
BODIES OF KNOWLEDGE: A DIVERSITY
PROMOTION ROLE FOR THE UN HIGH
COMMISSIONER FOR HUMAN RIGHTS

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A. Introduction: consolidation and diversity

In his 1997 final report on the human rights treaty bodies, Philip Alston proposed an expert group study of the modalities for consolidating the six treaty bodies.¹ But neither in his final report nor in the interim report submitted to the World Conference on Human Rights in 1993 did Alston specifically discuss the consolidation issue.² Instead he referred to the discussion in an earlier (1989) report in which he had presented consolidation into 'one or perhaps two new treaty bodies' as '[t]he most radical option' that had yet been put forward to address mounting problems such as system overload, resource constraints, and the burdensome proliferation of reporting duties on states.³ In that 1989 report, Alston signalled that

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¹ P. Alston, 'Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System', UN Doc. E/CN.4/1997/74, 7 March 1997, at para. 94 ('Alston Report 1997').

² For the 1993 interim report, see P. Alston, 'Interim Report of Study on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty Regime', UN Doc. A/CONF.157/PC/62/Add.11/Rev.1, 22 April 1993.

³ P. Alston, 'Report on Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights', UN Doc. A/44/1989, 8 November 1989, at para. 179 ('Alston Report 1989'). Alston does not assume consolidation means merger into a single body nor does he presuppose anything about the structure, functions, or formal powers of such a body. But he does discuss the consolidation issue in terms of its more radical version, what he styles a single 'super-committee'. Anne Bayefsky has also raised the issue of consolidation in her 'Report on the UN Human Rights Treaties: Facing the Implementation Crisis' which was prepared

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long-term consolidation may eventually warrant serious consideration,⁴ but the general focus of his discussion at that time was that consolidation might well prove retrogressive. Without taking a position, he addressed some potentially problematic aspects of consolidation in the following terms:

many of the advantages [of consolidation] can equally well be portrayed as disadvantages, and vice versa, depending on the assumptions and perspectives of the observer . . . It can be argued that the super-committee would, by virtue of its extensive purview and probably almost permanent sessions, develop enormous expertise. The counter-argument is that the variety of expertise represented on the existing range of committees is greater than could ever be captured on a single committee . . . Or, it can be argued that a single committee would facilitate the effective integration of different concerns such as racial and sex-based discrimination, children's and migrant workers' rights, and economic, social and cultural rights. The counter-argument is that some of those concerns might simply be glossed over and that the supervisory process would no longer serve to galvanize those sectors of the Government and of the community dealing with, or interested in, a specific issue.⁵

While Alston's 1997 recommendation to study the 'modalities' of consolidation could be read as a call to study only the legal and procedural means to achieve a preordained goal, it is clear enough that, in 1997 as in 1989, Alston was not advocating any particular model of consolidation.⁶ This is as it should be. Even if Alston now seems, on the whole, to take the view that some form of consolidation is necessitated by the current and growing systemic crisis, the disadvantages identified in 1989 are presumably as relevant now as they were then.

The tensions canvassed by Alston can be presented in terms of consolidation's threats to diversity of knowledge. One of the benefits of the current pluralistic structure (six treaty bodies for six treaties) is the diversity of vantage points it brings to bear on any state's human rights performance. Several forms of diversity of knowledge are at stake. *Diversity of expertise*

for the meeting of the International Law Association (ILA) Committee on International Human Rights Law and Practice at the 1996 Helsinki Conference of the ILA. In two brief references, the Bayefsky study recommends consolidation into two new bodies, one dealing with state reports and one dealing with petitions: International Law Association, *First Report, Committee on International Human Rights Law and Practice*, Helsinki Conference, 1996, at pp. 2, 14 and 22.

⁴ Alston Report 1989, *supra*, note 3, at para. 180.

⁵ *Ibid.*, at para. 182.

⁶ Alston indicates the role of the expert study group would be to explore 'the contours of such a reform': Alston Report 1997, *supra*, note 1, at para. 94.

concerns the range of professional disciplines that can be relevant to the interpretation of human rights. Depending on the treaty and specific issue at hand, several fields of knowledge can fruitfully cast light on relevant dimensions of a situation or normative debate – for example, law, medicine, social work, penology and law enforcement, development economics, nutritional science, health administration, architecture, and environmental studies. *Diversity of experience* concerns the relevance of the diverse lived experience, both negative and positive, of different social groups. Many of the social markers that are the central concern of non-discrimination norms (such as gender, race, ethnicity, religion, sexuality, economic class and social status) coincide at some level with different experiences that provide different insights into what is of value, how values relate to each other, and how the world functions so as to advance or suppress those values. Some experiences can be widely shared, so much so that we might call them cultural, while others are much more specific to a particular geographical and temporal context; others again represent something closer to what we would want to call universal experience. In some middle ground between expertise and experience, there is also something we might call *diversity of normative focus*, a rather awkward way to categorise the ‘different concerns’ that are associated with various categories of rights, such as those mentioned by Alston in the passage quoted.

This chapter will first summarise the benefits of diversity of knowledge and make a case for why it is important to collective decision-making bodies. It will next discuss some dimensions of the current state of affairs with respect to representation of diversity of knowledge within the UN human rights committees, with a view to suggesting why there is reason for concern. Proceeding from the premise that the harnessing of diversity must be central to any consolidation reforms, the chapter then goes on to develop its central proposal that an international candidate identification process be organised by the Office of the UN High Commissioner for Human Rights (UNHCHR) who would be assisted by an eminent persons group which she would establish. This reform proposal is put forward on the twin assumptions that the human rights treaty bodies will continue to have a separate existence for some time yet and that practical experience with attempts to promote diversity will provide valuable lessons for any eventual consolidation project. UNHCHR’s involvement would be designed to enhance the collective insight of each treaty body (and of the treaty bodies when they act in concert) through coordinated attention to

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both diversity of expertise and diversity of experience as relevant criteria for election to those bodies.

In the conclusion, brief mention will be made of a second proposal which could complement this election proposal. This is for the human rights committees, through pragmatic acts of institutional cooperation, to consider their six treaties as interconnected parts of a single human rights 'constitution' and thereby to consider themselves as partner chambers within a *consolidating* supervisory institution. Through such acts of pragmatic imagination, each committee would be encouraged to place itself within a network of dialogue with the other committees; all would seek to expand their horizons through harnessing the pool of diverse knowledge represented by their large collective membership and the diversity of normative mandates of the six treaties.

B. Valuing diversity of knowledge

We need to build into the institutional design of any consolidated treaty body what might be called a principle of interactive diversity. Such a principle is premised on the idea that superior collective judgment is exercised when multiple perspectives are encouraged to interact with each other in coming to grips with any given normative issue or decision. In order for diverse perspectives and actors to interact, there must first be a commitment to ensuring diversity is represented. Institutionalisation of this principle in the international human rights realm is justified by the imperative need to transcend limitations of knowledge and perspective, limitations that may compromise any claims to universal validity of conclusions reached by interpretive practice. Interactive diversity thus facilitates universalism. The rest of this section presents a brief justification of the foregoing claims.

A host of critical missions within and outside legal scholarship (among others, feminist theory, critical race theory, and post-colonial studies) have succeeded in unsettling the legitimacy of legal institutions, especially the domestic judiciary.⁷ They have done this by demonstrating the pervasiveness of choice in the operation of legal judgment, the contingency of

⁷ See, e.g., K. Crenshaw, N. Gotanda, G. Peller and K. Thomas (eds.), *Critical Race Theory: The Key Writings That Formed the Movement*, New York, 1995; B. Ashcroft, G. Griffiths and H. Tiffin (eds.), *The Post-colonial Studies Reader*, New York, 1995; R. Delgado and J. Stefancic (eds.), *Critical White Studies: Looking Behind the Mirror*, Philadelphia, 1997.

the criteria any given judge may find congenial to her or his choice, and the influence of what one sociologist has called the *habitus* of a judge on the relative appeal of various criteria.⁸ One result of such critiques has been to show how current legal systems produce norms that are populated by some social groups more than by others. It is not simply a question of explicit exclusion. It is also a case of an abundance of implicit norms generated by dominant perspectives on and experiences of the social world, for example those which reflect male experiences.⁹ These accounts have identified the absence of other social groups from participation in shaping the law as a central reason for such explicit and implicit exclusion. In short, they have demonstrated the pervasive partiality of the law.¹⁰ Thus, Jennifer Nedelsky explains two interlinked senses of partiality that result from a lack of diversity of representation in the judiciary:

The dispute over demands for diversity on the bench . . . could be understood as a dispute over the conditions of impartiality. In these terms, we can see one group claiming that a judiciary composed very largely of white, middle class men cannot be impartial. They will inevitably be biased,

⁸ Pierre Bourdieu's idea of *habitus* can be paraphrased as a reference to the constellation of dispositions, baseline assumptions and world views that are embodied in a group of persons, such *habitus* being structured, *inter alia*, by a person's present location in social hierarchies as well as by formative influences such as social group experience and educational upbringing (notably professional elite formation). While we can speak of each person as having a unique *habitus*, the primary sense is of *habitus* as a shared phenomenon, '[t]he conditionings associated with a particular class of conditions of existence' that operate at some sub-conscious level on the behaviour of those imbued with such *habitus*; they are 'structured structures predisposed to function as structuring structures': see P. Bourdieu, *The Logic of Practice*, Cambridge, UK, 1990, at p. 53.

⁹ See D. Réaume, 'What's Distinctive About Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law', 2 *Legal Theory*, 1996, pp. 265–99 especially at pp. 278–9.

¹⁰ A universal extrapolation is made here. Unless shown otherwise, it is assumed that this body of critical work is relevant to every legal system. This is not to say that attention to diversity matters in the same degree or operates in the same way, only that it matters in some degree and in some way. It is also important to note that, when we focus on the diversity of juridical bodies like courts or UN human rights committees as institutions charged with supervising the state (and, in varying degrees, non-state actors), the concern is not only with the law interpretively created by those bodies. The concern is also with the law made by other organs of state that suffer their own, often more serious, problems of social group domination. But, in the context of human rights which act in part as institutional devices allocating power to courts (or committees) to judge the acts or omissions of states, lack of diversity within these supervisory juridical bodies results in both failures to perceive and unwillingness to address affronts to human rights that to some degree stem from diversity deficits in non-judicial state organs.

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whether consciously or unconsciously, by the partiality of their limited perspective. Here I think it is interesting to note that the term 'partial' has two different meanings. One is partial in the sense of partial to something, liking it. The other is partial in the sense of being only a part. Both are of concern here, and both are thought to require diversity as a remedy. If the judiciary is drawn from only one group in society, there is a worry that they may be only partial to their own kind in their decision. Diversity on the bench eases that concern. And in the second sense of partiality, the inevitable limitation of one group's experience, perspective and understanding can be remedied by ensuring that judges come from all parts of society.¹¹

Other critical theorists have developed similar arguments as to why impartiality should be understood in terms of a kind of fullness or enlargement of thought, and as to how such impartiality would be fostered by 'the creation of institutions and practices whereby the voices and the perspectives of others, often unknown to us, can become expressed in their own right'.¹² For example, Tanya Coke, in the context of a discussion of the salience of experience of race in the United States, succinctly explains the need for racially diverse juries:

One fundamental reason why the racial composition of juries matters, quite apart from the issue of in-group partiality, is that a jury that draws upon the varied experiences of its members is less likely to rely upon complacent but uninformed assumptions in its deliberations. This view admits that impartiality is not embodied in a single 'ideal' juror but achieved through the cross-pollination of a range of views and experiences. The issue is not whether whites, blacks or Latinos have a greater or lesser capacity for impartial decision-making, but whether the optimum conditions for that deliberative process exist. Given the experiential boundaries of neighbourhood, job, race, gender, sexual orientation, and social station, most of us fail to recognize the false assumptions that underlie racism, sexism, and homophobia until others challenge them.¹³

Thus juries lacking in diversity of social experience are less likely to be impartial in their decision-making than are more diverse juries. As a consequence, what is affected is not (or, not just) political or societal legitimacy but also juridical validity. The fundamental insight is that an amalgamation

¹¹ J. Nedelsky, 'Judgment, Diversity and Relational Autonomy', J. A. Corry Lecture, Queen's University, Canada, October 1995 (unpublished manuscript).

¹² S. Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, New York, 1992, at pp. 140–1.

¹³ T. Coke, 'Lady Justice May Be Blind, But is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries', 69 *New York University Law Review*, 1994, p. 327 at p. 357.

of limited individual perspectives produces a limited collective perspective; judgment is enhanced when we increase the angles of vision that go into the judgment.¹⁴ Diversity in the context of a decision-making body composed of more than one person makes it more likely that all salient aspects of a normative problem, and all dimensions of a factual situation, will be perceived and factored into the deliberative process. Diversity multiplies perspectives while the need for collective decision necessitates that those perspectives engage each other. Diversity makes it less likely that reasoning will take place within the four corners of a single person's limited knowledge, and more likely that it will take place in the context of the necessity to test one's assumptions and intuitions against those of others. One could identify this as the difference between reasoning monologically and reasoning dialogically.

It might be objected that discourses of representation either entail, or degenerate into, a problematic essentialisation of identity and perspective because of a supposed underlying assumption that a given individual can also be a general representative of a social group. For example, it might be asked how any woman can be expected to represent the perspectives of women generally, especially when the relevant community for the legal order in question (here, a transnational community of women) is incredibly diverse across many other dimensions of experience (culture, race, class, place and so on). But the choice is not between communitarian essentialism (you *are* your group) or hyperindividualism. Groups emerge and change in a process of social and historical construction from within and from without. Groups may be treated as real in that sense but they are also highly contingent. Contingency includes the extent to which members have (and think of themselves as having) common experience and the extent to which such shared experience is positive or negative. Probably the key variable in determining the constructions that produce both group experience and members' identity is that of power.¹⁵ If we accept this, then

¹⁴ The phrase 'angles of vision' is Nedelsky's: 'The more angles of vision we are capable of taking into account in our judgment, the more we can free ourselves of the limitations of our private conditions. When we are locked into one perspective, whether through fear, anger, ignorance, or even through our notions of virtues such as duty, courage, or responsibility, we are not judging freely.' Nedelsky, *supra*, note 11.

¹⁵ The argument here is, of necessity, skeletal. The abstract reference to 'power' could, instead, have been a reference to something like 'the complex interaction of different power relations'. Power cannot be considered a simple variable. There are several dimensions and manifestations of power ranging from classical exercises of coercion (police power and

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we have no choice but to start somewhere in the middle of ‘the’ story of ‘the’ world as we know it. We must make judgments about our social world and what we know about the experience of different social groups, and then decide what experiential variables or demographic characteristics are *likely* to generate a certain commonality of understanding amongst people with such experience or characteristics. Here again, Coke provides insight:

Mono-racial juries (like juries of a single gender) will . . . summon only a limited range of social experiences to interpret the facts before them. One can accept this intuitive premise without adhering to essentialist generalizations about the sympathies of different races. African-Americans, Latinos, Asian and Native Americans are not merely citizens ‘who happen to be’ racial minorities but are members of historically-defined communities that more often than not retain a cultural specificity.¹⁶

However, it is not just commonality we are looking for. It is *relevant* commonality. Relevance cannot be determined other than through some appeal to purpose – why do we want to make *this* institution more diverse? We must always ask in what ways we should be concerned with diversity in a given normative field. When we bring purpose into the picture, we are able to ask specific questions in relation to the primary justification for interactive diversity, namely the thesis that qualitatively superior deliberation and outcomes are produced in relation to an institution’s normative focus.

As soon as a given institution such as a UN human rights committee has, as any part of its mandate, a duty to counteract, remedy, or be sensitive to the harmful effects of various forms of domination that help constitute and perpetuate disadvantaged or vulnerable groups, this requires us to develop criteria of salience about which groups’ experiences most need to be represented adequately in institutional dialogue if the institution’s normative mandate is to be taken seriously. The fundamental issue is the extent to which dominant social groups are currently represented in a way that makes it very difficult for the perspective of less dominant social groups to be recognised, let alone acted upon, as a basis for judgment. Thus, structuring diversity of representation cannot be concerned only with multiplying perspectives; multiplicity must also be imbued with a sense of purpose. What is required is that perspectives which are salient for full deliberation

economic power) to pervasive forms of structural power associated with social and cultural domination. All are relevant. All also tend to be mutually reinforcing and to contribute to similar results in terms of the relative position of power of a given group of persons.

¹⁶ Coke, *supra*, note 13 at pp. 353–4.

should be provided for through procedures that allow these perspectives to have a chance to contribute to the collective wisdom, rather than being ignored or submerged.

How might all this be relevant to the question of composition of the human rights treaty bodies? It seems evident enough that these bodies need to be diversity-sensitive in a strong sense, given that one of the central normative functions of international human rights supervision is to understand, reveal and help counteract exercises of power that produce oppression for dominated social groups. This function will be undermined without the insight of lived experience being part of the internal institutional dialogue. As such, the judgment exercised by the institution risks being systematically impaired if the perspectives of such groups are not adequately represented. This is so even when it is squarely acknowledged that diversity of social experience within an institution does indeed only produce an increased probability, not a guarantee, of meaningful understanding. The absence of guarantee is hardly a reason for not seeking to enhance diversity, within the constraints of a given institutional situation.¹⁷

C. Representation in the UN human rights treaty system

It is useful to outline current philosophies and practices of representation relating to the human rights committees. What follows is indicative only, but it is intended to suggest that there is reason to be concerned about diversity of knowledge, both experiential and disciplinary.

I. DIVERSITY OF SOCIAL EXPERIENCE

The criteria for the composition of the human rights committees are governed by the text of each treaty except for the Committee of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁸

¹⁷ In a similar vein, while no single person filling a vacancy on a multi-person institution can embody all the diversity needs of that institution, this does not mean that it is illegitimate to factor one or more pressing diversity needs of the institution (and the capacity of a given candidate to meet those needs) into one's assessment of whose election or selection would most enhance the collective excellence of the institution.

¹⁸ That treaty provides for the Economic and Social Council (ECOSOC) to be the supervisory body and provides no criteria for the composition of any subsidiary organ it establishes to perform that task. However, ECOSOC has adopted a resolution which sets out the criteria: ESC Res.1985/17, UN ESCOR, Supp. (No. 1), at p. 15, UN Doc. E/1985/85, 1985. Para. (b) of ESC Res.1985/17 provides that the ESCR Committee . . .

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In contrast to elections to the European Court of Human Rights, election to the committees is not as dominated by statist considerations, although there are important vestiges of such considerations.¹⁹ States elect the members of the committees.²⁰ All five treaties other than the ICESCR require states to nominate only their own nationals.²¹ While the ICESCR Committee is not subject to this limitation, organisational practice in electing members has been no different from that under the other five treaties; to the author's knowledge, there has not as yet been any nomination of anyone other than a state's own national.²² Four of the treaties (the Convention against Torture (CAT), the Convention on the Rights of the Child

shall have 18 members who shall be experts with recognized competence in the field of human rights, serving in their personal capacity, due consideration being given to equitable geographical distribution and to the representation of different forms of social and legal systems; to this end, 15 seats will be equally distributed among the regional groups, while the additional three seats will be allocated in accordance with the increase in the total number of states parties per regional group.

ECOSOC's filling of the gap in the ICESCR text will be treated as akin to treaty-authorized subsidiary rules and thus ESC Res.1985/17 will be regarded as if it were part of the ICESCR text. ESC Res.1985/17 refers to 'the regional groups'. The five regional groups within the UN are: Western European and Others Group (WEOG), Middle East and Asia, Africa, Latin America and Eastern Europe.

¹⁹ Some will find this characterisation of the European Court of Human Rights puzzling given that its judges are elected by an indirectly-elected body (the Parliamentary Assembly of the Council of Europe) from a pool of candidates nominated by each state (three nominees per state). However, under the European Convention on Human Rights (ECHR), each state is entitled to have one of its three nominees elected and the practice to date has been for the first person on each state's list to be elected, except in a few exceptional cases: H. Kruger, 'Selecting Judges for the New European Court of Human Rights', 17 *HRLJ*, 1996, p. 401 at pp. 401-2. Thus, the election procedure under the ECHR has to date operated more as an appointments procedure, albeit with a fitful checking mechanism that has resulted on rare occasions in the Parliamentary Assembly electing someone further down the list.

²⁰ Except for the ICESCR Committee which, being a creature of ECOSOC, is elected by the membership of ECOSOC. For all the committees, election is by secret ballot and a nominee must obtain an absolute majority.

²¹ Article 29(2), International Covenant on Civil and Political Rights (ICCPR); article 17(2), Convention on the Elimination of Discrimination against Women (CEDAW); article 43(3), Convention on the Rights of the Child (CRC); article 8(2), Convention on the Elimination of Racial Discrimination (CERD); article 17(2), Convention against Torture (CAT).

²² The depth of the practice is such that, if a state were to act in an uncharacteristically altruistic manner by nominating a non-national, '... the chances of election would probably be slight'. P. Alston, 'The Committee on Economic, Social and Cultural Rights', in *The United Nations and Human Rights: A Critical Appraisal* (ed. P. Alston), Oxford, 1992, p. 473 at p. 488.

(CRC), the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD)) allow each state to nominate only one person, thereby indirectly preventing 'over-representation' of any one state.²³ While the International Covenant on Civil and Political Rights (ICCPR) does permit nomination of two nationals,²⁴ it stipulates that the 'Committee may not include more than one national of the same state'.²⁵ There are no formal limitations for the ICESCR Committee in ESC Res.1985/17 except that implicit in the ceiling of four persons from any one regional grouping; in practice, the other five treaties' rule of one national per committee is read into the ICESCR as well. Thus statism is accommodated in a relatively limited way, its most significant element being the negative requirement that no one state can have more than one national on a committee.²⁶

None of the human rights treaties refers to representational diversity related to social experience as distinct from nationality.²⁷ Yet, the various treaties do express some concern with diversity of representation beyond nationality. In elections to all the treaty bodies, 'equitable geographic distribution' must be considered.²⁸ In addition, four of the treaty texts use some variation of the formula borrowed from the Statute of the

²³ *Supra*, note 21. ²⁴ Article 31(1), ICCPR. ²⁵ Article 30(2), ICCPR.

²⁶ If one is to have regard to the representation of a given state across all six committees, the picture would be more complicated. For example, Egypt and the Russian Federation each currently have nationals on four of the committees.

²⁷ The only attention states appear to have shown matters of representation outside the treaty-based criteria has been the concern voiced by some states that, with 100 per cent of the membership of the twenty-three-person CEDAW Committee, women are unduly represented on that Committee. These states succeeded in having ECOSOC call upon states parties not to nominate only women, but the CEDAW Committee's resistance to this has resulted in no change to date. See H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law', 85 *AJIL*, 1991, p. 613 at p. 624; A. Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women', 14 *YJIL*, 1989, p. 1 at p. 9, note 27.

²⁸ While the common ground for all six treaty bodies is thus the 'equitable geographic distribution' formula, it is only with respect to the ICESCR Committee that the standard UN regional grouping formula is the *official* basis for election to the body: *supra*, note 18. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Migrant Workers' Convention), which is not yet in force, adds an interesting spin on geographical diversity by calling for 'due consideration [to] be given to equitable geographic distribution, *including both States of origin and States of employment*': article 72(2)(a) (emphasis added). The inclusion of this added guideline shows a concern with interstate reciprocity that partly distinguishes migrant workers' issues from many other human rights issues.

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International Court of Justice (ICJ), which makes ‘representation of the main forms of civilisation and of the principal legal systems of the world’ constraining factors in elections to the Court.²⁹

Interestingly, the two newest instruments, CAT and CRC, seem less inclined to accept that societal or civilisational differences are relevant to the collective competence of their committees. CRC drops entirely the reference to either civilisations or social systems while retaining the criterion of representation of ‘principal legal systems’.³⁰ CAT omits any reference at all to either different social systems or different legal systems.³¹ It may have been assumed that geographical diversity was a sufficient surrogate for diversity amongst societies and legal systems. Moreover each of the two committees is significantly smaller, at ten members;³² it may have been felt that there was less room for manoeuvre to accommodate multiple representational criteria beyond geographic origin. It may also have been thought that experiential diversity is less relevant (even less legitimate) in the areas covered by the two treaties. CAT refers to legal knowledge not in terms of diversity (as do all five of the other treaties) but in terms of some implicit notion of universal legal expertise when it says that consideration should be given to the ‘usefulness of the participation of some persons having legal experience’.³³ Such bracketing of diversity seems highly tendentious given what we know, for instance, about debates over different cultural and religious perspectives on children’s rights. Even for one of the most universal of norms, the prohibition of torture, bracketing diversity is not without its problems, as Andrew Byrnes has noted:

[I]n view of the possible divergence of views as to whether various punishments ordained or lawful under Islamic law which would otherwise amount to torture or other ill treatment constitute ‘lawful sanctions’ within the

²⁹ Article 9, Statute of the ICJ. The ‘representation of the different forms of civilisation and . . . the principal legal systems’ formula applies to three treaty bodies: article 31(2), ICCPR; article 8(1), CERD; and article 17(1), CEDAW. Note that these human rights treaties refer to the *different* forms of civilisation while the ICJ Statute refers more archaically to the *main* forms of civilisation. A more modern formulation, which can be treated as the equivalent, applies to the ICESCR Committee which substitutes the words ‘representation of different forms of social and legal systems’. The Migrant Workers’ Convention drops any reference to civilisations.

³⁰ Article 43(2), CRC. ³¹ Article 17(1), CAT.

³² The CERD and ICESCR Committees, and the HRC, all have eighteen members while the CEDAW Committee has twenty-three.

³³ Article 17(1), CAT.

meaning of article 1, the presence of a member with some expertise in relation to Islamic laws and culture would seem highly desirable.³⁴

These criteria operate in a diffuse fashion because there is no system or procedure by which they are given effect. The various texts require only that 'consideration' be given to these criteria.³⁵ At most, the criteria act as guidelines in a process of unofficial coordination amongst states. Predictably enough, some coordination of voting in terms of the 'equitable geographic distribution' criterion has taken place by tapping into the standard UN practice of using regional groups to some degree as a stand-in for geographic diversity. Despite vast differences amongst states within each group, one rationale for reliance on the regional groups in the human rights context would seem to be a certain rough commonality of historical and modern experience.³⁶ Moreover, distribution along the lines of regional groups at least prevents a certain form of domination by any one group of countries and thereby promotes some diversity of perspective.³⁷

Most accounts of diversity of representation on the committees focus on the regional group system.³⁸ In practice, despite the reference to equitable

³⁴ A. Byrnes, 'The Committee Against Torture', in Alston (ed.), *supra*, note 22, at pp. 509, 511–12, note 10.

³⁵ For the ICESCR, the phrase used is 'due consideration'.

³⁶ M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford, 1995, p. 43. Craven goes on to make clear that he does not see the regional groupings as reflecting the most relevant geographical considerations, especially as they are first and foremost regional categories constructed with commonality of state interest in mind: *ibid.*, p. 44.

³⁷ It is recognised that the anti-domination function breaks down the greater the extent to which the regional groups are internally diverse with respect to political and economic systems and the greater the extent to which some of these systems are significantly shared by states outside the regional group. It is likely, for example, that 'Western' (or Western-oriented) states exist within the different regional groups to such a great extent that Western perspectives will not be confined to WEOG (Western European and Others Group) members alone.

³⁸ See for example Craven, *supra*, note 36, at pp. 43–4; T. Opsahl, 'The Human Rights Committee', in Alston (ed.), *supra*, note 22, p. 512; and Byrnes, *supra*, note 34, p. 475, respectively. On the HRC, see also D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford, 1991, pp. 44–7; and M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Kehl/Strasbourg/Arlington, 1993. The practice in electing the HRC seems to be to use the UN regional groups as the basis for categorising states parties but to vary the standard UN requirement of equal (i.e. the same) representation according to the proportionate representation amongst states parties, thus justifying some regional groups having more members than others without this being perceived as over-representation: see McGoldrick, *ibid.*, p. 47.

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geographic distribution, geographic imbalances are not uncommon even when attempts have been made to secure a pre-vote consensus.³⁹ For example, the most recent election to the CEDAW Committee resulted in no member from the Eastern Europe regional group.⁴⁰

Most attention has been focused on geographical disparities within the Human Rights Committee (HRC). Writing in the early 1990s, Opsahl noted that '[t]he geographical distribution of elected members has only roughly corresponded to the "electorate", so that, for example, Africa was under-represented until 1984'.⁴¹ Nowak, writing in 1993, noted that, since 1986, both 'the Western and socialist industrialised [Eastern European] countries were over-represented and, above all, the Latin American States somewhat under-represented' and that, after the 1992 election, 'the Western group [was] . . . the only region clearly over-represented'.⁴² After the elections in early 1997, the 'clear' over-representation of Western countries on the HRC has become even more problematic: close to 50 per cent (eight of eighteen members) are now from the Western group of countries. Perhaps more serious is the fact that this coincides with a complete absence of

³⁹ This is well depicted in Byrnes' account of how the 1987 CAT Committee elections resulted in four WEOG members being elected but only one African member 'despite a consensus reached in preliminary consultations that there would be 3 Western European members and 2 African members': Byrnes, *supra*, note 34, at p. 512. It is important to note that a pre-vote consensus can be guaranteed only if each regional group limits the number of nominees from states which are part of that regional group to the precise number allocated in the pre-vote negotiations. The rules for election are that the candidates receiving the largest number of votes and an absolute majority of votes are elected. The exception is the ICESCR Committee. Given the guarantee of three seats per group plus a proportionate share of the remaining three seats, it is possible for any regional group, if it were inclined, to organise itself so as to pre-elect the number of candidates which it was entitled to have elected and then nominate only that exact number of persons. In this way, other states would have no choice but to vote for those nominees with the result that the idea of a general election to the committee would be thwarted. This is not to say that this has happened, only that it could happen. Such a possibility would be very unlikely if the regional groups were not entitled to a fixed number of seats, but, instead, to a minimum (say, two) and a maximum (say, five).

⁴⁰ Of the twenty-three members, not one is from a state in that group. To appreciate why this is a problem, one need only note the special insight of women from Eastern Europe on the effects of transitional political and economic situations on women as well as on revivalist politics pushing traditional values: see N. Funk and M. Mueller (eds.), *Gender Politics and Post-Communism: Reflections from Eastern Europe and the Former Soviet Union*, New York, 1993. Note also that there is only one Eastern Europe member on the HRC. The list of members of all six human rights committees can be found in the 'Treaty Body Database' on the Internet website of the High Commissioner at <http://www.unhchr.ch>.

⁴¹ Opsahl, *supra*, note 38, at p. 374. ⁴² Nowak, *supra*, note 38, at p. 517.

representation of sub-Saharan Africa, even though the Africa group does have two nationals.⁴³

While these problematic results have occurred even at the level of state-oriented geography, the 1997 election to the HRC did produce better results from a trans-societal perspective, with the highest representation yet of women, five of eighteen up from three previously.⁴⁴ The CEDAW Committee continues to be composed entirely of women (twenty-three of twenty-three). However, three of the other committees have very few women members.⁴⁵ On the other hand, interestingly, 70 per cent of the CRC Committee are currently women.⁴⁶ The representation of women across all six committees is 41.2 per cent (forty of ninety-seven members), but that figure is pushed upwards by the CEDAW Committee; on the other five committees, only 23 per cent (seventeen of seventy-four) of members are women. If one focuses on the four treaties whose mandate is to focus on rights not defined in relation to membership in a particular social group, only 15.6 per cent (ten of sixty-four) of members are women.

2. DIVERSITY OF DISCIPLINARY EXPERTISE

This discussion suggests the limited extent to which diversity of social experience is accommodated by the treaties.⁴⁷ Some diversity of knowledge

⁴³ The island state of Mauritius and the North African state of Egypt did have nominees elected. If only to show the strained nature of regional categories, it might be noted that both countries could easily be considered part of another region, namely the 'Middle East and Asia' which is itself an agglomeration without a principled basis other than geographical proximity and some sort of shared constructed identity in opposition to historical and ongoing encounters with the West.

⁴⁴ Although articles 33 and 34 of the ICCPR stipulate that a vacancy due to death is to be filled by election after nominations by any state, the practice appears to be to allow the state whose national died to be the sole state to nominate a replacement. In this way, that nominee's 'election' is assured. The female HRC member from Lebanon was replaced under this process by a male. Thus the HRC currently has four female members. However, the election results (five of eighteen) will continue to be used as the reference point in this chapter.

⁴⁵ The ICESCR Committee (two of eighteen, using last election results as the measure despite the departure of one member); the CERD Committee (two of eighteen); and the CAT Committee (one of ten).

⁴⁶ Seven out of ten members are women.

⁴⁷ Information is virtually non-existent on many other fronts. For example, most committees may appear to have considerable racial, ethnic, cultural, and religious diversity because members are drawn from around the globe (this being a surrogate benefit of some

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of different legal systems was deemed desirable in all the texts except CAT. A focus on legal systems overlaps to some extent with diversity of experience, as legal systems are in many ways bound up in social systems and cultural traditions. Furthermore, there is something to be said for seeing experience with legal systems as valuable, at least potentially, for understanding how oppression occurs and is perpetuated.⁴⁸ But it may be that the focus on the need for representation of the legal profession (however broadly defined) was based more on the assumption that law is the most relevant discipline for the treaty bodies. While attention to including different legal systems reflects some commitment to diversity, it simultaneously elevates one discipline above all others. In terms of textual signals, CAT's reference to the need to consider including 'some persons having legal experience'⁴⁹ might imply that the CAT Committee was not intended to be dominated by lawyers. It is only the absence of *some* members with knowledge of law that CAT seems to treat as a problem. Article 17(1) can be read as intended to ensure only that a critical mass of lawyers is elected to the committee ('some as distinct from none', rather than 'some as distinct from all'). However, it has probably had the somewhat perverse effect of causing priority to be given in the nomination and election process to lawyers, law being the only discipline deemed worthy of express mention.⁵⁰ Andrew Byrnes noted with regret that, in the first term of the CAT Committee (1988–1991), as many as seven of the ten members were

adherence to a distributive scheme organised around the regional groups). However, further information would be needed to determine whether any significant number of members come from non-dominant groups within their own societies. Furthermore, no information is available on social and economic status, although it may fairly be assumed that the committee members disproportionately represent more economically privileged sectors of national societies. Also, there are no openly gay women or men on any of the committees to this author's knowledge.

⁴⁸ Lawyers may not always be the best at understanding this social dimension of the operation of legal systems. Recognition of this would open the door to seeing the usefulness of having a person on a committee who, for example, has been an anti-poverty activist or a mental health advocate and knows the Kafkaesque ways in which the law deals with the poor or the mentally ill. Or, it would suggest that having the experience, from the inside, of prison conditions and regimes could provide a vital insight for treaties such as the ICCPR and CAT. Such examples would be easy to multiply. A broader insight may be that there is a value in having persons on the committees who have directly experienced serious human rights violations.

⁴⁹ Article 17(1) (emphasis added). However, note that the body most dominated by lawyers, the HRC, also includes this phrase.

⁵⁰ Byrnes, *supra*, note 34, at p. 512.

lawyers; the other three had backgrounds in medicine, public health and communications.⁵¹

By contrast Byrnes welcomes the '[p]rofessional diversity [which] is [a] . . . distinguishing characteristic of CEDAW', adding:

Only about half of the experts who have served as CEDAW members are lawyers. Other members come from such areas as medicine, public health and hospital administration, political science, geography, trade union and labor relations, education, social work and engineering. This diversity of experience has been reflected in the Committee's questions and has been valuable in the areas of economic and social rights and development.⁵²

Writing in 1995 with similar concerns in mind, Matthew Craven has been critical of the fact that 'the vast majority of current members [of the ICESCR Committee] have a predominantly legal background', suggesting that there is a 'need for wider knowledge particularly as regards the rights to food, housing, clothing, and health'.⁵³ Comparatively little criticism can be found of the fact that the HRC is heavily dominated by the legal profession,

⁵¹ *Ibid.* Lessons can be drawn from the Council of Europe human rights system. It is generally recognised that one reason for the effectiveness of the European Committee for the Prevention of Torture is that non-lawyer members of the Committee have been central to the process. This has proven especially beneficial with respect to on-site visits conducted by the committee: conversation with Judge R. St. J. Macdonald of the European Court of Human Rights, Toronto, 17 September 1997. It is worth noting that article 4(1) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment specifies 'professional expertise in the areas covered by the Convention'. Thus, clear recognition of non-legal professional expertise is actually written into the treaty text.

⁵² Byrnes, *supra*, note 27, at p. 9.

⁵³ Craven, *supra*, note 36, at p. 46. A survey of the current composition of the ICESCR Committee reveals that half of the Committee (nine of eighteen) have legal backgrounds. Writing in 1995, Craven does not indicate what year he was assessing as the basis for his conclusion on the over-representation of lawyers, but the current 50 per cent is hardly the 'vast majority' to which he refers. Note that this evaluation by Craven is partly informed by his conception of the ICESCR Committee as having 'limited' functions that are 'strictly legal', *ibid.* Karl Joseph Partsch, in his account of the composition of the CERD Committee, appears to lament the fact that 'only half of the Committee members have had a legal background': K. Partsch, 'The Committee on the Elimination of Racial Discrimination', in Alston (ed.), *supra*, note 22, at pp. 339, 340. He juxtaposes what he sees as the under-representation of lawyers to the over-representation of 'diplomats who may have been chosen more on the basis of their rank than of their professional qualifications'. If the issue is the comparative merits of the CERD Committee having the expertise of lawyers versus diplomats (especially currently-serving diplomats), then Partsch's point is impeccable. However, the force of his concern is diminished if the comparison is between law and other relevant disciplines.

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suggesting an implicit conception of 'civil and political' rights that is oriented towards the idea of a mature body of norms that need to be applied in legally expert fashion as much as developed through creative acts of interpretation.⁵⁴

It is apparent that law has all but covered the treaty field as the discipline of choice. No mention is made of any other single field of knowledge. There is, however, an argument to be made that several of the treaties conceive their normative focus as interdisciplinary. Both the ICESCR and the ICCPR require that *each* committee member have 'recognised competence in the field of human rights';⁵⁵ CAT adopts the same formula.⁵⁶ Furthermore, the two conventions most closely associated with protecting rights of particular social groups conceptualise their respective fields in terms of a sub-discipline within the field of human rights. Both CRC and CEDAW presuppose the fields of 'children's rights' and 'women's rights', respectively, by requiring that each committee member have 'competence in the field covered by the Convention'.⁵⁷ CERD is conspicuous by its silence on the subject of expertise.

Thus, except for CERD, each text expressly presents itself as being about human rights, or a sub-discipline of human rights, *qua* field of knowledge. That being so, it is hard to maintain that law *per se* can map directly onto the treaty field, even if individual lawyers with interdisciplinary knowledge can do so. Instead, the treaty fields need to be seen as involving various distinct disciplinary bodies of knowledge *and* as interdisciplinary; the bridge between these two conceptions would seem to be that of mutual education and shared consideration through cross-disciplinary dialogue. To require that each committee member be expert in the field of the treaty is in effect to require that each member engage in a process of professional self-education through mutual education.⁵⁸

⁵⁴ A quick count suggests fifteen of the eighteen members after the 1997 elections to the HRC are lawyers, Yalden, El-Shafei, and Gaitan de Pombo not being trained in law. It is to be noted that article 28(2) of the ICCPR contains an identical provision to the CAT in noting the 'usefulness of the participation of *some* persons having legal experience' (emphasis added). We have moved from the idea of some lawyers to a world of virtually all lawyers.

⁵⁵ ESC Res. 1985/17, para. (b), *supra*, note 18, and article 28(2), ICCPR.

⁵⁶ Article 17(1), CAT.

⁵⁷ Article 17(1), CEDAW; article 43(2), CRC. The CRC actually refers to 'recognized' competence while CEDAW leaves out this qualifier.

⁵⁸ For a conception of dialogue as mutual education, see G. Warnke, *Justice and Interpretation*, Cambridge, Mass., 1993 pp. 154–7, 164.

I have argued that both the legitimacy and quality of official acts of judgment are improved when institutions are composed so as to enhance interactive diversity of experience. Something similar can be claimed for interactive diversity of expertise. Whatever necessary skills they bring to the interpretive enterprise, lawyers cannot claim a monopoly of knowledge of the interpretive *content* to be given to human rights. In this regard, a recent proposal for reform of the practice of nominating and electing judges to the European Court of Human Rights is of interest. In the 1998 elections to the new, merged European Court of Human Rights, states had, as before, the right to nominate three persons. Hans Christian Kruger, Secretary to the European Commission of Human Rights, suggested a new approach to nomination, albeit one that would still stay within the constraints of the treaty requirement that ‘candidates . . . must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence’.⁵⁹

Three candidates are to be proposed and it would seem appropriate that they should come from different ‘worlds’ of the legal profession in the land. In many of our countries one can identify three different groups making up the legal profession: the academic, the judicial service, and the practising or company lawyer. In order to avoid that the Court is composed of too many judges coming from only one of these groups, the candidates should be selected from all three of them, but only one person should be proposed from each group . . . The idea is that the eminent legal personalities proposed for election as judges to the European Court of Human Rights should be representative of the legal profession as a whole.⁶⁰

As Kruger notes, abandonment of the Parliamentary Assembly’s practice of only ‘electing’ the first person on each state’s list would be a necessary adjunct of such a system of nomination. Kruger’s proposal sees value in a diversity of sub-disciplinary perspectives within the law. But it may be, for example, that his proposal would create more intergenerational diversity in the pool of nominees. If so, this would probably also have a beneficial impact on gender diversity. On the latter score, Kruger goes on to supplement his three-estates proposal with a diplomatically-crafted proposal designed to confront the serious under-representation of women on the Court:

⁵⁹ Article 39(3), ECHR; article 21(1), Protocol 11 to the ECHR (ETS 155).

⁶⁰ Kruger, *supra*, note 19, at pp. 403–4. It does not appear that Kruger’s proposal, an unofficial one at this stage, was actually taken up by most states as a basis for deciding on their lists of nominees for the 1998 elections to the new Court.

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It goes without saying that due regard should also be paid to the need to ensure gender equality. As three candidates are to be proposed it should be clear that one candidate must be of a gender which is different from the other two.⁶¹

Diversity is thus on the agenda in the Council of Europe and some institutional steps are gingerly being taken to further interactive diversity.

D. The proposal: An affirmative election process

Diversity is valuable for what it contributes to dialogical reasoning. However, the dialogue cannot be merely formal: dialogue as process must be conditioned by dialogics as critical substance. The processes must not be tainted by power imbalances and the flattening effect of universalising 'neutrality'. Accordingly, there needs to be a more affirmative, proactive approach to diversity within the human rights committees.

⁶¹ *Ibid.*, p. 404. Prior to the 1998 elections to the Court, only one of the forty judges was a woman. On this aspect of Kruger's proposal, some action has been taken. In early October 1997 a letter was circulated to all states by the Secretary-General of the Council of Europe drawing their attention to the problem of lack of gender diversity on the Court and asking them to take this into account in their nominations for the first elections to the new Court. See D. Tarshys, Letter to Ministers in the Committee of Ministers of the Council of Europe, Strasbourg, 6 October 1997, on file with the author. Secretary-General Tarshys attaches as Appendix 5 to his letter an 'invitation' to states parties to the ECHR extended by the Ministers' own Deputies. The invitation is entitled 'Balanced representation of women and men in the new European Court of Human Rights'. Information from the Council of Europe Press Service is available on the nominees for thirty-one of the thirty-nine places on the new Court. Of the ninety-three candidates nominated from these thirty-one states (three candidates per state), thirteen were women. Two countries (the Slovak Republic and Albania) nominated two women, meaning that twenty states did not nominate any women to be amongst the three candidates from each of those states. Of the eleven states nominating women, only three states (Estonia, the Netherlands, and Slovakia) indicated their preference for their female candidate by listing her first; see *supra*, note 19 on the significance of the practice of listing a candidate at the top of a state's non-alphabetical list of three candidates, a practice which appears to have been carried over to the lists of candidates to the new Court (although a few states, like Switzerland, appear to have listed their nominees alphabetically). Elections for those thirty-one places took place at the end of January 1998 with the result that six women were elected (from Belgium, the Netherlands, Norway, the Slovak Republic, Sweden, and the Former Yugoslav Republic of Macedonia). Of those six elected, four were elected from either the second place on her state's list (Tulkens of Belgium, Greve of Norway, and Palm of Sweden) or third place (Nikolovska-Caca of Macedonia). By way of comparison, the Parliamentary Assembly also elected three men from further down the list (Maruste of Estonia, Baka of Hungary, and Wildhaber of Switzerland). In the elections for the remaining eight places, which took place in April 1998, three more women were elected – from Belgium, Croatia and Ireland.

1. GENERAL OUTLINES

The UN High Commissioner for Human Rights seems institutionally best-situated to assume the task of diversity promotion. It is proposed that she consider establishing a global search process for potential candidates. To this end, she could set up an Eminent Persons' Group (EPG) to act in an advisory capacity and to assist, as needed, in interactions with governments. She would receive suggestions of potential candidates from any person, group, or organisation. A small number would be identified as desirable candidates based on their individual capabilities and also on their contribution to institutional diversity of experience and expertise.⁶² Once a person has been approached to see if she or he would stand for election if nominated, the UNHCHR, alone or in association with members of the EPG, would approach the national state of the identified candidate and ask if that country would consider nominating its national. The UNHCHR could sound out support from other states both in the regional group (or a relevant sub-region) and globally in order to present to the national state a picture of potential support. The UNHCHR may wish to consult closely with states which are influential in the UN human rights process to ask them to indicate directly to the potential nominating state their willingness not only to vote for the state's candidate but also to encourage other states to do the same.

This proposal would not require any amendment to any treaty. Nor would it, I believe, represent any excess of mandate on the part of the UNHCHR: the treaty-based rules for nomination and election of committee members would still have to be followed.⁶³ National states would still nominate candidates and states parties to each treaty would still do

⁶² The politics of elections to the committees suggests that it would not be surprising if the elections process not only resulted in problems of diversity but also problems of threshold qualifications (what might be termed baseline competence) for being on a committee. As Opsahl says in a classic understatement, the UN politics of committee elections means that 'a high premium is not always placed on the individual qualities which are most important from the Committee's viewpoint, such as competence, energy, ability to co-operate, negotiating skill, and propensity to attend meetings': Opsahl, *supra*, note 38, at p. 374. Seasoned observers of the UN human rights committees may feel that the preceding discussion has leapt to the question of diversity of knowledge when basic competence is as much, or more, a concern. The proposed process would address threshold expertise concerns simultaneously with diversity concerns.

⁶³ The High Commissioner's mandate can be found in GA Res.48/141, 7 January 1994, reproduced in 33 *ILM*, 1994, p. 303.

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the electing.⁶⁴ The UNHCHR's role would be a legitimate expression of the international public interest in the outcome of what would remain state-controlled processes.⁶⁵ Her role would be complementary to that of states parties.

2. SEEKING THE COMMITTEES' VIEWS ON DIVERSITY CRITERIA AND NEEDS

As I have argued, diversity deserves attention as one element of reform of the treaty bodies. Substantive guidelines as to the diversity criteria which the UNHCHR might apply in relation to all the committees would be useful, but cannot be laid down *a priori*. Ideally, the UNHCHR should establish such criteria by consulting with states, observers of the committees, and the committees themselves. In the process, she would gain a sense both of the receptivity to her proposed role and of the most effective means to make a difference despite the coordination problems inherent in six diffuse election processes.

Each committee could be asked by the UNHCHR to consider including as part of its agenda each year or so a consideration of the most serious gaps, i.e. the most pressing needs, in its collective expertise and experience.⁶⁶ It is recognised that this suggestion may prove ill-advised. Especially if no work is done to prepare the ground, some committee members may resist frank discussion of diversity issues, particularly in relation to social group 'representation'. Gender diversity may be an exception, given the inroads into general awareness made in the wake of the World Conference on Human Rights, held in Vienna in 1993, and the Fourth World Conference on Women, held in Beijing in 1995. UN human rights discourse is gradually coming to accept as self-evident the need to include the

⁶⁴ The rules differ for the ICESCR Committee in that nominations are not limited to states parties and election is by the entire ECOSOC membership.

⁶⁵ Clause 3(a) of GA Res.48/141, *supra*, note 63, builds on the language of the 1993 Vienna Declaration of Human Rights by directing that the High Commissioner 'shall . . . [f]unction . . . in the recognition that, in the framework of the purposes and principles of the Charter, the promotion and protection of all human rights is a legitimate concern of the international community'. It would probably be more accurate to refer to this as the transnational public interest, to the extent that 'international' risks being understood as a synonym for 'interstate'.

⁶⁶ See Craven, *supra*, note 36, p. 44, who proposes that ICESCR Committee engage in such an exercise.

perspectives of women more systematically. It is significant in this respect that specific and potentially far-reaching recommendations to integrate gender perspectives into the work of all the human rights committees were addressed to all six committees, in 1995 and 1996, by the Annual Meeting of the Chairpersons of the Human Rights Treaty Bodies.⁶⁷

It might be thought that disciplinary diversity may be as much as most committees can contemplate discussing, without an undercurrent of resistance to the social 'politics' of diversity taking hold. However, given a strong view that the committees should become more, not less, juridical in character, similar resistance could also exist in relation to disciplinary pluralism.⁶⁸ In any event there will be serious constraints on how far any committee will go in making needs known, if by doing so, some current members may be voted out in the next elections. This of course applies equally to social diversity.

The committees might find that the best course is to search for some general consensus about the ideal medium-term profile of the committee. This would not preclude any committee from seeking to reach consensus on a more specific analysis of gaps and needs. In this way, some indicative guidelines could emerge to help guide the candidate identification process.

It might be thought that there is also something cumbersome about a process for consulting with each committee as a whole. It may be better simply to have the UNHCHR consult informally with the committees, welcoming submissions from any committee members and discussing matters of composition with the chairs at the time of their annual meeting. This would allow the diversity needs of any committee to be considered in terms of that committee's relations with the other committees. The more effectively and pervasively the six committees begin to interact as one *de facto* body by engaging in cooperative inter-treaty dialogue, the more it

⁶⁷ UN Doc. A/50/505, 4 October 1995, at para. 34; UN Doc. A/51/482, 11 October 1995, at para. 58. See also Report of the Secretary-General, 'Follow-up Action on the Conclusions and Recommendations of the Sixth Meeting of Persons Chairing the Human Rights Treaty Bodies', UN Doc. HRI/MC/1996/2 (15 August 1996) at paras. 100–8, especially on the Commission on Human Rights (para. 103), on the HRC, the ICESCR, CERD, and CRC Committees (paras. 105–8) and on the CEDAW Committee (para. 101).

⁶⁸ In this regard, note the following 1996 recommendation of Bayefsky in her study for the ILA Committee on International Human Rights Law and Practice: 'States parties should nominate to the treaty bodies individuals having the capacity to handle individual communications, namely, persons with legal qualifications.' ILA Committee Report, *supra*, note 3, p. 22 (emphasis added).

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may be possible to consider diversity within the combined membership of ninety-seven persons as a shared pool of knowledge, thus expanding the possibilities for different combinations and recombinations of experience and expertise.

3. THE ROLE OF THE EPG

The role of the proposed Eminent Persons' Group would be to give moral and political backing to the UNHCHR. Preliminary work would be undertaken by the staff of the Office of the UNHCHR. A list of the identified potential candidates would be passed by the EPG for discussion, modification and approval and for indications of willingness to assist in approaching governments. Beyond their advisory function, the members of the EPG could be more or less active as circumstances and dispositions permit. They could actively seek out candidates to recommend to the group and they could make known their support for candidates once states have nominated them.⁶⁹

4. THE 'KISS OF DEATH' OBJECTION

One objection to this proposal is that any process that publicly identified nominees as qualified, both in terms of indices of competence and in terms of relevant experiential and disciplinary knowledge related to human rights, could well spell the 'kiss of death' for those candidates. The underlying point is that there may be a sufficient number of states parties with little commitment to making the human rights committees effective. There is a possibility that such states might deliberately vote against very good candidates, perhaps even coordinating bloc voting against such candidates. A linked premise may be that, in the current election processes, many state representatives do not focus on the qualifications of the candidates, but cast votes for all sorts of reasons, including the pervasive 'trading' of votes

⁶⁹ The persons themselves should combine high moral stature on the international stage with a life that has involved some struggle in the cause of human rights. While complete lack of connection to current governments or to human rights NGOs might be an overly strong requirement, each person should nonetheless be widely recognised as someone who transcends his or her associations. The kinds of persons contemplated include people of the stature of Nelson Mandela, Rigoberta Menchu, Aung San Suu Kyi and Vaclav Havel.

across the whole UN electoral slate. The current electoral system is unedifying; even good candidates may be elected for reasons unrelated to their qualifications and willingness to serve.⁷⁰

The sober realism of the objection must be recognised. There is indeed evidence of resentment on the part of some governments who feel that international human rights bodies are pursuing their mandate too zealously. One example was the campaign of the United Kingdom for pre-screening of nominees for the new European Court of Human Rights. On 27 February 1996, the then UK Secretary of State of Foreign and Commonwealth Affairs made the following proposal in a letter to the Secretary-General of the Council of Europe:

Governments should agree now on an arrangement for exchanging informally the names of any new nominees as judges for the present Court before they are tabled. Part of the arrangement would be an understanding that account would be taken of the views of other governments . . .⁷¹

This attempt at orchestrating a more deferential European Court was not pursued, but the lesson of the UK initiative is that similar, perhaps less public, strategies could well be mounted in the UN arena by a range of states.⁷²

On the other hand, the 'kiss of death' phenomenon does not seem to have been, to date, a major feature in elections to the committees. The strongest and most committed members of the various committees have been sufficiently well-known over the years, and, at the very least, do not seem to have been prejudiced by that commitment at the point of re-election. This applies to certain committee members felt by some

⁷⁰ It is no secret that lobbying in UN elections does not come without a certain amount (even a high degree) of horse-trading. Opsahl understates the matter when he notes that '[b]loc voting and general diplomatic bargaining may also play their roles': Opsahl, *supra*, note 38, at p. 374. There is a general consensus amongst inside observers that this practice is prevalent, perhaps in part because elections to human rights committees are held in New York where diplomats are used to UN system-wide voting politics. In that regard, Michael Reisman's observation that 'elections to the [International] Court of [Justice] are largely political' has some relevance for elections to UN juridical bodies more generally: M. Reisman, 'Redesigning the United Nations', 1 *Singapore Journal of International and Comparative Law*, 1997, p. 1 at p. 24.

⁷¹ As quoted in Kruger, *supra*, note 19, at p. 401.

⁷² One saving grace is the formally non-binding character of the committees' normative acts. Effectiveness is thus not quite the same threat.

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governments to have been leaders in the process by which a particular committee may have 'overstepped its mandate'. From time to time there are rumblings about a disgruntled state contemplating targeting a committee member in a re-election, but full-scale challenges do not seem to have materialised.⁷³

Moreover, to focus on the *realpolitik* of vote-trading and the desire of some governments to rein back the committees does not quite capture the complexity of the situation. For instance, states known to have concerns about the growing 'sovereignty-encroaching' dimensions of the work of some of the committees have nonetheless nominated strong candidates.⁷⁴ It seems that a good percentage of states wish to be perceived on the relevant international stage as good citizens at least as much as they wish to pursue hard-nosed foreign policy agendas. Even if such conduct is partly a tribute paid by vice to virtue, it cannot be ignored that states see much to be gained by acting in good faith in both their nomination and voting behaviour. It is arguable that the more the profile of the committees is enhanced, including through the supportive involvement of the UNHCHR and even the UN Secretary-General, the more states will see it as prestigious to have nationals nominated to some of the committees. If in turn they know that there is some institutional pressure for strong candidates to be highlighted and weak candidates (or, at least, very weak candidates) to become known as such (even if less publicly), there may even be a dynamic favouring persons who can be presented as strong candidates.

Insiders to the diplomatic process of UN electoral politics suggest another angle, the so-called 'chuff factor'. States that are less influential in interstate politics and may even have problematic human rights records

⁷³ This does not mean that one should attribute the longevity of such members to a good faith voting process. One need assume no more than that good candidates make it to the committees because some states take the process seriously enough to nominate such persons and potentially obstructionist states are not willing to spend energy amassing blocking coalitions to vote down such candidates.

⁷⁴ One example that comes to mind is Justice Bhagwati, the successful nominee from India to the HRC. His record as the pioneer of activist Supreme Court of India jurisprudence could hardly have been unknown to the Government of India. Another example might be the election of Thomas Buergenthal to the HRC. Buergenthal's pioneering role on the Inter-American Court of Human Rights and his role in pushing the UN Truth Commission for El Salvador are also well-known to most states, including the USA. Of course, the USA and India are powerful states that presumably backed their nominations with effective lobbying. Good candidates coming from less powerful countries might be more easily the targets of a blocking coalition.

may nonetheless respond favourably when approached to nominate a national who would make a superb nominee for a certain committee.⁷⁵ Apart from the sense of prestige that may be elicited, states will see benefits associated with relative cost savings in terms of the election campaign itself, given the prospect of influential support.

Surely one cannot organise reform strategies entirely around short-term realism. There are longer term system-building goals to be valued, and risks must be taken to promote those goals. One such goal is to encourage a different kind of political rationality in elections to UN human rights treaty bodies than is generally practised in most spheres of international politics. There is value in the UNHCHR promoting a process that contributes to elevating the debate. There may be some ugly politics and some short-term defeats. Some states may react negatively to what they might see as meddling in their treaty-sanctioned prerogatives; others may exploit the transparency of the process in order to try to target a candidate for defeat. That is the risk of electoral politics everywhere.

However, the effect of elevating the discourse could make it more likely that states will present their case in terms of values and less in terms of the *realpolitik* of state interest. In a more rational climate, the terms of debate may become such as to invite both public responses and some inchoate form of community judgment. Diversity itself may prove an ally. If some states object to a person as being too 'Western' or too 'Asian', too 'liberal' or too 'conservative', too 'activist' or too 'deferential', others can respond with the argument that one person does not a committee make and that diversity itself points to the importance of including different perspectives on human rights, albeit with the bottom-line requirement that all candidates have a good faith commitment to the protection of the human rights which are the focus of the committee in question.

⁷⁵ It may be conceded that less influential states may feel chuffed in this way, but it may still be objected that states that are either concerned about sovereignty or about their own human rights records are unlikely to elevate 'chuff' over hard calculus of political interest, especially if it is expected that a candidate who has been identified is not likely to go easy on her or his own state any more than on other states. It is possible that the trend towards the committees forbidding a national from being involved in cases or reports which concern her or his state (see 1996 Chairpersons' Report, *supra*, note 67 para. 29) will decrease states' worries that a strong candidate will boomerang on them. Some states will still probably need to be convinced that their nationals will not play some behind-the-scenes informational role which will make the committee's appraisal of the state more effective than it otherwise would be if the national were not on the committee.

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It must be acknowledged that the emergence of a new kind of public rationality will be contingent on a combination of two things, neither of them certain – noble politics and gifted diplomacy. As to the former, the attempt to change the governing mode of electoral politics should benefit from high-profile states acting in a spirit of altruism. It has already been suggested that conceptions of self-interest can be flexible and that states are inclined to some extent toward thinking of their own interests in terms of aligning themselves with the community-oriented behaviour of the good citizen and with corresponding long-term goals associated with strengthening the community's institutions. This is the normative glue for much multilateral cooperation. Even within a standard interstate paradigm that revolves around the interaction of mutual self-interest under the guidance of the invisible hand of reciprocity, there has long been evidence of states operating under assumptions of what has been called 'diffuse reciprocity'.⁷⁶ Short-term benefits based on immediate and tangible mutual interests need not be all that motivate state behaviour. States do see virtue in acting in less self-regarding ways such as by promoting something as intangible as a rule of law ethic in international relations. And in some fields (of which human rights may be the prime example), some state elites wish to find ways in their international relations for them to think of themselves, and be recognised, as moral actors.

Accordingly, the UNHCHR could consider encouraging states to engage in strategically altruistic behaviour designed to show a general commitment to international human rights institution-building and a specific commitment to the system of human rights treaty bodies. By way of illustration only, three examples of behaviour to be encouraged in the election process could be suggested. First, states might consider starting a *de facto* practice of co-nominating nationals of other states along with the national state.⁷⁷ Second, and more altruistically, states could forswear nominations of their own nationals for a period of several election rounds in order to make space for and support excellent nominees from other states,

⁷⁶ R. Keohane, 'Reciprocity in International Relations', 40 *International Organisation*, 1986, p. 1 at p. 20. The idea of diffuse reciprocity has its parallel in theories of treaty law (especially treaty interpretation) which emphasise the relational nature of treaties and the desire of states to foster and maintain a sustainable, good faith relationship: on this, see I. Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities', 12 *Michigan Journal of International Law*, 1991, p. 371.

⁷⁷ Co-nomination would have no formal status, but nor is it specifically prohibited by the treaties.

especially less powerful states. Third, states could be encouraged to nominate persons to the committees who have been independent observers, and even perhaps strong critics, of that state's own human rights record.

In terms of gifted diplomacy, the involvement of the UNHCHR will need to be marked by strategic prudence and diplomatic acumen, not to mention charisma. The questions Robinson will have to address include: how to solicit recommendations of potential nominees; how much to encourage public debate as to the merits of candidates; how public to make it known that certain state nominees have emerged with the assistance of this process; how to approach a government whose national has been identified, including whether to call on members of the EPG to assist the UNHCHR in this regard or whether to ask some key states to make representations to the government in question; how many persons to seek to nominate through this process so as to maximise chances of election while minimising states' discomfort; whether to encourage states to make an intended nomination known to the UNHCHR so that it may be factored into the UNHCHR's overall picture of diversity needs; how to take into account the fact that, in any given election, a number of candidates may be current committee members standing for re-election whom the UNHCHR will not wish to be seen as directly challenging; and how the process will interact with regional or sub-regional groups' coordination of nominations.

Careful judgment will need to be exercised. For example, it may be justified to seek nomination and election of only one or two members to one committee. For another committee, a strategy of one nomination per regional group may make more sense. Or it may be justified to focus on the representation of, and within, an entire regional group or sub-region. In some cases it might be desirable to let the process run its course if there are a large number of good current committee members and several good and diverse challengers nominated. Overall, the UNHCHR must not be perceived to be seeking to control the current process so much as stimulating and, to some extent, helping to coordinate it.

5. A MORE RADICAL PROPOSAL FOR GREATER TRANSPARENCY

A more ambitious proposal has recently been put forward for enhancing the election process with respect to certain international human rights bodies. Reisman has proposed an international 'advise and consent' procedure modelled somewhat on practice in the United States. In that practice,

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bar associations and non-governmental organisations (NGOs) appraise the qualifications of candidates nominated for the federal judiciary and these appraisals then feed into the confirmation hearings held by the US Congress. Reisman's central proposal is for the NGO community (along with national bar associations) to create an unofficial procedure that would influence General Assembly voting for the ICJ. He adds that there is no reason not to extend this procedure to other bodies such as the International Law Commission as well as 'the Human Rights Committee . . . and other inter-governmental human rights institutions'.⁷⁸ As Reisman puts it, '[b]y exploiting the available network of international communications, NGOs, if they worked together, could develop an international "advise and consent" procedure that could improve the quality of candidates for international posts'.⁷⁹ Alternatively the General Assembly might consider creating a Judicial Review Committee which would hold hearings on the qualifications of candidates to the ICJ and UN Administrative Tribunal, inviting candidates to appear before the Committee and allowing submissions from interested actors, such as NGOs. Unless there is a UN Charter amendment, the Committee's powers would only be recommendatory, but the idea would be to enhance the election process by promoting a kind of participatory transparency. Reisman recommends experimenting with this procedure for five years and then extending it to other bodies if it proves successful.

Even if sufficient support could be garnered, it would not seem desirable to consider such a judicial review committee for the committees. Admirable as the desire for transparency may be, the proposal will, with some justification, be viewed as being premised on a very American practice that has been known to descend into a nationally-televised spectacle.⁸⁰ Such

⁷⁸ Reisman, *supra*, note 70, at pp. 25–6. ⁷⁹ *Ibid.*, p. 26.

⁸⁰ The Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe has adopted a resolution according to which the Assembly is to 'call upon candidates [to the European Court of Human Rights] to participate in a personal interview': Resolution 1082 (1996) of 22 April 1996 (ninth sitting), cited in Kruger, *supra*, note 19, at p. 402, note 4. Kruger notes that '[w]hilst the idea to hold such interviews probably comes from the proceedings in the United States Senate Committee relating to the appointment of judges to the United States Supreme Court, it is of course understood that the European exercise should not take that dimension. But the interviews should give an opportunity for the parliamentarians electing the judges to get to know the candidates a little', *ibid.* (emphasis added). The Council of Europe's Parliamentary Assembly organised personal interviews with all the candidate judges nominated for the new permanent

official advice and consent processes lend themselves too easily either to sensationalist and selective targeting of occasional candidates or bland endorsements of everyone who satisfies a relatively mediocre threshold of basic competence. A more serious objection is that, in the international human rights context, the General Assembly is not necessarily the right forum for addressing questions of merit and diversity in a depoliticised fashion. In contrast, the UNHCHR's office may be viewed as an official institution that is at arm's length from states and that is mandated to seek to represent a kind of transnational interest in the protection and promotion of human rights. This most emphatically does not mean that the UNHCHR is not caught up in and seriously constrained by the realities of the interstate diplomacy evident elsewhere in the UN, but it does give her both the moral and the institutional space to seek to represent the public interest in the strengthening of the UN human rights committees.

There are strategic benefits in associating a candidate identification process with the UNHCHR. The UNHCHR, as a single institution, can better approximate the centralised coordination function that the current diffuse election process lacks. Accordingly, she can develop a more coherent view of the needs of each committee. She can act on her appraisal in what she judges to be the most strategically effective way. She will of course herself be a diplomatic actor who must avoid being seen to intrude in treaty-based processes that have states and nationality at their centre. For that reason, she will undoubtedly need to carve out some creative middle ground in which she acts both as agent of the transnational order and as a kind of friend of states. In this latter capacity, she would make it clear that she views her role as secondary to that of states who must still do the nominating and the electing. Legitimacy on both dimensions would be heightened if it were known that some priority is given to looking for candidates from poorer or otherwise less influential states.

European Court of Human Rights 'to take place within a special sub-committee of the Assembly's Committee on Legal Affairs and Human Rights . . . at the Council of Europe's offices in Paris, in two periods from 17–19 December 1997 and from 7–9 January 1998'. See Tarshys, *supra*, note 61. This interviewing process may have had some impact on the eventual vote for the first thirty-one places on the new Court, which was described *supra*, in note 61. It will be recalled that, despite the fact that most states continued with their practice of putting their preferred candidate at the top of their list of three candidates, the Parliamentary Assembly elected seven of the thirty-one new judges from further down the list, including four women; see *supra*, note 19 on how, in the past, the Assembly has only rarely second-guessed states' preferred candidates.

In the UN context, transparency must be viewed instrumentally rather than as an intrinsic value to be pursued at all costs. As such, the UNHCHR, the closest thing we have to a centralised agency for considering merit and diversity in a global perspective, will have to exercise much tact and judgment. Further, her role does not exclude Reisman's main suggestion, the unofficial formation of an association of NGOs to appraise candidates in some publicly accessible manner, perhaps in concert with professional associations. This is something that could be done now as an independent initiative designed to try to influence the committee election process.⁸¹

The question remains of the extent to which the UNHCHR initiative should be connected to any NGO process. NGOs are probably better placed to engage in the kind of frank evaluation and assessment of candidates that Reisman recommends. The more diversity of representation within the NGO coalition that might seek to formalise such an evaluation process, the more legitimate the contribution would be. Yet, however legitimate any NGO process, it should still take into account the UNHCHR's views on the most constructive role for NGOs. For instance, it would not seem desirable for the UNHCHR to disfavour candidates unless, for some reason, the very integrity of the process was at risk. Her role should be positive – designed to promote excellent candidates who will also make a distinct contribution to diversity of knowledge. While poorer candidates may lose out, this will be a by-product, not the goal, of the UNHCHR's involvement. In contrast, the role of NGOs might be to draw attention to clearly unworthy candidates and to take a more assertive stand on problems of diversity in a given committee or the committees as a whole. However, many states will react differently to an assessment of a candidate by an NGO coalition and to an assessment by the UNHCHR. In the end, the most constructive involvement of NGOs, at least during a transitional period, might be for them to interact with the UNHCHR's process by initiating NGO-based searches for candidates who can then be suggested to the UNHCHR.

Finally, it must be acknowledged that with NGO involvement comes a potential danger of NGO influence reproducing the patterns of dominance

⁸¹ There is much evidence in other spheres, notably environmental law and the law of the sea, that NGOs can help resource-strapped and thinly-spread delegations of poorer states to coordinate and represent their interests better: see e.g. J. Clapp, 'Africa, NGOs, and the International Waste Trade', 3 *Journal of Environment and Development*, 1994, p. 17.

already found in interstate and transnational society.⁸² It is still the case that the most prominent and influential NGOs are Western-based and, to a significant extent, Western-oriented, although, in Geneva, there is arguably a greater degree of networking with grassroots NGOs from around the world and even a greater physical presence of those NGOs from time to time. All of this relates to the possibility that the UNHCHR might consider urging states parties to move the elections to Geneva. This could be a merely cosmetic move. Heads of mission in Geneva, whether or not more steeped in human rights issues than their colleagues in New York, are not necessarily less inclined to the baser forms of politics. Paradoxically, having elections in Geneva could create an even greater politicisation than exists in New York if states' missions in Geneva see elections to the committees as an extension of their annual battles in the Commission on Human Rights. Nonetheless, moving to Geneva would at least place elections in the right normative context and begin to lay the groundwork for a more deliberative, good faith election process than may be possible in New York.

E. Conclusion: Future explorations

In this chapter, I have not engaged in any detailed discussion of what are the most salient diversity criteria for each committee. I have rather sought to make the case for the relevance of such criteria to the work of the committees, leaving it to others to take up the further task of articulating criteria.

There has also been no discussion of a second proposal which ideally would accompany the candidate identification proposal. This second proposal would advocate a deepening of the emerging forms of cooperation amongst the committees so as to place the committees in dialogue with one another. One might achieve many of the benefits of interactive diversity by considering the potential of the committees to share their knowledge and to engage in a process of mutual education. There are many possibilities as to the forms such institutional cooperation could take.⁸³ The principle of

⁸² See C. Scott, 'Commentary on Part IV – Human Rights', in *United Nations Reform: Looking Ahead after Fifty Years* (eds. E. Fawcett and H. Newcombe), Toronto, 1995, p. 168; L. Weisberg, 'The Vienna World Conference on Human Rights', in *ibid.*, p. 173 at pp. 177–8.

⁸³ For example: joint drafting of general comments; overlapping sessions designed to exchange views; development of a kind of Council of the Committees through evolution of the annual meeting of the chairpersons; vigorous pursuit of bilateral relationships between

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interactive diversity involves bringing to bear multiple angles of vision on normative questions. Due to the diverse normative mandates of the six treaties, there are many ways in which interaction amongst the committees could be promoted.

For example, the CEDAW Committee and the CRC Committee could interact intersectionally⁸⁴ to create a combined mandate focusing on the 'girl child'. The CEDAW Committee and the CERD Committee would intersect so as to produce the potential for an analysis in which gender is brought to race and race to gender.⁸⁵ It is through interactive institutional relations that the treaty bodies which focus on particular social groups (the CEDAW Committee, the CRC Committee as well as the CERD Committee, to the extent that minority groups are its primary concern) can increase the understanding of the ICESCR Committee and the HRC of the special and complex forms of human rights violations that might otherwise be overlooked. When the ICESCR Committee and the CEDAW Committee engage in dialogue, women's poverty should become more visible to *both*. A few years of experience with a conscious agenda of promoting dialogical engagement not only within but also amongst the human rights treaty regimes could be instructive as to the shape any long-term consolidation should take.⁸⁶

different committees (including joint preparation of general comments and joint scrutiny of state reports); and promotion of some degree of overlapping membership across the committees.

⁸⁴ On the concept of intersectionality in the context of the social experience of black women in the United States see, for example, K. Crenshaw, 'Whose Story is it Anyway', in *Race-ing Justice, Engendering Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality* (ed. T. Morison), New York, 1992, p. 402 especially at pp. 404–5. Other ideas such as the concept of interdependence would point to other axes of inter-treaty dialogue: see C. Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall L. J.*, 1989, p. 769 especially at pp. 848–50.

⁸⁵ Because of a certain diversity along ethnic and racial lines, the CEDAW Committee already has its own intersectional dynamic, however unarticulated, resulting from women from different backgrounds conversing across their differences. For some sense of dialogues across difference within the field of women's rights, see the many chapters in R. Cook (ed.), *Human Rights of Women: National and International Perspectives*, Philadelphia, 1994.

⁸⁶ For example, it might become apparent that a single consolidated body is justified, but that it should be structured so as to have expert chambers with primary responsibility for specific treaties. It might then make sense to have one member from each of the UN's five regional groups associated with each chamber. If we think in terms of seven treaties (adding the Migrant Workers' Convention), that would result in a body of thirty-five persons,

Finally, there is the difficult case of the CEDAW Committee. Can we really justify a committee made up entirely of women any more than we could tolerate committees made up entirely of men? This is a more complex question than it looks, especially if we recall the centrality of questions of power to a purposive analysis of the need for diversity. Much depends on what the CEDAW Committee's current function is and what its ideal function should be. One plausible account of the CEDAW Committee is that a central function is to produce, over time, a rich account of women's rights that seeks to achieve common understandings across the radical diversity of women's experience. In that sense, the CEDAW Committee might be seen as having a complex representational function. Yet, the CEDAW Committee, too, must engage in acts of judgment that are persuasive beyond women themselves. It is hard to avoid the conclusion that, at some point, it will be desirable for the CEDAW Committee to have some gender diversity. On the timing of such a transition, much will depend on the CEDAW Committee's relationship to the other committees and on the extent to which it is the central mechanism by which women's experiences can be made known throughout the treaty body system. If and when the other committees begin consistently to contain a critical mass of women, the CEDAW Committee will have to rethink its opposition to states nominating men to the committee. This only underlines the need for further reflection, by the UNHCHR and others, on what diversity requires of us in relation to all the committees.

approximately one-third of the current ninety-seven members. This is not an unreasonable size if one notes that there are presently forty judges on the European Court of Human Rights.