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Introduction

On November 8, 2013, an experienced advocate for economic and social rights sits down with me in Palais Wilson, the home of the Office of the High Commissioner for Human Rights (OHCHR) and meeting venue for the human rights treaty bodies. We chose the empty childcare room over the crowded cafeteria. I asked her for this interview to learn more about how the work of one such treaty body, the Committee on Economic, Social and Cultural Rights (CESCR), facilitates the work of non-governmental organizations (NGOs) at the domestic level. Why do human rights organizations like hers prepare parallel reports and statements on states, often requiring resource-intensive collaboration with other actors, or travel to Geneva without being allowed to speak during the constructive dialogue between treaty body and state delegation? Even the intergovernmental Human Rights Council (HRC) grants its observers more visible participation opportunities in their procedures.

She explains her organization's advocacy as a result of many NGOs' conviction that treaty bodies provide a meaningful channel through which "to influence lawmaking,"[1] which materializes particularly, she says, in their work to draft and adopt General Comments (GCs).[2] To explicate further, she cites an earlier-morning dialogue between a treaty body member and a government official, in which strong disagreement ensued regarding this particular state party's obligations under Article 7 of the International

[1] Interview with an NGO Officer.

[2] I use the term *general comments* to refer to the interpretations of the human rights treaty bodies. Two treaties, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), use the term *general recommendations*. When not pointing to specific General Comments or General Recommendations, this book subsumes the two treaties' general recommendations within the term *general comments*.

Covenant on Economic, Social and Cultural Rights (ICESCR) in the aftermath of the 2007–2008 global financial and economic crisis.[3] Pressed on the austerity measures the government imposed as a response, which clawed back domestic advances in the protection of just and favorable conditions of work and "raised important concerns regarding the principles of non-retrogression, progressive realization, non-discrimination and minimum core obligations" (OHCHR 2012: 8), the official defended them as a move of necessity to restore economic stability.

Notably in their pushback, this government was no rogue dissenter but rather one of many state parties arguing, whether directly or by inference, that they hold latitude to decide on exceptions from human rights obligations in the event of such crises. Probing the governments' lines of argument, I ask my interview partner if states shouldn't here know better on the subject of their obligations, given that CESCR concluding observations and International Labor Organization (ILO) conventions provide additional clarification on this exact topic. The advocate for economic and social rights looks at me, shakes her head, and expresses sympathy for the government's position. In her view, the obligations as set out in the Covenant itself and, particularly, Article 7 are vague and thus in need of more direct and comprehensive clarification than that provided by concluding observations and ILO conventions. *That* kind of clarification, she says – *authoritative* clarification – comes by way of general comments.

She follows this vignette by recounting a general comment drafting process she initiated with a treaty body member – a longtime NGO colleague of hers – years earlier, in which she facilitated consultation with civil society and trade unions on state obligations under Article 7. With reference to the only recently adopted Optional Protocol allowing for individual complaints, she described her role and that of the other involved actors, all of whom had a professional interest in the justiciability of the ICESCR, as part of a global strategy of strengthening economic, social, and cultural rights. In 2016, three years after our interview, the Committee on Economic Social and Cultural Rights adopted General Comment No. 23[4] on the right to just and favorable conditions of work as set out in Article 7. It laid out states' obligations in times of

[3] The financial crisis posed serious threats to the progress made in the development of ESC rights (Nolan 2014; Ratjen and Satija 2014). For the context of the debate in the UN, see OHCHR 2012.

[4] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), April 7, 2016, E/C.12/GC/23, www.refworld.org/docid/5550a0b14.html [accessed February 24, 2021].

economic, fiscal, and political crises and austerity measures and also included new categories of work and workers that evolved since the Covenant's drafting.

This episode from my first research stay at the UN in Geneva exemplifies the very direct access that human rights professionals like her have to the UN treaty bodies. As representatives of specific human rights organizations, they come to the premises of Palais Wilson to make proposals for agendas, share information on treaty implementation at site events, present parallel reports to support the monitoring of state reports, and make written and oral statements on the treaty bodies' days of general discussion. While their interest to "influence lawmaking"[5] in the treaty bodies is not surprising, the seemingly very direct and natural opportunities granted to do so are. I had never put much thought into the processes that lead to the adoption of a general comment; like many other human rights scholars, I looked at them only as one of the instruments available to fulfill the expert committee's mandate as *monitoring* bodies. Closer examination, however, appeared to paint the picture of an instrument whose impacts were much more productive than prescriptive – indeed this NGO professional was but one among many individuals who came to the treaty bodies' sessions to above all influence not monitoring but *lawmaking*.

This lawmaking became the core focus of an empirical inquiry into the treaty bodies' work to produce general comments, whose findings are what this book bears. This inquiry was guided less by legal questions than by an interest to determine how exactly general comments, which lack formal status in international human rights law and require no formal consent by states, are elaborated and adopted - and more particularly, how this happens within a treaty body system presently mired in stakeholder contestation, a decade-long reform process, and resource burdens. Because what surprised me most about this emphatic notion of the general comments' seeming efficacy to influence law was that they were managing to do so, with such stresses notwithstanding.

So how *do* the treaty bodies, against this pessimistic backdrop and a lack of formalized procedure, draft and adopt their interpretations – and how does this answer bear on our understandings of international organizations, transnational actors, and international law? Derived from the research of this aforementioned inquiry, which dives beneath the surface of formal access

[5] Lawmaking is quoted here from the interview in the opening vignette. This book discusses and analyzes several examples of general comments that influenced the development of international human rights law, and as such, I use the term *lawmaking* to specify an activity that produces outputs that can be argued for as (soft) law (Lagoutte, Gammeltoft-Hansen, and Cerone 2016).

rules, procedures, and actors of the UN treaty body system, this book's answer is that they do so through their members' close collaboration with non-state actors in an informal, short-lived process of liaising I conceive as a *Transnational Lawmaking Coalition* (TLC) for human rights. Through the instrument of treaty interpretations, these coalitions press for clarification of state obligations in response to global challenges, crises, and/or state inaction, and consequently contribute to the development of international human rights law. Specifically comprising at least one UN treaty body member alongside human rights professionals, these coalitions maneuver outside the above stresses, or rather fill in the space they leave behind, as an actor strategically using treaty interpretations to account for better protection of human rights.

1.1 INTERPRETING HUMAN RIGHTS: THE POWER AND PRACTICE OF TREATY BODIES

This book's focus on who makes human rights needs certain clarification regarding its embeddedness in broader debates about the history, origins, and nature of human rights. My account on human rights in international law and politics does not deny that the institutionalization, including the "legalization" of human rights in global governance,[6] has not always been driven by actors with the best interests for all in mind. Some actors might have been more purposeful, and other actors well-meaning but damage-doing in their endeavor to respect, protect, and fulfill human rights for all. Some governments, and increasingly so it seems, have either lost or never had a genuine interest in protecting human rights. In this regard, I agree with scholars who have repeatedly highlighted the hostage-taking of human rights by states, international institutions, and non-state actors (Hopgood 2013; Moyn 2018; Mutua 2007). Yet, not complying with or violating human rights is often justified with the weaknesses of human rights law,[7] and only to a lesser extent

[6] For legalization, see the IO special issue 2000 (Abbott et al. 2000 or Abbott and Snidal 2012), and also: Aalberts and Gammeltoft-Hansen 2018; Finnemore and Toope 2001. For human rights in other institutions than the UN Geneva bodies, see for example Walling 2015, 2020; Zvobgo and Graham 2020.

[7] In this book, human rights are understood as law when they are codified in one of the core treaties or their optional protocols. As such, I draw a distinction between human rights as law and as norms (Finnemore and Sikkink 1998; Jurkovich 2020b). Arguments about the meaning and application of laws in-use (Wiener 2009) are thus in-built features of human rights law, providing for the possibility of norm change (Sandholtz 2007). In my view, treaty interpretations of human rights law can serve two functions here: for one, they can further clarify what is needed for this translation of law into practice by highlighting state obligations. For another,

with a general rejection of the value(s) inherent in human rights (Winston 2018). Any scenario of a "twilight of human rights law" (Posner 2014) requires the acknowledgment that the treaties themselves are likely the product of actors who entered their negotiations with different interests. But my approach to the weaknesses of the UN human rights treaty system is not in adding yet another critique of human rights – others have already done so at great length and support for their arguments occurs every day in the news – but in taking an actor-centric perspective and turning to an in-depth analysis of *who* makes human rights law.

Human rights law, and the UN human rights treaties specifically, are far from perfect. Not only those treaties adopted tell us a story about the political forces behind them, but even more telling are those which both remain subject to endless negotiations and open-ended working groups and where support for nonbinding regulations prevails, for example, in business and human rights. My interest in treaty interpretations is grounded, for one, in the (allegedly) less politicized nature of their making, as expert committees decide on their scope and not governments. For another, and this is where this book departs from pessimistic outsets on the state of international human rights, treaty interpretations provide the opportunity to clarify obligations in light of political, economic, and social challenges. In that sense, they can be a tool to *make* rights right – and account for previous shortcomings in human rights law.

This perspective on general comments[8] unsurprisingly does not come from one of formal international lawmaking,[9] but is informed by decades of scholarship on advocacy for human rights. Numerous scholars have already shown how, and under what conditions, human rights matter for people around the globe.[10] Struggles in their name repeatedly tell the story that human rights are, and have always been, contested and that those who claim to speak for them do

they can *make* human rights law, by incorporating norms which have not yet been codified into the treaty. Hence, the focus of this study is the process until norms become validated as law, but that does not mean that human rights are then ready for implementation in all places or immediately achieve acceptable levels of compliance (Chayes and Chayes 1993).

8 General comments carry "significant legal and political weight" (Winkler 2012: 41). While their legal value remains disputed and their impacts vary, these interpretations are "one of the potentially most significant and influential tools available (. . .) to deepen the understanding and strengthen the influence of international human rights norms" (Alston 2001: 763). Or, to put it differently: the "fact that general comments do not have a formal, binding, legal status does not mean that they lack legal significance" (Oette 2018: 9).

9 For an excellent overview on that matter in international law scholarship, see Brölmann and Radi 2016.

10 Given the immensity of this literature, I include only a selection of scholarship here: Comstock 2021; Creamer and Simmons 2015, 2020; Hillebrecht 2014; Krommendijk 2015;

not always give rise to collective benefits. Their politicization is of key concern for multilateralism and the lives of billions of individuals around the globe. For these individuals, the codification of norms presents a basis on which to articulate demands for justice. International human rights law can matter, yet under the right social and legal conditions. One central condition is that obligations are clear and unambiguous, so that states know what to do for their implementation, human rights advocates at the local level know what to demand, and individuals whose rights were violated have a basis for claiming them and keep leeway for local norm translation to a minimum (e.g. Zimmermann 2017). Human rights, however, count as especially vague, indeterminate, and ambiguous norms in international law. This makes them vulnerable to political, economic, and social challenges, like the financial and economic crisis in the introductory example and explains why they need interpretation through the treaty bodies in the form of general comments.

Unlike courts or intergovernmental institutions, the treaty bodies have largely remained at the sidelines of scholarly attention to the development of human rights. This dismissal has shifted in recent years,[11] with the publishing of research that has demarcated the substantial, tangible ways in which treaty body decisions impact domestic politics and law – that is, how their functions, in practice, go beyond a mere monitoring of the treaties' obligations. Their work has always included a multistakeholder perspective, conceptualizing any success of the treaty bodies as one that goes beyond a dual state-committee relation (De Búrca 2017). While states have established the expert committees as monitoring bodies, general comments have "traditionally been the point at which states articulate opposition to treaty bodies as they often view the practice as going beyond the treaty into the realm of developing new law" (McCall-Smith 2016: 32).

In this book, general comments are to a lesser extent understood as an instrument addressing implementation problems in human rights law than as one reflecting changed normative orientations which have not (yet) been addressed by formal international law. As such, the book follows socio-legal scholarship which assumes that this is succeeded by change in behavior of a wider range of actors to which the law applies (Halliday and Shaffer 2015: 8–11). Helfer, for example, showed how ICESCR's General Comment No. 14 on the right to health became a key document in shaping a right to access to medicine

Merry 2009; Oette 2018; Risse, Ropp, and Sikkink 1999, 2013; Sikkink 2011, 2019; Sikkink and Walling 2007; Simmons 2009.

[11] For an overview of scholarship on the treaty bodies, see Bayefsky 2001; Keane and Waughray 2017; Keller and Ulfstein 2012; McCall-Smith 2016.

against intellectual property laws (Helfer 2015). The treaty bodies are thus approached as actors who can shape the development of international law intentionally through treaty interpretations.[12]

The matter of human rights interpretation is "both complex and, to a certain extent, obscure" (Fitzmaurice 2013: 739). TLCs can shed light on this matter by taking an actor-centered approach to the practice of human rights treaty interpretation. The drafting process for interpretations is not further specified in the treaties but left to the discretion of the respective treaty body.[13] This lack of unambiguous secondary rules[14] gives the treaty bodies as collective actors leeway for internal debate about appropriate practices of rule-making (Raymond 2019). In this respect, these bodies differ significantly from international courts, whose decisions strictly contour the detailed procedure of adoption treaties typically define, which only allows for the consideration of certain forms of evidence and substantive law. Treaty bodies, in contrast, have the procedural room to decide themselves which sources of information they consult – and can do so without diluting their interpretations' legal weight; their pronouncements are often cited in the same breath as decisions of international courts and tribunals, considered "key catalysts" of legal developments.[15]

From this perspective, treaty bodies are thus more than mere agents following the orders of their principals, standing today as powerful actors in human rights law and for the improvement of human rights protection around the

[12] Similarly, see Diane Desierto, on ICESCR and trade law, who highlighted that "many of the Committee's General Comments anticipated later treaty developments in labor rights protections, education, and access to health care, gaining resonance in international practice much later than when the General Comments were first issued" (Desierto 2017).

[13] See Appendix B for an overview of rules of procedures across treaty bodies, for example, Art. 39 (2) ICCPR; Art. 10 (1) CERD; Art. 19 (1) CEDAW; see for example "Rules of Procedure of the Human Rights Committee," January 9, 2019, CCPR/C/3/Rev.11 (Rules of Procedure), which, inter alia, leaves open the criteria according to which the topics for general comments are selected and which sources will be consulted in the drafting process.

[14] Within norms research, these rules about norm making have been identified as metagovernance norms (Pantzerhielm, Holzscheiter, and Bahr 2019) or organizing principles (Wiener 2008, 2018).

[15] The term was used by CEDAW in *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35, July 14, 2017. See also Report of the International Law Commission (2018), Chapter IV, UN Doc. A/73/10 2018, 112 para. 17's quoting of GR No. 35: "the pronouncement may serve as a catalyst for the subsequent practice of States parties." From a socio-legal perspective, "they [international and transnational soft-law instruments] are not binding legal instruments in themselves; rather actors aim to *catalyze* [my emphasis] through these instruments the adoption, recognition, and enforcement of binding, authoritative legal norms in nation-states" (Halliday and Shaffer 2015: 14).

globe. Their general comments are tools of choice for the expert committees but also for the many human rights organizations who have traditionally worked with them on alternative monitoring. Rather than assess the treaty bodies' application of formal rules of treaty interpretation in a legal exercise,[16] I am, as I said, primarily interested in how the treaty bodies engage in their interpretations in the face of resource constraints and government backlash against human rights. To be clear, I presume neither that all treaty interpretations are the (sole) outcome of a TLC, nor that all general comments impact the development of international human rights law. But as these instruments, which require no further ratification by states, may sway the future course of human rights protection, then it is important to study how and by whom they are drafted.

1.2 TRANSNATIONAL INFLUENCE ON INTERNATIONAL LAWMAKING

While the book's first contribution is to the scholarship on the UN human rights treaty bodies and their interpretations of human rights law, it speaks to and builds upon a variety of scholarship on IR and specifically on IOs. For one, it seeks to contribute to the rich literature on processes and procedures of international lawmaking. IR scholars have provided excellent contributions to the design of international agreements (Koremenos 2016; Tallberg et al. 2014; Voeten 2019) and the procedures of international lawmaking. This vein of literature has seen substantive contribution by IR scholars regarding, for example, practices of making new rules and norm change (Finnemore and Sikkink 1998; Raymond 2019; Sandholtz 2008), yet most of its scholarship remains focused on negotiations among states, inevitably producing a perspective on lawmaking as a "diplomatic practice riven with power, interest, and values amid sociopolitical hierarchies" (Mantilla 2020: 9). When lawmaking, as in the human rights treaty bodies, is a practice by a committee of independent experts, dynamics are different. As human rights treaty bodies are composed of *independent* experts, this book is also a study on expert committees, connecting scholarship on their role as bodies or entities within IOs with that on experts and the role of legal and other technical or functional expertise (Kennedy 2005; Leander and Aalberts 2013; Littoz-Monnet 2017).

For another, the literature on transnational regulation regimes increasingly challenges conceptions of a state-led order (Shaffer 2012), yet multilateral rule-making remains central to the work of non-state actors (Hickmann 2015, 2017). In the absence or stagnation of such formal rule-making processes (Pauwelyn, Wessel, and Wouters 2014), they remain reliant on international legal

[16] For an overview, see Fitzmaurice 2013.

frameworks for norms inherent to their work. As such, this book departs from the observation made by others, that actors increasingly seek alternatives to formal treaty-making in global governance (Benvenisti 2007; Krisch 2014; Pauwelyn, Wessel, and Wouters 2012; Rodiles 2018). It remains focused instead on alternatives given within the formal order: the interpretations of norms of international public law. IL and IR scholarship has recently begun to explore the strategic use of interpretations by states to influence how others interpret international legal obligations and redefine meanings of rules (Daku and Pelc 2017; Krieger 2019; Putnam 2020). A focus on interpretative practices has highlighted the agency of international legal institutions to generate change in international law (Stappert 2019).

Treaty interpretations clarify, and often create, new norms and thus also spur the interest of non-state actors to directly influence their outcome (Squatrito 2012). IO scholarship has demonstrated that this interest is mutual, establishing the "opening up" of IOs to transnational actors as a constant trend over time and across all issue areas (Jönsson and Tallberg 2010; Sommerer, Tallberg, and Squatrito 2015; Tallberg, Sommerer, and Squatrito 2013). The increased participation of transnational actors in international organizations, such as NGOs, advocacy networks, corporations, epistemic communities, and unions, reflects this changing nature of global governance. International organizations no longer saliently represent cooperation forums for states alone, and regularly invite transnational actors to provide expertise or services and publicly communicate their efforts in this regard (Carayannis and Weiss 2021; Ecker-Ehrhardt 2018). Even if they do so simply for means of self-legitimation, any IO today must justify these actors' noninclusion more than their inclusion (Jönsson and Tallberg 2010; Risse 2013; Tallberg, Sommerer, and Squatrito 2013). While access to agenda-setting, implementation, and monitoring is well documented and well explained, opportunities for their involvement are least extensive in the phase of decision-making (Steffek 2013; Tallberg et al. 2014: 770). This phase includes lawmaking, where some studies have well explained how non-state actors can nevertheless be successful in shaping the outcome of interest (Betsill and Corell 2001; Dany 2012; Glasius 2002; Rietig 2016).

Explanations for non-state influence can be briefly distinguished between norm-based models, resource-based models, and those looking at both perspectives to explain varying degrees of impact on different international organizations (Liese 2010). The decision whether and to what extent access is granted to what type of actor is not random, as research on the design of international institutions (Koremenos, Lipson, and Snidal 2001; Tallberg, Sommerer, and Squatrito 2016; Voeten 2019), democratic practices, and legitimacy in international institutions all tells us (Dingwerth, Schmidtke, and

Weise 2020; Dingwerth et al. 2019; Mert 2019; Scholte 2011). International institutions have different functional and normative incentives to include non-state actors (Nasiritousi, Hjerpe, and Bäckstrand 2016); for example, the involvement of civil society actors stands for more transparent decision-making (Scholte 2011), and non-state actors have different strategies to make use of these incentives and with different effects (Dellmuth and Bloodgood 2019; Dellmuth and Tallberg 2017). On an informal cooperation level with the rule-makers, non-state actors can be influential intermediaries (Abbott, Levi-Faur, and Snidal 2017). Organization theories with a focus on organizational culture have, for example, provided explanations as to why not every NGO is equally successful in every international organization, although they support the same norms (Hopgood 2006; Wong 2012). Yet, given the nature of international policy – and lawmaking – these studies focus mainly on intergovernmental settings. This creates an emphasis on *visible* public institutions and processes in international organizations. By contrast, the conditions and circumstances for participation, access, and, ultimately, influence on lawmaking in expert committees are different, and their strategies to engage with independent experts are less visible than when engaging with diplomats or states representatives in international negotiations (Türkelli, Vandenhole, and Vandenbogaerde 2013).

1.3 THE ARGUMENT IN BRIEF: TRANSNATIONAL LAWMAKING COALITIONS

TLCs, to bring the concept back to the fore, both shed light on the particularities of the treaty interpretation process and provide an analytical lens to understanding the key role expert bodies and issue professionals – working informally and sans government-involvement at the boundaries of an IO – play in the development of human rights law. As this book's empirical work will show, TLCs are typically found in situations where state action to tackle global challenges is absent or stuck or social pressure is not (yet) high enough to engage in formal law-making (Mantilla 2020). In that sense, TLCs are no new phenomenon. Efforts by individuals and organizations from civil society, academia, international institutions, and other public and private spheres to advocate for global solutions and lobby for preferred regulations exist in all places where policies are made.[17] Yet, TLCs notably differ in their organizing pursuit: Rather than work toward persuading governments or intergovernmental negotiations, individuals in TLCs deliberately choose international law as

[17] See for example Dellmuth and Tallberg 2017; Hanegraaff, Beyers, and De Bruycker 2016.