of general comments, or its examination of complaints by individuals . . . alleging violations of the Covenant, the Committee is the pre-eminent interpreter of the meaning of the International Covenant on Civil and Political Rights"). The ICCPR also provides for the possibility of state-to-state complaints to the Committee, *see* ICCPR, *supra* note 3, art. 41, but "no inter-State complaint has been submitted to the Committee," OHCHR, HRC FACT SHEET, *supra* note 7, at 27; *see also* OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 35 (noting that the state-to-state "procedure has never been used" in any of the treaty bodies).

they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights."[38] The Committee studies these reports along with shadow reports from civil society and information from other U.N. entities.[39] It then engages in constructive dialogue with the submitting state, transmits its concluding observations on ways the state should improve its human rights practices, and follows up on the state's resulting efforts.[40]

Second, the Committee issues general comments that detail its understanding of both obligations and best practices regarding specific rights or cross-cutting issues.[41] The Committee's most recent general comment explains the scope of the right to peaceful assembly guaranteed in Article 21 of the Covenant.[42]

Third, as to states that have accepted the Optional Protocol to the ICCPR, the Committee receives "communications from individuals . . . who claim to be victims of a violation by that State Party of any of the [Covenant] rights."[43] After considering an individual's communication and the state response, if any, the Committee communicates "its views" as to whether the state violated the Covenant.[44] If it finds the state did so, the Committee will direct the state to provide "an effective remedy" consistent with the state's Covenant obligations.[45] Resolving individual communications, drafting general comments, and reviewing state reports all involve interpreting the ICCPR.

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[38] ICCPR, *supra* note 3, art. 40(1).

[39] *See* OHCHR, HRC FACT SHEET, *supra* note 7, at 15-22 (generally describing the reporting process, albeit with some outdated particulars).

[40] *Id.*

[41] *See, e.g.*, *id.* at 24 (describing general comments of the Human Rights Committee specifically); OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 36 (describing general comments of the treaty bodies).

[42] *See* Hum. Rts. Comm., General Comment No. 37, ¶ 11, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020) (detailing the Committee's understanding of the ICCPR right to peaceful assembly), https://digitallibrary.un.org/record/3884725?ln=en [https://perma.cc/AF7T-C4EA].

[43] G.A. Res. 2200A (XXI), art. 1, Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 6, 1966).

[44] *Id.* art. 5(4).

[45] ICCPR, *supra* note 3, art. 2(3)(a).

II. THE INTERNATIONAL LAW OF TREATY INTERPRETATION

Treaty interpretation is itself a matter of international law. The Vienna Convention on the Law of Treaties ("Vienna Convention" or "VCLT") sets out how to interpret treaties consistently with international law.[46] When considering the VCLT, two caveats are in order. First, not all states have ratified the Vienna Convention.[47] The United States, for example, has not.[48] Yet Articles 31 and 32, which address treaty interpretation, reflect customary international law such that even states that have not ratified the Convention are bound to interpret treaties consistently with Articles 31 and 32.[49] Second, some assert that human rights treaties are not subject to the general international law of treaty interpretation.[50]

[46] Vienna Convention on the Law of Treaties arts. 31-32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. For a treatise on the Vienna Convention, see RICHARD K. GARDINER, TREATY INTERPRETATION (2d ed. 2015).

[47] *See Vienna Convention on the Law of Treaties: Status*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last visited Sept. 22, 2022) [https://perma.cc/32M3-VJDM].

[48] *Id.* (recording that the United States has signed but not ratified the Vienna Convention).

[49] *See, e.g.*, Int'l L. Comm'n, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, at 17-19, U.N. Doc. A/73/10 (2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf [https://perma.cc/C7EV-4N7K] (recognizing that "the rules set forth in articles 31 and 32 reflect customary international law" and "apply . . . between all States"); GARDINER, *supra* note 46, at 162 ("[I]t is now beyond question that the Vienna rules (ie, articles 31-33) are rules of customary international law."); Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 448 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012) (The VCLT rules of treaty interpretation "reflect customary international law binding on all states"); *see also* INT'L L. INST., *Obligations of Signatories Prior to Ratification*, *in* 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1, 212 (Sally J. Cummins & David P. Stewart eds., 2001) (noting that "the United States regards [the Vienna Convention] as the authoritative guide to current treaty law and practice").

[50] *See, e.g.*, Neha Jain, *Interpretive Divergence*, 57 VA. J. INT'L L. 45, 47-51, 69-71, 74-76, 79 (2017) (characterizing the VCLT rules as the orthodox approach to treaty interpretation while recognizing arguments and jurisprudence favoring differing interpretive approaches for different treaties, such as human rights treaties, and taking that argument further by asserting that even different parts of the same treaty should be subject to different interpretive methods); Schlütter, *supra* note 37, at 263 (noting that

Addressing the arguments in support of this assertion is beyond the scope of this Article.[51] Suffice it to say that no treaty on the interpretation of human rights agreements has supplanted the Vienna Convention on the Law of Treaties, nor would it be easy to conclude that states have, out of a sense of legal obligation, engaged in a general and consistent practice of interpreting human rights agreements in a new uniform way.[52]

"[i]f human rights . . . [are different] from the rules of general international law" as "many scholars, but also international human rights bodies . . . advocate," then "it [can be] argued that interpretation must pay due regard to this special nature, or even develop special rules" (footnote omitted)); Tobin, *supra* note 14, at 220 (acknowledging the "widespread, albeit contested, view that human rights treaties . . . warrant a special interpretive methodology"). *But cf.* Mechlem, *supra* note 11, at 912, 919 (asserting that "[t]he interpretation rules [of the VCLT] apply to human rights as much as they apply to other international law treaties," while also arguing that the unique nature of human rights treaties "requires that [they be] interpreted in a manner sufficiently favorable to the effective protection of individual rights"); Başak Çalt, *Specialized Rules of Treaty Interpretation*, *in* THE OXFORD GUIDE TO TREATIES 504, 504-05, 511-13, 522 (2d ed. 2020) (rejecting the argument that human rights treaties require an interpretive regime apart from the VCLT, but asserting that application of VCLT principles has resulted in a specialized focus on ensuring the effectiveness of human rights guarantees when interpreting human rights treaties); GARDINER, *supra* note 46, at 168, 179, 211 (arguing that the VCLT's good faith and object and purpose elements support consideration of effectiveness in treaty interpretation).

[51] *See generally* GARDINER, *supra* note 46, at 474-75 (citing "broad descriptions of rights . . . coupled with mechanisms to ensure (or encourage) respect for them" rather than the vertical nature of human rights as the more compelling reason why human rights interpretation might demonstrate "special features"); Schlütter, *supra* note 37, at 263-64 (explaining that a unique approach to the interpretation of human rights may be justified by the fact that those rights create vertical obligations between states and individuals rather than horizontal obligations between states; that human rights constrain states vis-à-vis individuals, undermining the notion of sovereignty; that human rights are considered universal values; and that human rights treaties are living documents that must adjust to social changes); Tobin, *supra* note 14, at 220 (asserting that the argument for "a special interpretive methodology" for human rights treaties "is essentially grounded in the non-reciprocal nature of human rights treaties as a key point of distinction from other treaties"); MARTIN SCHEININ, HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION OF THE LAW OF TREATIES —CONFLICTS OR HARMONY 4-7 (2005), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2005)014rep-e [https://perma.cc/6E9L-TXMM] (offering various reasons why interpretation of human rights treaties might depart from the general understanding of the VCLT, including the constitutional character of human rights treaties).

[52] *See* GARDINER, *supra* note 46, at 474 ("[T]here is little to suggest from practice that the Vienna rules are not the proper rules for interpretation of all treaties, at least as a

Even treaty bodies like the Human Rights Committee that depart from the VCLT also make reference to the Vienna Convention,[53] demonstrating its continuing relevance.[54] At present, then, while there are arguments for departing from the general law of treaty interpretation when it comes to human rights, those arguments do not yet reflect a change in international law.[55] This Article thus proceeds on the assumption that human rights treaties remain subject to the general international law rules of treaty interpretation found in the VCLT.

starting point."); Tobin, *supra* note 14, at 215 (noting that when it comes to the interpretation of human rights treaties, "states . . . have accepted the principles of the VCLT"). One argument for a special interpretive regime for human rights that might find support in the VCLT is that judicial or quasi-judicial human rights institutions — the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court on Human and People's Rights, and treaty bodies such as the Human Rights Committee — do not follow the VCLT and this has resulted in agreement, or subsequent practice reflecting agreement, to alter VCLT rules in the human rights context. *Cf.* Çalt, *supra* note 50, at 513-16 (arguing that states have not engaged in wholesale rejection of the specialized, effectiveness approach to human rights treaty interpretation (which, incidentally, supports the Human Rights Committee's broad interpretation of the right to life), supporting the conclusion that the approach is not "a radical departure from Article 31 [of the] VCLT"); GARDINER, *supra* note 46, at 258-59 (arguing that where states have accepted an international tribunal's decisions as "final and binding," similar "successive or awards [by the tribunal] . . . between different parties can show a consistent practice effective to establish the interpretation as that agreed by the parties in the case"). At least as to the Human Rights Committee, however, this argument is unlikely to succeed given, *inter alia*, the relatively low rate of state compliance with the Committee's decisions, *see supra* notes 21–22 and accompanying text, and the conditions necessary to establish subsequent practice or agreement, *see, e.g.*, *infra* note 230 (explaining the International Law Commission's view that treaty body pronouncements alone are insufficient to establish the subsequent practice or agreement that may influence treaty interpretation under the VCLT).

[53] *See* Schlütter, *supra* note 37, at 273 (noting that "references to the VCLT" were more prominent in the Human Rights Committee's earlier work and now exist but are "scarce").

[54] *See, e.g.*, *id.* (asserting that the Human Rights Committee (like other treaty bodies) has "applied the VCLT and consider[s itself] bound by its rules"); Mechlem, *supra* note 11, at 911 n.10 ("All human rights bodies[, including the Human Rights Committee,] apply articles 31 and 32 of the Vienna Convention.").

[55] *See* Tobin, *supra* note 14, at 219 ("The principles under the VCLT constitute those norms that have been accepted for the interpretation of international human rights treaties.").

Article 31 of the Vienna Convention lays out the primary content of those rules. Under Article 31, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[56] Thus, of all the considerations that inform treaty interpretation, ordinary meaning of a treaty's text appears as the starting point, immediately informed by context and purpose.[57] According to Article 31, context is broader than one might first suppose. Context embraces not just the treaty's "text, including its preamble and annexes," but "(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; [and] (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[58]

In addition to this context, Article 31 dictates that interpretation shall "take[] into account . . . : (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; [and] (c) any relevant rules of international law

[56] Vienna Convention, *supra* note 46, art. 31(1). Good faith applies throughout the interpretation process and can support requirements of reasonableness or effectiveness, but often plays no clear "or independent role." GARDINER, *supra* note 46, at 168.

[57] *See* Pauwelyn & Elsig, *supra* note 49, at 448 (the VCLT's "summing up of text, context and purpose is described as a holistic, non-hierarchical exercise, albeit one that starts with the text of the treaty"); Int'l L. Comm'n, *supra* note 49, at 22 (noting that "courts typically begin their reasoning by looking at the terms of the treaty, and then continue, in an interactive process, to analyse those terms in their context and in the light of the object and purpose of the treaty" (footnote omitted)); Schlütter, *supra* note 37, at 274 (noting that certain treaty bodies, including the Human Rights Committee, usually "take[] the actual wording and text of the treaty as a starting point"). Some argue that text is the primary consideration, not merely a starting point. *See* Tobin, *supra* note 14, at 217. The International Law Commission, however, emphasizes that treaty interpretation "consists of a single combined operation, which places appropriate emphasis on the various means of interpretation" identified in the VCLT. Int'l L. Comm'n, *supra* note 49, at 17.

[58] Vienna Convention, *supra* note 46, art. 31(2).

applicable in the relations between the parties."[59] These considerations make room for some evolution in a treaty's meaning.[60] Evolution may also be possible if application of the VCLT rules of interpretation leads to a conclusion that a particular provision (e.g., a generic term) or a particular type of treaty (e.g., a treaty that is considered to be law-making, constitutive, or constitutional[61]) is meant to evolve in meaning as circumstances change.[62] What the Vienna Convention does not support is an evolutionary approach to interpretation that is not faithful to the VCLT rules,[63] including one driven by the normative goals of the interpreter.[64]

With the addition of subsequent agreement, subsequent practice, and relevant rules of international law to the interpretive mix, it is apparent that the VCLT dictates consideration of a broad range of factors in interpreting treaties.[65] Moreover, "to confirm the meaning" that these

[59] *Id.* art. 31(3). For a discussion of various issues that arise and approaches that interpreters take when considering "relevant rules of international law" in the interpretation of human rights treaties, see Çalt, *supra* note 50, at 516-20.

[60] *See* GARDINER, *supra* note 46, at 291 (noting that the interpretive consideration of subsequent practice and international law more broadly can result in "evolution of [a] treaty's content"); Geraldo Vidigal, *Hidden Meanings: Evolutionary Interpretation Between Norm Application and Progressive Development*, 24 J. INT'L ECON. L. 203, 210 (2021) (reviewing EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW (Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau & Clément Marquet eds., 2020)) (explaining that these provisions "overtly [permit] the evolution of legal instruments, comprising not merely the application of given rules to new circumstances but a transformation of the applicable rules themselves" — not based on "the choice[s] of third-party interpreters but [on] the actions of states, as international law's rightful legislators and primary interpreters").

[61] *See* Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 237, 244 (2016).

[62] *See* GARDINER, *supra* note 46, at 467-70.

[63] *See id.* at 452 ("[g]eneral descriptions of approaches, such as . . . 'teleological' . . . or 'evolutionary' are *not* . . . a substitute for . . . full use of" the VCLT rules); Int'l L. Comm'n, *supra* note 49, at 66 (consistent with the approach of "most international courts and tribunals . . . [a]ny evolutive interpretation of the meaning of a [treaty] term over time must . . . result from the ordinary process of treaty interpretation" captured in the VCLT).

[64] *See* Vidigal, *supra* note 60, at 212-14, 216-19 (describing this form of evolutionary interpretation).

[65] *See* Int'l L. Comm'n, *supra* note 49, at 18 (noting that "all [the considerations in article 31] are to be taken into account in the process of interpretation"). As Professor

considerations support, or if these considerations "leave[] the meaning ambiguous or obscure; or . . . lead[] to a result which is manifestly absurd or unreasonable," "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[66]

The breadth of considerations the Vienna Convention endorses creates undeniable space for discretion in treaty interpretation, though not the discretion to ignore the considerations endorsed.[67] The ways in

Shai Dothan puts it, treaty interpretation under the Vienna Convention partakes of "elements of all three [traditional] approaches to treaty interpretation": textual, which focuses on a treaty's language; subjective, which focuses on the parties' intent; and teleological, which focuses on the treaty's "object and purpose." Shai Dothan, *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, 42 FORDHAM INT'L L.J. 765, 766-67 (2019); *see also* Crootof, *supra* note 61, at 252-53 (noting that the Vienna Convention "attempts to integrate" the "three primary schools of thought on treaty interpretation: the 'textual' or 'ordinary meaning of the words' school, the 'intentions of the parties' school, and the 'teleological' or 'aims and objects' school"); Schlütter, *supra* note 37, at 274 (asserting that the Vienna Convention "combines several of the theoretical approaches that were and still are prevalent in international legal theory: good faith or effectiveness, the subjective, teleological or functional, and the contextual or systemic method"); Tobin, *supra* note 14, at 17 (noting that the VCLT "embrace[s] a range of interpretive approaches — textual, contextual, teleological, and historical"). More controversially, Professor Dothan finds in this breadth a call to create "a theory on [the] interaction" of these three approaches and develops a theory that allows judges to interpret treaties consistent with "the good of all mankind" if "a [treaty's] text . . . is not completely clear and [there is] reason to suspect that the parties that negotiated it did not take the interests of all people involved into account." Dothan, *supra*, at 767-69.

[66] Vienna Convention, *supra* note 46, art. 32(a)-(b).

[67] *See, e.g.*, GARDINER, *supra* note 46, at 452 ("since the Vienna rules only provide basic guidance on interpretation, and principally what is to be taken into account rather than great detail of how interpretive elements are to be used, there is a whole further level of the interpretive exercise," which requires judgment); Mechlem, *supra* note 11, at 913 ("The application of the method of interpretation set out in Articles 31 and 32 provides significant flexibility."); Pauwelyn & Elsig, *supra* note 49, pt. III, para. 2 ("[W]ithin [the VCLT] framework, a certain degree of discretion remains."); Tobin, *supra* note 14, at 3 ("[T]here is almost universal consensus . . . that the inherent elasticity of the general rule [of treaty interpretation in the VCLT] makes it incapable of producing *the* determinate meaning of a treaty." (emphasis added)). One scholar went so far as to assert that "[d]ue to the variety of available methods and the possibility of their combination, it is almost impossible to arrive at an illegal interpretation." Schlütter, *supra* note 37, at 317; *see also* Tobin, *supra* note 14, at 19 (noting the any limits imposed by the VCLT on treaty interpretation are easily escaped). Part III's evaluation of particular examples of

which the considerations might be applied combined with the abstract nature of human rights guarantees unquestionably make the interpretation of human rights treaties challenging.[68] The VCLT rules do not offer mechanistic or mathematical solutions.[69] Indeed, the meaning of particular VCLT provisions remains unclear or contestable.[70] Yet, as the next Part seeks to demonstrate, some interpretations are difficult to square with the interpretive approach adopted in the VCLT.

III. TREATY INTERPRETATION AT THE HUMAN RIGHTS COMMITTEE

In 2020, an International Law Association Study Group issued a report on treaty interpretation at the Human Rights Committee. Concluding that the Committee interprets the ICCPR's provisions principally in the views the Committee issues in resolving individual communications, the report focused on treaty interpretation in the Committee's quasi-judicial resolution of these communications. Consistent with my limited experience, the report concludes that the Committee's approach to interpretation is predominately implicit.[71] The international law of treaty

interpretation against VCLT standards undermines that suggestion. *See infra* Part III. In so doing, this Article makes clear that interpretation may exceed the bounds of the VCLT but does not settle the question of how to choose among interpretations that are consistent with the VCLT. For one answer to that question, see Tobin, *supra* note 14, at 3-4, 49.

[68] *See* Çalt, *supra* note 50, at 507-08 (noting both that a widely recognized approach to interpretation under the VCLT — the "crucible approach" — allows the interpreter some "judgement [in deciding] how the wording, context, and object and purpose interact with each other" when thrown into the interpretive crucible, and that human rights treaties impose abstract obligations on states toward individuals, "mak[ing] human rights treaties a demanding case for interpretation"). *See generally* Crootof, *supra* note 61, at 252 (noting that "multilateral treaties usually employ broad language and set generalized standards rather than specific rules" and therefore are open to interpretive leeway).

[69] *See* GARDINER, *supra* note 46, at 31 ("[A]pplication of . . . the Vienna rules, is not a purely mechanical process; but their proper application is the correct procedure and the best assurance of reaching the correctly ascertained interpretation."); *id.* at 456 ("[T]he Vienna provisions on interpretation were not conceived as in any sense to be applied mechanistically or as if mathematical formulae . . . .").

[70] *See, e.g.*, *infra* text accompanying note 102 (noting uncertainty regarding the provisions of international that may influence treaty interpretation under the VCLT).

[71] PHOTINI PAZARTZIS & PANOS MERKOURIS, FINAL REPORT ON THE UN HUMAN RIGHTS COMMITTEE AND OTHER HUMAN RIGHTS TREATY BODIES 3 (2020),

interpretation does not play a consistent, express role in either deliberations or decisions. Instead, the Committee's "jurisprudence . . . contains only sporadic and limited *direct* references to the VCLT rules."[72]

That alone does not mean that the Committee rejects the interpretive considerations required by international law.[73] Indeed, given the fact that international law directs attention both to such well-accepted inputs as the treaty's text and to a wide range of other considerations, it is difficult to imagine an interpretive approach that would not overlap with the VCLT approach to some degree. But overlap is not compliance.[74] Thus, while the Committee acts consistently with the international law of treaty interpretation in certain respects, the Committee does not apply that law wholesale or unfailingly.[75]

Rather, the Committee's interpretation of the ICCPR is significantly influenced by a desire to expand human rights obligations. On one hand, this drive is consistent with the VCLT's instruction to consider the object and purpose of a treaty.[76] The ICCPR unquestionably seeks to advance human rights. On the other hand, consideration of object and purpose under the VCLT does not "allow[] the general purpose of a treaty to override its text,"[77] nor does it authorize a general purposive

https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=24287&StorageFileGuid=c9f48971-97b0-4d84-8bb4-f866273942c8 [https://perma.cc/6T8N-GBLM].

[72] *Id.*

[73] *See* GARDINER, *supra* note 46, at 476 (recognizing that a failure to reference the Vienna Convention rules "does not necessarily indicate that they are not being used").

[74] This is so for at least two reasons. First, "the Vienna rules are to be applied together, not in bits." *Id.* at 161. As a result, considering some of the interpretive elements of the VCLT does not achieve compliance. Second, compliance requires intent, not just correspondence between the VCLT rules and the Committee's practices. *See* SHANY, *supra* note 22, at 119 ("Although some of the international relations literature describes compliance as a relationship of correspondence between legal norms and state conduct, the preponderance of the international law and international relations literature requires such convergence between law and practice to be purposeful in nature." (footnote omitted)).

[75] Consistent with that conclusion, the ILA report indicates that interpretative analysis, "including references to the VCLT rules of interpretation," is more likely to appear in concurring or dissenting opinions that depart from the majority's views. PAZARTZIS & MERKOURIS, *supra* note 71, at 2-3.

[76] *See* Vienna Convention, *supra* note 46, art. 31(1).

[77] GARDINER, *supra* note 46, at 211.

approach, unmoored to the considerations identified in the VCLT.[78] The desire to expand human rights norms can outpace what is persuasively within the ICCPR's ambit.

To illustrate, consider the Committee's interpretation of two provisions: Article 2's declaration that a state's ICCPR obligations extend to "individuals within its territory and subject to its jurisdiction,"[79] and Article 6's guarantee of "the inherent right to life."[80] These examples are apt for two reasons. First, I encountered both interpretations during my time on the Committee,[81] though my analysis of both is limited to the public record. Second, both are controversial. Controversial interpretations are likely to present two, potentially competing dynamics: a desire to fortify a decision through strict application of the international law of treaty interpretation,[82] and desire to achieve normative ends. As a result, controversial interpretations can be particularly telling in identifying the most prominent interpretative influences on the Committee. Both examples illustrate the strength of normative pull over international law in the Committee's treaty interpretation. This Section first identifies that dynamic, then addresses its pros and cons.

A. Scope of Covenant Obligations: Territory and Jurisdiction

Article 2 of the ICCPR states that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[83] In its General Comment No. 31, the Committee interprets territory and jurisdiction in the disjunctive to reach

[78] *See id.* at 162, 211, 213.

[79] ICCPR, *supra* note 3, art. 2(1).

[80] *Id.* art. 6(1).

[81] *See supra* note 17 and accompanying text.

[82] *But cf.* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 292-93 (2015) (arguing that courts might strategically depart from accepted principles of interpretation and thereby risk noncompliance as compliance with a judgment not based on accepted principles, if secured, would signal the strength of the court's reputation going forward).

[83] ICCPR, *supra* note 3, art. 2(1).

individuals within a state's territory or subject to its jurisdiction.[84] The Committee has also interpreted "jurisdiction" to mean "within the power or effective control of" the state.[85] Whether or not these interpretations comply with the international law of treaty interpretation,[86] a more recent interpretation does not.

In a 2020 case, *A.S. et al. v. Italy*,[87] the Committee addressed a communication from relatives of individuals fleeing Syria who perished in a shipwreck in the Mediterranean Sea.[88] The authors of the communication claimed that Italy had violated their relatives' right to life under the ICCPR by failing to render assistance when the ship their relatives were in was in distress.[89] "[T]he shipwreck occurred outside the national territories of both Italy and Malta," but within Malta's search and rescue zone on the high seas pursuant to the International Convention on Maritime Search and Rescue ("SAR Convention").[90] The Committee nonetheless found that the victims were "subject to Italy's jurisdiction."[91]

The Committee reasoned that "a special relationship of dependency" arose between Italy and the victims based on fact and law.[92] Factually, the first distress call was made to Italy, the Maritime Rescue Coordination Centre in Rome remained involved in the rescue effort, and

[84] *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 31, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (stating this conclusion).

[85] *Id.*

[86] *See, e.g.*, *Inputs Received: United States of America* in *General Comment No. 36 on Article 6: Right to Life*, OHCHR ¶ 13 (Oct. 6, 2017), https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life [https://perma.cc/7RBS-27AH] [hereinafter *U.S. Observations*] (asserting that consistent with "longstanding international legal principles of treaty interpretation," ICCPR obligations should be interpreted to apply "only to individuals who are both within the territory of a State party and subject to its jurisdiction"); U.S. OBSERVATIONS ON HUMAN RIGHTS COMMITTEE GENERAL COMMENT NO. 31 ¶¶ 3-9 (2007), https://2001-2009.state.gov/s/l/2007/112674.htm [https://perma.cc/DY2B-AQXW] (arguing to the same conclusion).

[87] A.S. v. Italy, *supra* note 17.

[88] *Id.* ¶¶ 1.1, 2.1.

[89] *See id.* ¶ 1.2.

[90] *Id.* ¶ 2.7.

[91] *Id.* ¶ 7.8.

[92] *Id.*

a vessel from the Italian navy was proximate to the distressed vessel.[93] Legally, under international law, Italy had "a duty to respond in a reasonable manner to calls of distress" and "a duty to appropriately cooperate with other states undertaking rescue operations."[94] Given this "special relationship of dependency," "the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable" given Italy's legal obligations.[95] The victims "were thus subject to Italy's jurisdiction."[96]

It is not easy to discern the theory behind the Committee's conclusion that acts that generate direct and reasonably foreseeable effects in a special relationship of dependency give rise to jurisdiction, nor how this understanding might apply in future cases. More importantly for present purposes, it is hard to square the Committee's interpretation of "jurisdiction" with the international law of treaty interpretation.

The term "jurisdiction" in international law ordinarily refers to authority.[97] Thus, the customary international law addressing jurisdiction to prescribe, adjudicate, and enforce governs the authority of states to apply their domestic law, assert judicial or other process, and impose penalties for violation.[98] Consistent with the typical meaning of "jurisdiction," the Covenant seems to envision a system of mutuality: when a state has, or perhaps asserts, authority over an individual, the state also bears obligations toward that individual.

The Committee departs from the ordinary sense of "jurisdiction" as authority to find that the victims were within Italy's jurisdiction, not because Italy possessed, or even asserted, authority in the area of the shipwreck or over the persons of the victims, but because of obligations Italy had under international law and under the particular facts.[99] Under

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. pt. 4, intro. note (AM. L. INST. 1987) (speaking of "jurisdiction, *i.e.*, the authority of states").

[98] *See, e.g.*, *id.* (defining jurisdiction as "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and nonjudicially").

[99] *See* A.S. v. Italy, *supra* note 17, ¶ 7.8.

the VCLT, "[a] special meaning shall be given to a term if it is established that the parties so intended."[100] But nothing in the other interpretative considerations identified by the VCLT appears to support the conclusion that the parties understood jurisdiction to mean obligation rather than authority. The only possible exception is the VCLT's direction that interpretation must consider "any relevant rules of international law applicable in the relations between the parties."[101] What this provision means remains unclear.[102] Without attempting a definitive settlement, it is notable that the provision refers to "relevant rules of international law."[103] The Committee relied on obligations under the law of the sea to find that the victims were within Italy's jurisdiction. Yet if this area of law is relevant,[104] the law most relevant to establishing the reach of a state's Covenant obligations would not be the law on which the Committee relied. Rather, it would be the law the Committee acknowledged but discounted: the law dividing the high seas into search and rescue zones, which links to the Covenant's reference to territory as

[100] Vienna Convention, *supra* note 46, art. 31(4).

[101] *Id.* art. 31(3)(c).

[102] *See, e.g.*, GARDINER, *supra* note 46, at 297 (observing that "adoption of the apparently innocuous reference to 'any relevant rules' of international law appears to have provided a classic treaty-makers' compromise—elegant but uninformative"). "Rules of international law" does appear to include treaties, and not just law-making treaties. *See id.* at 299.

[103] Vienna Convention, *supra* note 46, art. 31(3)(c). Gardiner "take[s] the ordinary meaning of 'relevant' rules of international law as referring to those touching on the same subject matter as the treaty provision . . . being interpreted or which in any way affect that interpretation." GARDINER, *supra* note 46, at 299. Given the context in which "relevant" appears, he further asserts that the "relevant rules must be [ones] which can aid the quest for the meaning of a treaty provision, not [merely] those applying to a situation generally." *Id.* at 305.

[104] As previously suggested, relevant rules of international law may only include those that bear on interpretation, not those that govern the parties' relationship more broadly. *See supra* note 103. During the drafting of General Comment No. 36, both the United States and the Netherlands objected that the SARS Convention was not relevant to the question of jurisdiction under the ICCPR, and that the notion of state jurisdiction on the high seas was inconsistent with the law of the sea. *See U.S. Observations*, *supra* note 86, ¶ 14; *Inputs Received: The Netherlands* in *General Comment No. 36 on Article 6: Right to Life*, OHCHR ¶ 29, https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life (last visited Nov. 22, 2022) [https://perma.cc/Z5WH-88EL] [hereinafter *Netherlands Comments*].

well as to the notion of power or effective control.[105] The Committee concludes that Malta had Covenant obligations to the victims based on this international law, so the Committee credits its relevance to some degree, but it nonetheless finds obligations in Italy "notwithstanding the fact that [the victims] were within the Maltese search and rescue region."[106]

If the international law of treaty interpretation does not support the Committee's distinctive interpretation of "jurisdiction," as the above analysis suggests, what explains that interpretation? As suggested in my dissenting opinion, an understandable, even commendable, desire to address and prevent avertible tragedies such as this one.[107] "[M]ore than 200 people," "including 60 children," died unnecessarily in the shipwreck.[108] Italy could have done more.[109] And in the face of such a tragedy, the normative conclusion is clear: Italy *should* have done more. The Committee's interpretation enshrines that normative conclusion for this and future cases, but it does so in conflict with the international law of treaty interpretation.

B. Right to Life

The prominence in Committee interpretation of normative considerations and the neglect of international law governing treaties is equally, if not more, apparent in the Committee's reading of the ICCPR right to life. The Committee's most current understanding of that right is reflected in General Comment No. 36, the Committee's third general comment on the topic.[110] Much of General Comment No. 36 can be squared with the international law of treaty interpretation, but critical parts cannot. To illustrate how the Committee's interpretation of the right to life departs from the international law of treaty interpretation and reflects normative goals, this Section focuses on two aspects of

[105] *See* A.S. v. Italy, *supra* note 17, ¶ 7.8.

[106] *Id.*

[107] *See id.* ¶ 4 (Moore, dissenting).

[108] *Id.* ¶¶ 1.1, 2.3 (majority's views).

[109] *See, e.g.*, *id.* ¶ 2.4 (noting that an "Italian navy ship . . . . was closest to the vessel in distress").

[110] U.N. Hum. Rts. Comm., General Comment No. 36, ¶ 1, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter General Comment No. 36].

General Comment No. 36: the breadth of its interpretation of the right to life[111] and its interpretation of that right to include a right to abortion. As indicated above, a focus on controversial matters of interpretation, such as abortion, is particularly probative because such questions likely present both the incentive to follow the international law of treaty interpretation to put the Committee's reading on as strong a footing as possible and the pull to interpret in ways that achieve normative goals. Hotly contested topics such as abortion are opportunities to see whether international law or normative goals exert more influence on the Committee.

To refresh, the VCLT instructs that treaty interpretation occur in good faith and consider "the ordinary meaning to be given to" a treaty's terms "in their context and in light of its object and purpose."[112] Context embraces not only the treaty's broader "text, including its preamble and annexes," but agreements "related to the treaty" "in connection with the conclusion of the treaty."[113] In addition to context, the VCLT mandates consideration of subsequent agreements or practices that establish the parties' shared understanding of the treaty, and "any relevant rules of international law applicable in the relations between the parties."[114] The Committee's interpretation of the right to life is difficult to square with these rules of interpretation.

The relevant language of the Covenant appears in subparagraph 1 of Article 6, which states, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived

[111] While General Comment No. 36 was under consideration, the United States noted this concern over the breadth of the Committee's interpretation of the right to life. *See U.S. Observations*, *supra* note 86, ¶ 3 (objecting that "the range of issues the Committee considers to fall within the scope of the inherent right to life . . . under Article 6 is overly expansive and the Committee provides little to no authoritative legal support or treaty analysis grounded in established rules of treaty interpretation under international law to support many of its positions"); *see also id.* ¶¶ 4, 10 (reiterating the United States' view that the Committee failed to follow the international law of treaty interpretation in drafting general comments, including General Comment No. 36).

[112] Vienna Convention, *supra* note 46, art. 31(1).

[113] *Id.* art. 31(2).

[114] *Id.* art. 31(3).

of his life."[115] Additional subparagraphs address deprivation of life through genocide or capital punishment.

1. Breadth

Based on text alone, the "inherent right to life" might have more than one meaning.[116] Most fundamentally, it might refer to life versus death. Under this core interpretation, the right would be aimed at preventing states from taking life. More expansively, "life" might refer to a particular quality of life to which an individual is entitled. This more expansive meaning is not the most ordinary, however. The fact that quality of life varies so drastically across the globe and that the right secured is "inherent" in each individual suggests that the core interpretation is more natural. The fact that no adjective qualifies "life" might also signal that the guarantee does not secure a particular type of life. The bare text of the right thus leans toward an interpretation that the right to life captures the core right to live rather than die. That conclusion does not mean that the right is inconsequential. Protecting life if only from state deprivation is a significant goal that, to date, has not been fully achieved.[117]

Context, at each level, supports the core interpretation of the right to life. Start with Article 6 itself. Article 6 consists of six paragraphs. The right to life appears in the first paragraph. Within that paragraph, the right to life is immediately followed by a requirement that the right be secured by law. Law is more likely to be successful in prohibiting acts that would terminate life than in securing a particular quality of life. The prohibition on deprivation that quickly follows may also suggest that the guarantee is of life as against arbitrary death. The term "arbitrary" could have broad

[115] ICCPR, *supra* note 3, art. 6(1).

[116] *See, e.g.*, GARDINER, *supra* note 46, at 184 (asserting that "the plain, normal, or ordinary meaning [is] a thing of potential variety rather than objectively ascertainable in most cases").

[117] For a sad reminder of this fact, see, for example, Hum. Rts. Comm., Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2707/2015, ¶ 8.5, U.N. Doc. CCPR/C/128/D/2707/2015 (May 26, 2020) (finding a violation of article 6(1) based on allegations that the complainant's "son died as a result of the torture he suffered while in [police] custody").

meaning,[118] but overall, it serves to limit the sort of deprivation that is prohibited. The notion of arbitrary deprivation more readily describes arbitrary taking of life than arbitrary taking of quality of life.

Moreover, four of the five remaining paragraphs in Article 6 address limitations on the death penalty.[119] The final paragraph addresses genocide, highlighting situations where "deprivation of life constitutes the crime of genocide."[120] The article within which the right to life sits, then, suggests that the right is focused on life versus death, preservation versus deprivation. The Second Optional Protocol to the Covenant, which builds on Article 6, continues the focus on deprivation of life by imposing a non-derogable obligation on states parties to refrain from executing anyone within their jurisdiction.[121]

At times in General Comment No. 36, the Committee sets aside this context to interpret the right to life as a right to life with dignity.[122] One way to support this interpretation is to broaden to the preambular context of the right to life, but the Committee departs from the VCLT in the manner in which it relies on the preamble. The international law of treaty interpretation specifically identifies a treaty's preamble as part of the relevant context that should guide interpretation of a treaty's text.[123]

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[118] *See, e.g.*, General Comment No. 36, *supra* note 110, ¶ 12 ("The notion of 'arbitrariness' is not to be fully equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality." (footnote omitted)).

[119] *See* ICCPR, *supra* note 3, arts. 6(2), (4)-(6).

[120] *Id.* art. 6(3).

[121] *See* G.A. Res. 44/128, arts. 1(1), 6(2) (Dec. 15, 1989).

[122] *See* General Comment No. 36, *supra* note 110, ¶¶ 3, 26, 62. In doing so, the Committee acted in harmony with the jurisprudence of the Inter-American Court of Human Rights but went beyond that of the European Court of Human Rights and the African Court on Human and People's Rights. *See* Thomas M. Antkowiak, *A "Dignified Life" and the Resurgence of Social Rights*, 18 NW. J. HUM. RTS. 1, 9-16 (2020). The VCLT does not make the jurisprudence of these regional courts directly relevant to interpretation of the ICCPR right to life. Moreover, these courts' divergence undermines any suggestion that the Inter-American Court's approach represents either subsequent practice or subsequent agreement under the VCLT. *See infra* note 230.

[123] Vienna Convention, *supra* note 46, art. 31(1)-(2) (directing that treaty interpretation shall consider context, which includes a treaty's preamble). The preamble may also help reveal a treaty's object and purpose, though "the substantive provisions will provide the fuller indication of the object and purpose." GARDINER, *supra* note 46, at 218.

The preamble to the ICCPR states, first, that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and second, that the rights in the ICCPR "derive from the inherent dignity of the human person."[124] The first phrase recognizes that dignity and rights are separate concepts. The second explains that they are nonetheless related in that dignity is the source of rights. The Committee, however, equates the two and essentially makes the source — dignity — the right. Thus, the Committee reasons that the right to life "concerns the entitlement of individuals . . . to enjoy a life with dignity."[125] In doing so, instead of reading the ICCPR's terms "in their context" as the VCLT directs, the Committee effectively reads the context as the right.[126] The treaty term "life" arguably becomes a qualifier in a right to life with dignity.[127]

The Committee does not pursue the full implications of a right to life with dignity in General Comment No. 36. Most of the General Comment focuses on more fundamental questions such as what constitutes arbitrary deprivation of life. But the Comment does not identify the analytical stopping point of a right to life with dignity either. Such a right might overlap to a degree with other human rights, or it might swallow them up. The Comment implausibly leans toward the latter. The fact that the Comment covers topics as distant as sex education and nuclear nonproliferation is one indicator of that fact. Another is the fact that the Comment states that "States parties should take appropriate measures to address" such things as "pervasive traffic and industrial accidents, degradation of the environment, . . . the prevalence of life-threatening diseases, such as AIDS, tuberculosis and malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness."[128]

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[124] ICCPR, *supra* note 3, pmbl.

[125] General Comment No. 36, *supra* note 110, ¶ 3.

[126] *Cf.* GARDINER, *supra* note 46, at 206 ("The recitals in the preamble are not the appropriate place for stating obligations . . . .").

[127] Further, as the Netherlands pointed out during drafting, "it is unclear what is meant by 'dignity.'" *Netherlands Comments*, *supra* note 104, ¶ 4.

[128] General Comment No. 36, *supra* note 110, ¶ 26. *But see U.S. Observations*, *supra* note 86, ¶¶ 36-38 (discussing text and travaux préparatoires in disputing that the right to life gives rise to obligations of this sort).

While all these are normatively desirable, at some point this reading of the right to life passes another contextual line that the VCLT approach to interpretation would respect, or at least consider. The ICCPR, as its name reflects, is a treaty on civil and political rights. The Committee's interpretation extends far beyond what would ordinarily be considered civil and political rights.

Even if the Committee only understood the right to life with dignity as extending to civil and political rights, however, such a right would not find unequivocal support in the broader context of the Covenant. On one hand, the Covenant guarantees a host of civil and political rights that might be cited to find a right to a particular quality of life. Relying on the other guarantees of the Covenant, one might argue that the right to life includes, for example, the right to a life free from inhumane treatment when detained, or a life of "liberty and security of person."[129] Yet, these guarantees appear in their own articles within the Covenant, suggesting they are not mere manifestations of the right to life.[130] Moreover, many of these guarantees are derogable while the right to life is not.[131] Reading these guarantees into the right to life would thus change their nature in a way inconsistent with the terms of the treaty. In short, context — whether within Article 6 or within the Covenant as a whole — does not support the breadth of the Committee's interpretation of the right to life.

Nor does the object and purpose of Article 6 or of the Covenant.[132] As discussed, Article 6 recognizes "the inherent right to life" while focusing

[129] ICCPR, *supra* note 3, art. 9(1).

[130] As Professor Tobin explains, "[i]nternal system coherence[,]" which is key to persuasiveness in interpretation, "prevents the conception of [a] right . . . as a repository for everything that affects the" enjoyment of that right. Tobin, *supra* note 14, at 38. Thus, while "[i]t is entirely appropriate to identify overlap between one right and other rights within a treaty . . . consistent with the principle of interdependence and indivisibility" of rights, "it is also necessary . . . to delineate . . . the discrete domain of each right" rather than have one right swallow the rest. *Id.*

[131] ICCPR, *supra* note 3, art. 4(2).

[132] As a result, there is no need to consider which object and purpose — if not both — is relevant in treaty interpretation. *See, e.g.*, GARDINER, *supra* note 46, at 210 (arguing that "it is consistent with reading a provision in its context to take account of the provision's object and purpose," providing a separate ground for considering a provision's object and purpose); Schlütter, *supra* note 37, at 278 ("[I]t is now common practice . . . to refer either to the object and purpose of the treaty as a whole, or to the object and purpose of the

on protecting against deprivation of life — especially by the state through capital punishment — rather than on quality of life.[133] The Covenant's ambitions are broader, but again are focused on civil and political human rights, even if these are part of a broader set of indivisible human rights. The Covenant does not attempt to address or advance all aspects of human rights or human dignity.

Beyond ordinary meaning, context, and object and purpose, the international law of treaty interpretation considers "agreement[s] relating to the treaty which [were] made between all the parties in connection with the conclusion of the treaty" as well as instruments "made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[134] The International Covenant on Economic, Social and Cultural Rights might qualify as such an agreement or instrument given the relationship between the ICCPR and ICESCR.[135] The original intent was to codify the Universal Declaration of Human Rights in a single treaty.[136] Given Cold War disagreements, the decision was made to draft two treaties — the ICCPR and ICESCR — that, alongside the Universal Declaration, form the International Bill of Rights.[137] The U.N. General Assembly adopted the two treaties by consensus on the same day.[138] The

individual provision in question, even though the VCLT speaks only of the *treaty*'s object and purpose.").

[133] ICCPR, *supra* note 3, art. 6(1); *see supra* text accompanying notes 115–21.

[134] Vienna Convention, *supra* note 46, art. 31(2)(b).

[135] *See U.S. Observations*, *supra* note 86, ¶ 7 (developing similar arguments based on the ICESCR in contesting General Comment No. 36's interpretive conclusions).

[136] *See* OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 6-7.

[137] *See, e.g.*, *id.* at 7; MÓNICA PINTO, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1 (2021), https://legal.un.org/avl/pdf/ha/icescr/icescr_e.pdf [https://perma.cc/RZS2-KTVE] (discussing the Cold War decision to draft two covenants).

[138] *See supra* notes 3–4; PINTO, *supra* note 137, at 1. The meaning of "conclusion of [a] treaty" is not clear but could include the moment of adoption of the text. *See* GARDINER, *supra* note 46, at 86, 88 (treating "the General Assembly resolution adopting the United Nations Convention on Jurisdictional Immunities of States and Their Property" as "an instrument which was made in connection with the conclusion of the Convention"); *id.* at 241 (reasoning that "the 'Final Act' of a diplomatic conference" could fit "within the description of an instrument made in connection with the treaty's conclusion and is likely to be readily seen as one accepted by the parties as an instrument related to the treaty"); *id.* at 232-35 (discussing what treaty conclusion means). "[A]ll the parties" would have to

two communicate their connectedness by sharing identical preambles and identical first articles, which guarantee self-determination.[139] Their preambles also note the interdependence of civil and political rights and economic, social, and cultural rights, an interdependence that continues to be recognized.[140] From there, however, the Covenants address different types of rights and impose different obligations on states with regard to those rights.

The ICESCR, for example, recognizes rights such as "the right to work," to "[a] decent living," to "[r]est, leisure and . . . periodic holidays with pay," "to education," "[t]o take part in cultural life," and "[t]o enjoy the benefits of scientific progress and its applications."[141] All of these rights fit within a right to dignity. Yet if such a right were already embodied in the ICCPR right to life, there would have been no need to articulate these rights and certainly no need to do so in a separate treaty. Moreover, the obligations states assume under the ICESCR are different than under the ICCPR. Under the ICCPR, "[e]ach State Party . . . undertakes to respect and to ensure . . . the rights recognized in the . . . Covenant."[142] Under the ICESCR, "[e]ach State Party undertakes to take steps, individually and through international assistance and co-operation, . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant by all appropriate means."[143] This language recognizes that

refer to the states that adopted the ICCPR and ICESCR rather than those that ultimately ratified, as there is not complete overlap between the states that have consented to the ICCPR and ICESCR. *But cf.* GARDINER, *supra* note 46, at 237 (suggesting that "parties" is best "read as looking at the position when the treaty is being interpreted after entry into force and is being applied in treaty relations between the parties").

[139] *Compare* ICCPR, *supra* note 3, pmbl., art. 1, *with* ICESCR, *supra* note 4, pmbl., art. 1.

[140] *See* ICCPR, *supra* note 3, pmbl. (asserting that "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights"); ICESCR, *supra* note 4, pmbl. (same); OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 7 ("The preambles to both [Covenants] recognize the interdependence of all human rights, stating that the human rights ideal can be achieved only if conditions are created whereby everyone may enjoy their economic, social, cultural, civil and political rights.").

[141] ICESCR, *supra* note 4, arts. 6(1), 7(a)(ii), (d), 13(1), 15(1)(a)-(b).

[142] ICCPR, *supra* note 3, art. 2(1).

[143] ICESCR, *supra* note 4, art. 2(1).

states may not be able to secure the guaranteed rights on their own or at once. Reading quality of life obligations from the ICESCR into the ICCPR thus changes the nature of the obligations for states that have ratified the ICESCR and imposes those obligations in a more demanding form on states that have not.

Subsequent state practice and rules of international law similarly do not support the Committee's broad interpretation of the right to life. The VCLT requires that interpretation "take[] into account . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" as well as "any relevant rules of international law applicable in the relations between the parties."[144] States have, subsequent to the ICCPR, adopted a number of human rights treaties.[145] For each, states have created at least one international committee to oversee compliance with the treaty.[146] In these efforts, which have taken years and decades,[147] states have demonstrated that they did not understand or intend paragraph 1 of Article 6 of the ICCPR to guarantee all human rights that might comprise a right to life with dignity. States see these later treaties are not mere refinements or restatements of a right to life with dignity in Article 6, paragraph 1, but advancements in the recognition of fundamental human rights. Indeed, not all states that have ratified the ICCPR have ratified these later treaties.[148]

Finally, VCLT Article 32 permits recourse to "supplementary means of interpretation," including the treaty's travaux préparatoires, "to confirm the meaning resulting from the application of Article 31" or when the

[144] Vienna Convention, *supra* note 46, art. 31(3)(b)-(c).

[145] While the International Convention on the Elimination of All Forms of Racial Discrimination was adopted before the ICCPR and ICESCR, the remaining six core human rights treaties were adopted after. *See* OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 4-6.

[146] *See id.* at 19-20.

[147] *See id.* at 2 (noting that "the nine core international human rights treaties currently in force and their optional protocols. . . . are the product of more than half a century of continuous elaboration since the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948").

[148] To review states' ratification records, see *Status of Ratification Interactive Dashboard*, OHCHR, https://indicators.ohchr.org/ (last visited July 14, 2022) [https://perma.cc/457A-R3S3].

considerations in Article 31 "lead[] to a result which is manifestly absurd or unreasonable."[149] The suggestion from this last provision is that the international law of treaty interpretation seeks to avoid unreasonable results. The implication of finding a right to life with dignity in Article 6, paragraph 1 approaches, rather than avoids, the unreasonable by opening the possibility that all human rights, present and future, fall to one degree or another within one paragraph of one article of one of the human rights covenants.[150] Similarly, the travaux préparatoires of Article 6 confirm a common understanding that the right to life was meant to prevent termination of life rather than to secure a particular condition of life. At times, for example, the proposed article was framed as a prohibition on deprivation of life except pursuant to a qualifying criminal sentence.[151] Much of the discussion similarly focused on whether to include a list of circumstances in which "death," "killing," or the "taking of life" would not violate the right to life.[152] Such a list was not incorporated in the face of concerns that it necessarily would be non-exhaustive and would detract from the fundamental character of the right to life.[153] Yet the focus was unquestionably on the loss of life rather than on ensuring quality of life.

In short, applying the international law of treaty interpretation to the ICCPR's right to life reveals that the Committee's interpretation of the right, and the implications of that interpretation, extend beyond what the international law of treaty interpretation can support. Instead, the Committee's interpretation reflects commendable, but also problematic, normative goals.

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[149] Vienna Convention, *supra* note 46, art. 32(b). The travaux should be used to "illuminate a common understanding of the agreement, not unilateral hopes and inclinations." GARDINER, *supra* note 46, at 119.

[150] *See* Schlütter, *supra* note 37, at 271 ("As every human rights treaty is limited to a particular set of rights, any interpretation which goes beyond that scope is questionable, and likely to be illegitimate.").

[151] *See* MARC J. BOSSUYT, GUIDE TO THE "*TRAVAUX PRÉPARATOIRES*" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 113-15, 120 (1987).

[152] *See id.* at 114-18, 124.

[153] *See id.* at 115, 117, 121-22, 124.

2. Abortion

The Committee's particular conclusion that the right to life includes a right to abortion likewise departs from the international law of treaty interpretation.[154] The scope of the right the Committee recognizes is not entirely clear. On the one hand, the right is not unfettered: "States parties may adopt measures designed to regulate voluntary termination of pregnancy."[155] On the other hand, the right is quite broad. The Committee explains that states parties have a duty "to ensure that women and girls do not have to resort to unsafe abortions," and that states "should remove barriers to effective access by women and girls to safe and effective abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers."[156] Whatever the ultimate contours of the right to abortion in the

[154] *See* Thomas Finegan, *International Human Rights Law and the "Unborn": Texts and Travaux Préparatoires*, 25 TUL. J. INT'L & COMP. L. 89, 122 (2016) (noting that the VCLT "methodology reveals that there is nothing in the ICCPR to justify construing abortion as a human right"). *Cf. id.* at 125 (asserting that the Committee on the Elimination of All Forms of Discrimination Against Women likewise fails to "make any kind of concerted effort to adopt a VCLT interpretative methodology for the purposes of evaluating the claim of a human right to abortion under" the Convention on the Elimination of all Forms of Discrimination Against Women).

[155] General Comment No. 36, *supra* note 110, ¶ 8.

[156] *Id.*; *see also* U.N. Hum. Rts. Comm., General Comment No. 28, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter General Comment No. 28] ("When reporting on the right to life protected by article 6, States parties should . . . . give information on any measures taken by the State . . . to ensure that [women] do not have to undergo life-threatening clandestine abortions."). The Committee has cited other provisions of the ICCPR, such as articles 7 (prohibiting "torture or . . . cruel, inhuman or degrading treatment or punishment," ICCPR, *supra* note 3, art. 7), and 24 (requiring special protection of children, *see id.* art. 24), in support of certain aspects of its abortion-related interpretation. *See* General Comment No. 28, *supra*, ¶ 11; General Comment No. 36, *supra* note 110, ¶ 8; *see also* Andrea Stevens, *Pushing a Right to Abortion Through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment*, 6 PENN. ST. J.L. & INT'L AFFS. 71, 78-102 (2018) (discussing the range of rights that treaty bodies and other actors have relied upon to support a right to abortion). *But cf.* Stevens, *supra*, at 125-29 (arguing that some of these other rights might also be cited to prohibit abortion). This Article does not take up every aspect of the Committee's abortion-related interpretation. Instead, to evaluate the Committee's general approach to treaty interpretation, the Article focuses on the Committee's core interpretation of the right to life as including a right to abortion.

Committee's view, interpreting the right to life to include a right to abortion is difficult to square with the VCLT approach to interpretation.

Indeed, at least some considerations under the VCLT support a right to life for the unborn as opposed to a right to abortion.[157] The language of life typically reflects opposition to abortion. The two sides of the abortion debate are routinely referred to as "pro-life" and "pro-choice," including internationally. The ordinary meaning of "the right to life," then, would suggest prohibition of abortion rather than abortion rights. Moreover, the terms "every" and "inherent" may suggest that the unborn also possess the right to life.[158] Even if the terms do not reach all the unborn, they could easily reach those who may viably live outside the womb. National laws lend support to the judgment that humanity begins in the womb as most restrict abortion even before viability.[159]

Context also supports a conclusion that the right to life extends to the unborn. When the mother's life is at stake, the language of Article 6, paragraph 1 prohibiting arbitrary deprivation of life might support either a right to life for the unborn or access to abortion. Other, contextual considerations are less equivocal. As noted, the right to life appears in paragraph 1 of Article 6. Four paragraphs later in Article 6, the Covenant dictates that a "[s]entence of death . . . shall not be carried out on a pregnant woman."[160] This prohibition suggests that something more than the woman's life is at stake when a pregnant woman faces execution. The prohibition is absolute; execution is not consistent with the Covenant even if the woman would choose to have her unborn child die

[157] *See* Stevens, *supra* note 156, at 73 (asserting that "the ICCPR and other U.N. human rights treaties are more easily interpreted to protect the rights of unborn human beings than a mother's right to abortion, except in situations where the mother requires life-saving treatment that results in the loss of her child").

[158] ICCPR, *supra* note 3, art. 6(1).

[159] *See* Claire Cain Miller & Margot Sanger-Katz, *On Abortion Law, the U.S. Is Unusual. Without* Roe*, It Would Be, Too*, N.Y. TIMES: THEUPSHOT, https://www.nytimes.com/2022/01/22/upshot/abortion-us-roe-global.html (last updated May 4, 2022) [https://perma.cc/VW6L-E9ED] (noting that few countries "allow abortions for any reason beyond 15 weeks of pregnancy," which precedes viability, though permissible grounds beyond that point may be broad).

[160] ICCPR, *supra* note 3, art. 6(5). For similar reasoning based on this provision, see, for example, Stevens, *supra* note 156, at 122-23.

with her. The travaux préparatoires indicate that "[t]he principal reason for [this provision] . . . was to save the life of an innocent unborn child."[161]

The state agreement reflected in the ICESCR also contradicts the Committee's interpretation. The ICESCR recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[162] Notably, the steps the Covenant identifies to achieve that right include those necessary to increase the prospect of, rather than prevent, live birth.[163] If the ICCPR right to life included a right to abortion, the ICESCR might have included a qualification here.

Nor has subsequent state practice or international law confirmed a right to abortion. The International Law Commission maintains, as a general matter, that "the weight [to be given] subsequent practice [in treaty interpretation] . . . depends, *inter alia*, on whether and how it is repeated" as well as the "consistency and breadth" of the practice.[164] Moreover, the subsequent practice must occur "in the application of the

[161] Carlos Manuel (Rapporteur), Draft International Covenants on Human Rights, 12th Sess. at 36, U.N. Doc. A/3764 (1957). Some states believed the death sentence could not be "carried out before the child was born. . . . [O]thers thought that the death sentence should not be carried out at all if it concerned a pregnant woman" as "[t]he normal development of the unborn child might be affected if the mother were to live in constant fear that, after the birth of her child, the death sentence would be carried out." *Id.* In either case, concern for the unborn child motivated a special prohibition on execution of pregnant women. The concern for the unborn manifested in this provision was cited to support a right to life for the unborn during the drafting of Article 6. *See id.* at 34. Another possible basis for the provision would be the additional pain to the mother or family from the execution of the unborn child. *See* General Comment No. 36, *supra* note 110, ¶ 49 (asserting that states should "refrain from executing . . . persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families"); Stevens, *supra* note 156, at 123 (explaining that a draft of General Comment No. 36 justified the prohibition on the execution of pregnant women by reference to the interests and rights of family members, such as the father and fetus). This rationale also turns on the value of the unborn life.

[162] ICESCR, *supra* note 4, art. 12.

[163] *Id.*; *see also* Finegan, *supra* note 154, at 111, 125 (also citing this provision in support of rights of the unborn). General Comment No. 36 similarly declares that "[s]tates parties should . . . develop strategic plans . . . for improving access to medical examinations and treatments designed to reduce maternal and infant mortality". General Comment No. 36, *supra* note 110, ¶ 26.

[164] Int'l L. Comm'n, *supra* note 49, at 70, 72-74; *see also* GARDINER, *supra* note 46, at 259 (noting "that practice requires an element of constancy").

treaty" being interpreted.[165] In addition, for subsequent practice to yield interpretive agreement as required by the VCLT, "there must be a common understanding regarding the interpretation of a treaty which the parties are aware of and accept."[166] "Conflicting positions regarding interpretation expressed by different parties to a treaty preclude the existence of an agreement."[167] Indeed, even "equivocal conduct by one or more parties will normally prevent the identification of an agreement."[168] The agreement must be general among the parties, even if the subsequent practice is not.[169]

Even at the time of the drafting of General Comment No. 36, states disagreed on whether the right to life includes a right to abortion. For example, the Netherlands "support[ed] the Committee's view that states parties should provide access to safe abortion,"[170] while the United States maintained that "any issues concerning access to abortion . . . are outside the scope of Article 6."[171] State practice continues to reflect disagreement regarding abortion.[172] Many countries of the world permit abortion under

[165] Vienna Convention, *supra* note 46, art 31(3)(b); *see also* Int'l L. Comm'n, *supra* note 49, at 32.

[166] Int'l L. Comm'n, *supra* note 49, at 75; *see also id.* at 43 ("[T]he identification of . . . subsequent practice [under the VCLT] requires particular consideration of the question of whether the parties, by . . . a practice, have taken a position regarding the interpretation of a treaty or whether they were motivated by other considerations.").

[167] *Id.* at 76.

[168] *Id.*; *see also* GARDINER, *supra* note 46, at 269-70 (explaining the widely held view that practice must "be 'concordant', that is identical or sufficiently close to identical as to show that the parties have demonstrated their agreement"); *id.* at 279 (noting that to qualify as a subsequent practice, "there must be no treaty party dissenting from the practice").

[169] *See* Int'l L. Comm'n, *supra* note 49, at 79. As Gardiner puts it, "participation of all the parties in the practice is not required. What is required is their manifested or imputable agreement." GARDINER, *supra* note 46, at 267; *see also id.* at 270 (there need not have "been abundant practice by all parties"; "[i]t is sufficient if there is practice of one or more parties and good evidence that the other parties have endorsed the practice").

[170] *Netherlands Comments*, *supra* note 104, ¶ 7.

[171] *U.S. Observations*, *supra* note 86, ¶ 7.

[172] *See* Stevens, *supra* note 156, at 74 & n.15, 78, 103-04, 116-17, 129 (noting both state acceptance and rejection of the embrace of a right to abortion by treaty bodies and other UN institutions as well as divergent state practice in the regulation of abortion).

certain circumstances.[173] Yet many do not, notwithstanding political and economic pressure from states that do.[174] Mapping the world's abortion laws reveals that abortion restrictions remain prominent in the Global South.[175] Even in the north, gestational limits apply.[176] Similarly, while there are arguments that broad references to "sexual and reproductive health" in international instruments include a right to abortion, these arguments are contested.[177] In short, like the others interpretive considerations outlined in the VCLT, neither subsequent state practice nor international law support an interpretation of the right to life that recognizes a right to abortion.

The VCLT permits recourse to a treaty's travaux préparatoires to confirm interpretations reached under the considerations of Article 31. Here, the travaux verify that the right to life in Article 6 does not include a right to abortion. At least in the late 1940s when negotiations began, "the majority of laws punished cases of abortion."[178] During the lengthy negotiation of Article 6, various states supported language affirming that the right to life begins at conception or expressly protecting the right to life of the unborn.[179]

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[173] *See* Miller & Sanger-Katz, *supra* note 159 (mapping abortion restrictions around the world).

[174] *See id.*

[175] *See id.*

[176] *See, e.g.*, Adam Liptak, *Conservatives, Often Wary of Foreign Law, Look Abroad in Abortion Case*, N.Y. TIMES (Oct. 4, 2021), https://www.nytimes.com/2021/10/04/us/politics/abortion-conservatives-foreign-law.html [https://perma.cc/B8K4-LM5E] (noting that as of 2017, only 7 of 198 countries permit elective abortions beyond 20 weeks).

[177] *See, e.g.*, *Joint Statement Promoting Women's Health and Strengthening the Family*, U.S. MISSION TO INT'L ORGS. IN GENEVA (Nov. 11, 2020), https://geneva.usmission.gov/2020/11/11/joint-statement-promoting-womens-health-and-strengthening-the-family-wha-73/ [https://perma.cc/C23V-RQKZ] ("Reaffirm[ing] that there is no international right to abortion . . . .").

[178] U.N. ESCOR, Comm'n on Hum. Rts., 2d Sess., 1st mtg. at 6, U.N. Doc. E/CN.4/AC.3/SR.1 (Dec. 5, 1947) [hereinafter Summary Rec. of the First Meeting] (statement of the United States representative).

[179] *See* Drafting Comm. on an Int'l Bill of Hum. Rts., Rep. of the Drafting Comm. to the Comm'n on Hum. Rts., 1st Sess. at 74, U.N. Doc. E/CN.4/21 (Jul. 1, 1947) (proposed Chilean text stating that "[u]nborn children . . . shall have the right to life"); *id.* (proposed Lebanese text stating that "[e]veryone has the right to life and bodily integrity from the moment of conception"); *id.* at 82 (proposed Lebanese text stating that "[i]t shall be unlawful to deprive any person, from the moment of conception, of his life or bodily

States responded in a variety of ways. Yugoslavia "agreed in principle" but asserted that there "was no use stating the principle [that life begins

integrity"); U.N. ESCOR, Comm'n on Hum. Rts., 2d Sess., 2d mtg. at 2, U.N. Doc. E/CN.4/AC.3/SR.2 (Dec. 5, 1947) [hereinafter Summary Rec. of the Second Meeting] (Lebanese proposal to replace "from the moment of conception" with "at any stage of his human development" in the Lebanese text); Comm'n on Hum. Rts., Draft Int'l Covenant on Hum. Rts., U.N. Doc. E/CN.4/386 (Mar. 30, 1950) (Lebanese proposed language to recognize the sacredness of life "from the moment of conception"); Comm'n on Hum. Rts., Draft Int'l Covenant on Hum. Rts., U.N. Doc. E/CN.4/398 (Apr. 3, 1950) (same); U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 140th mtg. at 6, U.N. Doc. E/CN.4/SR.140 (Apr. 7, 1950) [hereinafter Summary Rec. of the 140th Meeting] (Lebanese amendment to recognize the sacredness of life from conception offered tentatively given the fact that it "might not be a feasible matter for legislation by some governments"); U.N. Gen. Assembly, Draft Int'l Covenants on Hum. Rts., U.N. Doc. A/C.3/L.654 (Nov. 18, 1954) (proposed five-Power amendment by Belgium, Brazil, El Salvador, Mexico, and Morocco to state that "[f]rom the moment of conception, [the right to life] shall be protected by law"); U.N. GAOR, 12th Sess., 811th mtg. at 246, U.N. Doc. A/C.3/SR.811 (Nov. 14, 1957) (statement of the El Salvadorian representative agreeing with Belgium on "the need to protect the life of the unborn child" and asserting that while the right to life attaches at birth "it could be protected during the pregnancy of the mother"); U.N. GAOR, 12th Sess., 812th mtg. at 249, U.N. Doc. A/C.3/SR.812 (Nov. 15, 1957) (statement of the Mexican representative, agreeing with Belgium and El Salvador "that human beings should be protected even before birth, which would inter alia imply the prohibition of voluntary abortion"); U.N. GAOR, 12th Sess., 813th mtg. at 253, U.N. Doc. A/C.3/SR.813 (Nov. 18, 1957) (statement of the Belgian representative, supporting the five-Power amendment "as a matter of natural logic"); U.N. GAOR, 12th Sess., 815th mtg. at 265, U.N. Doc. A/C.3/SR.815 (Nov. 20, 1957) [hereinafter Draft Int'l Covenants on Hum. Rts. 815th Meeting] (statement of the Brazilian representative, supporting the five-Power amendment and expressing her belief "that there could [not] be much disagreement on the principle"); *id.* at 267 (statement of the Ecuadorian representative, supporting the five-Power amendment as it "placed importance upon the right to life from the moment of conception"); U.N. GAOR, 12th Sess., 821st mtg. at 293, U.N. Doc. A/C.3/SR.821 (Nov. 26, 1957) [hereinafter Draft Int'l Covenants on Hum. Rts. 821st Meeting] (statement of the Belgian representative, lamenting the rejection of the five-Power amendment and the United Nations' apparent lack of "concern for the unborn child"); Manuel, *supra* note 161, at 29-30, 33-34, 38 (summarizing the history of the five-Power amendment, including arguments for and against, as well as the final vote); *see also* Comm'n on Hum. Rts., Summary Rec. of the Second Meeting, *supra*, at 2 (International Federation of Christian Trade Unions proposing treaty language stating that "[n]o person shall be subjected to . . . any destruction of his foetal being"). *But cf.* U.N. ESCOR, Comm'n on Hum. Rts., 16th Sess., 149th mtg. at 4, U.N. Doc. E/CN.4/SR.149 (Apr. 17, 1950) [hereinafter Summary Rec. of the 149th Meeting] (statement of the Chilean representative, opposing an effort to recognize the sacredness of life "from the moment of conception," as "[t]he rights of the unborn human being were not universally recognized").

before birth] without inserting a clause to ensure implementation."[180] China believed that language guaranteeing life before birth "was superfluous since, as the mother was protected, the child would also be protected from its conception to its birth" and that abortion could be addressed by inserting a prohibition on unlawful abortions into an article of the Covenant prohibiting physical mutilation.[181] Various states urged "that some countries would find it difficult to ratify the Convention" with language prohibiting abortion.[182] Others noted that such language

[180] Summary Rec. of the Second Meeting, *supra* note 179, at 3 (statement of the Yugoslav representative); *see also* U.N. GAOR, 12th Sess., 818th mtg. at 279, U.N Doc. A/C.3/SR.818 (Nov. 22, 1957) [hereinafter Draft Int'l Covenants on Hum. Rts. 818th Meeting] (statement of the Yugoslav representative, "endors[ing] the provision for the protection of the right to life 'from the moment of conception' . . . although the language used might be open to criticism on legal and technical grounds"); Summary Rec. of the Second Meeting, *supra* note 179, at 3 (statement of the Chairman, Lord Dukeston of the United Kingdom, that a prohibition on fetal destruction "could not be included in such a way as to ensure legal implementation").

[181] Summary Rec. of the First Meeting, *supra* note 178, at 6 (statement of the Chinese representative); *see also* Summary Rec. of the Second Meeting, *supra* note 179, at 3 (statement of the Chinese representative reiterating "that the unborn infant was . . . a part of its mother"). *Cf.* Draft Int'l Covenants on Hum. Rts. 818th Meeting, *supra* note 180, at 280 (statement of the Pakistani representative, finding the provision protecting the right to life from conception to be "pointless").

[182] U.N. ESCOR, Comm'n on Hum. Rts., 2d Sess., 9th mtg. at 3, U.N. Doc. E/CN.4/AC.3/SR.9 (Dec. 10. 1947) [hereinafter Summary Rec. of the Ninth Meeting] (statement of United States Observer); *see* also U.N. ESCOR, Comm'n on Hum. Rts., 2d Sess., 35th mtg. at 13, U.N Doc. E/CN.4/SR/35 (Dec. 12, 1947) [hereinafter Summary Rec. of the Thirty-Fifth Meeting] (statement of Chairman of the Commission on the Status of Women, noting that the laws of many civilized countries permitted abortion in clearly specified cases "to preserve the life of the woman" and that a failure to recognize situations of legal abortion "would prevent the ratification of the Convention by certain countries"); *id.* at 15 (statement of the United Kingdom representative, fearing that, without recognition that national law may permit abortion in certain circumstances, "many states, such as the United Kingdom, the Scandinavian countries and possibly some Federal States of the United States of America, where this principle was already established by law, would have difficulty ratifying the Convention"); Draft Int'l Covenants on Hum. Rts. 815th Meeting, *supra* note 179, at 268 (statement of the United Kingdom representative, asserting that "[l]egislation on the subject [of abortion] was devised on different principles in different countries and it was therefore inappropriate to include . . . in an international instrument"). *But cf.* Summary Rec. of the Thirty-Fifth Meeting, *supra*, at 16 (statement of the Panamanian representative noting that a provision recognizing that abortion might be permissible in certain circumstances "would prevent [many states] . . . from signing this Convention"); U.N. GAOR, 12th Sess., 817th mtg. at

would "embrace antenatal life, whereas all the other provisions of the Covenants related to post-natal life only"[183]; that such language would involve "the delicate question of the rights and duties of the medical profession"[184]; that "[i]t was impossible for the State to determine the moment of conception and accordingly to protect life from that moment"[185]; and that a provision protecting life beginning at conception "was too vague."[186] Notwithstanding the various reasons for opposing language protecting life at conception, no proposal was made to recognize a right to abortion. The closest the negotiations came was a proposal to state that abortion is illegal except in limited circumstances, namely, where "permitted by law and . . . done in good faith in order to preserve the life of the mother or on medical advice to prevent the birth of a child of unsound mind from parents suffering from mental disease, or in a case where the pregnancy is the result of a rape."[187] No proposal

277, U.N Doc. A/C.3/SR.817 (Nov. 22, 1957) [hereinafter Draft Int'l Covenants on Hum. Rts. 817th Meeting] (statement of the El Salvadorian representative that "many national legislations afforded protection to the unborn child, [and] the Covenant should do no less").

[183] Draft Int'l Covenants on Hum. Rts. 815th Meeting, *supra* note 179, at 268 (statement of the United Kingdom representative). *But see* Finegan, *supra* note 154, at 104 (noting the falsity of this assertion given the prohibition on execution of pregnant women).

[184] *See* Draft Int'l Covenants on Hum. Rts. 815th Meeting, *supra* note 179, at 268 (statement of the United Kingdom representative, asserting that paragraph 1 of Article 6 "consider[s] the delicate question of the rights and duties of the medical profession"); *see also* Summary Rec. of the 149th Meeting, *supra* note 179, at 5 (statement of the United Kingdom representative, opposing language recognizing the sacredness of life from conception as "that text . . . raised a great many legal, medical and moral problems"). *But cf.* Summary Rec. of the Thirty-Fifth Meeting, *supra* note 182, at 16 (statement of the Panamanian representative that a provision recognizing the permissibility of abortion in certain circumstances would be irrelevant "in a Convention on broad international questions" since it touched on "a highly controversial point relating to forensic medicine").

[185] Draft Int'l Covenants on Hum. Rts. 817th Meeting, *supra* note 182, at 278 (statement of the Saudi Arabian representative).

[186] U.N. GAOR, 12th Sess., 819th mtg. at 283, U.N Doc. A/C.3/SR.819 (Nov. 25, 1957) (statement of the Ukrainian Soviet Socialist Republic representative).

[187] Summary Rec. of the Ninth Meeting, *supra* note 182, at 3 (proposal of the United Kingdom Legal Adviser); *see also id.* (statement of Lebanon that, if countries permitted abortion, they did so in "only 3 cases"); Comm'n on Hum. Rts., Rep. of the Working Party on an Int'l Convention on Hum. Rts., 2d Sess. at 6, U.N. Doc. E/CN.4/56 (Dec. 11, 1947)

identifying situations in which abortion was permissible made it into the final text. The travaux, then, at best indicate that abortion is not prohibited by the ICCPR; they do not demonstrate that the Covenant ensures a right to abortion through the right to life.[188]

As with the breadth of the Committee's interpretation of the right to life, the inclusion of a right to abortion appears to have been motivated by normative ends. Indeed, even if the right to life were to embrace a measure of health, it would not be clear that abortion would fit within that measure. As discussed, the right to life in the Covenant is focused on deprivation.[189] The World Health Organization reports (albeit based on incomplete data[190]) that the ten leading causes of death among

(draft convention embodying the proposal of the United Kingdom Legal Adviser); Summary Rec. of the Thirty-Fifth Meeting, *supra* note 182, at 14 (statement of the Indian representative, supporting the fact that "exceptions [to the right to life] might be made for 'unborn persons'"); Summary Rec. of the 140th Meeting, *supra* note 179, at 12 (statement of the Indian representative, identifying abortion as permissible, notwithstanding the right to life, "in order to save the life of the mother"); Draft Int'l Covenants on Hum. Rts. 821st Meeting, *supra* note 179, at 294 (statement of the Canadian representative that Canada could not support a proposal "that might be interpreted as prohibiting any measure which sought to protect the mother, when her life was in danger, to the detriment of the unborn child"). *Cf.* Draft Int'l Covenants on Hum. Rts. 818th Meeting, *supra* note 180, at 279 (statement of the Mexican representative, asserting that protection of the right to life from conception "would not preclude States wishing to do so from authorizing any medical intervention that might be necessary in certain circumstances, for example to save the mother's life"). Others strongly opposed recognition of instances in which abortion could be permitted by national law. *See* Summary Rec. of the Thirty-Fifth Meeting, *supra* note 182, at 12 (statement of International Federation of Christian Trade Unions); *id.* at 12-13 (statement of Chilean representative, describing the language originally proposed by the United Kingdom Legal Adviser as "a shameful provision which should be deleted"); *id.* at 16 (statement of the Chilean representative, reaffirming Chile's position); *id.* at 16-17 (statement of the Panamanian representative, opposing the inclusion of the provision originally proposed by the United Kingdom Legal Adviser in both the text and commentary of the Convention).

[188] *Cf.* Finegan, *supra* note 154, at 107-11, 122, 125-26 (analyzing the text and travaux préparatoires to find support for a "right to life of the unborn to some indeterminate extent" and no room for "a right to abortion," while acknowledging that the travaux could support a neutral stance on the right to life of the unborn).

[189] *See supra* Section III.B.1.

[190] *See About the WHO Mortality Database*, WORLD HEALTH ORG., https://platform.who.int/mortality/about/about-the-who-mortality-database (last visited Aug. 19, 2022) [https://perma.cc/Q5AW-WFTY].

women of all ages in 2019 were (from most to least deadly): ischaemic heart disease, stroke, chronic obstructive pulmonary disease, lower respiratory infections, Alzheimer disease and other dementias, neonatal conditions,[191] diarrhoeal diseases, diabetes mellitus, hypertensive heart disease, and kidney diseases.[192] In this context, singling out abortion for treatment might reflect policy preferences rather than a desire to protect life from its greatest threats.

The Committee's reasoning in finding a right to abortion similarly appears to be selectively applied. The Committee asserts that "States parties [have a] . . . duty to ensure that women and girls do not have to resort to unsafe abortions."[193] The general principle seems to be that states must prevent recourse to unsafe activities to which people will resort even if the activity is prohibited. Based on this principle, the Committee might have concluded that states must provide safe needles to drug users who would otherwise reuse needles. The full implications of this principle are unclear, but its application to abortion alone may reflect reasoning to a normative end.

C. Costs and Benefits of the Committee's Approach

Of course, a normative approach to treaty interpretation is not necessarily bad. It has both pros and cons. While much could be said of the advantages and disadvantages of a normative approach, this Section attempts to distill key arguments. The principal benefit is the development of human rights through the recognition of new or enlarged obligations and protections.[194] There is certainly room to expand on the

[191] "[N]eonatal conditions . . . includes birth asphyxia and birth trauma, neonatal sepsis and infections, and preterm birth complications." *Leading Causes of Death and Disability 2000-2019: A Visual Summary*, WORLD HEALTH ORG., https://www.who.int/data/stories/leading-causes-of-death-and-disability-2000-2019-a-visual-summary (last visited Aug. 19, 2022) [https://perma.cc/V9LR-M8HU] (emphasis omitted).

[192] *Id.*

[193] General Comment No. 36, *supra* note 110, ¶ 8.

[194] *See* SHANY, *supra* note 22, at 124 (noting that norm development by an international court "may promote the broad agenda of the legal regime in which the relevant international court is embedded"); *id.* at 143-44, 153 (suggesting that legitimacy turns in part on the justice of decisions rendered, while recognizing that one's notion of justice can be influenced by one's interests).

rights enshrined in the ICCPR, especially as technological and other developments threaten gaps in human rights protection.[195] Responding through treaties or customary international law takes time, if successful at all.[196] Certain states may support but others oppose new rights or understandings. As a result, the extension of human rights through normative interpretation is welcomed by many constituencies,[197] such as human rights advocates and institutions, who may then use the interpretation to push for change. To the extent states respond positively, human rights may evolve not only in principle but in practice.[198] Yet there are costs to expanding interpretations of the ICCPR based on normative goals or preferences.

The rule of law — which is both a presumed goal behind the creation of international tribunals[199] and a principle that applies to international organizations[200] — suffers when expert theories, goals, or preferences supplant governing interpretive rules.[201] International law's content may

[195] *See generally* Crootof, *supra* note 61, at 239 (noting that "treaty regimes that cannot accommodate the shifting needs of states parties risk becoming irrelevant as circumstances and customs change").

[196] *See, e.g.*, *id.* at 247-52 (discussing the difficulty of modifying multilateral treaties through consent); Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1292 (2005) (noting that "treaties are considered harder to amend than contracts or statutes[,]" and perhaps even than the Constitution).

[197] *Cf.* SHANY, *supra* note 22, at 138-39, 157 (explaining that an international court's legitimacy can be strong with some but not other constituencies).

[198] *See id.* at 123 (observing that, even if the states parties to a dispute do not comply with an international court's judgment, the judgment "may generate new norms, or clarify existing norms, and thus affect the long-term practices of third parties").

[199] *See id.* at 40 (in addition to supporting the norms embodied in their particular treaties, "[o]ne could argue that . . . international courts . . . were created as part of an ideology-driven effort to strengthen the rule of law in international affairs").

[200] *See* G.A. Res. 67/1, ¶ 2 (Nov. 30, 2012) (recognizing "that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions").

[201] *See, e.g.*, Mechlem, *supra* note 11, at 909-10 (asserting that treaty bodies' failure to apply "a legal method of interpretation," namely, the VCLT, undermines "the rule of law"). Prominent aspects of the rule of law include "predictability of judicial decision-making" and "legal clarity." Schlütter, *supra* note 37, at 270.

become less clear and predictable,[202] even within a tribunal and certainly between tribunals.[203] A sense that international law is the work of an elite corps creeps in. Reliance interests may be upset, and both perceptions of legitimacy[204] and persuasiveness decline.[205] Noncompliance may result.[206] For these and other reasons, states may become more hesitant

[202] *See* Mechlem, *supra* note 11, at 910, 940, 946 (asserting that "legal certainty," predictability, and reproducibility suffer when the rules of treaty interpretation are not followed).

[203] *See id.* at 944 (noting that a failure to follow the VCLT can lead to inconsistency, even within the same treaty body); Pauwelyn & Elsig, *supra* note 49, at 9 (asserting that "value-based interpretation[, even interpretation focused on the normative goals of the treaty,] is probably the interpretative method that risks the most fragmentation or conflict between tribunals").

[204] Of course, legitimacy can mean many things. *See* SHANY, *supra* note 22, at 138-40; *see also* Schlütter, *supra* note 37, at 269 (legitimacy "is a strongly contested concept," but "[a] common view is that the concept is concerned with the acceptance and justification of authority of international institutions"). Legitimacy may refer to "the actual acceptance of authority by a relevant constituency." SHANY, *supra* note 22, at 138. Acceptance of the Committee's authority may decrease among constituencies that disagree with the Committee's failure to follow the law of treaty interpretation or its resulting normative conclusions. *See id.* at 156. Legitimacy might also refer to "justified authority." *Id.* at 139. Legality, among other things, can influence whether an exercise of authority is justified. *Id.* at 140. As a result, departure from the law of treaty interpretation may also decrease the Committee's legitimacy. *See id.* at 143-44. The legal indeterminacy reflected in normative interpretations might as well. *See id.* at 140 n.12.

The impacts on legitimacy caused by normative interpretation might also be expressed in terms of "the three categories of legitimacy assessment appertaining to specific . . . institutions: source, process, and outcome." *Id.* at 141. From the perspective of parties to a treaty, "norms derived from judicial discretion enjoy lesser source legitimacy than norms deriving from state consent." *Id.* at 156. Process legitimacy depends on adherence to proper procedure, *id.* at 141-43, which arguably does not occur when the Committee neglects the international rules of treaty interpretation. And "states may regard interpretations that conflict with deeply held convictions on the proper balance that must be struck between competing values or on who should be striking such a balance as having limited outcome legitimacy." *Id.* at 156.

[205] *See* Mechlem, *supra* note 11, at 908, 922, 924, 935-36, 946 (emphasizing how the failure to follow "an appropriate and accepted method of interpretation" — i.e., the VCLT — undermines interpretive legitimacy and persuasiveness).

[206] *See id.* at 908 (concluding that the lack "of an appropriate and accepted [interpretive] method . . . . make[s] it easier for states and other actors to ignore [treaty bodies'] output"); Tobin, *supra* note 14, at 248 (acknowledging "that if the potential elasticity in the meaning of any term is stretched too far, the resulting discordance with states' expectations is likely to result in disengagement and a lack of implementation");

to enter international agreements or to submit to the jurisdiction of international institutions.[207] At a minimum, the transaction costs of negotiating new agreements and dispute resolution regimes may increase. In short, expanding human rights obligations through novel interpretive approaches may give rise to normative gains, but corresponding losses for the Committee and for human rights generally.

IV. RECOMMENDATIONS: ACCOMMODATING NORMATIVE DEVELOPMENT AND INTERNATIONAL LAW COMPLIANCE

In light of the costs of a normative approach to treaty interpretation, the Committee would benefit from following the VCLT in its interpretive efforts. Of course, it is more than a matter of wisdom, it is also a matter of law. Yet the Committee need not sacrifice its normative ambitions or contributions entirely. This Part proposes a path to combine a VCLT approach to Covenant interpretation with a normative role for the Committee through the three main functions the Committee performs.

Although individual communications may be the primary context in which the Committee interprets the ICCPR, they are poorly suited to that role as a practical matter. The Committee's views on individual communications provide a limited opportunity to engage in robust treaty interpretation. The Committee's views follow a formula that includes summarizing the parties' submissions and then addressing admissibility and the merits.[208] The General Assembly has adopted a 10,700 word limit "for each document produced by the human rights treaty bodies."[209] While this limit saves on translation costs, it also makes it difficult for the Committee to engage in extensive interpretive analysis in its views. Of course, the Committee could engage in that analysis even if the analysis were not memorialized in its views, but the prospect of extensive analysis in the pre-session working groups or the full Committee is dimmed by another constraint: time.

SHANY, *supra* note 22, at 7 (failure by international courts to "follow the law laid down in their constitutive instruments . . . undermine[s their] legitimacy . . . and may lead to a legal or political backlash against them").

[207] *See* Stevens, *supra* note 156, at 133-34, 134 n.293 (arguing that interpretive overreach "discourage[es] states from ratifying human rights treaties").

[208] *See, e.g.*, A.S. v. Italy, *supra* note 17 (providing an example of this format).

[209] G.A. Res. 68/268, ¶ 15 (Apr. 21, 2014).

The General Assembly has adopted a formula for determining the days of meeting time each treaty body is permitted.[210] In 2021, the Committee spent 12 weeks in plenary session.[211] While this is as many weeks as can be expected of uncompensated experts who maintain other careers, this is hardly enough time to handle the Committee's load of individual communications, let alone its other functions. The Secretary General reported that, as of October 31, 2019, there were 1,123 individual communications awaiting review by the Human Rights Committee, while the Committee resolved an average of 130.9 communications per year between 2018 and 2019.[212] At that rate, it would take nearly nine years to handle the backlog of communications alone. Moreover, the Committee continues to receive more than 300 communications per year.[213] As a result, there are serious practical constraints to the Committee conducting a thorough VCLT analysis for the interpretative questions that may arise in each individual communication.

That is not the case when it comes to general comments, however. Since its first session in 1977, the Human Rights "Committee has adopted 37 General Comments," most of which address specific rights guaranteed by the Covenant.[214] Interestingly, none of these general comments references the interpretive provisions of the VCLT. General comments take multiple years to draft, review, and adopt.[215] As a result, there is

[210] *See id.* (setting forth the calculations for allotting treaty-body time).

[211] *See Sessions for CCPR - International Covenant on Civil and Political Rights* in *UN Treaty Body Database*, UNITED NATIONS HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR (last visited July 25, 2022) [https://perma.cc/H4MT-G9N7] (listing the dates of the Human Rights Committee's three 4-week plenary sessions in 2021).

[212] *Status of the Human Rights Treaty Body System*, *supra* note 19, Annexes VII-VIII at 19-20.

[213] *Id.* Annex VI at 17.

[214] *General Comments: Human Rights Committee*, OHCHR, https://www.ohchr.org/en/treaty-bodies/ccpr/general-comments (last visited July 14, 2022) [https://perma.cc/AX5B-EFPP]; *see UN Treaty Body Database*, UNITED NATIONS HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (last visited July 14, 2022) [https://perma.cc/5M8U-ZP5F] (listing the Committee's General Comments, including the subjects they address).

[215] *See, e.g.*, *Human Rights Committee Concludes the Second Reading of Its Draft General Comment on the Right to Life*, OHCHR (Oct. 24, 2018), https://www.ohchr.org/en/press-releases/2018/10/human-rights-committee-concludes-second-reading-its-draft-general-

plenty of time to apply the international law of treaty interpretation in discerning the scope and content of the right in question. Once a general comment has been adopted, the Committee can refer back to that comment and its thorough analysis when deciding run of the mill communications. Indeed, the practice of referring to general comments in deciding individual communications is already common.[216] Individual communications that present novel issues will yet require treaty interpretation, but these will be a subset of the communications presented, reducing the need to engage in time-consuming interpretation in the press of hearing communications.

In crafting general comments consistent with the Vienna Convention, and in relying on those comments to decide communications, disputes regarding interpretation will certainly remain. As noted, the Vienna Convention leaves room for disagreement in interpretation, especially when it comes to broad provisions like those found in human rights treaties.[217] But taking the time to apply the Vienna Convention in crafting general comments will allow the Committee to better comply with the international law of treaty interpretation.

Moreover, room for normative impulses will remain — through the process of reviewing state reports.[218] States parties submit initial and periodic reports on their human rights practices to the Committee.[219] The Committee then meets with a delegation from the state under review and engages in what is called a constructive dialogue.[220] The

comment (last visited July 14, 2022) [https://perma.cc/P64A-KH67] (describing the process and timeline involved in drafting General Comment No. 36 on the right to life); *Human Rights Committee Developing New Right to Life General Comment*, INT'L JUST. RES. CTR. (July 28, 2015), https://ijrcenter.org/2015/07/28/human-rights-committee-developing-new-right-to-life-general-comment/ [https://perma.cc/PZ2Z-BDXC] (same).

[216] *See, e.g.*, Mechlem, *supra* note 11, at 927 (noting that "General Comments lend interpretive assistance to the decision of individual complaints").

[217] *See supra* text accompanying notes 65–67.

[218] General comments could also include normative views, though it would be important to separate those from the Committee's interpretation pursuant to the VCLT. The critical point is that the drafting of general comments provides a particular opportunity to engage in thorough application of the VCLT.

[219] *See, e.g.*, OHCHR, HRC FACT SHEET, *supra* note 7, at 15 (discussing states parties' reporting obligations).

[220] *See, e.g.*, *id.* at 18-19 (describing the practice of constructive dialogue).

dialogue is "constructive" in the sense it is not meant merely to identify human rights problems in the state.[221] Through the dialogue, the Committee goes beyond noting concerns and employs the expertise of its 18 members to assist the state in improving its human rights practices.[222] At the conclusion of the exchange, the Committee issues concluding observations.[223] These typically include sections on both positive aspects of the state's human rights record and areas of concern.[224] The latter are accompanied by recommendations on how the state should address its human rights deficiencies.[225]

The dialogue on states' reports might be constructive in another sense, and this is where the normative aims of the Committee come in. During the dialogue, Committee members could communicate broader, more normative views of the Covenant, views that may lack support in the international law of treaty interpretation.[226] These views could even be summarized in the Committee's concluding observations, though setting them apart in some way would be important in order to distinguish them from recommendations flowing from treaty obligations. States would then have the opportunity to respond by rejecting, adopting, or modifying these views.[227] As states came to accept and live the views, new

[221] *See* OHCHR, TREATY SYSTEM FACT SHEET, *supra* note 1, at 28.

[222] *See id.*

[223] OHCHR, HRC FACT SHEET, *supra* note 7, at 19.

[224] *Id.*

[225] *Id.*

[226] The ICCPR permits the Committee, in response to state reports, to transmit "such general comments as it may consider appropriate, to the States Parties." ICCPR, *supra* note 3, art. 40(4). While this provision is the basis for the Committee's general comments, it could also support the practice of communicating normative positions in concluding observations.

[227] The Committee could assess states' compliance with these additional views — as the Committee currently does with some recommendations made in concluding observations — to generate evidence of states' acceptance or rejection of its views. *See* Hum. Rts. Comm., Note by the Human Rights Committee on the Procedure for Follow-up to Concluding Observations, U.N. Doc. CCPR/C/161 (Dec. 23, 2021), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f161&Lang=en [https://perma.cc/7RNX-6FC3] (describing the Committee's procedure for following up on concluding observations).

provisions of customary international law might emerge.[228] These provisions might also affect the interpretation of the Covenant. Article 31 of the VCLT instructs that interpretation include "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," as well as "any relevant rules of international law applicable in the relations between the parties."[229] Consequently, views of the Covenant generated by the Committee and accepted by the states parties in their application of the treaty could come to alter the interpretation of the Covenant consistent with the VCLT.[230] Interpretive changes, at least those based on subsequent

[228] To explore whether subsequent customary international law can modify a treaty, rather than merely affect its interpretation, see Crootof, *supra* note 61, at 264-88. Professor Crootof supports the minority position "that customary international law may modify treaties." *Id.* at 240.

[229] Vienna Convention, *supra* note 46, art. 31(3)(b)-(c).

[230] As the International Law Commission has recognized, "[a] pronouncement of an expert treaty body [such as the Human Rights Committee] *may give rise* to . . . [the sort of] subsequent agreement or subsequent practice" that may influence treaty interpretation under the Vienna Convention. Int'l L. Comm'n, *supra* note 49, at 16 (emphasis added); *see id.* (recognizing the Human Rights Committee as an "expert treaty body"). Yet the Committee's pronouncements alone "cannot . . . constitute a subsequent agreement or subsequent practice [that would affect treaty interpretation] since [the VCLT] requires an *agreement* of the parties or subsequent practice of the parties that establishes their *agreement* regarding the interpretation of the treaty." *Id.* at 110 (emphasis added); *see also id.* at 26, 30 (explaining that subsequent practice only provides "an authentic means of interpretation of [a] treaty" if it reflects the parties' common understanding of the treaty's meaning); *id.* at 26-27 (noting that "pronouncements of . . . expert treaty bodies . . . may be indirectly relevant for the identification of subsequent agreements and subsequent practice as authentic means of interpretation if they reflect, give rise to or refer to such subsequent agreements and practice of the parties themselves"); *id.* at 43 ("The identification of subsequent agreements and subsequent practice . . . requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty."); Schlütter, *supra* note 37, at 289-92 (expressing skepticism that a treaty body's own interpretations, without state acceptance, may influence treaty interpretation as a form of subsequent practice). *But cf.* Mechlem, *supra* note 11, at 920-22 (arguing that while state practice is relevant, "the treaty bodies are the main interpreters of human rights treaties" and therefore "the principal generators of 'subsequent practice'"). As a result, the Committee's pronouncements alone are insufficient to alter the meaning of the Covenant.

practice, would not likely be quick or common.[231] "It will often be difficult to establish that all the parties [to a multilateral treaties like the ICCPR] have accepted" the Committee's "particular interpretation of the treaty."[232] This is especially true because, according to the International Law Commission, "[s]ilence by a party [cannot] be presumed to constitute subsequent practice . . . accepting an interpretation."[233] As grounds for interpretive change arise, however, the Committee could update its general comments to reflect new interpretations. The process of updating is already standard. Indeed, as noted, General Comment No. 36 is the Committee's third general comment on the right to life. In this way, the Committee could both comply with the Vienna Convention and exert normative influence.

CONCLUSION

The Human Rights Committee, alongside the other human rights treaty bodies, stands as one of the great achievements of the international human rights movement. In all its core functions, the Committee actively interprets the International Covenant on Civil and Political Rights. The Committee's interpretive approach, however, departs from the international law of treaty interpretation, with both costs and benefits. In light of the costs, this Article proposes an approach that would result in compliance with international law while leaving room for the Committee to influence the normative evolution of ICCPR rights. That approach would turn costs into added benefits at a time when human rights need all the strengthening that is possible.

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[231] This would hold true under the International Law Commission's criteria for identifying subsequent practice, as summarized in this Article. *See supra* text accompanying notes 160–65; *supra* text accompanying note 227. Interpretive change would be more speedy and common under less demanding criteria. *See, e.g.*, Mechlem, *supra* note 11, at 920-21 (suggesting that the criteria for identifying subsequent practice are less demanding).

[232] Int'l L. Comm'n, *supra* note 49, at 111. This may be particularly true in the human rights arena, where states frequently do not live up to their obligations. *See* Tobin, *supra* note 14, at 218-19.

[233] Int'l L. Comm'n, *supra* note 49, at 106, 113. "Silence . . . can constitute acceptance[, however,] . . . when the circumstances call for some reaction." *Id.* at 113 (quoting *id.* at 75).