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## Transnational Lawmaking Coalitions as Change Agents in International Law

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### 1. Introduction

International human rights law and its institutions are under pressure. The workload of the treaty-monitoring bodies increased rapidly without accompanying funding or personnel, and to strengthen the treaty bodies, states initiated a year-long reform process which did not bring the relief needed for the United Nations (UN) human rights system.<sup>1</sup> At the same time, the adoption of new treaties stagnates, and challenges for human rights and their defenders increase around the globe and also within multilateral institutions. The members of the UN human rights treaty bodies, elected in their personal capacity as independent experts, are confronted with various social, economic, and political challenges for human rights when monitoring states compliance with the obligations in the treaties. Examples for such challenges range from threats to human rights by climate change or growing social inequalities to a decline of democratic institutions in many countries once at the forefront of human rights protection.

To address such challenges for human rights, treaty bodies increasingly make use of their instrument which allows them to interpret the human right treaties, the so-called 'general comments.'<sup>2</sup> They are general in the sense that they address all states parties to the covenants but require no further act of consent by those states for their adoption. Governments regularly reject general comments as non-binding when confronted with obligations arising from such a document, often accusing the treaty bodies to overstep their mandate. Yet, general comments can play an important role for domestic policy change, for example through their 'persuasive authority' among several stakeholders,<sup>3</sup> by being referenced in domestic court rulings, or because

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<sup>1</sup> <[www.ohchr.org/en/treaty-bodies/treaty-body-strengthening](http://www.ohchr.org/en/treaty-bodies/treaty-body-strengthening)> accessed 27 October 2022.

<sup>2</sup> Nina Reiners, *Transnational Lawmaking Coalitions for Human Rights* (CUP 2022).

<sup>3</sup> Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT rights in Europe' (2014) 68(1) *International Organization* 77–110, 81ff.

their content requires national policymakers to react to them.<sup>4</sup> Some general comments can also impact the development of international law. The Human Rights Committee, for example, has, in its General Comment No 36, substantially expanded the right to life in relation to issues such as environment and abortion. In 2013, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) adopted a general recommendation aimed at combatting racist hate speech, creating far-reaching obligations for states parties to adopt measures preventing racist hate speech. And the Committee on Economic, Social and Cultural Rights in 2002 established the first normative framework in human rights law for a human right to water. General comments sit somewhere between two maximalist positions defining its boundaries in international law: some scholars praise general comments as influential tools in human rights law<sup>5</sup> and as ‘authoritative interpretation[s]’<sup>6</sup> of the human rights treaties, while others are more hesitant to attribute legal value to general comments for the development of soft law.<sup>7</sup>

This chapter focuses on the agents behind the drafting of such instruments for international legal change, so called transnational lawmaking coalitions (TLC).<sup>8</sup> They are transnational in the sense that they are not coalitions between states or state delegates (thus not international) but are formed by experts in international monitoring bodies with professionals working in various professions relevant to human rights across borders, thus transnational. Transnational lawmaking coalitions are temporary and informal collaborations between one or more professionals and one or more member(s) of a treaty-monitoring body. Within a TLC, all involved actors coalesce around a like-minded goal of action: to develop, apply, or interpret a legal norm. Their interactive structure is thus temporary—in contrast to alliances, which operate long-term—maintained simply until the desired outcome is achieved.<sup>9</sup> The type of actor we seek to describe as a TLC shows two characteristics which distinguish it from other actors in global governance

<sup>4</sup> Beth A Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (CUP 2009).

<sup>5</sup> Max Lesch and Nina Reiners, ‘Informal human rights law-making: How treaty bodies use “General Comments” to develop international law’ (2023) 12(2) *Global Constitutionalism*, 378–401.

<sup>6</sup> Kasey L McCall-Smith, ‘Interpreting International Human Rights Standards. Treaty Body General Comments as a Chisel or a Hammer’ in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 27–46, also P Alston, ‘The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law’ in Laurence Boisson de Chazourne and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality/L’Ordre Juridique International, un Système en Quête d’Équité et d’Universalité: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff Publishers 2001) 763–76.

<sup>7</sup> Stephen Tully, ‘A Human Right to Access Water-A Critique of General Comment No 15’ (2005) 23(1) *Netherlands Quarterly of Human Rights* 35–63; Conway Blake ‘Normative Instruments in International Human Rights Law: Locating the General Comment’ (2008) NYU Center for Human Rights and Global Justice Working Paper 17, 2–38.

<sup>8</sup> Reiners, *Transnational Lawmaking Coalitions* (n 2).

<sup>9</sup> Achieving a goal can, however, result in mission expansion, as Haddad analysed in the case of the NGO Coalition for an International Criminal Court. After achieving their advocacy goal of the establishment of the ICC, they became service providers to the ICC: ‘mission expansion was not originally intended, but evolved with the perceived needs of the court so that the ICC could become the fair, effective court that the CICC envisioned’ Heidi Nichols Haddad, ‘After the Norm Cascade: NGO Mission

literature: first, TLCs form around experts. Its members do not need to pressure, socialize, or persuade governments; rather, the targets of their activities are expert bodies. Secondly, their mode of operation is determined by the interpersonal relationships among the members of a TLC. This shift to their personal interactions comes at the cost of reaching the limits of common explanations for transnational actors' influence—which are of lesser importance in lawmaking (eg the size of a non-governmental organization (NGO) or network or strategies employed to publicly reach a wide audience). So far, TLCs have been fruitfully applied to explain single drafting processes in the UN human rights treaty bodies.<sup>10</sup> Yet, their significance for broader change processes in international law remains to be explored. I argue that UN experts and professionals act on legal change by influencing the development of international human rights law through TLCs. To illustrate TLCs and the conditions of their influence, the chapter discusses two interpretation processes within the UN. The interpretation of the right to decent working conditions by the Committee on Economic, Social and Cultural Rights and the inclusion of right to abortion under the right to life by the UN Human Rights Committee.

## 2. Interpretation and Change Agents in International Law

The framework for this volume identifies different ideal-typical paths which may contribute to change in international law.<sup>11</sup> As Krisch and Yildiz note, such pathways in reality often overlap and some become more central to change than others. I want to explore agents and agency of legal change with a focus on expert bodies on the bureaucratic path. Expert bodies are often authorized to monitor the law but have the potential to change international law through their treaty interpretations. While fewer multilateral treaties are concluded in international law, which is said to symbolize 'treaty fatigue'<sup>12</sup> among states, international law remains the common language of global governance,<sup>13</sup> and normative change increasingly happens through interpretation. States strategically use interpretive tactics to influence how other states interpret legal obligations.<sup>14</sup> In addition, the literature on international

Expansion and the Coalition for the International Criminal Court' (2013) 19(2) *Global Governance: A Review of Multilateralism and International Organizations* 187–206, 200.

<sup>10</sup> Reiners, *Transnational Lawmaking Coalitions* (n 2); Max Lesch, *Dynamics of Deviance: Torture and Its Prohibition in World Politics* (Johann-Wolfgang-Goethe-Universität 2020).

<sup>11</sup> See Nico Krisch and Ezgi Yildiz, "The Many Paths of Change in International Law: A Frame," in *The Many Paths of Change in International Law*, ed. Nico Krisch and Ezgi Yildiz (Oxford University Press, 2023).

<sup>12</sup> Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European Journal of International Law* 733–63.

<sup>13</sup> Hannah Birkenkötter, 'International Law as a Common Language Across Spheres of Authority?' (2020) 9(2) *Global Constitutionalism* 318–42.

<sup>14</sup> Tonya L Putnam, 'Mingling and Strategic Augmentation of International Legal Obligations' (2020) 74(1) *International Organization* 31–64.

courts has demonstrated how judges and communities of legal practice are able to develop and change legal norms through interpretation.<sup>15</sup>

Analytical inquiries usually reveal states' interests and power dynamics as creators and blockers of international law but may also point to other pathways for legal change. Within these alternative pathways, international legal scholarship has emphasized the sizeable role formal legal institutions, such as international and domestic courts, potentially play as change agents.<sup>16</sup> Scholarship in this field has helped us to understand that international courts' judgments change domestic policies beyond the parties to the case,<sup>17</sup> how the design of these institutions constrains judicial practices,<sup>18</sup> and how despite these constraints judicial activities can at least invoke incremental norm change.<sup>19</sup> Of further importance to assess agency are interactions with other institutions and inter-organizational relationships.

For example, the literature provides a rich account of the important role that NGOs play for the operation of courts,<sup>20</sup> how regulatory intermediaries influence the rulemaking by third parties.<sup>21</sup>

Although the field of human rights shows no dearth of models for norm change through non-state actors, these models remain largely state-centric. The boomerang and the spiral models,<sup>22</sup> as well as the justice cascade,<sup>23</sup> all theorize

<sup>15</sup> Nora Stappert, 'Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning Through the Interpretive Practices of International Criminal Courts' (2019) 12(1) *International Theory* 1–26; Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014).

<sup>16</sup> Oumar Ba, *Agents of Change: How International Courts Alter International Politics* (OUP 2017); Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(1) *International and Comparative Law Quarterly* 57–92.

<sup>17</sup> Helfer and Voeten (n 3).

<sup>18</sup> Jeffrey L Dunoff and Mark A Pollack, 'The Judicial Trilemma' (2017) 111(2) *American Journal of International Law* 225–76.

<sup>19</sup> Ezgi Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights' (2020) 31(1) *European Journal of International Law* 73–99.

<sup>20</sup> Heidi Nichols Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (CUP 2018); Heidi Nichols Haddad, 'Judicial Institution Builders: NGOs and International Human Rights Courts' (2012) 11(1) *Journal of Human Rights* 126–49; Theresa Squatrito, 'The Democratizing Effects of Transnational Actors' Access to International Courts' (2018) 24(4) *Global Governance: A Review of Multilateralism and International Organizations* 595–613.

<sup>21</sup> Luc Brès, Sébastien Mena, and Marie-Laure Salles-Djelic, 'Exploring the Formal and Informal Roles of Regulatory Intermediaries in Transnational Multistakeholder Regulation' (2019) 13(2) *Regulation & Governance* 127–40; Kenneth W Abbott, David Levi-Faur, and Duncan Snidal, 'Theorizing Regulatory Intermediaries: The RIT Model' (2017) 670(1) *The Annals of the American Academy of Political and Social Science* 14–35; Tom Pegrām, 'Regulatory Stewardship and Intermediation: Lessons from Human Rights Governance' (2017) 670(1) *The Annals of the American Academy of Political and Social Science* 225–44.

<sup>22</sup> Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP 2013); Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999); Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887–917; Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998).

<sup>23</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton & Company 2011).

influential non-state actions to bring about human rights change vis-à-vis governments. This state-centrism owes itself largely to the models' approach of norm change as change in commitment or compliance with human rights, thus when a norm already exists as a right but is not yet (fully) implemented. I thus distinguish between human rights as law and as norms.<sup>24</sup> Norm emergence models in international relations that account for different stages and actors were recently introduced to the discipline,<sup>25</sup> but do not fully take into account the specifics of *legal* norm change. Scholars of international legal change, on the other hand, are interested in why some norms still remain to be codified as independent rights into human rights law, and how co-dependent rights finally became independent human rights.

Several motives explain the interest of non-state actors, especially those claiming to represent civil society, in the making of international human rights law. In general, domestic and transnational advocacy groups and networks need the international legal framework to hold governments accountable.<sup>26</sup> Human rights defenders and lawyers use strategic litigation,<sup>27</sup> both through national and regional courts but also through individual complaints to the treaty bodies, to get clarification on what constitutes a human rights violation and can point to international human rights law when domestic law is ambiguous or silent about a violation. This clarity, rendered tangible, is crucial for awareness-raising: as grassroots or local actors *need* people to know that a certain government behaviour is unlawful and that they have the right to defend themselves, international human rights law may be cast as an instrument to overcome injustice,<sup>28</sup> speak 'Rights to Power',<sup>29</sup> and empower individuals in international politics.<sup>30</sup> While this assumption deserves critical examination regarding just representation, civil society actors' interest in the change of human rights law and the long-standing success of NGOs and

<sup>24</sup> Arguments about the meaning and application of laws in-use (Antje Wiener, 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations' (2009) 35(1) *Review of International Studies* 175–93) are thus inbuilt features of human rights law, itself providing for the possibility of norm change (Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (OUP 2007). Hence, when norms become validated as law, that does not mean that human rights are ready for implementation in all places or immediately achieve acceptable levels of compliance (Abram Chayes and Antonia H Chayes, 'On Compliance' (1993) 47(2) *International Organization* 175–205).

<sup>25</sup> Elvira Rosert, 'Norm Emergence as Agenda Diffusion: Failure and Success in the Regulation of Cluster Munitions' (2019) 25(4) *European Journal of International Relations* 1103–31.

<sup>26</sup> Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights* (n 21); Risse, Ropp and Sikkink, *The Power of Human Rights* (n 21).

<sup>27</sup> Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury Publishing 2018).

<sup>28</sup> Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2019); Sikkink, *The Justice Cascade* (n 22).

<sup>29</sup> Alison Brysk, *Speaking Rights to Power: Constructing Political Will* (OUP 2013).

<sup>30</sup> Gita Sen and Avanti Mukherjee, 'No Empowerment without Rights, No Rights without Politics: Gender-Equality, MDGs and the Post-2015 Development Agenda' (2014) 15(2–3) *Journal of Human Development and Capabilities* 188–202.

transnational advocacy networks in bringing about domestic policy change highlight their role as potential change agents in international law.

Krisch and Yildiz assume that paths other than state-led ones are likely to emerge when alternative authorities exist in a given context—authorities that, like courts, international bureaucracies, and public or private expert bodies, are recognized as having significant weight in the ascertainment of international law, even if they do not enjoy acceptance as formal lawmakers.<sup>31</sup> United Nations human rights treaty bodies are widely regarded as authorities for the monitoring of human rights law,<sup>32</sup> best described as state-empowered entities.<sup>33</sup> Actors who want to see change enacted are likely to turn to such authorities when state-led paths are blocked. The coalition created to develop treaty interpretations together with external professionals—which is this chapter's main focus—is a powerful change agent for international law.

### 3. Transnational Lawmaking Coalitions and Change

The UN human rights treaty system is monitored by committees composed of independent experts. They consider state reports and individual complaints and are further authorized to interpret the treaty norms. Their outputs sometimes lead to the development and specification of human rights.<sup>34</sup> They have limited resources available for this task, which encourages the involvement of other actors such as NGOs or academics, and a resource exchange takes place, whereby knowledge is traded for access.<sup>35</sup> These external actors provide material and ideal resources to the treaty bodies in both formal and informal ways. If the treaty body requires external resources to work on a treaty interpretation, such drafting coalitions are mainly constituted through personal relationships. Such relationships enable individuals to influence the interpretation of the treaty, through which the respective committee can in turn influence the further development of

<sup>31</sup> Nico Krisch and Ezgi Yildiz, 'From Drivers to Bystanders: The Varying Roles of States in International Legal Change' (LCIL Lecture, 2021).

<sup>32</sup> Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2018) 67(1) *International & Comparative Law Quarterly* 201–32; Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies. Law and Legitimacy, Studies on Human Rights Conventions* (CUP 2012); Eckart Klein, 'Impact of Treaty Bodies on the International Legal Order' in Rüdiger Wolfrum and Volker Röben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 571–79.

<sup>33</sup> Sandesh Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law' (2017) 55(2) *Columbia Journal of Transnational Law* 343–94.

<sup>34</sup> Çalı Başak, Cathryn Costello, and Stewart Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21(3) *German Law Journal* 355–84.

<sup>35</sup> Jonas Tallberg and others, 'NGO Influence in International Organizations: Information, Access and Exchange' (2015) 48(1) *British Journal of Political Science* 1–26; Michele M Betsill and Elisabeth Corell, 'NGO Influence in International Environmental Negotiations: A Framework for Analysis' (2001) 1(4) *Global Environmental Politics* 65–85.

human rights norms—without further involvement of state actors being needed. Individual members of the TLC may belong to distinct epistemic communities<sup>36</sup> or professional<sup>37</sup> or advocacy networks.<sup>38</sup> The emphasis on personal relationships as an entry requirement provides a pathway to understand transnational actors' influence at the individual level, which is different from organizational level explanations that usually revolve around the internal structure of an NGO<sup>39</sup> or the purpose of an organization.

The role of civil society actors in the UN human rights system has been extensively researched, highlighting their potential power.<sup>40</sup> The influence of NGOs on international legal developments is often summed up as difficult to depict due to the lack of formal access rules with reference to methodological difficulties.<sup>41</sup> Typically, their influence on legal developments is seen to flow through intermediaries such as states and international courts.<sup>42</sup>

Transnational lawmaking coalitions are understood as an informal collaboration in pursuit of a like-minded goal of action, occurring between one or more non-state actors and one or more members of an expert committee, for the purpose of elaborating an interpretation of one (or more) human rights norms. The concept of coalition is often used to describe temporary cooperation between two or more states,<sup>43</sup> or collaboration among civil society actors. Like civil society coalitions, such as the International Campaign to Ban Landmines, TLCs are characterized by in-depth expertise and the ability 'to reach outside their comfort zone'.<sup>44</sup>

<sup>36</sup> Mai'a K Davis Cross, 'Rethinking Epistemic Communities Twenty Years Later' (2013) 39(1) *Review of International Studies* 137–60; Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46(1) *International Organization* 1–35.

<sup>37</sup> Leonard Seabrooke and Lasse Folke Henriksen, *Professional Networks in Transnational Governance* (CUP 2017).

<sup>38</sup> Keck and Sikkink (n 21).

<sup>39</sup> Wendy H Wong, *Internal Affairs: How the Structure of NGOs Transforms Human Rights* (Cornell University Press 2012); Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Cornell University Press 2006).

<sup>40</sup> Ann M Clark, Elisabeth Friedman, and Kathryn Hochstetler, 'The Sovereign Limits of Global Civil Society—A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women' (1998) 51(1) *World Politics* 1–35; Anna Holzscheiter, 'Representation as Power and Performative Practice: Global Civil Society Advocacy for Working Children' (2016) 42(2) *Review of International Studies* 205–26; Fiona McGaughey, 'From Gatekeepers to GONGOs: A Taxonomy of Non-governmental Organisations Engaging with United Nations Human Rights Mechanisms' (2018) 36(2) *Netherlands Quarterly of Human Rights* 111–32.

<sup>41</sup> Gamze Erdem Türkelli, Wouter Vandenhole, and Arne Vandenbogaerde, 'NGO Impact on Law-Making: The Case of a Complaints Procedure under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child' (2013) 5(1) *Journal of Human Rights Practice* 1–45.

<sup>42</sup> Charlotte Dany, *Global Governance and NGO Participation: Shaping the Information Society in the United Nations* (Routledge 2012); Cynthia Price Cohen, 'The Role of NGOs in the Drafting of the Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly* 137–47; Haddad, *The Hidden Hands of Justice* (n 19); Nicole Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case' (2009) 63(1) *International Organization* 33–65.

<sup>43</sup> eg Amrita Narlikar, *International Trade and Developing Countries: Bargaining Coalitions in the GATT & WTO* (Taylor & Francis 2003).

<sup>44</sup> George E Mitchell, Hans-Peter Schmitz, and Tosca Bruno-van Vijfeijken, *Between Power and Irrelevance: The Future of Transnational NGOs* (OUP 2020) 69.

Drafting an interpretation of a human right requires knowledge of international and domestic case law on the one hand and technical knowledge about the legal norm to be interpreted on the other. The functional demands on members are two-fold. First, external members must possess expertise on the applicability which the expert committee member does not have. This knowledge can be of a purely technical nature—for example, basic scientific knowledge—or stem from professional practice, such as the knowledge of an NGO member about implementation gaps in a local context. An example of this is the interpretation of the right to water by the UN Committee for Economic, Social and Cultural Rights (CESCR),<sup>45</sup> where knowledge of the global status of such a right was as important as knowledge of implementation in local contexts and technical expertise on water provision.<sup>46</sup> Ideally, these areas of knowledge are combined and complemented by a member with a broader view on international relations to facilitate the implementation of the interpretation by states. This makes the staff of international institutions valuable members of a TLC: they have expert knowledge, have often gained experience in local contexts—or are at least informed about it—and are familiar with government positions on the subject. Secondly, at least one member should have legal expertise and be familiar with the terminology of international law. This member ensures that the formulation of state obligations is based on international standards, thereby facilitating implementation. Without being embedded in state practice and case law, the coalition runs the risk of only formulating political goals instead of working towards a legally convincing framework.

How can this collaboration be explained? Principal-agent approaches explain the delegation of certain tasks by states to international organizations to reduce the transaction costs of policymaking.<sup>47</sup> This also explains why treaty monitoring and interpretation were delegated to expert bodies.<sup>48</sup> The delegation leads to a loss of control, which over time affords the expert committees greater autonomy in their decision-making processes than originally intended by the principals. Resources, such as special knowledge, have long been recognized as an important access requirement for cooperation in global law.<sup>49</sup> From a rationalist point of view, TLCs

<sup>45</sup> Madeline Baer, 'Beyond Consensus: Contesting the Human Rights to Water and Sanitation at the United Nations' (2022) *Human Rights Review* 1–23; Eibe Riedel, 'The Human Right to Water and General Comment No 15 of the CESCR' in Eibe Riedel and Peter Rothen (eds), *The Human Right to Water* (BWV 2006) 19–36. For an in-depth study of the drafting process of General Comment No 15 see ch 4 in Reiners, *Transnational Lawmaking Coalitions* (n 2).

<sup>46</sup> Malcolm Langford and Anna FS Russell, *The Human Right to Water: Theory, Practice and Prospects* (CUP 2017).

<sup>47</sup> Darren G Hawkins and others, *Delegation and Agency in International Organizations* (CUP 2006).

<sup>48</sup> Liliana Andonova and Manfred Elsig, 'Informal International Law-Making: A Conceptual View from International Relations' in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Law-Making* (OUP 2012) 63–80.

<sup>49</sup> Susan Block-Lieb and Terence C Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (CUP 2017); Sigrid Quack, 'Law, Expertise and Legitimacy in Transnational Economic Governance: An Introduction' (2010) 8(1) *Socio-Economic Review* 3–16.



and their individual members are goal-oriented, mindful of their individual preferences for the content of treaty interpretation, and their relationships within the TLC initially provide mutual benefits due to the sharing of resources. This exchange is manifested in the information or activities that a committee member needs and that they receive from professionals outside the UN. However, the committee member bears personal risks if they or the committee are unable to carry out the tasks delegated by states parties or go beyond the mandate by imposing excessive human rights obligations.<sup>50</sup> On the external member side, the benefit of sharing resources within informal coalitions is more difficult to explain. Non-governmental organizations have always played a central role in the human rights field, including in the development of standards.<sup>51</sup> The interpretations by the human rights treaty bodies are no exception and have long since become the focus of legal and political science research as a contribution to legal developments in international law.<sup>52</sup> Yet, professionals often invest a lot of time in preparing the interpretation, for which they are not officially recognized or compensated. Close and trusting interpersonal relationships enable effective collective action even in situations that feature uncertainty.<sup>53</sup> While this may not support the establishment and maintenance of large networks and movements,<sup>54</sup> personal relationships are a central feature of the TLC and enable individual influence on the interpretation of the treaty.

#### 4. Change Agents in Action: Two Case Studies of Human Rights Treaty Interpretation

All nine international human rights treaties are overseen by committees composed of independent experts who are appointed and elected by the states parties for a

<sup>50</sup> Stephen Tully, 'A Human Right to Access Water—A Critique of General Comment No 15' (2005) 23(1) *Netherlands Quarterly of Human Rights* 35–63.

<sup>51</sup> Andrea Liese, *Staaten am Pranger: Zur Wirkung internationaler Regime auf innerstaatliche Menschenrechtspolitik* (Verlag für Sozialwissenschaften 2006); Jutta M Joachim, 'Framing Issues and Seizing Opportunities: The UN, NGOs, and Women's Rights' (2003) 47(2) *International Studies Quarterly* 247–74; Holzscheiter (n 39); Nina Reiners and Andrea Liese, 'Nichtstaatliche Akteure in der Menschenrechtspolitik: von Normanwälden über Komplizen zu Infragestellern und Herausforderern' (2015) 8(2) *Zeitschrift für Außen- und Sicherheitspolitik* 651–76.

<sup>52</sup> David Roth-Isigkeit, 'Die General Comments des Menschenrechtsausschusses der Vereinten Nationen: ein Beitrag zur Rechtsentwicklung im Völkerrecht' (2012) 17(2) *MenschenRechtsMagazin* 196–210; Nina Reiners, 'Die Interpretation von Menschenrechtsnormen durch die Vertragsausschüsse der Vereinten Nationen' (2018) 23(1) *MenschenRechtsMagazin* 5–14; Max Lesch, *Dynamics of Deviance: Torture and Its Prohibition in World Politics* (Johann-Wolfgang-Goethe-Universität zu Frankfurt am Main 2020).

<sup>53</sup> Nina Reiners, 'The Power of Interpersonal Relationships: A Socio-Legal Approach to International Institutions and Human Rights Advocacy' (2023), *Review of International Studies*, online first.

<sup>54</sup> Hans-Peter Schmitz and Kathryn Sikkink, 'International Human Rights' in Walter Carlsnaes, Thomas Risse, and Beth A Simmons (eds), *Handbook of International Relations* (SAGE 2013) 827–52, 839.

fixed, renewable, four-year term primarily based on their human rights expertise.<sup>55</sup> For all committees, there initially was no regulation as to the committees' task to develop general comments. This raises the question of how the committees decide on the interpretation of human rights. The following illustrates the formation and operation of TLCs in two cases of norm development and specification: first, the interpretation of the right to decent working conditions by the CESCR, and secondly, the extension of the right to life towards abortion by the UN Human Rights Committee (CCPR). In both cases, using primary and secondary sources as well as interviews, I outline how the experts in the committees fulfil their assigned task of interpreting the treaty. The two covenants, entered into force in 1976, have roughly the same number of states parties, and, together with the Universal Declaration of Human Rights, are regarded as the international charter of human rights.<sup>56</sup> It shows that it is not the committee as a collective, but individual committee members, who work with non-state actors to develop treaty interpretations and use their knowledge to further develop global human rights norms.

#### 4.1 General Comment No 23, CESCR

The UN Committee for Economic, Social and Cultural Rights is the committee charged with overseeing compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR). It has eighteen members and is one of the oldest treaty committees in the UN human rights system.<sup>57</sup> The ICESCR includes a wide range of norms, which in turn are considered vague and open to interpretation. This explains why the instrument of treaty interpretation in the form of general comments is used particularly frequently.<sup>58</sup> Collectively, the members of the committee have broad expertise in economic, social, and cultural rights. Some experts specialize in the norms of individual articles of the covenant, while others have expertise in human rights in general.

General Comment No 23 was adopted by the committee at its 57th meeting in March 2016.<sup>59</sup> It specifies the state obligations resulting from Article 7 ICESCR, the

<sup>55</sup> Valentina Carraro, 'Electing the Experts: Expertise and Independence in the UN Human Rights Treaty Bodies' (2019) 25(3) *European Journal of International Relations* 826–51.

<sup>56</sup> Christopher NJ Roberts, *The Contentious History of the International Bill of Human Rights* (CUP 2014).

<sup>57</sup> OHCHR, United Nations Human Rights—Office of the High Commissioner for Human Rights, 'United Nations Human Rights Appeal 2020'.

<sup>58</sup> Matyas Bodig, 'Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights' in Stephanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 69–88.

<sup>59</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 23 (2016) on the right to just and favourable conditions of work (art 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23 <[www.refworld.org/docid/5550a0b14.html](http://www.refworld.org/docid/5550a0b14.html)> accessed 27 October 2022.

right to just and favourable working conditions. In its opening remarks, the comment also refers to General Comment No 18, in which the committee interpreted the right to work enshrined in Article 6 ICESCR.<sup>60</sup> The need for this general comment arose from the government measures taken after the 2008 financial crisis. In May 2012, the committee addressed the states parties in writing and emphasized that ‘any proposed policy change or adjustment made to deal with the negative impact of the austerity measures [ ... ] must identify the minimum core content of rights or a social protection floor [ ... ] and ensure the protection of this core content at all times.’<sup>61</sup> This letter also repeatedly emphasized the importance of the International Labour Organization’s (ILO) agreements for this purpose.

A first draft of the general comment was presented by the two rapporteurs Virginia Bras Gomes and Renato Ribeiro Leao in the 54th session of the committee in 2015.<sup>62</sup> At the same meeting, the committee adopted a statement in which minimum social standards, the so-called social protection floors of the ILO, were emphasized as an fundamental part of the agreement and agreed that these must also be guaranteed in view of austerity measures.<sup>63</sup> Just three months after this meeting, the draft was discussed in Geneva, based on more than thirty written comments.<sup>64</sup> The short time between the public presentation of the draft and its discussion, as well as the fact that the comments received deal in detail with certain aspects of the draft, points to the common practice that the draft had already been made available to selected stakeholders in advance.

Given the short time available, only three countries (Australia, Greece, and Mexico) submitted written statements on the draft, and only one representative, namely from Greece, came to discuss the draft. As a country particularly affected by the financial crisis, Greece explicitly supported the committee’s view that workers’ rights are a prerequisite for economic growth.<sup>65</sup> In this discussion, the International Commission of Jurists (ICJ), an NGO based in Geneva, insisted on clearer wording of the general comment and criticized the draft as still too vague,

<sup>60</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 18: The Right to Work (art 6 of the Covenant), 6 February 2006, E/C.12/GC/18 <[www.refworld.org/docid/4415453b4.html](http://www.refworld.org/docid/4415453b4.html)> accessed 27 October 2022.

<sup>61</sup> CESCR, ‘Social Protection Floors: An Essential Element of the Right to Social Security and of the Sustainable Development Goals’, E/C.12/2015/1; OHCHR [website], 15 April 2015 <<http://docst.ore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedP1F1vfPMJvHEXEU4Khj3y6yINSyq8u5n%2ba%2bgVU%2fQRd1%2bntxmQe%2beWynffCas%2fN5Bp%2bf2U0tNs0CiwKxDPx8dBbFO50SIXs>> accessed 27 October 2022, 1.

<sup>62</sup> CESCR, ‘Report on the Fifty-fourth, Fifty-fifth and Fifty-sixth Sessions’, E/C.12/2015/3, OHCHR [website], 2016 <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/2016/22&Lang=E>> accessed 27 October 2022.

<sup>63</sup> CESCR, ‘Social Protection Floors’ (n 59).

<sup>64</sup> See United Nations Office of the High Commissioner for Human Rights <[www.ohchr.org/en/events/days-general-discussion-dgd/2015/general-discussion-draft-general-comment-article-7-icescr](http://www.ohchr.org/en/events/days-general-discussion-dgd/2015/general-discussion-draft-general-comment-article-7-icescr)> accessed 27 October 2022; CESCR, ‘Fifty-fifth session. Summary record of the first part (public) of the 44th meeting’, E/C.12/2015/SR.44, United Nations [website], 6 July 2015 <<https://undocs.org/E/C.12/2015/SR.44>> accessed 27 October 2022.

<sup>65</sup> CESCR, ‘Fifty-fifth session. Summary record’ (n 62) para 10.

especially with regard to state obligations. The ICJ's chief legal adviser had been working on such a general comment for years with committee member Philippe Texier, who left the CESCR in 2012.<sup>66</sup> This was not just an NGO lawyer's attempt to lobby an independent committee member to support and provide information about a standard-setting process. Philippe Texier and the legal adviser were colleagues in the ICJ, as Philippe Texier had worked for the NGO since 2008 and held the office of committee member at the same time.<sup>67</sup> Both had a common goal and access to the instrument of choice and prepared this general comment together. After Philippe Texier left the CESCR, plans for such a general comment initially stalled. In order to revive this plan, the ICJ advocate had to find other members to support the draft, even though this decision had consequences for the relationship with the CESCR member. The first draft was finally presented and publicly discussed in 2015. At the next meeting of the CESCR, in March 2016, General Comment No 23 was then adopted by the committee.

The interpretation of Article 7 as a reaction to the impact of the global financial and economic crisis required external input, as the broad expertise within the committee was not specialized enough regarding workers' rights and austerity measures. Several non-state actors feared that austerity policies and state measures to contain the effects of the financial crisis would lead to weakened workers' rights. To counter such developments, they argued for an increased specificity of a state's obligations under the ICESCR. In particular, the personal connection of committee member Texier to the ICJ enabled the close and early involvement of a colleague from civil society in the development of a general comment about workers' rights under the impact of economic, financial, and tax crises.

## 4.2 General Comment No 36, Human Rights Committee

The Human Rights Committee stands out among the UN human rights treaty committees, as membership consists almost exclusively of lawyers. The ICCPR only states that the eighteen members of the committee must be 'persons of high moral character and recognized competence in the field of human rights' and 'consideration [is to be given] given to the usefulness of the participation of some persons having legal experience'.<sup>68</sup> The interpretations of the CCPR are considered particularly authoritative for the development of international human rights.<sup>69</sup> The committee has a high level of expertise regarding the legal interpretation of the treaty.

<sup>66</sup> Interview with Senior Legal Officer of NGO ICJ, 8 November 2013.

<sup>67</sup> See International Commission of Jurists, <[www.icj.org/commission/commissioners-from-europe-and-cis/](http://www.icj.org/commission/commissioners-from-europe-and-cis/)> accessed 27 October 2022.

<sup>68</sup> Art 28 ICCPR.

<sup>69</sup> Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their Legitimacy' in Keller and Ulfstein (eds) (n 31) 116–98; Roth-Isigkeit (n 51).

In view of the openness of the norms in the covenant and the particularity that human rights treaties are considered ‘living instruments’,<sup>70</sup> the committee must, when interpreting the norms, also consider political, social, and economic developments. Consultation with external actors is an important part of the working processes of the CCPR. The committee regularly invites interested stakeholders to submit written and oral comments on the various drafts.<sup>71</sup> How the committee evaluates and considers those inputs, given the increasing workload and other activities of its members, is left to the internal decision-making process.

After more than three years of drafting, the committee adopted General Comment No 36 in October 2018. It provides a comprehensive interpretation of the substantive provisions of Article 6 ICCPR, the right to life.<sup>72</sup> These provisions include the right to life in the face of environmental threats, defending the right to life in times of war, and addressing threats to the right to life in the face of extreme poverty and homelessness.<sup>73</sup> The document was approved unanimously and reflects the CCPR consensus on the scope of the right to life. Surprisingly for many observers, the general comment also contained obligations arising for states for guaranteeing the right to life and its compatibility with abortion. In this commentary, the committee goes further than in previous views by recognizing a human right to abortion.

The two rapporteurs for the general comment were Yuval Shany and Sir Nigel Rodley. Nigel Rodley died during the drafting process, so Yuval Shany took over the sole continuation of the draft, Nigel Rodley having been the initiator of this interpretation.<sup>74</sup> The committee began the formal drafting process with a half-day of general discussion during the 114th session on 14 July 2015. The committee invited interested members of the National Human Rights Institutions (NHRIs), civil society, and academia to the event. After two years, a first draft was ready and the CCPR invited all interested stakeholders to comment on the committee’s draft. Comments were submitted by various stakeholders, including states parties, other UN and regional human rights mechanisms, UN agencies or specialized agencies, NHRIs, NGOs, research institutions, and academics. The wording of the draft was subsequently amended. At the outset, the draft contained a declaration excluding the unborn child from the scope of application of the right to life under Article 1

<sup>70</sup> Daniel Moeckli and Nigel D White, ‘Treaties as “Living Instruments”’ in Dino Kritsiotis and Michael Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2016) 136–71.

<sup>71</sup> Keller and Grover (n 67).

<sup>72</sup> Sarah Joseph, ‘Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36’ (2019) 19(2) *Human Rights Law Review* 347–68.

<sup>73</sup> United Nations Human Rights Committee, ‘General Comment 36’ (2018) UN Doc CCPR/C/GC/36.

<sup>74</sup> OHCHR, United Nations Human Rights—Office of the High Commissioner for Human Rights, ‘Human Rights Committee Adopts General Comment on the Right to Life’ <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23797&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23797&LangID=E)> accessed 27 October 2022.

ICCPR.<sup>75</sup> Accordingly, the potential right to life of the unborn child does not take precedence over the right to life of pregnant mothers.

Then, in October 2018, the CCPR adopted General Comment No 36, including paragraph 8 on abortion. The article links the denial of access to abortion to the violation of women's and girls' right to life. It calls for legal access to abortion when the pregnancy endangers the mother's life or health, completion of the pregnancy would cause significant pain or suffering, particularly in cases of rape or incest, and calls on states to decriminalize abortion and promote confidential healthcare in this regard.

In view of the internal controversies within the committee and critical conservative legal voices,<sup>76</sup> the progressiveness of the general comment regarding abortion is linked to Nigel Rodley's driving role.<sup>77</sup> His clear views on abortion had been noticeable in many state reporting procedures before the CCPR. Nigel Rodley was not only a professor of human rights and published many key works in this field, he also worked for Amnesty International for almost twenty years, was the UN Special Rapporteur on torture, and a member of numerous NGOs. His close relationships with non-state actors are also reflected in the #NotAVessel campaign organized by the NGO Abortion Rights Campaign, which can be traced back to a statement by Rodley to the Irish government.<sup>78</sup>

For the general comment, Nigel Rodley needed the expertise of his former NGO colleagues to push through progressive content during the public discussions of the draft, even against the numerous anti-abortion organizations. It required the formation of an advocacy network<sup>79</sup> to support the committee in its progressive endeavour.<sup>80</sup> At the same time, the revision of the draft was made possible by research work on worldwide state practice in the academic environment of the two rapporteurs.<sup>81</sup> The work of advocacy networks was important for the committee members to generate support for their own interests in the public debate. However, the drafting work itself took place outside of the committee meetings and favoured the involvement of a few individuals in the personal environment of committee

<sup>75</sup> CCPR/C/GC/R.36/Rev.2, Human Rights Committee. 'Draft General Comment No 36: Article 6, Right to Life: International Covenant on Civil and Political Rights: Draft/Prepared by Yuval Shany and Nigel Rodley, Rapporteurs', 2015, para 2.

<sup>76</sup> Andrea Stevens, 'Pushing a Right to Abortion through the Back Door: The Need for Integrity in the UN Treaty Monitoring System, and Perhaps a Treaty Amendment' (2018) 6(1) *Pennsylvania State Journal of Law & International Affairs* 71–141.

<sup>77</sup> See United Nations Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Ireland' (2014) UN Doc CCPR/C/IRL/CO/4.

<sup>78</sup> Fiona De Londras and Mairead Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Bristol University Press 2018) 50.

<sup>79</sup> Keck and Sikkink (n 21).

<sup>80</sup> Livio Zilli, 'The UN Human Rights Committee's General Comment 36 on the Right to Life and the Right to Abortion' (*Opinio Juris*, 6 March 2019) <<http://opiniojuris.org/2019/03/06/the-un-human-rights-committees-general-comment-36-on-the-right-to-life-and-the-right-to-abortion/>> accessed 27 October 2022.

<sup>81</sup> Interview with Yuval Shany, 7 January 2021.

members, in this case, the doctoral students of the two rapporteurs at their universities in Tel Aviv and Essex.

## 5. Conclusion

As a joint path of international expert institutions and individual experts from academia, NGOs, or other international institutions, TLCs can foster change processes in international human rights law. The chapter demonstrates that NGOs working towards change in international human rights law likely ‘select’ the path on which they already have connections—a fact that makes that path appear more receptive to their claims than others. Transnational lawmaking coalitions aid in the ‘construction’ of change, especially on bureaucratic or private-authority paths—a construction that will often not be entirely conclusive but pave the way for further construction efforts by others and an eventual broader ‘reception’ of the respective interpretive community.<sup>82</sup>

The state path runs largely in parallel to a TLC path. The possibility for experts on the human rights treaty bodies to closely collaborate with legal and technical experts on treaty interpretations to shape the development of human rights law is a powerful strategy to meet backlash and human rights contestation by states. States are certainly the creators and primary addressees of the human rights treaty regime, but they have delegated the monitoring and interpretation of these norms to independent expert committees, who are expected to act as international intermediaries.<sup>83</sup> Yet, the treaty bodies as intermediaries do not always act in the spirit of their principals, with some exceeding their mandates with progressive general comments, as the above cases attest, by means of exemplification of the TLC workings. The important roles that individual professionals in TLCs in connection with the expert body play<sup>84</sup> change ‘the bilateral and formal nature of the interstate monitoring regime in significant ways’.<sup>85</sup> In human rights, the multitude of actors—rather than fixed institutions—further manifests in the implementation of decisions by treaty bodies.<sup>86</sup> While this might lead to area-specific ‘human rights experimentalism’,<sup>87</sup> the observation that state-empowered entities step in as authorities for legal change can be extended to such entities in other fields.<sup>88</sup>

<sup>82</sup> Krisch and Yildiz, this volume.

<sup>83</sup> Pegram (n 20).

<sup>84</sup> Reiners, *Transnational Lawmaking Coalitions* (n 2).

<sup>85</sup> Gráinne De Búrca, ‘Human Rights Experimentalism’ (2017) 111(2) *American Journal of International Law* 277–316, 310.

<sup>86</sup> Gráinne De Búrca, *Reframing Human Rights in a Turbulent Era* (OUP 2021).

<sup>87</sup> De Búrca, ‘Human Rights Experimentalism’ (n 83).

<sup>88</sup> Sivakumaran (n 32); Anthea Roberts and Sandesh Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’ (2012) 37(1) *Yale Journal of International Law* 107–52.

Nevertheless, states technically hold the power to end the practice of the treaty bodies, as well as numerous ways to shape its bounds. For one, they can elect the members of the expert committees at their discretion, and thereby can choose candidates who are less progressive or with more or less expertise in a given legal field. For another, they can exercise their particularly powerful thumb on budgetary support in contexts where the authority and decisions of a committee exceed their tolerance.

Considering the discourse on the stagnation of treaty-making and a growing range and types of challenges to international law, TLCs remind future International Relations and International Law scholarship to take the varying roles of states in legal change processes seriously. More attention needs to be devoted to how such coalitions impact the values and structure of international law,<sup>89</sup> and specifically, how human rights change could otherwise take place in an increasingly under-financed and contested regime.

<sup>89</sup> Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (OUP 2019); Heike Krieger and Andrea Liese, 'A Metamorphosis of International Law? Value Changes in the International Legal Order From the Perspectives of Legal and Political Science' (2019) KFG Working Paper Series No 27 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3322745](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3322745)> accessed 27 October 2022.