

Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation

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INTRODUCTION

Human rights protected in international treaties are invariably vague and ambiguous. This ambiguity is most acute with respect to economic, social, and cultural rights.¹ The rights to health, housing, and education are not standards that have traditionally been renowned for their clarity of content. But even civil and political rights, which have a significantly longer jurisprudential ancestry, are often indeterminate. For example, the precise scope of the prohibition against torture is continuously shifting,² and the parameters of the right to a fair trial remain contentious.³ Thus, the need to determine the meaning of human rights standards is a constant dilemma: a dilemma that is heightened by the absence of an authoritative adjudicative body to bind states parties to a particular interpretation of each human right.⁴

In practice, non-judicial actors—academics, NGOs, treaty monitoring bodies, special rapporteurs, and states—attempt to fill this interpretive void. All too often, however, this process of defining the content of a human right is accompanied by scant, if any, explanation of the methodology used to generate the interpretation offered.⁵ Indeed, in the case of

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1. See generally, HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 280–94 (3d ed. 2008).

2. See *Selmouni v. France*, App. No. 25803/94, 1999-V Eur. Ct. H.R. ¶ 101 (noting that ‘certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future’).

3. George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 EUR. J. INT’L L. 279, 292–93 (2004) (noting that there are eight possible interpretations of the right to a fair trial under the European Convention on Human Rights).

4. Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities* 12 MICH. J. INT’L L. 371, 375 (1991) (noting that the problem of authoritative decision making in international society relates to its decentralized character).

5. See, with respect to the Convention on the Rights of the Child, ASBJØRN EIDE & WENCHE BARTH EIDE, *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*:

human rights standards, advocates can be quick to offer interpretations that reflect personal preferences as to the nature of protection that the advocates think the right in question *should* accord.⁶ The work of the committee bodies established to monitor implementation of human rights treaties has, at times, also been accused of such an approach.⁷ Such “result driven jurisprudence”⁸ may well persuade those who focus on what the law should be (*lex ferenda*) but its impact is limited for those who focus on what they perceive the law to be (*lex lata*). Moreover, this *lex ferenda* approach encourages criticisms like David Kennedy’s that “the human rights movement degrades the legal profession by encouraging a combination of overly formal reliance on textual articulations that are anything but clear or binding and sloppy humanitarian argument.”⁹ Simply clothing an assertion about the content of an internationally recognized human right with the apparel of humanity may satisfy a moral or political urge, but it does not necessarily accord with the nature of the *legal* obligations actually assumed by a state under a human rights treaty.

Those who seek to engage with this “legal” question typically use, to varying degrees,¹⁰ the general rule of treaty interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties (“VCLT”): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms . . . in their context and in light of its object and purpose.”¹¹ The VCLT also allows recourse to subsequent practice among states, other relevant rules, and the *travaux préparatoires* of a treaty as additional tools by which to resolve the interpretive dilemma.¹²

ARTICLE 24 THE RIGHT TO HEALTH 1–2 (2006) (dedicating three paragraphs to the issue of methodology); SHARON DETRICK A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 5–7 (1999) (taking three pages to outline her methodology); U.N. CHILDREN’S FUND [UNICEF], IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD xv–xvi (2d ed. 2004) (allocating two pages to the methodology adopted); GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 297–312 (1995) (failing to expressly address the issue of methodology).

6. See Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT’L J. CONST. L. 2, 6 (2009).

7. See Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment 12* (Center for Hum. Rts. & Global Just. Working Paper No. 17, 2008), available at <http://www.chrgj.org/publications/docs/wp/blake.pdf>; Stephen Tully, *A Human Right to Access Water? A Critique of General Comment No 15.*, 23 NETHERLANDS Q. HUM. RTS. 35 (2005). But cf. Malcolm Langford, *Ambition that Overleaps Itself? A Response to Stephen Tully’s Critique of the General Comment on the Right to Water*, 24 NETHERLANDS Q. HUM. RTS. 433 (2005).

8. Waldron, *supra* note 6, at 17.

9. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 120 (2002).

10. See, e.g., JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 48–73 (2005); MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 3 (1995); Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT’L L. 529, 535–38 (2003).

11. Vienna Convention on the Law of Treaties art. 31(1), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

12. Paragraphs (2) and (3) of Article 31 provide that:

However, there is almost universal consensus, acknowledged even at the time of the VCLT's adoption, that the inherent elasticity of the general rule makes it incapable of producing *the* determinate meaning of a treaty.¹³ The VCLT general rule may act as a constraint on the interpretive process, but any faith in its capacity to discover *the* meaning of a text surely must be strained, given the inherent indeterminacy of language. Joseph Weiler explains that the failure to address this reality has meant that "Article 31 has turned into a straightjacket" for conceptual thinking about treaty interpretation.¹⁴ The VCLT's general rule may frame the interpretive process, but it is ultimately unable to resolve the question of how to choose *a* meaning for the text of a treaty from among the inevitable range of potential meanings.

A question therefore emerges as to what features are required of an interpretive methodology such that it is able to acknowledge the limitations associated with an application of the VCLT general rule and to identify those additional factors that will inform the selection of *a* meaning from within a suite of meanings. This paper attempts to provide an answer to this question with respect to human rights treaties. It seeks to move beyond the "straightjacket of Article 31" of the VCLT and to avoid excessive reliance on imprecise rules of interpretation and the use of sloppy humanitarian argument by offering a more reflective, strategic, and transparent methodology for the interpretation of international human rights treaties.

Part I will argue that legal interpretation is not simply the process of attributing *a* meaning to the text of a treaty but is ultimately an act of

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a. Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
 3. There shall be taken into account, together with the context:
 - a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c. Any relevant rules of international law applicable in the relations between the parties.
- Id.* art. 31(2)–(3). Article 32 of the VCLT further provides that:
- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.

Id. art. 32.

13. See Joseph Weiler, *Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century* 5–6 (Feb. 14, 2008) (draft unpublished presentation, International Legal Theory Colloquium: Interpretation in International Law, Institute for International Law and Justice, New York University School of Law) available at <http://www.iilj.org/courses/documents/2008Colloquium.Session5.Weiler.pdf>.

14. *Id.* at 5.

persuasion: an attempt to persuade the relevant interpretive community that a particular interpretation is the most appropriate meaning to adopt. Part II will explore the nature of the interpretive community relevant to the interpretation of international human rights treaties. It will show that this community has moved beyond states and their agents toward a more communitarian model in which the interests and expertise of a much wider range of parties and actors must be taken into account in the interpretive exercise. This process of addressing multiple actors is described as constructive engagement. Part III will outline the features considered apposite for the performance of this task. More specifically, it will argue that the persuasive appeal of an interpretation offered for a human rights standard will be enhanced if it is able to satisfy four criteria: It must be principled, clear and practical, coherent in its reasoning and consistent with the system of international law, and sensitive to the nature of the socio-political context within individual states and throughout the international legal order. For the purpose of illustrating these four features, this article will make primary recourse to elements of the right to health because, as one commentator has explained, “one would be hard pressed to find a more controversial or nebulous human right.”¹⁵ It therefore offers the opportunity to demonstrate how the interpretive methodology advanced in this paper can be used to guide the selection of a meaning from among the vast range of potential meanings that could be attributed to the right to health. Such a focus on the right to health, however, does not exclude the application of the inter-

15. Jennifer Prah Ruger, *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements*, 18 YALE J.L. & HUMAN. 273, 273 (2006). Although there are various formulations of the right to health, the approach adopted under Article 12 of the International Covenant on Economic Social and Cultural Rights will be the primary focus of attention in this paper. It provides that:

- (1) The States to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

International Covenant on Economic, Social, and Cultural Rights art. 12, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]. Such an ambitious and wide ranging provision gives rise to a multitude of interpretive dilemmas including: what is the meaning of the highest attainable standard of health, what is the meaning of health, does it extend to the social determinants of health, what obligations flow from the requirement that states recognize the right to health, are the measures required to fulfill these obligations universal or do they differ between states, what is the minimum core of the right to health, to what extent should states be responsible for ensuring the health of an individual in the home, workplace and general community, to what extent must states prevent threats to an individual's health from non-state actors, is privatization of health care services compatible with the right to health, is the right to health justiciable, and to what extent must intellectual property rules be designed to maximize access to medicine and medical services?

pretive methodology proposed in this paper to any other standard under an international human rights treaty.

I. THE ACT OF INTERPRETATION: FROM INTENTIONALISM TO PERSUASION

Legal interpretation is generally understood as an act, or, some may say, art, of attributing and then communicating meaning of a word or collection of words within a legal text.¹⁶ The form of international treaties has long made this act a task of considerable difficulty. As Dr. Lushington observed in 1844 in *Maltass v. Maltass*:

Now in the construction of treaties . . . we cannot expect to find the same nicety of strict definition as in modern documents, such as deeds, or Acts of Parliament; it has never been the habit of those engaged in diplomacy to use legal accuracy but rather to adopt more liberal terms.¹⁷

Lord McNair in his 1961 treatise on *The Law of Treaties* wrote that “[t]here is no part of the law of treaties which the text writer approaches with more trepidation than the question of interpretation.”¹⁸

Despite his misgivings, McNair still asserted that the task of interpretation could be reduced to a single sentence: “it can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*”¹⁹ Such a comment reflects a time when the meaning of a term was considered to be transparent and readily discernible from the text of a legal instrument. In subsequent years, commentators have challenged and, for the most part, dispelled this perception. It is now widely accepted that the “[m]eaning is not present . . . in the expression itself.”²⁰ Instead, the interpretive exercise is very much an active process of constructing *a* meaning rather than finding *the* meaning which lies latent with the text.²¹

16. See Mark Toufayan, *Human Rights Treaty Interpretation: A Postmodern Account of its Claim to “Speciality”* 23–24 (Center for Hum. Rts. & Global Just., Working Paper No. 2, 2005); MYRES S. McDUGAL, HAROLD D. LASSWELL & JAMES C. MILLER, *THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* xvi (1994) (emphasizing the significance of communication in the interpretive process); Maartin Bos, *Theory and Practice of Treaty Interpretation*, 27 NETH. INT’L L. REV. 3, 6–15 (1980) (examining the debate as to the definition of interpretation within international law).

17. *Maltass v. Maltass*, 3 Curt. 231, 1 Rob. Eccl. 75 (1844), *as cited in* A.D. MCNAIR, *THE LAW OF TREATIES* 392 (1961).

18. MCNAIR, *supra* note 17, at 364.

19. *Id.* at 365.

20. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 8 (2006). See also ROSLYN HIGGINS, *PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT* (1994).

21. HIGGINS, *supra* note 20, at 3 (quoting Sir Hersch Lauterpact’s view that judges do not “find rules” but “make choices”).

This change in approach, however, presents real concerns for any legal order—including international law—that prizes attributes such as objectivity, certainty, and stability. For some, the prospect of a “menu” of potential meanings from which one meaning is selected by the interpreter is more than unsettling: it carries with it the risk that the interpretive function will be transferred into one of lawmaking.²² The legal interpretive community—a concept that will be fully explored in Part II—therefore accepts that rules and principles of interpretation must be created to constrain the range of potential meanings so as to protect against an unwarranted conflation of the interpretation function.²³ Owen Fiss describes this as a process of “bounded objectivity.”²⁴

It is important to acknowledge that, as with domestic law, the interpretation of international treaties has never been free from the strictures of principles or rules. McNair’s insistence on maintaining the fidelity of the parties’ intentions is one attempt to constrain the interpretive process.²⁵ Beyond this subjective or intentionalist approach to treaty interpretation, numerous other approaches have been advocated, each with a different point of emphasis:²⁶ a literal or formalist approach focuses on the text itself, an historical approach extends its consideration to the drafting history, a systematic approach locates the interpretation of a phrase within its broader system of meaning, a teleological approach is concerned with securing an interpretation consistent with the object and purpose of the instruments, and a sociological approach is prepared to adopt an interpretation that accords with social and political objectives even if this creates a discordance with the text.²⁷

In practice, the lines of demarcation between different approaches are often difficult, if not impossible, to draw,²⁸ and the interpretive exercise invariably resembles an “eclectic mix” of approaches that consider the text, purpose, public policy, and history of an instrument, rather than the application of a precise mathematical formula.²⁹ The development of such ap-

22. See, e.g., *South West Africa (Liber./Eth. v. S. Afr.)* 1962 I.C.J. 465, 466 (Joint Dissenting Opinion of Fitzmaurice & Spender, JJ., to Judgment of 21 Dec. on Preliminary Objections) (“We are not unmindful of, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other . . . but these are matters for the political rather than for the legal arena.”).

23. See, e.g., KOSKENNEIMI, *supra* note 20, at 7 (“[A]ll legal argument both in theory and doctrine [i]s a movement between a limited set of available argumentative positions.”).

24. Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 738, 745 (1982).

25. See MCNAIR, *supra* note 17, at 345–431 (outlining many other well-established principles).

26. For a discussion of these approaches, see Francis Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT’L & COMP. L.Q. 318 (1969); Bos, *supra* note 16, at 364–70.

27. See Bos, *supra* note 16, at 364–70.

28. See Jacobs, *supra* note 26, at 319 (recognizing that in practice approaches inevitably overlap and are often combined).

29. See Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 713 (1998) (citing Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 522 (1996)).

proaches has two important features. First, there is an expectation, at least within the legal interpretive community, that the interpretive exercise must be constrained in some way and that rules of interpretation should establish the nature of these constraints.³⁰ Second, in practice there is rarely, if ever, universal agreement as to where these boundaries should be placed. Instead of offering the stability necessary to ground Fiss's "bounded objectivity" theory,³¹ the rules themselves remain constantly in need of interpretation.³²

Controversy is therefore a constant feature of the interpretive enterprise.³³ This does not mean that the meaning of a human right under an international treaty is radically indeterminate in the sense of never being capable of holding *a* meaning. Instead, the accepted meaning of any term at a particular point in time will be that which attracts and achieves dominance over all other alternative understandings within the relevant interpretive community.³⁴ When seen from this perspective, the act of interpretation is more than simply the attribution or communication of *a* meaning. It is ultimately an act of persuasion³⁵—an attempt to convince the relevant interpretive community that a particular meaning from within a suite of potential meanings is the most appropriate interpretation to adopt.³⁶ This, in turn, gives rise to two questions of central relevance to this inquiry: who is the relevant interpretive community for the purposes of an international human rights treaty, and what factors should be considered or used to inform the selection of a particular meaning of a human right from within a range of possible meanings so as to enhance its persuasiveness?

Part II addresses the first of these questions. It examines the notion of an interpretive community and then offers a discussion of the identity of this

30. See Detlev. F. Vagts, *Treaty Interpretation and the New American Ways of Law Reading*, 4 EUR. J. INT'L L. 472, 480 (1993). See also Derek C. Smith, *Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions in Treaty Interpretation in U.S. v Alvarez-Machain*, 6 EUR. J. INT'L L. 1, 8–9 (1995).

31. Fiss, *supra* note 24, at 745.

32. See Johnstone, *supra* note 4, at 377.

33. See Martii Koskenneimi, *Letter to the Editors of the Symposium*, in *THE METHODS OF INTERNATIONAL LAW* 109, 114 (Stephen Ratner & Anne Marie Slaughter eds., 2004) (determining, upon reflecting that "competent lawyers routinely drew contradictory conclusions from the same norms," that "the law's indeterminacy was a property internal to the law itself").

34. See Johnstone, *supra* note 4, at 378.

35. Other commentators have discussed the importance of legal argument to be "justified" or "valid." See, e.g., KOSKENNIEMI, *supra* note 20, at 24–28; Van Alstine, *supra* note 29, at 714; Higgins, *supra* note 20, at 7. Justification or validity, however, refers to the identification of the basis upon which an argument is formed. It does not, however, mean that such an argument will be persuasive in the sense of its acceptance or adoption within the relevant interpretive community.

36. See Ryan Goodman, *Sociological Insights into International Human Rights Law* 5–7 (Apr. 3, 2008) (unpublished presentation, International Legal Theory Colloquium: Interpretation in International Law, Institute for International Law and Justice, New York University School of Law), available at <http://iilj.org/courses/documents/2008Colloquium.Session10.Goodman.pdf> (discussing the definition and relevance of persuasion as a mechanism for social influence within international human rights law, and noting that "persuasion occurs when actors actively assess the content of a particular message . . . and change their minds").

community with respect to the right to health and the challenges involved in accommodating the dissonant voices within any interpretive community. After addressing these issues, the paper proceeds in Part III to the second question by providing a detailed discussion of those factors which should inform the selection of a meaning.

II. DEFINING THE INTERPRETIVE COMMUNITY: MOVING BEYOND STATES TOWARD A COMMUNITARIAN MODEL

The idea of interpretive communities is drawn from the work of the literary theorist Stanley Fish.³⁷ Fish claims that interpretive authority lies neither in the text nor the reader but in the community of individuals who share internal “categories of understandings[] and stipulations of relevance and irrelevance” that constrain and inform the interpretive process thereby generating meaning.³⁸ Fish himself concedes that such a model would not necessarily produce universal agreement with respect to the meaning of a text. Indeed, he accepts that if the act of interpretation were performed by another community of individuals with a different set of expectations and assumptions, a different interpretation would emerge.³⁹ Commentators have expressed mixed views concerning Fish’s work.⁴⁰ The aim in this paper is not to defend Fish or his detractors but rather to borrow his notion of “interpretive communities” to facilitate the interpretive exercise. While Fish was concerned with how meaning was produced within a particular interpretive community, the aim here is to consider how to influence the relevant interpretive community to accept a particular meaning.

For the purposes of this analysis, the idea of an interpretive community is used to identify those persons or entities and their agents that have an interest, either direct or implied, in the meaning of the rights under international instruments. This interest arises for a variety of reasons, including the potential for the relevant standard to impose legal obligations or create benefits or for its implementation to carry practical consequences for certain persons or entities. First and foremost, this community will be populated by states, which remain the central subject within the international legal system. Only they can enter treaties and be bound by their terms. As a consequence, states and their agents have a direct interest in the interpretation of such instruments and must thus be seen to form a core part of the relevant international interpretive community. However, scholars have in-

37. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

38. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 141–42 (1989).

39. *Id.* at 141–142.

40. Compare RONALD DWORKIN, *LAW’S EMPIRE* 425–26 n.23 (1998) (describing Fish’s concept of internal conventions as somewhat “mysterious” and “lame”), with Johnstone, *supra* note 4 (embracing Fish’s theory to interpret international treaties).

creasingly recognized the emergence of a communitarian paradigm within international law that “vindicates values and pursues interests which cannot be said to be strictly an aggregation of distinct national interests.”⁴¹ This shift from “bilateralism to community interest”⁴² has a significant impact on the composition of the interpretive community when seeking to interpret international human rights treaties. Far from being the exclusive concern of states and their officials, the provisions in human rights instruments will invariably be of interest and concern to a broad range of non-state actors who have an interest in the implications associated with the implementation of the relevant rights.⁴³ As a consequence, a narrow interpretive community that is confined to the interests of states will be inadequate to address this broader understanding of international law and those actors who are relevant to securing the implementation of human rights treaties.

Let us consider, for example, the interpretive community relevant to the right to health. It is perhaps difficult to identify those actors who would *not* be relevant for inclusion within this community. Of course, health professionals will have an interest in the meaning of the right to health, as will international organizations and non-governmental organizations (“NGOs”) that invoke the language of the right to health to address health needs. Given that the right to health also requires the navigation of issues such as resource allocation, cultural diversity, and international cooperation, the interpretation of this right will often carry significant consequences for a much broader range of actors. These actors include members of the general community who may be affected by the reallocation of resources to realize the right to health, religious groups whose traditional practices may conflict with aspects of an individual’s right to health, and multinational corporations whose interests and investments may be compromised if rules regulating intellectual property were adjusted to improve access to medicines.⁴⁴

The Committee on Economic, Social, and Cultural Rights (“ESC Committee”) recognized this multitude of actors, declaring the following in its General Comment on the Right to Health:

41. Weiler, *supra* note 13, at 16. For a more detailed discussion of this paradigm see generally Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994).

42. Simma, *supra* note 41.

43. See Human Rights Council [HRC], *Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 12–17, U.N. Doc. A/HRC/4/28 (Jan. 17, 2007) (prepared by Paul Hunt) (detailing the role and relevance of civil society in implementing the right to health). It is important to recognize that a state is not a homogenous body in the sense of sharing a unified interest or common commitment to the meaning of a human right. It may represent a common position to the international community but this position will invariably represent the outcome of complex and contentious negotiations between the various agents and bodies that comprise the state.

44. See LAWRENCE GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 230 (2008) (noting that “[a] broad range of stakeholders exert considerable power over events that influence health” and that “these stakeholders may act alone, in partnership, or in conflict”).

While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society—individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities regarding the realization of the right to health.⁴⁵

The Committee on the Rights of the Child (“CRC Committee”) concurred with this approach in its General Comment on the General Measures of Implementation for the Convention on the Rights of the Child (“CRC”).⁴⁶

Such comments lend support to a vision of an interpretive community comprised of actors with diverse, overlapping, and potentially conflicting interests. This, in turn, presents a challenge to the interpretation of a standard such as the right to health. It requires recognition that “the ‘clients’ of international interpreters are no longer only the Governments of the States which signed the treaties”⁴⁷ and that the “worldwide social consciousness at work today ‘communalizes’ and ‘publicizes’ international relations far beyond the traditional rules of governmental interaction.”⁴⁸ It has therefore been suggested that, under such a model, the broader interests of non-state actors must be taken into account when interpreting a treaty provision such as the right to health.⁴⁹

It is possible to envisage how such a requirement could be accommodated in proceedings before a court or tribunal where the views of the relevant parties and their potentially dissonant voices could be directly represented. However, it presents a practical dilemma for the interpretation of those international human rights treaties that lack a coercive adjudicative body able to hear competing views and to insist on the adoption of a particular meaning. Yet, even without such bodies, it remains appropriate to be cognizant of the diverse and potentially conflicting interests within the relevant interpretive community when attributing a meaning to human rights standards. Indeed, it will be suggested below that the requirement to offer an interpretation that is coherent in its reasoning places a demand

45. U.N. Econ. & Soc. Council [ECOSOC], Committee on Econ., Soc. and Cultural Rights [CESCR], *General Comment No. 14: The Right to the Highest Attainable Standard of Physical and Mental Health*, ¶ 42, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR, *General Comment No. 14*].

46. U.N. Committee on the Rights of the Child [CRC], *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child*, ¶¶ 1, 56, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter CRC, *General Comment No. 5*] (“While it is the State which takes on obligations under the Convention, its task of implementation—of making reality of the human rights of children—needs to engage all sectors of society and, of course, children themselves.”). See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990) [hereinafter CRC].

47. Weiler, *supra* note 13, at 22.

48. Simma, *supra* note 41, at 234.

49. See Weiler, *supra* note 13, at 22.

upon interpreters to identify, engage with, and consider such views when offering a meaning for a particular right.

This does not mean that these views must always be accommodated or reconciled before offering an interpretation. However, a careful consideration of such views, to the extent that they can be identified, contributes to a deeper and more rigorous analysis, thus strengthening the coherence in the reasoning used to support an interpretive exercise. Such a model demands robust dialogue and engagement in the interpretive exercise as opposed to disengagement and dismissal of competing interpretations without explanation.⁵⁰ It creates an evolutionary interpretive process in the sense that a shared understanding or commitment to a particular meaning will emerge over time.⁵¹ This does not preclude the possibility of offering a robust defense of a particular meaning with respect to various aspects of a human right. However, it does create a need to identify the most effective way to ensure that such offerings are able to persuade the interpretive community so as to generate a shared, rather than idiosyncratic, understanding of a right's meaning.

Before examining this question of how to generate a persuasive interpretation, it is important to acknowledge the consequences that flow from such a broad vision of the relevant interpretive community. There is a real prospect that there will be some aspects of a human right where a shared meaning will prove elusive or even unachievable. If all the dissonant voices within the relevant interpretive community cannot always be heard and persuaded, who should be the primary target when seeking to generate a persuasive account as to the content of a human right?

With respect to this issue, states still remain the central actor to be persuaded by the interpretive exercise, as they hold the primary legal responsibility for the implementation of obligations under international treaties.⁵² From a practical perspective, however, the greater the level of support within the broader interpretive community for a particular interpretation, the greater the prospect that a state will be persuaded to adopt that particular interpretation.⁵³ Thus, for example, state actions to secure the right to

50. *See id.*

51. *See* Johnstone, *supra* note 4, at 407 (explaining this process as a form of intersubjective interpretation in which parties expect disagreements over the meaning of terms but assume that such disagreements will not indicate a desire to withdraw from or terminate a treaty).

52. *See* Simma, *supra* note 42 at 247 (suggesting that, despite the development of a community interest in international law, the state paradigm remains dominant).

53. This position is consistent with the process of "acculturation" whereby actors, including states, adopt the beliefs and behavioral patterns and practices of the culture in which they operate. *See* Goodman, *supra* note 36. *See also* Beth Simmons, Explaining Variation in State Commitment to and Compliance with International Human Rights Treaties 26–30 (Jan. 31, 2008) (unpublished presentation, International Legal Theory Colloquium: Interpretation in International Law, Institute for International Law and Justice, New York University School of Law) available at <http://www.iilj.org/courses/documents/2008Colloquium.Session3.Simmons.pdf> (discussing impact of human rights treaties on social mobilization and implying that the greater a society's shared understanding as to the content of a right, the more effective a social mobilization effort is likely to be).

health are influenced by, among other things, the views of health professionals, patient preferences and demands, the private health sector, and the competing demands within a government for the allocation of resources. An interpretation of the right to health that does not remain aware of these potential interests and the influence of such actors on state behavior is unlikely to succeed.⁵⁴ For example, there is little to be gained from arguing that the obligation under Article 12(2)(d) of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”),⁵⁵ which requires states to assure medical attention in the event of sickness, requires the provision of kidney dialysis *on demand*. While patients with a kidney condition would undoubtedly prefer such an interpretation, public health policy makers and medical professionals with limited resources may determine on reasonable grounds that priority should be given to other legitimate public health objectives.⁵⁶ Focusing attention on the balance of such interests may help produce workable interpretations.

Even in those circumstances where a state and a large section of the broader interpretive community accept and agree to implement a particular interpretation with respect to an aspect of a human right, such measures are unlikely to be effective in practice unless *all* the non-state actors whose assistance is required for the implementation of the right are persuaded by the interpretation that has been adopted. For example, a large part of the relevant interpretive community, including states, NGOs, academics, and United Nations (“U.N.”) bodies, now considers it necessary and appropriate to criminalize female genital cutting as a means of fulfilling a state’s obligation under Article 24(3) of the CRC to protect children against traditional practices prejudicial to their health.⁵⁷ However, powerful individuals remain within communities who sanction the practice, are not persuaded as to its harmful impact, and continue to undertake clandestine measures to

54. It is important to note that even in circumstances where there is a strong sense of a shared understanding as to the meaning of a right, this will not necessarily persuade a state to adopt such an interpretation. Thus, for example, condemnation of the detention of refugees in Australia was widely recognized as being in violation of Australia’s obligations under the International Covenant on Civil and Political Rights. The Australian Government at the time, however, refused to accept this interpretation.

55. ICESCR, *supra* note 15, art. 12(2)(d).

56. This issue arose under the South African Constitution in *Sobramoney v. Minister for Health*, 1997 (12) BCLR 1696 (CC). The appellant argued that the right to emergency medical treatment, which is not subject to progressive implementation under the South African Constitution, extended to kidney dialysis on demand. However, the South African Constitutional Court rejected this argument and held that a right to kidney dialysis fell within the scope of the general right of access to health services which was subject to progressive realisation. Although the Court was sympathetic to the appellant’s condition, it held that it would “be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.” *Id.* ¶ 29.

57. See John Tobin, *The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?*, 9 HUM. RTS. L. REV. 373, 389–90 (2009) (discussing those actors and instruments that favor criminalisation of female genital cutting).

ensure its existence.⁵⁸ So, while there may be an agreed meaning within certain elements of the interpretive community as to the nature of a state's obligation under Article 24(3) of the CRC, the failure to persuade the entire community as to the harmful nature of this practice undermines the capacity to protect children from female genital cutting. This scenario highlights the importance of ensuring that the interpretive exercise is conscious of the need to persuade not only states of the interpretation being offered but also other actors who have the capacity to secure or impede the realization of a human right. The question remains, however, as to the most appropriate method by which to ensure such an outcome.

III. SEEKING TO PERSUADE BY CONSTRUCTIVE ENGAGEMENT

A. *Providing a Transparent Account of the Interpretive Process*

This paper has argued that interpretation is a process that seeks to persuade the relevant interpretive community to adopt a particular meaning of a standard protected under an international human rights treaty. It has also suggested that this notion of interpretation as persuasion is particularly apt with respect to international human rights instruments because they possess few other mechanisms by which to secure compliance.⁵⁹ As a consequence, if there is a perceived controversy or uncertainty with respect to the meaning of a particular right, as is nearly always the case, then there is a need to persuade states and the broader interpretive community to adopt a particular meaning of this right. The alternative is to allow states to adopt a form of auto-interpretation in which the meaning of a human right will effectively remain dependent upon, and largely captive to, state interests. Such an outcome is inconsistent with the emergence of the communitarian model of international law discussed above and the principle that “the view of a State cannot be the last word on the international lawfulness of its activities.”⁶⁰ As Weiler has observed, states may be “the ‘masters of the treaty’

58. WORLD HEALTH ORGANIZATION [WHO], FEMALE GENITAL MUTILATION, PROGRAMMES TO DATE: WHAT WORKS AND WHAT DOESN'T 1, 4–6 (1999), available at http://whqlibdoc.who.int/hq/1999/WHO_CHS_WMH_99.5.pdf; U.N. CHILDREN'S FUND [UNICEF] INNOCENTI RESEARCH CENTRE, CHANGING A HARMFUL SOCIAL CONVENTION: FEMALE GENITAL MUTILATION/CUTTING (2008) 11, available at http://www.unicef-irc.org/publications/pdf/fgm_eng.pdf.

59. A complex system has been created at the international level to achieve this end. See Andreas Zimmermann, *Dispute Resolution, Compliance Control and Enforcement in Human Rights Law*, in MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL 15 (Geir Ulfstein ed., 2007).

60. International Law Comm'n [ILC], *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 487, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *ILC Fragmentation Report*] (finalized by Martti Koskenniemi). See also Simma, *supra* note 42, at 229, 233, 296–301. This view reflects by implication the limitations associated with article 31(3)(b) of the VCLT, which allows for recourse to any subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation. This rule may be relevant to the interpretation of bilateral treaties but it is extremely problematic in relation to human rights treaties where its application would create a “very

but they are not masters without normative limits.”⁶¹ To prevent state control, the international community must reject the position advanced by many states, including the United States in its 2006 dialogue with the Human Rights Committee, that “only the parties to a treaty were empowered to give a binding interpretation of its provisions.”⁶²

To conceive of interpretation as the choice of *a* meaning which is designed to persuade an interpretive community requires an interpretive methodology that will enhance the persuasiveness of the interpretation to be offered. This Part will suggest that the features of such a model require the proposed meaning to be (1) principled, (2) clear and practical, (3) coherent in its reasoning and consistent with the system of international law, and (4) sensitive to the nature of the socio-political context within individual states and throughout the international legal order.

The identification of these features is an attempt to recognize what Koskenneimi would term the “rules” that govern the production of the arguments used to justify the interpretation of a human right.⁶³ Their cumulative impact is directed toward an interpretive technique that relies on the interpreter’s engagement with the relevant interpretive community in an ongoing dialogue. This focus on engaging the interpretive community, and thus the social and political context, contrasts with the traditional view, in which “reflection on the ‘political foundations’ of international law . . . ha[s] had only marginal—if any—consequence on the doctrinal elaborations of different areas of international law.”⁶⁴ This is not to say that consideration of the VCLT’s rules of interpretation is not a necessary feature of an interpretive methodology; it is. But it is not sufficient. This is because the assumption that the application of the accepted doctrine concerning treaty interpretation produces a cohesive interpretation denies the controversial nature of both the doctrines themselves and the outcomes produced by their application.⁶⁵ While the traditional doctrine may constrain the range of potential meanings, it will not deliver *the* meaning of a human right.

It is therefore important to heed Koskenneimi’s warning that to retreat to formal doctrine and ignore social theory and political practice is to become “trapped in the prison-house of irrelevance.”⁶⁶ Indeed, the danger of

real risk that state auto-determination” as to the scope of their obligations would “trump” the existence of any obligations under such a treaty. HATHAWAY, *supra* note 10, at 71.

61. Weiler, *supra* note 13, at 21. The nature of these normative limits, which are primarily located in the provisions of the VCLT, are discussed *infra* Part III(B)(1). They are also found in the provisions of human rights treaties that create systems for monitoring compliance.

62. Human Rights Committee [HRC], *Summary Record of the 2380th Meeting: Consideration of Reports Under Article 40 of the Covenant: Second and third periodic reports of the United States of America*, ¶ 8, U.N. Doc. CCPR/C/SR.2380 (July 27, 2006).

63. KOSKENNEIMI, *supra* note 20, at 8.

64. *Id.* at 1.

65. *See id.* at 3.

66. *Id.* at 4.

excessive formalism is harmful on a number of fronts. Not only do excessively formal approaches fail to take account of the political context in which states assume their obligations under international human rights law, but they also risk being disregarded by the broader interpretive community. Thus, for example, the Millennium Taskforce on Child and Maternal Health may have accepted the necessity of human rights to achieving the Millennium Development Goals,⁶⁷ but it also warned that “human rights initiatives fixated on and bound by chapter and verse of human rights treaties often miss the mark.”⁶⁸

Despite this deflation in the capacity of doctrine to produce a fixed and determinate meaning of a text, there is still a need to be cognizant of the observation that those who interpret human rights treaties tend to infuse their understanding with “beliefs, biases, blind spots and prejudices about what it means to be a ‘human being.’”⁶⁹ Such subjectivity is an inescapable aspect of the interpretive process and the task is not to mask this reality but to adopt a methodology that seeks to mitigate the potential for the subjective preferences of an interpreter. As an interpretive methodology, the requirements that an interpretation be principled, practical, coherent and context-sensitive help to provide transparency to the process of how one particular meaning may be selected from within a suite of potential meanings.

B. *The Features Required for Constructive Engagement*

1. *Principled Interpretation*

a. *Overview*

Lord McNair insisted in 1961 that “[t]reaties must be applied and interpreted against the background of the general principles of international law.”⁷⁰ Despite the misgivings about doctrine aired in the previous section, no attempt is made here to deviate from McNair’s directive. Indeed, if an interpretive outcome is to have any persuasive force within an interpretive community, it must be constructed in light of the principles that have been agreed upon by that community to guide the interpretive exercise.⁷¹ In this case, states, which are the central actors in the interpretive community, have accepted the principles of the VCLT.

67. See U.N. MILLENNIUM PROJECT, TASK FORCE ON CHILD HEALTH AND MATERNAL HEALTH, WHO’S GOT THE POWER? TRANSFORMING HEALTH SYSTEMS FOR WOMEN AND CHILDREN 31 (Lynn P. Freedman et al. lead authors, 2005), available at <http://www.unmillenniumproject.org/documents/maternalchild-complete.pdf>.

68. *Id.* at 33–34.

69. Toufayan, *supra* note 16, at 10–11.

70. McNAIR, *supra* note 17, at 466.

71. See Bos, *supra* note 16, at 37 (suggesting that rules of interpretation represent important tools which “are not only steering aids for the normative concept but also instrumental in making the interpreter conscious of his own normative concept”).

Where this paper departs from McNair's approach is in arguing that, although such principles remain necessary, a more holistic approach is required to overcome the limitations of the VCLT.⁷² McNair's work is useful for identifying those general principles that are relevant to the interpretive exercise. He declared that treaties' "very existence and validity rest on one of the earliest and most fundamental of those principles—*pacta sunt servanda*"⁷³—a principle that is now codified in Article 26 of the VCLT: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."⁷⁴

The obligation to "perform" anticipates that the ratification of a human rights treaty will carry practical consequences in terms of measures required by states to fulfill their obligations. Moreover, when this obligation is combined with the obligation of "good faith" the result is that states may not adopt a passive response to the implementation of a treaty on the basis that the terms are unclear or ambiguous. On the contrary, it demands that states actively engage with such terms in order to produce an understanding of their content such that the treaty is capable of effective implementation.⁷⁵

b. The 1969 Vienna Convention on the Law of Treaties

As to how this task is to be undertaken, Article 31 of the VCLT outlines the general rule of interpretation, providing in paragraph 1 that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁷⁶ Paragraph 2 explains that this "context" extends beyond the text of the treaty to include its preamble and annexes, any agreement made in connection with the treaty between all the parties, and any instrument made by one of more parties and accepted by the other parties as an instrument related to the treaty.⁷⁷ Paragraph 3 adds that interpreters must take into account "any subsequent agreement between the parties regarding the interpretation of the treaty," "any subsequent practice in the application of the treaty which establishes the agreement of parties regarding its application," and "any relevant rules of international law."⁷⁸

Article 32 of the VCLT further provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circum-

72. See Toufayan, *supra* note 16, at 2.

73. McNAIR, *supra* note 17, at 466.

74. VCLT, *supra* note 11, art. 26.

75. See RICHARD GARDINER, TREATY INTERPRETATION 148 (2008) ("Although it is difficult to give precise content to the concept generally, it does include one principle that applies to interpretation of specific terms used in a treaty. This is commonly described as the principle of 'effectiveness'. . . .").

76. VCLT, *supra* note 11, art. 31.

77. *Id.*

78. *Id.*

stances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.⁷⁹

As these provisions have already been the subject of significant commentary elsewhere,⁸⁰ it is unnecessary to provide a detailed analysis of their content here. Instead, it is sufficient to make some observations, first with respect to their general application and then in relation to their application to human rights treaties. Turning to the question of their application, it is important to note that they embrace a range of interpretive approaches—textual, contextual, teleological, and historical.⁸¹ Vagts has suggested that Article 31 offers a hierarchy with primary emphasis to be placed on a textual approach to treaty interpretation followed by a contextual, teleological, and historical approach in descending order.⁸² In contrast, Toufayan maintains that “[n]o one single means dominates the others,” and that the “order chosen in Article 31 is that of logic, proceeding from the intrinsic to the extrinsic, from the immediate to the remote, the ‘ordinary meaning’ being merely a natural starting point.”⁸³ The Report of the Study Group of the International Law Commission on the Fragmentation of International Law (“ILC Fragmentation Study”) took the similar view that “[t]here is no reason “to separate these techniques too sharply from each other.”⁸⁴

Such an approach is consistent with the role envisioned for Article 31(1) of the VCLT by the International Law Commission (“ILC”) Commentaries on the Draft Articles provisionally adopted at the Vienna Conference in 1966:

[T]he application of the means of interpretation in the article would be a single combined operation. All the various elements as they were present in any given case would be thrown in the crucible and their interaction would give *the* legally relevant interpretation.⁸⁵

79. *Id.*, art. 32.

80. See generally GARDINER, *supra* note 75; IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1984); HATHAWAY, *supra* note 10, at 48–73.

81. See KOSKENNIEMI, *supra* note 20, at 292 (“It refers to virtually all thinkable interpretive methods.”); Toufayan, *supra* note 16, at 30 (suggesting that they do not extend to a restrictive interpretive approach); Bos, *supra* note 16, at 145 (suggesting that the provisions require “concurrent use of no less than three methods”).

82. Vagts, *supra* note 30, at 484.

83. Toufayan, *supra* note 16, at 9.

84. *ILC Fragmentation Report*, *supra* note 60, ¶ 428. See also ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 187 (2000).

85. International Law Commission [ILC], *Draft Articles on the Laws of Treaties with Commentaries* 187, 219–20 (art. 28 cmt. 8), in International Law Commission [ILC], *Report of the International Law Commis-*

In practice, however, the act of interpretation is more complex and far less precise in its capacity to yield “*the*” relevant interpretation than the ILC comment is willing to concede. First, the comment assumes an understanding of the “ordinary meaning” of a term, which in practice will be invariably contentious. And second, the requirement of “good faith,” although unclear,⁸⁶ may have been “intended to restrain an excessive literalism” even within the textual approach.⁸⁷

It is true that the VCLT recognizes the limitations of a formal textual approach by including a requirement to consider the “context;” this acknowledges that the ordinary meaning of a word cannot be ascribed in isolation.⁸⁸ But the inclusion of a requirement to consider context raises a question as to “how widely ‘context’ is to be understood.”⁸⁹ To a certain extent, the “object and purpose” of a treaty will assist in the resolution of this dilemma by contributing to an understanding of the “context.” But the teleological approach is not without its own problems. As Francis Jacobs points out, there are problems of “priority” (“[W]hat significance is to be attached to [the object and purpose of a treaty]?”) as well as problems of methodology (“[A]re [objects and purposes] to be ascertained only by intrinsic means, *i.e.*, by reference to the text and related documents, or also by extrinsic means?”).⁹⁰

The International Court of Justice has indicated that the preamble of a treaty may assist with respect to this second question.⁹¹ But an examination of the preamble of any international human rights treaty will generally yield an answer that is expressed at such a high level of abstraction that it is unlikely to narrow the interpretive inquiry. Moreover, a consideration of any subsequent agreements or practice between parties—as is permitted under Article 31(3) of the VCLT—will rarely prove helpful with respect to

sion on the Work of its Eighteenth Session, UN Doc. A/CN.4/191 (1966) [hereinafter ILC Commentary] (emphasis added).

86. Jacobs, *supra* note 26, at 334.

87. *Id.* at 333. This position is consistent with the International Law Commission Commentary on the Draft Articles, which provides that “when a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.” ILC Commentary, *supra* note 85, at 219 (art. 28 cmt. 6).

88. See *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1992 I.C.J. 351, 719 (separate Opinion of Judge Bernandez).

89. Jacobs, *supra* note 26, at 334.

90. *Id.* at 337. See also Myres McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992, 993 (1967) (“Lest it be thought that the references to ‘context’ and to ‘object and purpose’ are intended to remedy the blindness and arbitrariness of ‘ordinary meaning,’ context is immediately defined as including mere text.”).

91. See *Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. US)*, 1952 I.C.J. 176, 196 (“The purposes and objects of this Convention were stated in its Preamble In these circumstances the Court cannot adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects.”). See also *Interpretation of Peace Treaties (Second Phase)*, Advisory Opinion, 1950 I.C.J. 221, 229 (“It is the duty of the Court to interpret the Treaties, not to revise them.”); *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 282.

an international human rights treaty because all too often states fail to treat their obligations under such treaties with the respect that international law demands. To be fair, Article 32 of the VCLT does allow for recourse to the drafting history of a treaty to resolve any interpretive dilemmas, but, as will be discussed below, most commentators have recognized the limits of this source as a means of resolving interpretive disputes.

The cumulative impact of these limitations caused Myres McDougal to comment in his assessment of the draft VCLT provisions in 1967 that “the Commission’s formulations are so vague and imprecise and so impossible of effective application that a sophisticated decision-maker can easily escape their putative limits.”⁹² His concerns are not without foundation. With respect to the right to health, for example, a requirement that states recognize the right to the highest attainable standard of health is hardly a phrase that renders itself amenable to an orderly and consistent application of the provisions of the VCLT. But as with all norms, the legal interpretive community has developed expectations and has accepted practices regarding the use and application of the interpretive principles under the VCLT that constrain the extent to which a decision maker will be prepared to step outside these bounds.⁹³ Some of these accepted practices with respect to human rights treaties are outlined below.

At this point, however, it is important to acknowledge that the process of treaty interpretation, “far from being the accounting of raw interpretive data or the prioritization of certain interpretive means over others[,] is in reality a holistic construct.”⁹⁴ Although the principles under the VCLT do not offer a formulation that will necessarily “give” the meaning of a provision within a treaty, they still remain tools to guide this task.⁹⁵ Moreover, as there is a strong expectation, at least within the legal elements of the interpretive community, that the VCLT principles of interpretation will be used to “frame” the interpretive exercise, engaging them is an essential feature of a persuasive interpretation.⁹⁶ As Ryan Goodman has explained, “the persuasive appeal of a counterattitudinal message increases if the issue is structured to resonate with already accepted norms.”⁹⁷ The principles under the VCLT constitute those norms that have been accepted for the interpretation of international human rights treaties. The requirement for

92. McDougal, *supra* note 90, at 998.

93. Bruno Simma & Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, in *THE METHODS OF INTERNATIONAL LAW*, *supra* note 33 at 23, 46 (noting that, in the interpretive process, “it is standards derived from legal sources deemed to be representative of the attitude of the community that provide the yardsticks for finding a — not *the* — correct solution to a legal problem.”).

94. Toufayan, *supra* note 16, at 10.

95. *ILC Fragmentation Report*, *supra* note 60, at 250 (noting that the VCLT provides a “tool box for dealing with fragmentation”).

96. *See id.*

97. Goodman, *supra* note 36, at 6 (discussing “framing” as the process by which an argument is structured).

system coherence, which is discussed in more detail below, demands that an interpretation of such treaties must be informed by the provisions of the VCLT, as it is the international instrument adopted by states to guide the interpretation of treaties. Article 31(1) of the VCLT is itself an example of a general rule of international law that, according to paragraph (3)(c) of Article 31, must be taken into account in the interpretation of any treaty.⁹⁸

c. Human Rights Treaties and the VCLT

There is a widespread, albeit contested, view that human rights treaties, as a form of special regime, warrant a special interpretive methodology.⁹⁹ This view is essentially grounded in the non-reciprocal nature of human rights treaties as a key point of distinction from other treaties.¹⁰⁰ It is not necessary to examine or resolve this debate here. Rather, its significance lies in the extent to which it has led to the development of interpretive practices by human rights bodies with respect to the application of the interpretive principles of the VCLT. These practices have particular relevance to the interpretation of international human rights treaties.

The first point to note is that the bodies responsible for monitoring implementation of such treaties—the various treaty monitoring committees—have not as yet given any detailed consideration to the interpretive methodology they adopt when performing their role.¹⁰¹ The work of regional bodies, however, is more insightful on this topic. Of principal significance is

98. VCLT, *supra* note 11, art. 31.

99. See Toufayan, *supra* note 16; J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* chs. 4–5 (2d ed. 1993) (detailing methods of interpretation and principle of effectiveness); Rudolf Bernhardt, *Thoughts on the Interpretation of Human Rights Treaties*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION STUDIES IN HONOUR OF GERARD J WIARDA* 65 (F. Matscher and H. Petzold eds., 1988).

100. See Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT'L L. 489, 497, 504–513 (2000); René Provost, *Reciprocity in Human Rights and Humanitarian Law*, 65 BRIT. Y.B. INT'L L. 383, 383–85 (1995); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 90, ¶ 239 (1978) (“Unlike international treaties of the classic kind, the [European] Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, [and] objective obligations . . .”). See also *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion, 1982 Inter-Am. Ct. H.R. (ser. A) No. 2, at 14–16, ¶¶ 29–33 (Sept. 24, 1982); *Restrictions to the Death Penalty* (Arts 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion, 1983 Inter-Am. Ct. H.R. (ser. A) No. 3, at 76–77, ¶ 50 (Sept. 8, 1983).

101. This observation is based on an assessment of general comments and recommendations variously adopted by the committee bodies in which there is no explicit reference to the general rule of interpretation under Article 31 of the VCLT. It remains possible that the concluding observations of the committee bodies might make some reference to it, but, given the general nature of such documents, it is considered to be unlikely. Some committees have made reference to various provisions of the VCLT such as Articles 26 and 27, but Article 31 has not been the subject of any direct or detailed consideration. Where it has been mentioned, it has been in the context of demanding that states avoid a form of auto-interpretation in favor of the rule under Article 31. See, e.g., Human Rights Committee [HRC], *Concluding Observations: United States of America* ¶ 10, U.N. Doc. A/61/40 (Vol. 1) (July 27, 2006).

the European Court of Human Rights, (“ECtHR”)¹⁰² which has been the most sophisticated of the human rights bodies with respect to this issue. It has advocated that an interpretation of the rights under the European Convention on Human Rights and Fundamental Freedoms must be one which:

- “is most appropriate in order to realise the aim and achieve the objective of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by parties”;¹⁰³
- will “make its safeguards practical and effective”;¹⁰⁴ and
- adopts a dynamic interpretation that responds to evolving standards.¹⁰⁵

A similar approach has been adopted by the Inter-American Court of Human Rights.¹⁰⁶ To the extent they can be surmised, the views of the U.N. human rights treaty monitoring committees seem to be in agreement.¹⁰⁷

102. See generally, François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* 283 (Mireille Delmas-Marty ed., 1991); H. Mosler, *Problems of Interpretation in the Case Law of the European Convention of Human Rights*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER IN MEMORY OF HARO F. VAN PANHUYS* 149 (Frits Kalshoven et al. eds., 1980).

103. *Wemhoff v. Germany*, App. No. 2122/64, 1 Eur. H.R. Rep. 55, 75 (1968).

104. *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. H.R. Rep. 99, 102 (1995).

105. See, e.g., *Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. 1, 10 (1978).

106. See, e.g., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 114–15 (Oct. 1, 1999):

114. This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989), and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.

115. The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter’s faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

107. See, e.g., Human Rights Committee [HRC], *General Comment No. 6: The Right to Life* 128, ¶¶ 4–5, U.N. Doc. HRI/GEN/1/Rev.7 (Apr. 30, 1982) (stressing states’ obligations to take “effective measures to prevent the disappearance of individuals . . . [and to] establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life,” and “not[ing] that . . . [t]he expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and [that] the protection of this right requires that States adopt positive measures.”); Committee on the Elimination of Discrimination Against Women [CEDAW], *General Recommendation No. 25: Temporary Special Measures* 270, ¶ 3, U.N.

Some commentators see the adoption of such an approach as a deviation from the interpretive principles of the VCLT. For example, Vagts has suggested that human rights treaties have “attracted a style of interpretation that has drawn away from traditional treaty reading” whereby “[t]hese courts also feel that they have tacit permission from the parties to the agreement to develop a body of jurisprudence that sacrifices fidelity to a text . . . in order to develop internal consistency and to keep pace with the perceived necessities of changing times.”¹⁰⁸ An alternative explanation is to conceive of the approach adopted by the ECtHR as the development of practices to implement the principles under the VCLT, especially the requirements of good faith and the object and purpose test. In other words, the principles of non-restrictive interpretation, effectiveness, and dynamic interpretation do not operate to restrict states’ obligations to the greatest extent possible. Rather, they ensure that states are required to actively protect human rights. Thus, rather than represent a deviation from the VCLT, these principles simply provide evidence of a practical application and understanding of how the general rule of interpretation under the VCLT can be applied to achieve the object and purpose of a human rights treaty. As a consequence, interpreters should use the principles of non-restrictive interpretation, effectiveness, and dynamic interpretation to assist in the interpretation of international human rights treaties. The extent to which they should be employed, however, must be tempered by the other factors which are considered essential to ensure a constructive approach to interpretation. Thus they should be used to enable *an* interpretation, but they cannot be used to justify *any* interpretation.

d. The Relevance of the Parties’ Intentions

It will be recalled that McNair’s understanding of the aim of the interpretive exercise was reduced to the simple question of identifying the intention of the parties to a treaty. Such a requirement is notably absent from the VCLT and it was the subject of criticism at the time of drafting.¹⁰⁹ However the justification given in the ILC Commentaries to the draft VCLT was that “the text [of a treaty] must be presumed to be the authentic expression of the intentions of the parties” and hence that “the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”¹¹⁰ Thus, the in-

Doc. HRI/GEN/1/Rev.7 (May 12, 2004) (“The Convention is a dynamic instrument.”); Human Rights Committee [HRC], *General Comment 24: Issues relating to Reservations made Upon Ratification of Accession to the Covenant of the Optional Protocols or in relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/21/Rev.1/Add.6 (Nov. 2, 1994).

108. Vagts, *supra* note 30, at 499.

109. See, e.g., McDougal, *supra* note 90, at 992 (condemning the International Law Commission’s “explicit rejection of a quest for the intention of the parties as a subjective element distinct from the text . . . [in favor of a] basic approach which demands merely the ascription of a meaning to a text”) (internal quotes omitted).

110. ILC Commentary, *supra* note 85, at 220 (art. 27 cmt. 11).

tion of the parties was to remain a relevant and underlying consideration, albeit in the background, that was to be given effect through an application of the principles of Articles 31 and 32.

An intentionalist approach, however, comes into conflict with the principle of dynamic interpretation, which anticipates that the meaning of a term within a treaty may take on an understanding different to that which was accepted at the time of drafting. This is a well-known tension, and domestic jurisdictions have invariably given preference to the dynamic approach.¹¹¹ At the international level, the parties' intention carries significant weight, given the degree to which the system is based upon the consent of sovereign states. However, the notion that the intention of the parties to a treaty can be distilled with any precision from either the text or the drafting history of a treaty is problematic. As Judge Pescatore explained in 1963:

It is not, in actual fact, on the intentions of the contracting parties that agreement is reached, but on the written formulas of the treaties and only on that. It is by no means certain that agreement on a text in any way implies agreement as to intentions. On the contrary, divergent, even conflicting, intentions may perfectly well underlie a given text.¹¹²

Moreover, in the construction of multilateral treaties such as international human rights treaties, "a wide variety of different human individuals, acting for a variety of constituencies, participate in the negotiating, drafting, signing and ratification of the document."¹¹³ This makes it difficult to elucidate with any clarity the precise intentions of the states party to the drafting process.

This does not mean that it is impossible to identify the common intentions of the states responsible for the drafting of a human rights treaty. For example, it is reasonable to infer from the text of the treaties that it was the intention of the parties that drafted the ICCPR and ICESCR that the state parties would have an immediate obligation to ensure civil and political rights and a progressive obligation to ensure economic, social, and cultural rights. Moreover, recourse to the drafting history of a human rights treaty is invariably used as a tool to assist in the identification of any general themes that may emerge as to the common intentions of the parties.¹¹⁴ Such a practice, however, is problematic.

111. See RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* 110–18 (2000).

112. Pierre Pescatore, Professor at the University of Liège and Judge at the Court of Justice of the European Communities, Public Lecture (1963), cited in L. NEVILLE BROWN & FRANCIS G. JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 245 (2d ed. 1983).

113. Vagts, *supra* note 30, at 504.

114. See HATHAWAY, *supra* note 10, at 55–56.

e. *The Need to Handle with Care: Making Recourse to the Drafting History*

Commentators have expressed considerable anxiety with respect to interpretive endeavors that rely upon the drafting history. Reuter, for example, has warned that “recourse to preparatory work means reading uncertain ground: its content is not precisely defined nor rigorously certified. . . . Moreover, preparatory work is not always published.”¹¹⁵ A dilemma is also created by making recourse to the historical documents underlying the adoption of an instrument that is supposed to be given a dynamic interpretation and adapt to evolving standards. Although reliance upon *travaux préparatoires* in the interpretation of treaties is problematic, the practice remains widespread.¹¹⁶

In defense of this practice, and after a careful examination of the literature, Hathaway formed the view that:

[T]here appears to be neither theory nor practice to justify the view that the designation of a treaty’s preparatory work as a supplementary means of interpretation requires that it be relegated to an inherently subordinate or inferior place in a comprehensive, interactive process of treaty interpretation.¹¹⁷

As such, the better view is that recourse to drafting history should be viewed “as a means by which to achieve the interpretive goal set by Article 31.”¹¹⁸ In other words, it should be used, albeit with due caution, to assist in providing guidance and insight as to the object and purpose of a treaty and the broad underlying intentions of the parties to the drafting process.¹¹⁹ In light of Judge Pescatore’s comments, such intentions should not be considered determinative or representative of the intentions of *all* the parties to the drafting process. The drafting history may play a role in contributing to an understanding of the various terms within the enumeration of a human right, but there is no realistic process by which to identify the precise intentions of the parties in the sense anticipated by Lord McNair with respect to the full enumeration as to the meaning of a right.

Such an approach is consistent with the first condition under Article 32 of the VCLT with respect to the use of a treaty’s drafting history; it can be used to *confirm* an interpretation arising from the application of Article

115. PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 97–98 (1989). See also Jacobs, *supra* note 26, at 339 (“Recourse to *travaux préparatoires*, as a means of establishing the intentions of the parties, is fraught with practical difficulties” and thus “should not be considered a primary means of interpretation.”).

116. HATHAWAY, *supra* note 10, at 56–57.

117. *Id.* at 59.

118. *Id.*

119. Vagts, *supra* note 30, at 486 (suggesting that the use of drafting history may at times be helpful, although it remains contentious and will not always clarify the parties’ intentions).

31.¹²⁰ It is also consistent with the condition that recourse to the *travaux préparatoires* is reasonable where an application of Article 31 leaves the text of a treaty “ambiguous or obscure” or “absurd or unreasonable.”¹²¹ Given the limited capacity of the general rule of interpretation under Article 31 to produce a determinate meaning for any treaty provision, it must follow that the threshold for making use of the drafting history will be quite low.¹²² Thus if ambiguity is a feature of all treaty provisions, a consideration of the drafting history will be necessary to examine whether it has the capacity to assist in constraining the range of potential meanings for the text of such a provision. In such circumstances, recourse to the drafting history of an international human rights treaty actually becomes a legitimate feature of a principled interpretive approach. It will not, however, produce a single meaning of a human right, and it remains to be considered what other factors beyond those identified as being relevant under the VCLT should guide the selection of a meaning from within a suite of potential meanings. First among those considerations is a requirement that the interpretation adopted is clear and practical.

2. Clear and Practical

Given the high level of abstraction that characterizes human rights treaties, the interpretive process must be directed toward achieving what might be described as descending levels of abstraction (or increasing levels of clarity) as to the content of a human right. As Maartin Bos has emphasized, the interpretive process must not only be “an activity . . . designed to clarify the text of a written manifestation of law” but also be cognizant of the need to ensure that the interpretation offered is capable of application to “the realities of daily life and practice.”¹²³ Clarity and practicality are therefore essential attributes of an interpretive process that seeks to persuade the interpretive community as to the suitability of the interpretation offered.

The requirement that an interpretation of a human right be clear and practical is so obvious that its identification as a specific element of a persuasive interpretation could be considered unwarranted. Should not every act of interpretation instinctively be guided by these features? In practice, however, reliance on instinct raises the risk that the subjective preferences of an interpreter will be insufficiently attentive to the need for an interpretation that is clear and practical. Take, for example, the concept of minimum core obligations, which was developed by the Committee on

120. VCLT, *supra* note 11, art. 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty . . . in order to confirm the meaning resulting from the application of article 31 . . .”).

121. *Id.*

122. See HATHAWAY, *supra* note 10, at 60.

123. BOS, *supra* note 16, at 15.

Economic Social and Cultural Rights (“ESC Committee”).¹²⁴ Although intended as a tool to assist in securing the implementation of the rights under ICESCR, it still lacks a clear and practical understanding of its application.¹²⁵ In its General Comment on the right to health, the ESC Committee embarked upon an expansion of the scope of this concept so as to include a non-derogable minimum core obligation to secure the immediate implementation of a long list of measures.¹²⁶ For many, if not all, states in both the developing and developed worlds, the capacity to ensure the content of the minimum core obligation required by the ESC Committee remains as distant as the prospect of the full realization of the right to health itself. As such, this aspect of the vision of the right to health offered by the ESC Committee is simply not practical because it cannot be achieved even when states act with the best of intentions. Human rights advocates, other treaty monitoring bodies, and even some commentators may find it compelling and convincing,¹²⁷ but to suggest that states must secure such a vision immediately, irrespective of their available resources, is to ignore the realities that confront states when seeking to implement the right to health.

An explicit awareness of the need to pursue a clear and practical interpretation encourages a certain level of reflection in the interpretive process. Importantly, the requirements of clarity and practicality do not demand that the interpretive exercise must always resolve these issues in the first

124. U.N. Econ. & Soc. Council [ECOSOC], Committee on Econ., Soc. and Cultural Rights [CESCR], *General Comment No 3: The Nature of States' Parties Obligations*, ¶ 10, U.N. Doc. E/1991/23, Annex III (Dec. 14, 1990) [hereinafter CESCR, *General Comment No. 3*].

125. Attempts have been made to clarify the practical meaning of this principle. See, e.g., EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES (Sage Russell & Danie Brand eds. 2002). But significant work remains to be done on this project. See Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008) (providing the most comprehensive critique of this concept to date and concluding that the concept is so problematic that it ought to be stripped of any normative status and restricted to advocacy in its use). The South African Constitutional Court also grappled with the concept of the minimum core within the rights to health and housing but ultimately resolved to leave it within the more general scope of the reasonableness review. *Gov't of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 ¶ 33 (CC) (declining to decide on the question of the minimum core with respect to the right to housing because of a perceived lack of information before the court to make such a finding); *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (refusing to define a minimum core standard for the right to health largely by virtue of its perceived institutional capacity). Cf. Justice Richard J. Goldstone, *Foreword* to *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* vii, xii (Varun Gauri & Daniel M. Brinks eds., 2008) (arguing that the comments of the court should not be taken as a call to abandon any future reliance on the minimum core approach).

126. CESCR, *General Comment No. 14*, *supra* note 45, ¶¶ 43, 47.

127. See, e.g., DAVID BLCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* 223 (2007); Audrey Chapman, *Core Obligations related to the Right to Health*, in *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, 185 (Audrey Chapman & Sage Russell eds., 2002) (tending to embrace the work of the ESC Committee without any critical reflection as to its legitimacy); U.N. Human Rights Council [HRC], *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶¶ 51–53, U.N. Doc A/HRC/7/11 (Jan. 31, 2008) (prepared by Paul Hunt) (also embracing the approach of the ESC Committee).

instance. This may be possible where there is a rich jurisprudence and sophisticated debate within the interpretive community from which to draw and develop the interpretation offered. These features often characterize the understanding of civil and political rights. But with respect to economic and social rights, where the boundaries of such rights are relatively porous and uncharted, interpreters may need to place greater emphasis on the collaborative process necessary to identify the practical measures required for effective implementation. It would be rare indeed that an individual could claim to be the sole repository of all knowledge necessary to provide a comprehensive, clear, and practical interpretation of every aspect of the right to health. Thus, as Vagts has explained, the focus must be on the practical, with less attention given to “finding ‘the’ right way of interpreting . . . than on identifying techniques that clarify, that help achieve the target of the drafters and that further a fruitful interaction between the writers and the readers of these documents.”¹²⁸ The aim in such circumstances is to contribute to a dialogue with the interpretive community whereby an understanding as to the practical implementation of a human right will be developed through consultation and negotiation.

An adaptation of the techniques offered by democratic experimentalism provides an example of this more flexible and participatory approach to the interpretive project than that traditionally associated with legal scholarship.¹²⁹ Such an approach commences the interpretive process by accepting the articulation of a human right at a reasonably high level of abstraction and offering an incomplete specification of a right’s meaning in a particular context.¹³⁰ For example, the obligation of a state to recognize the right to the highest attainable standard of health could be interpreted as requiring a state to ensure that its health system progressively meets the health needs of all persons within its jurisdiction without discrimination. The specific details with respect to the implementation of this directive are then left to the state but must comply with various procedural requirements such as effective participation with the relevant interpretive community. The interpretive exercise remains engaged with the process via a requirement to examine and monitor the results of the implementation measures. An ongoing dialogue is thus facilitated with additional directions provided to states when considered necessary to achieve the effective enjoyment of the right to health.

128. Vagts, *supra* note 30, at 473.

129. On democratic experimentalism, see generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003). See also A. Bryce Hoflund & Marybeth Farquhar, *Challenges of Democratic Experimentalism: A Case Study of the National Quality Forum in Health Care*, 2 REG. & GOVERNANCE 121, 123 (2008) (examining the democratic experimentalist approach to health care regulation and noting that the three core mechanisms of this approach are “benchmarking, learning by monitoring, and participation by diverse organizations in deliberative decision-making”).

130. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 822 (2003).

It has been suggested that the decision of the South African Constitutional Court in the *Treatment Action Campaign* case,¹³¹ which concerned access to an antiretroviral drug to prevent transmission of HIV/AIDS from mothers to their children, reflects elements of the experimentalist project. For example, Katharine Young has explained that the remedies adopted by the Court were directed at solving the problem “rather than upholding a substantive and final content of the right of access to health care” as formulated under the South African Constitution.¹³² Moreover, the Court provided for the ongoing revisability of the measures required to secure the right to health “in light of better information and improved developments in scientific and professional communities.”¹³³

Under this model, the interpretive process may be evolutionary and partially indeterminate, but it remains clear to the extent that the measures determined to be appropriate at each stage are capable of guiding states in their attempts to transform an abstract concept, such as the right to health, into reality. Importantly, the determination of whether a measure is considered to be practical is not the sole province of the interpreter and must be evaluated in light of the socio-political context within a particular state; this is the fourth feature of the interpretive methodology required for a constructive approach to interpretation and is discussed below. The requirement of practicality also does not mean a level of pragmatism that would leave the content of the right to health subject to only those measures that states were prepared to implement. On the contrary, an interpretation that is clear and practical must still be principled, which demands that it be consistent with a vision that ensures the effective realization of the object and purpose underlying the right in question.

It is important to note that emphasis on the process required to generate a practical meaning does not mean that the modes of construction advanced under the VCLT can be abandoned. The interpretive exercise must first seek to engage with the VCLT in order to consider the extent to which the general rule is able to guide and constrain the range of potential meanings. Recourse to a more process-oriented approach occurs after the capacity of the VCLT has been exhausted. In other words, attention to process and to particular modes of construction are interdependent and non-severable features of a persuasive interpretive methodology.

3. *Coherence*

The requirements that an interpretation of a human right be principled, clear, and practical are necessary but not sufficient to enhance the persua-

131. *Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (10) BCLR 1033 (CC).

132. Katharine Young, *Movements in Constitutionalism: Beyond Jurisgenesis and Experiment* 49 (Nov. 3, 2008) (unpublished manuscript, on file with author).

133. *Id.*

siveness of the interpretation offered. The interpretation must also demonstrate both coherence in its reasoning and coherence within the international legal system.¹³⁴ Although the two are interconnected, Soriano explains, “[t]heories of coherence in legal reasoning focus on the arguments, and on how the given arguments are connected” whereas “coherence in the legal system focus[es] on fitting a decision into the legal system and on the fitting together of all components of the legal system.”¹³⁵

a. Coherence in Reasoning

With respect to the first form of coherence, Soriano’s “modest notion of coherence in legal reasoning” provides a useful insight into the process required for coherence in the articulation of the content of a human right.¹³⁶ It accepts that a plurality of values forms the backdrop against which interpretive acts take place and that a fixed or definitive answer will always remain elusive. As such, the focus must shift toward an examination of the extent to which a particular interpretation can be justified. For Soriano, justification is the activity of giving arguments to support premises. The coherence of these arguments must be assessed by reference to the connectedness of their underlying reasons, which he calls their “supportive structures.”¹³⁷

Under such a model, interpretation essentially becomes an act of persuasion, the effectiveness of which is influenced by the depth and rigor of its analysis. Critical to this process are the properties of the supportive structures used to construct an interpretation of a particular provision and to support its reasoning, that is, the link between the reasons and a decision or view. According to Soriano, the number of supportive relations, the length of the supportive structure, the strength of the support, and the capacity for what is termed “netting” of reasons are particularly important.¹³⁸ In seeking to generate the appropriate supportive structures necessary to justify the interpretation of any human right, interpreters should first identify and then assess the quality of the views of those sources that have sought either to contribute to the understanding of the right in question or possess the capacity and expertise to do so.

Such an approach is a common feature of attempts to interpret human rights standards. The body or person interpreting a right will almost invariably enlist the work of a human rights treaty body, a relevant special rapporteur, courts, commentators, and/or other experts to support its inter-

134. Leonor Moral Soriano, *A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice*, 16 *RATIO JURIS* 296, 296 (2003).

135. *Id.* at 296–97.

136. *Id.*

137. *Id.* at 310–20.

138. *Id.* at 311–19. The idea of netting reasons is used in contrast to the idea of chained reasons. It is preferred because it is considered to better reflect the need to pursue the interconnectedness and reciprocal nature of reasons as opposed to the simple accumulation of independent chains of reasons. *Id.* at 310–11.

pretation. For example, when interpreting the right to the highest attainable standard of health, the work of the ESC Committee and CRC Committee receives close attention, as these bodies have a mandate to monitor the implementation of states' obligations and both have issued general comments in relation to the right to health.¹³⁹ The qualities of mandate and expertise also mean that consideration is regularly given to the work of the Special Rapporteur on the Right to Health,¹⁴⁰ whose mandate requires that he prepare reports¹⁴¹ that contribute to the understanding of the normative contours of the right to health.¹⁴² Other sources that are referred to regularly include the work of commentators who have contributed to the

139. U.N. Committee on the Rights of the Child [CRC], *General Comment No 3: HIV/AIDS and the rights of the child*, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003); U.N. Committee on the Rights of the Child [CRC], *General Comment No 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/4 (July 1, 2003); U.N. Committee on the Rights of the Child [CRC], *General Comment No 9: The rights of children with disabilities*, U.N. Doc. CRC/C/GC/9 (Feb. 27, 2007); CESCR, *General Comment No. 14*, *supra* note 45. The concluding observations of each Committee also address matters in relation to the implementation by States parties of the right to health.

140. *See* Comm'n on Human Rights Res. 2002/31, U.N. Doc. E/CN.4/RES/2002/31 (Apr. 22, 2002) (establishing the mandate of the Special Rapporteur). *See also* Comm'n on Human Rights Res. 2005/24, U.N. Doc. E/CN.4/RES/2005/24 (Apr. 15, 2005); Human Rights Council Res. 6/29, U.N. Doc. A/HRC/RES/6/29 (Dec. 14, 2007) (both renewing the mandate for another three years).

141. These reports include annual reports to the now abolished Commission on Human Rights (*see, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4/2003/58 (Feb. 13, 2003) (*prepared by* Paul Hunt); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4/2004/49 (Feb. 16, 2004); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4/2005/51 (Feb. 11, 2005); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4.2006/48 (Mar. 3, 2006); the Human Rights Council (*see, e.g.*, Gen. Assembly, Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/HRC/7/11 (Jan. 21, 2008); Gen. Assembly, Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/HRC/4/28 (Jan. 17, 2007)); and the U.N. General Assembly (*see, e.g.*, Special Rapporteur of the Commission on Human Rights, *The right of everyone to enjoy the highest attainable standard of physical and mental health, delivered to the General Assembly*, U.N. Doc. A/58/427 (Oct. 10, 2003); Special Rapporteur of the Commission on Human Rights, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, delivered to the General Assembly*, U.N. Doc. A/59/422 (Oct. 8, 2004); Special Rapporteur of the Commission on Human Rights, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, delivered to the General Assembly*, U.N. Doc. A/60/348 (Sept. 12, 2005); Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, delivered to the General Assembly*, U.N. Doc. A/61/338 (Sept. 13, 2006); Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, delivered to the General Assembly*, U.N. Doc. A/62/214 (Aug. 8, 2007)).

142. *See, e.g.*, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health, delivered to the General Assembly*, U.N. Doc. A/58/427 (Oct. 10, 2003) (attempting to develop some of the conceptual issues relevant to the right to health such as the use of indicators and benchmarks and criteria for the identification of "good practices").

literature on the right to health,¹⁴³ as well as the jurisprudence of regional and domestic courts, which have begun to recognize not only the health dimensions of civil and political rights such as the right to life but also the justiciability of the right to health as a separate norm.¹⁴⁴

The reasons underlying recourse to the interpretive work of other actors are seldom acknowledged. Perhaps it is considered to be so self-evident that no explanation is warranted. The view taken here, however, is that it remains important to expressly acknowledge why such an approach is necessary; namely, to enhance and defend the coherence of the interpretation offered. Moreover, an active awareness as to the reason for “netting” the views of other actors guards against a tendency to simply import such views into the meaning of a right. Instead, interpreters must critically assess whether the reasoning underlying such views is convincing in light of the requirements that it be principled, practical, coherent, and context-sensitive.

The pursuit of coherence in reasoning must not be developed simply by reference to the views of the legal interpretive community with respect to a particular human right. Thus, for example, as noted above, the Millennium Taskforce on Child and Maternal Health accepted the need for human rights to achieve the Millennium Development Goals.¹⁴⁵ However, it also warned that “human rights initiatives fixated on and bound by chapter and verse of human rights treaties often miss the mark.”¹⁴⁶ As a consequence the broader notion of interpretive community outlined in Part II anticipates that knowledge and expertise with respect to the practical and effective understanding of a human right will rest in a much broader range of actors. Thus, for example, with respect to the right to health, there is evidence of an increasing dialogue that is forging an understanding about the nexus between public health and human rights generally.¹⁴⁷ For example, the

143. See, e.g., Human Rights Council [HRC], *Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 55–99, U.N. Doc. A/HRC/4/28 (Jan. 17, 2007) (prepared by Paul Hunt) (examining cases on the right to health); BRIGIT TOEBES, *THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW* 167–242 (1998) (providing a comprehensive examination of case law on the right to health until the late 1990s).

144. The South African Constitutional Court’s case law provides some jurisprudence in this area. See, e.g., *Minister for Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (finding that a failure to provide access to antiretrovirals to children and their mothers in all public hospitals was a violation of Constitution); *Soobramoney v. Minister for Health*, 1998 (1) SA 765 (CC) (determining the nature of the distinction between emergency medical treatment and access to health care). See also *Soc. and Econ. Rights Action Ctr. v. Nigeria*, 155/96, Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights 2001–2002, Annex V (2001) (finding the Federal Republic of Nigeria to be in violation of the right to health for failing to regulate activities undertaken by oil companies in the Niger Delta).

145. U.N. MILLENNIUM PROJECT, *supra* note 67.

146. *Id.* at 34.

147. See generally U.N. MILLENNIUM PROJECT, *supra* note 67, at 29–35; JONATHAN MANN ET AL., *HEALTH AND HUMAN RIGHTS: A READER* (1998); Lynne Freedman, *Reflections on Emerging Frameworks of Health and Human Rights*, 1 *HEALTH & HUM. RTS.* 314 (1995); Sofia Gruskin & Daniel Tarantola, *Health and Human Rights*, in *THE OXFORD TEXTBOOK OF PUBLIC HEALTH* (Roger Detels et al. eds.,

World Health Organization (“WHO”) has developed guidelines in areas such as maternal health, children’s health, and mental health that draw upon human rights principles.¹⁴⁸ The Millennium Development Project Taskforce on Child Health and Maternal Health has stressed the importance of human rights in contributing to child and maternal health,¹⁴⁹ and commentators have emphasized the links between human rights and health on matters such as child maltreatment¹⁵⁰ and public health programming.¹⁵¹

At the same time, it remains important not to overstate the role that human rights discourse has come to play in public health policy. Indeed, there remains a great deal of caution and skepticism within the area of public health as to the merits of international human rights law as a strategy to secure health outcomes, and “equity” remains the preferred and dominant paradigm.¹⁵² However, the recognition by key actors within the area of public health such as the WHO, the Millennium Development Project Taskforce on Child Health and Maternal Health, and UNICEF¹⁵³ that

2004); Paul Hunt, *The Right to Health: From the Margins to the Mainstream*, 360 LANCET 1878 (2002); Alicia Yamin, *Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care*, 10 HEALTH & HUM. RTS. 45 (2008); Daniel Tarantola, *Building on the Synergy between Health and Human Rights: A Global Perspective* (Francis-Xavier Bagnoud Center for Health and Human Rights, Working Paper Series No. 8, 2000).

148. See, e.g., WORLD HEALTH ORGANIZATION, SOUTH EAST ASIA REGION, TOWARDS A BETTER TOMORROW: CHILD RIGHTS AND HEALTH; WORLD HEALTH ORGANIZATION, DIVISION OF MENTAL HEALTH AND PREVENTION OF SUBSTANCE ABUSE, GUIDELINES FOR THE PROMOTION OF HUMAN RIGHTS OF PERSONS WITH MENTAL DISORDERS (1996), available at http://whqlibdoc.who.int/hq/1995/WHO_MNH_MND_95.4.pdf; WORLD HEALTH ORGANIZATION, ADVANCING SAFE MOTHERHOOD THROUGH HUMAN RIGHTS (2001), available at http://whqlibdoc.who.int/hq/2001/WHO_RHR_01.5.pdf. See also WORLD HEALTH ORGANIZATION, THE WORLD HEALTH REPORT 2005: MAKE EVERY MOTHER AND CHILD COUNT (2005), available at <http://www.who.int/whr/2005/en/index.html>.

149. U.N. MILLENNIUM PROJECT, *supra* note 67, at 3–4.

150. Richard Reading et al., *Promotion of Children’s Rights and Prevention of Child Maltreatment*, 373 LANCET 332 (2009).

151. Armando De Negri Filho, *A Human Rights Approach to Quality of Life and Health: Applications to Public Health Programming*, 10 HEALTH & HUM. RTS. 93 (2008).

152. See, e.g., The Lancet Editorial, *Moving Forward with Maternal Health and Human Rights*, 373 LANCET 2172 (2009) (noting that the health community often perceives “human rights to be solely about whistleblowing, lawyers, and litigation”); Alexis Palmer et al., *Does Ratification of Human-Rights Treaties Have Effects on Population Health?*, 373 LANCET 1987 (2009) (finding that there is no consistent association between ratification of human rights treaties and health or social outcomes). With respect to the preference for equity, see CHALLENGING INEQUITIES IN HEALTH: FROM ETHICS TO ACTION (Timothy Evans et al. eds., 2001); Cesar G. Victora et al., *Applying an Equity Lens to Child Health and Mortality: More of the Same is not Enough*, 362 LANCET 233 (2003); Margaret Whitehead, *The Concepts and Principles of Equity and Health*, 6 HEALTH PROMOTION INT’L 217 (1991). Compare Paul Braveman & Sofia Gruskin, *Defining Equity in Health*, 57 J. EPIDEMIOLOGY AND COMMUNITY HEALTH 254 (2003) (tracing congruence between equity and human rights), with U.N. MILLENNIUM PROJECT, *supra* note 67, at 29–31 (recognizing the relevance and importance of human rights but as a tool for informing and understanding equity).

153. Memorandum from Carol Bellamy, Executive Director, U.N. CHILDREN’S FUND [UNICEF], *A Human Rights Based Approach to UNICEF Programming for Children and Women* (Apr. 21, 1998) (copy on file with author); UNICEF, HUMAN RIGHTS FOR WOMEN AND CHILDREN: HOW UNICEF HELPS MAKE THEM A REALITY (1999), available at http://www.unicef.org/publications/files/pub_human_rights_children_en.pdf. See also UNICEF, *Realizing Rights, Getting Results*, <http://www.unicef.org/rights/results/index.html>.

human rights have a significant role to play in securing public health objectives provides an opportunity to examine the measures required for the practical implementation of the right to health. Thus, while the literature emerging from public health and general medical discourse may not be directly concerned with addressing the normative content of the right to health, its capacity to contribute to an understanding as to the most effective and practical measures by which to secure the right to health warrants attention.

Engagement with material generated outside the legal interpretive community represents a departure from the historical tendency of international legal scholarship to rely almost exclusively on what could broadly be labeled legal sources. It is a reflection of the dominant perception, often pervasive within domestic legal scholarship, that law is a closed system of logic and that reliance on non-legal sources will compromise the integrity of the legal analysis. This article rejects such an approach for two reasons. First, law is not a complete discipline and is dependent upon insights from other disciplines when attempting to map out the content of human rights. As a consequence, the coherence in the reasoning used to advance a particular view or vision in relation to the meaning of a human right will often be strengthened by the insights of other discourses. Second, as explained in Part II, the interpretive community that the interpretive act must persuade cannot be restricted to the legal fraternity. On the contrary, it must extend to those who work within fields that intersect either directly or indirectly with the implementation of a human right. A coherence in reasoning that satisfies the expectations of only the legal interpretive community will be of little benefit if it is unable to appeal to those persons who actually develop the policies and undertake actions that affect, for example, the health of individuals.¹⁵⁴

b. System Coherence

The idea of coherence within domestic legal systems has been the subject of significant commentary and, according to Soriano, generally examines whether a decision “cohere[s] either with a particular set of principles (Dworkin), or with the principles and norms of a branch of the legal system (Raz and Levenbook).”¹⁵⁵ At the international level, the International Court of Justice has also held that “an international instrument has to be interpreted and applied within the framework of the entire legal system

154. This is essentially an extension of the observation made by Justice Higgins that “[t]he making of legal choices will not even contribute to justice if it purports totally to ignore political and social contexts.” HIGGINS, *supra* note 20, at 9.

155. Soriano, *supra* note 134, at 305. See RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986) (“According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”); Joseph Raz, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 277, 277–325 (Joseph Raz ed., 1994); Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 *LAW & PHIL.* 355 (1984).

prevailing at the time of the interpretation.”¹⁵⁶ Despite this directive, concern has emerged recently that the fragmentation of international law “puts to question the coherence of international law.”¹⁵⁷ Although the ILC Fragmentation Study conceded that “coherence is . . . a formal and abstract virtue,” it still acknowledged that “[c]oherence is valued positively owing to the connection it has with predictability and legal security.”¹⁵⁸ It therefore took the view that coherence “should be understood as a constitutive value of the system.”¹⁵⁹ Such a position indicates that the interpretation of a human right under an international treaty must pursue coherence with the system of international law in order to satisfy the expectations of the interpretive community and thus enhance its persuasiveness. System coherence requires that an interpretation be coherent within both (a) the entire system of international law—termed here as “external system coherence” and (b) the context of the other provisions of the international human rights treaty in question—termed here as “internal system coherence.”¹⁶⁰

i. External System Coherence

The ILC Fragmentation Study gives significant attention and guidance to external system coherence. The Study explains the problem created by fragmentation in this way:

It is a preliminary step to any act of applying the law that a prima facie view of the matter is formed. This includes, among other things, an initial assessment of what might be the applicable rules and principles. The result will be that a number of standards may seem prima facie relevant. A choice is needed, and a justification for having recourse to one instead of another.¹⁶¹

However, the preliminary step to which the study refers is in fact preceded by an earlier step: the development of an understanding as to the content and meaning of the potentially relevant rules. A question thus remains as to how this initial interpretive exercise must be undertaken.

156. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 53. See also Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279, 280 (2005) (arguing that Article 31(3)(c) of the VCLT, which requires that any relevant rules of international law must be taken into account in the interpretive process, “expresses a more general principle of treaty interpretation, namely that of systemic integration within the international legal system”).

157. *ILC Fragmentation Report*, *supra* note 60, ¶ 491.

158. *Id.*

159. *Id.*

160. This concept of external system coherence seeks to accommodate and exceed the requirement under Article 31(3)(c) of the VCLT, *supra* note 11, that the application of the general rule under Article 31(1) take into account any relevant rules of international law applicable in the relations between the parties. The requirement of external system coherence requires a consideration of not just these rules but the entire system of international law, especially the provisions of other human rights treaties, but also other multilateral treaties and regimes within international law.

161. *ILC Fragmentation Report*, *supra* note 60, ¶ 36.

In relation to this issue, the ILC Fragmentation Study outlines some principles that offer assistance. First, “[i]n international law, there is strong presumption against normative conflict.”¹⁶² Applying this presumption supports a preference for harmonization. Such an approach works well to resolve any apparent conflicts that may arise between the provisions of treaties that have broadly similar objects and purposes. Thus, for example, harmonization offers an appropriate interpretive guideline with respect to the resolution of apparent conflicts between the formulation of the right to health under the CRC and ICESCR. It cannot, however, resolve genuine conflicts between norms under international law.¹⁶³

In such circumstances, the principle of *lex specialis* (that special law derogates from general law) becomes relevant as a “widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.”¹⁶⁴ In the case of the interpretation of the right to health, *lex specialis* suggests that where there is a special rule that is relevant to the potential scope of the right to health, that special rule should inform the interpretation.¹⁶⁵ The principle of *lex specialis* can thus be used to perform a harmonization function. Such a technique also indicates that there are limits on the extent to which the interpretive process can expand the meaning and content of a human right. This is because the coherence of the legal system will be undermined if the interpretive process seeks to extend the boundaries of a provision beyond another special rule with a more precisely delimited scope of application.¹⁶⁶ Interpreters must therefore take care to maintain the distinction between *lex lata* and *lex ferenda*—the law as it is and the law as it might be.¹⁶⁷

To take one example, the ESC Committee in its General Comment on the Right to Health declared that “censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information” would be a violation of state obligations.¹⁶⁸ Such an interpretation is problematic because it fails to recognize the existence and scope of the right to freedom of access to information—a specific rule within the ICCPR which is relevant to the issue of censorship.¹⁶⁹ To censor or withhold health information *may* constitute an interference with both the right

162. *Id.* ¶ 37.

163. *Id.* ¶ 42.

164. *Id.* ¶ 56.

165. *Id.* ¶ 60 (noting that “*lex specialis* may also seem useful as it may provide better access to what the parties have willed.”).

166. *Id.* ¶ 57.

167. HIGGINS, *supra* note 20, at 10.

168. CESCR, *General Comment No. 14*, *supra* note 45, ¶ 34.

169. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 85 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. Article 19 of the ICCPR provides:

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

to health and freedom of access to information, but, contrary to the views of the ESC Committee, it does not *necessarily* constitute a violation of either right. Ultimately this question must be resolved after considering whether the interference could be justified under the terms of Article 19 of the ICCPR as being in accordance with the law and necessary to achieve a legitimate objective.¹⁷⁰ Thus, while the expansive approach adopted by the ESC Committee may carry a superficial allure for those seeking to advance the scope of the right to health, it carries a real risk of compromising system coherence and perpetuating a reductionist rather than substantive approach¹⁷¹ to the question of whether a state has fulfilled its obligation to respect the right to health.

The rationale underlying *lex specialis* further demands that the interpretation of a specific provision expressed in general or broad terms such as the right to health remain cognizant of any special “self-contained regimes”¹⁷² that intersect or overlap with matters that could fall within the scope of the right to health. Failure to recognize such rights risks further fragmentation of the international system by conflating a specific right to extend to matters that are already the subject of an entire, separate, special regime. This is not to suggest that a special provision such as the right to health must always yield to the provisions of another special regime or special rule.¹⁷³ Rather, the interpretation of any human right must acknowledge other aspects of the international legal system that may overlap with and inform the potential scope of that right.

For example, the use and testing of weapons and the pollution of the environment are both matters that are subject to significant international regulation and ongoing discussions. However, the ESC Committee in its General Comment on the Right to Health explained that the scope of the right to health included an obligation to refrain from testing weapons that are harmful to human health and that cause unlawful pollution. It did so without any acknowledgment of the complexity of these issues and the level of sophistication of the measures already undertaken by states.¹⁷⁴ As such, the ESC Committee appears to have adopted its views without any consid-

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

170. Human Rights Committee, *General Comment No. 10, Freedom of Expression (Art. 19)*, ¶ 3, U.N. Doc. HR1/GEN/1/Rev.1 at 11 (Jun. 29, 1983).

171. John Tobin, *Seeking Clarity in Relation to the Principle of Complementarity: Reflections on the Recent Contributions of Some International Bodies*, 8 MELBOURNE J. INT'L L. 356 (2007).

172. ILC *Fragmentation Report*, *supra* note 60, ¶¶ 123–37.

173. See *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. 88, 114–15 (“Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application.”).

174. CESCR, *General Comment No. 14*, *supra* note 45, ¶ 34.

eration of the need to ensure external system coherence. It might be possible to offer a principled, practical, and context-sensitive defense for the inclusion of such obligations within the scope of the right to health. Such a defense, however, would need to take account of the regimes that already exist under international law with respect to the regulation of these issues.

Finally, it is important to recognize that the application of *lex specialis* as an interpretive technique is not without its limitations and difficulties. As the ILC Fragmentation Study explains, “it is often hard to distinguish what is ‘general’ and what is ‘particular.’”¹⁷⁵ “[T]he principle [of *lex specialis*] also has an unclear relationship with other maxims of interpretation . . . such as . . . the principle *lex posterior deogat legi priori* (later law overrides prior law) and may be offset by normative hierarchies or informal views about ‘relevance’ or ‘importance’” such that a more general treaty overrides a more specific one.¹⁷⁶ Notwithstanding these limitations, the application of the principle of *lex specialis* is prima facie an essential feature of an interpretive process that seeks to maintain coherence within the international legal system.

ii. Internal System Coherence

The enumeration of a human right within an international treaty may constitute a special rule within that treaty, but it is not a self-contained rule. When this occurs, there will be potential for cross-fertilization and overlap between the content of a particular right and other provisions of a treaty. In such circumstances, the interpretive process should produce a meaning for the right that is informed by and consistent with the other provisions within the treaty. Such an outcome is described as internal system coherence and is consistent with the requirement under Article 31(2) of the VCLT that the context in which a treaty is to be interpreted extend to a consideration of the text of the treaty itself.¹⁷⁷

The treatment of the right to health by the ESC Committee provides an opportunity to examine the application of this requirement for internal system coherence. In its General Comment on the right to health under Article 12 of the ICESCR, the ESC Committee declared that the right to the highest attainable standard of health is “not confined to the right to health care.”¹⁷⁸

[T]he drafting history and express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe

175. ILC *Fragmentation Report*, *supra* note 60, ¶¶ 58, 116–18.

176. *Id.* ¶ 58.

177. VCLT, *supra* note 11, art. 31(2).

178. CESCR, *General Comment No. 14*, *supra* note 45, ¶ 4.

and potable water and adequate sanitation, safe and healthy working conditions and a healthy environment.¹⁷⁹

The ESC Committee added that “[t]he right to health is not to be understood as a right to be *healthy*.”¹⁸⁰ As a consequence, the right to the highest attainable health must take “into account both the individual’s biological and socio-economic preconditions and a State’s available resources.”¹⁸¹ Moreover, the ESC Committee has acknowledged that “[t]here are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health.”¹⁸² Such an approach is practical given that no state is capable of guaranteeing the health of any individual. It also draws upon the drafting history to clarify the nature and scope of this term, which is a legitimate process in seeking to offer a principled interpretation.

An issue remains, however, as to whether the very expansive definition of health adopted by the ESC Committee can be said to satisfy the requirement of internal system coherence. With the exception of environmental and industrial hygiene, the text of Article 12 of the ICESCR makes no express mention of the other socio-economic determinants of health listed in the definition of health advanced by the ESC Committee. Moreover, the ESC Committee’s inclusion of these determinants arguably encroaches upon the normative territory of other rights within the ICESCR that specifically address such issues, including the right to an adequate standard of living.¹⁸³ It may have been more appropriate for the ESC Committee to recognize the interdependence of such rights with the right to health rather than to conflate the meaning of health where there was no explicit textual basis for this approach.

Internal system coherence prevents the conception of the right to health as a repository for everything that affects the health of an individual.¹⁸⁴ It is entirely appropriate to identify overlap between one right and other rights within a treaty; such an approach is consistent with the principle of interdependence and indivisibility. But it is also necessary to ensure internal system coherence and to delineate to the greatest extent possible the discrete domain of each right. Interpreters must take care to ensure that the rights relevant to matters that have an effect on the health of a person—housing, working conditions, and the like—are not subsumed within the right to health and thereby denied their *lex specialis* status or capacity for a content

179. *Id.*

180. *Id.* ¶ 8.

181. *Id.* ¶ 9.

182. *Id.*

183. ICESCR, *supra* note 15, art. 11(1).

184. TOEBES, *supra* note 143, at 259–60; Steven D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 2, 28 (1994); Ruger, *supra* note 15, at 312–13.

independent of the right to health.¹⁸⁵ Although the importance of *lex specialis* has been identified in the context of achieving external system coherence, it is important to stress that it also operates “within a single instrument”¹⁸⁶ such as the ICESCR.

The final point to emphasize with respect to the issue of internal system coherence is that many human rights treaties possess what are described in this paper as “general principle rights.” Such rights are not confined to a particular subject area and have the potential to affect the interpretation of all the rights under a particular treaty. For example, in the case of the CRC,¹⁸⁷ the CRC Committee¹⁸⁸ and UNICEF¹⁸⁹ have identified four such rights: the prohibition against discrimination (Article 2); the requirement that the best interests of the child shall be a primary consideration in all matters affecting a child (Article 3); the right to survival and development (Article 6); and the right to participation (Article 12).¹⁹⁰ In a similar vein, the rights protected under the ICCPR are all informed by the principle of non-discrimination and an obligation to secure the implementation of civil and political rights (Article 2).¹⁹¹ The United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) also sets out in Articles 3 and 4 the general principles and obligations of states that are to guide the interpretation and implementation of the rights under the CRPD.¹⁹²

Internal system coherence demands that the process of interpretation be alert to these “general principles” and ensure that the interpretation offered for a particular right is consistent with, and informed by, these provisions. It is important to recognize, however, that system coherence, whether internal or external, focuses on the text of a treaty. As such, it makes no attempt to locate the interpretive exercise within the broader socio-political context in which the right is to be operationalized. Thus, the final factor that must inform the selection of a meaning from within a suite of potential meanings is the need for context sensitivity.

185. TOEBES, *supra* note 143, at 260 (identifying four general areas which overlap with the right to health but still retain a dimension that is autonomous or independent of the right to health: life; physical integrity and privacy; housing, food and work; and education and information).

186. CESCR, *General Comment No. 14*, *supra* note 45, ¶ 68.

187. CRC, *supra* note 46.

188. CRC, *General Comment No. 5*, *supra* note 46, ¶ 12.

189. UNICEF, HUMAN RIGHTS FOR WOMEN AND CHILDREN, *supra* note 153, at 8.

190. *Id.* at 8–10; CRC, *General Comment No. 5*, *supra* note 46, ¶ 12.

191. ICCPR, *supra* note 169, art. 2.

192. Convention on the Rights of Persons with Disabilities, arts. 3–4, *opened for signature* March 30, 2007, A/RES/61/106, *available at* <http://www.unhcr.org/refworld/docid/45f973632.html> (*entered into force* May 3, 2008).

4. Context Sensitivity

It is now widely accepted that, rather than being natural and immutable, the content of international law is contextualized.¹⁹³ Thus, for a pragmatist such as Justice Higgins, former President of the International Court of Justice, “[a] refusal to acknowledge political and social factors cannot keep law ‘neutral’, for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics.”¹⁹⁴ It follows therefore that “the assessment of so-called extralegal considerations is part of the legal process.”¹⁹⁵ And for a theorist, such as Martii Koskenneimi, “it is neither useful nor ultimately possible to work with international law in abstraction from descriptive theories about the character of social life among States and normative views about the principles of justice which should govern international conduct.”¹⁹⁶ These observations reveal that the interpretive process does not occur within a sterile vacuum and that attempts to fabricate or insist upon such an interpretive environment will condemn the interpretive exercise to irrelevance. Interpretation involves the process of choosing a meaning from a range of potential meanings, and, in order to have any persuasive capacity, that choice must be undertaken with an awareness of the context in which it is made.

The integration of such a feature into the interpretive process is not without its difficulties. The identification of the relevant context will itself be a subjective inquiry and a matter of “interpretation.” It may be easy to agree on the need to take account of the social and political context in which international law operates, but these broad and general exhortations conceal complex and contentious debates as to how these contexts are constituted. This is not the place to resolve these debates. Rather, as a minimum, the interpretive exercise must demonstrate sensitivity to context at two levels: local and global.

a. Local Context Sensitivity

The accepted doctrine within international human rights law is that human rights are universal. This position is invariably subject to the criticism that human rights instruments impose standards that prioritize Western values at the expense of non-Western values.¹⁹⁷ Those who stir the cultural relativist cauldron remind us that rights discourse can be used in a

193. See, e.g., Simma & Paulus, *supra* note 93, at 29; Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, in *THE METHODS OF INTERNATIONAL LAW*, *supra* note 33, at 47, 48.

194. HIGGINS, *supra* note 20, at 5 (quoting Rosalyn Higgins, *Integrations of Authority and Control: Trends in the Literature of International Law and International Relations*, in W. MICHAEL REISMAN & BURNS H. WESTON, *TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL* 85 (1976)).

195. *Id.*

196. KOSKENNIEMI, *supra* note 20, at 1.

197. See generally STEINER ET AL., *supra* note 1, at 517–40.

hegemonic way to displace, devalue, and colonize other, competing agendas.¹⁹⁸ The requirement of participation mandates that the implementation of a rights-based approach must be sensitive to, informed by, and reflect the needs and interests of local populations. Such an approach not only has intuitive appeal but also is supported by research in the area of public health, for example, which indicates that “selection of effective interventions to be implemented at the level of community and health facilities should be based on the local epidemiological profile and other locally-defined key criteria.”¹⁹⁹ The relevance of this insight to the interpretive process is significant. It demands that the specific measures required for the implementation and operationalization of a human right not be universal. Rather, an understanding of the required measures must be developed in consultation with states and their citizens as they attempt to accommodate the diverse needs and practices that are peculiar to each state.

Such an approach disapproves of the automatic transferability of Western expectations with respect to the measures required for the realization of human rights in favor of models that are tailored to meet local demands and respond to local needs.²⁰⁰ It therefore requires sensitivity to the social, cultural, and political practices within a particular state and allows for a degree of flexibility in the implementation of measures to secure a human right. At the same time, this does not allow a state to invoke cultural or traditional practices to defend violations of international human rights. As Philip Alston has explained, “[j]ust as culture is not a factor which must be excluded from the human rights equation, so too must it not be accorded the status of a metanorm which trumps rights.”²⁰¹ Thus, for example, in the context of a child’s right to health, paragraph 3 of Article 24 of the CRC demands, “[s]tates parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”²⁰² At the same time, the measures required for the elimination of such practices are not to be imposed or defined exclusively

198. See, e.g., Kennedy, *supra* note 9.

199. Jennifer Bryce et al., *Reducing Child Mortality: Can Public Health Deliver?*, 362 LANCET 159, 163 (2003).

200. *Id.* See also Sue Diamond, *An Analysis of Child Protection and Protecting Children from Rights and Public Health Perspectives*, Paper delivered at the International Symposium on Human Rights in Public Health: Research, Policy and Practice, Univ. of Melbourne (Nov. 3–5, 2004) (on file with author) (warning against the ‘transplant’ of child protection models developed in the USA into emerging democracies and other developing nations); Beth Verhey, *Child Soldiers: Preventing, Demobilizing and Reintegrating* 17 (World Bank, Africa Region Working Paper Series No. 23, 2001), available at <http://www.worldbank.org/aft/wps/wp23.pdf> (examining research which suggests that Western-style trauma assistance and its focus on the individual may not necessarily be as effective as psychosocial approaches that emphasize the role of family and the community in the context of the demobilization of child soldiers in Africa).

201. Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* 20 (Philip Alston ed., 1994).

202. CRC, *supra* note 46, art. 24(3).

by reference to Western values. On the contrary, a context-sensitive approach favors collaboration and consultation at the local level over the imposition of hegemonic visions of the content and scope of the right to health.

Understanding this need to demonstrate local context sensitivity in the interpretive process is assisted by an examination of the margin of appreciation doctrine developed under the European Convention on Human Rights (“ECHR”).²⁰³ The principle, which is not expressly provided for within international human rights treaties and has been the subject of significant criticism, was developed by the ECtHR to allow states a margin of discretion in the measures required to comply with their obligations under the ECHR in light of the particular circumstances within the state party. Although the Court initially applied the principle largely in the context of assessing the reasonableness of state-imposed limitations on rights, the Court now uses it to inform determinations as to the scope of a right.²⁰⁴ This development indicates the potential to apply the doctrine to the task of mapping out the scope of the right to health.

One of the justifications for the margin of appreciation doctrine is the perceived need to accommodate cultural diversity within the states parties to the ECHR.²⁰⁵ Following a careful analysis of the case law of the Court, Arai-Takahashi concluded that “[t]he doctrine’s only defensible rationale . . . is to enable the [ECtHR] to provide endorsement of the maintenance of cultural diversity, ensuring to the citizens of Europe the means to articulate and practice their preferred values within a multicultural democracy.”²⁰⁶ Such an observation is significant in the context of this paper and its attempt to articulate an interpretive approach to international human rights treaties that remains sensitive to the socio-political context within a state. Despite the fact that the margin of appreciation has dissenters,²⁰⁷ it remains

203. See Alston, *supra* note 201 (advocating this approach). See also MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 115–16 (1995) (advocating this position with respect to the obligations of states under the ICESCR). The literature with respect to the principle is extensive. However, the work of Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Intl. Studies in Human Rights, Vol. No. 28, 1996) provides one of the more comprehensive insights into the operation of this doctrine. See also ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 629–34 (2d ed. 2007).

204. See Yourow, *supra* note 203.

205. *Id.* at 195–96; Humphrey Waldo, *The Effectiveness of the System Set Up by the European Court of Human Rights*, 1 HUM. RTS. L. J. 1, 9 (1980) (arguing that the margin of appreciation doctrine was designed to “reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy”).

206. YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 49 (2002).

207. See, e.g., Timothy Jones, *The Devaluation of Human Rights under the European Convention*, 6 PUB. L. 430 (1995); Ronald MacDonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 124 (Ronald MacDonald et al. eds., 1993) (expressing concern that the doctrine obscures the reasons for a court’s decisions).

a necessary interpretive technique.²⁰⁸ As a general rule, the scope of a state's margin will generally be wider when there is less agreement within the relevant interpretive community as to the measures required to secure the enjoyment of a particular right. The discretion accorded to states, however, is not without limits, and an overarching requirement demands that any measures adopted be directed toward the effective realization of the object and purpose of the right in question. In other words, context-sensitive interpretation must still be principled. For example, with respect to the right to health, there is a general obligation on states to provide appropriate sexual education for adolescents so as to minimize the threats to their health associated with consequences such as teenage pregnancies and the transmission of STDs.²⁰⁹ States have a wide margin of appreciation with respect to the measures they adopt to provide such education. An abstinence only approach, however, would not be consistent with the obligations of a state under the right to health, as the evidence indicates that such a model is ineffective in securing the sexual health of adolescents.²¹⁰

b. Global Context Sensitivity

Context awareness also requires an understanding of the tension that marks both the origins and implementation of international human rights standards. Although international human rights treaties may act as legal constraints on the exercise of state sovereignty, their implementation is in turn constrained by state sovereignty. Unlike domestic law, where a state cannot, as a general rule, unilaterally disengage from domestic adjudicative processes, such unilateral action is a permanent and accepted feature of the international legal system. In the absence of effective coercive measures, dialogue and communication are the tools by which international human rights standards are secured. This means that there is an ever-present risk that states will disengage from the interpretive dialogue on the scope of a right if they perceive that the interpretation of that right is discordant with their expectations.

208. See Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L. J. 1, 5–6 (1998) (detailing those factors that should influence and inform the scope of the margin of appreciation: (1) existence of common ground among states regarding the right; (2) the nature of the right (3) the nature of the duty incumbent on the state (whether it is positive or negative); (4) the nature of the aim pursued by a state when interfering with the right (5) the nature of the activity being affected including its importance for the individual and society; (6) the circumstances of the case and (7) the actual wording of the right); Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights*, 19 HUM. RTS. L. J. 30 (1998).

209. U.N. Committee on the Rights of the Child [CRC], *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, ¶¶ 24–26, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

210. See, e.g., MATHEMATICA POLICY RESEARCH, *IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS* 59–61 (2007) (noting research that confirmed the ineffectiveness of abstinence only programs as a way of reducing teen pregnancies and the transmission of STDs).

The challenge, therefore, is to develop an interpretive methodology that is sensitive to this political reality. Although a restrictive approach to interpretation is unlikely to antagonize states, such interpretive appeasement creates the risk that the object and purpose of a treaty will be subverted. In such circumstances, the interpretive act risks becoming, to borrow the word of Koskenniemi, nothing more than an “apology.”²¹¹ It may be pragmatic, but it will not be principled.

Moreover, such an approach, even if it were adopted, would still be unable to address what are termed here as “effectiveness gaps” in a treaty. These “gaps” include what Dixon has labeled as “blind spots” and “burdens of inertia” to explain deficiencies within the domestic legislative process that occur for various reasons and require a judicial response to remedy the subsequent weaknesses in the legislation.²¹² These terms are appropriated in this paper to describe deficiencies within the drafting process of an international treaty. “Blind spots” refer to those specific issues that were overlooked or unanticipated in the drafting process but that are essential to the effective operation of the relevant provision and thus require the development of an appropriate interpretive response. With respect to the right to health, for example, although Article 12 of the ICESCR does not address sexual health explicitly, it forms an integral element of an individual’s health. As such, the ESC Committee has declared that the right to control one’s health and body must extend to sexual and reproductive freedom.²¹³

“Burdens of inertia” refer to those matters that may have been discussed during the drafting process but were not specifically included in the treaty because factors such as time and political intransience on the part of some states prevented consensus with respect to an appropriate formulation. In such circumstances, a gap may be left within the text of a treaty, which, unless addressed, may undermine its effective implementation. Thus the phrase “effectiveness gaps” is used to illustrate the areas in which the interpretive exercise will need to develop an appropriate understanding of the text of a treaty with respect to matters unanticipated or unresolved between states but necessary for the effective operation of the treaty. For example, although the right to health does not expressly impose an obligation on states to provide appropriate social and human resources for the realization of this right, the failure to imply such an obligation would create a serious “effectiveness gap.” As a consequence, states must, as a matter of legal obligation, look beyond the mere accumulation of financial resources and provide the social resources required for effective implementation of the right to health.

211. KOSKENNIEMI, *supra* note 20.

212. Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391 (2007).

213. CESCR, *General Comment No. 14*, *supra* note 45, ¶ 8.

This need to remedy gaps within a human rights treaty indicates that a restrictive interpretive approach is incompatible with the effectiveness principle. It requires the adoption of an active and creative approach to interpretation, which is not without dangers. Interpreters need to exercise caution and self-reflection when identifying gaps; this identification will be a function of the subjective perceptions of an interpreter rather than an objective reality. Toufayan explores this danger in his examination of Roland Barthes' Eiffel Tower essay, in which the interpretive enterprise is supposed to reveal certain landmarks.²¹⁴ When these are not visible, the interpreter fills in the gaps created by his or her experience.²¹⁵ Under such a model, the treaty gaps are not "real," but rather they are perceptions which have been created in light of the subjective expectations or values of an individual as to what a human rights treaty should achieve.²¹⁶ This bias is invariably unrecognized by the interpreter or even the interpretive community, and only "[w]hen enough time has passed and society has changed" does it become "easier to recognize the biases."²¹⁷

It is conceded that this bias can never be eliminated. However, as suggested by Toufayan, "there is . . . a better chance to uncover biases and blind spots when a variety of alternative narratives are competing to tell the story of international human rights law, as opposed to a narrow range of 'official' stories which are received without questioning and perceived as authoritative doctrine."²¹⁸ The interpretive methodology outlined in this paper seeks to achieve this end by a consideration of the views expressed from a variety of sources in order to enhance the coherence of the reasoning that underlines an interpretation of a text.

However, even where consensus exists with respect to the identification of a gap within a treaty, dissention remains as to how this gap should be addressed, as illustrated in the following quote adopted by Justice Scalia in a 1989 United States Supreme Court opinion:

[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes and to stop where

214. Toufayan, *supra* note 16, at 12.

215. *Id.*

216. *Id.*

217. *Id.* at 13.

218. *Id.*

that stops — whatever may be the imperfections or difficulties which it leaves behind.²¹⁹

Lord McNair offered a more balanced perspective when he explained that “[c]onditions should be implied only with great circumspection; for if they are implied too readily, they would become a serious threat to the sanctity of a treaty.”²²⁰ Importantly, however, he is still prepared to concede that “it is reasonable to expect that circumstances should arise . . . in which it is necessary to imply a condition in order to give effect to this intention.”²²¹

This acceptance of the need to imply conditions within a treaty to ensure its effectiveness indicates that the interpretive function is ultimately one of actively constructing meaning. At the same time, the need to offer an interpretation that makes the rights under a treaty real rather than illusory does not provide an unfettered license for conflating the terms of a treaty in such a way that the intentions and expectations of states are ignored. A more balanced approach is required.

In order to add more depth and flexibility in the application of such an approach, an adaptation of Tushnet’s model of weak and strong forms of judicial review may prove helpful.²²² The origins and focus of this model are different from the issues required to accommodate the context in which the international human rights system operates.²²³ However, the terms “weak” and “strong” are more appropriate in an international interpretive context than the traditional dichotomy of restraint and activism for two reasons. First, as outlined above, a restrictive approach to human rights interpretation has been discounted in favor of a dynamic interpretation that ensures effective implementation. Secondly, the premise underlying this paper is that interpretation is ultimately an active process whereby meaning is created. Activism is thus a fundamental element of interpretation, and the real issue is how this process should be performed.

In response to this question, the preceding discussion has indicated that a constructive approach to interpretation is one that is principled, practical, coherent, and remains sensitive to local contextual considerations. Each of these features operates as a constraint on the interpretive exercise; however, their application is far from precise and there remains scope for the exercise of discretion in the interpretive process. The exercise of this discretion must remain balanced if it is to manage the potential conflict between the need for the interpretive exercise to remain engaged with the interpretive community and the need to construct a meaning of a right that will render

219. *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 135 (1989) (citing *In re The Amiabile Isabella*, 19 U.S. 1, 32 (1821)).

220. McNAIR, *supra* note 17, at 436.

221. *Id.*

222. Tushnet, *supra* note 130; MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2007).

223. Tushnet’s work is primarily concerned with the methods available for judicial enforcement of rights rather than their interpretation.

it effective. But the exercise of discretion does not address the question of how to balance these interests.

Use of the terms strong and weak may be of assistance. A strong approach to interpretation could be said to describe an outcome that is more demanding of states as to the nature of their obligations and, as a consequence, would offer greater protection for an individual. However, a weak approach would not be restrictive in the sense of excessive deference to states' interests. On the contrary, it would still pursue an interpretation that secures the effective protection of an individual's rights, but it would be less inclined to expand or conflate the scope of that protection.

The adoption of a strong approach would be justified in two circumstances: first, when the interpretive inquiry relates to the scope of a state's negative obligation with respect to the right, and, second, when the supportive structures within the relevant interpretive community for the adoption of a particular interpretation are strong. In the first circumstance, because negative obligations are less demanding, there is less reason for states to be antagonized by a strong approach. In the second scenario, the strength of the supportive structures would act as a disincentive for states to disengage with the interpretive process. In contrast, a weak approach to interpretation would be more appropriate in matters that concern the scope of a state's positive obligations, given the additional burden to be imposed on a state. This would be especially true when the supportive structures for a strong approach are weak.²²⁴

The minimum core obligation of the right to health as advanced by the ESC Committee in its General Comments Numbers 3 and 14 provides an illustration of this weak/strong dichotomy. The original conception of this core obligation was confined to a rebuttable presumption that all states must secure the essential elements of primary health.²²⁵ In contrast, the later exposition extended to a long list of minimum core obligations and "obligations of comparable priority," which were said to be absolute and non-derogable, irrespective of available resources.²²⁶ Both visions of the minimum core impose a significant burden on states. However, the former could be described as a weak interpretive approach to the extent that it was relatively modest in the list of demands imposed on states. In contrast, the vision offered in General Comment Number 14 represents a strong interpretive approach. As to which vision should be preferred, the interpretive methodology advanced in this paper favors the original vision of the minimum core because, as argued above, the vision of the minimum core of the

224. See Tushnet, *supra* note 130, at 823 (suggesting that weak-form judicial review may be "particularly attractive in light of widespread misgivings . . . about judicial enforcement of social-welfare rights"). See also Dixon, *supra* note 212, at 408–15 (adapting Tushnet's analysis by using the terms "intermediate" and "weak" approaches to inform the respective interpretation of the negative and positive dimension of economic and social rights).

225. CESCR, *General Comment No. 3*, *supra* note 124, ¶ 10.

226. CESCR, *General Comment No. 14*, *supra* note 45, ¶ 44.

right to health under General Comment Number 14 is unprincipled and impractical. The long list of measures required of states is so onerous that few states, if any, are likely to adopt such an approach.

The weak/strong dichotomy is clearly an imperfect, imprecise, and unstable classification scheme. But it is not intended to fix or to direct the interpretive process to a certain outcome. Rather it provides a potential tool to guide the interpretive approach in accordance with the nature and context of the matter under consideration. It accepts that if the potential elasticity inherent in the meaning of any term is stretched too far, the resultant discordance with states' expectations is likely to result in disengagement and a lack of implementation. On the other hand, an excessively restrictive approach that is focused on appeasement of states will jeopardize the effective implementation of the right in question and undermine the object and purpose of the treaty. Thus, the interpretive exercise must be constantly directed to achieve a balance between appeasement and disengagement if it is to have the capacity to persuade states and the broader interpretive community to adopt the interpretation offered.

CONCLUSION: TOWARD A COMMON UNDERSTANDING

In Vattel's chapter on the interpretation of treaties in *Les droit des gens*, he declared, "[I]t is not permissible to interpret what has no need of interpretation. When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurdity, there is no ground for refusing to accept that meaning which the deed naturally presents."²²⁷ What would Vattel have made of the text of international human rights treaties, fraught as they are "with the coinage of textual obfuscation?"²²⁸ Doubtless he would have offered the series of general principles and presumptions that he had identified as tools by which to overcome such abstraction. But as Lauterpacht has observed, the "rich choice of weapons in Vattel's armory of rules of interpretation" was such that any party to a dispute could have drawn some advantage from their application.²²⁹ This is precisely the dilemma that confronts the interpretation of international human rights treaties. The VCLT offers a general rule for the interpretation of such treaties. However, this rule is fraught with so many internal inconsistencies and ambiguities that commentators have largely accepted that it is incapable of producing *the* meaning of a text. Controversy with respect to the meaning of international treaties is therefore a constant feature of the interpretive landscape.

227. EMER DE VATTEL, *LE DROIT DES GENS* 199 (Charles G. Fenwick trans., Gibson Bros. 1916) (1758).

228. Weiler, *supra* note 13, at 2.

229. Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 *BRIT. Y.B. INT'L L.* 48, 48 (1949).

Such controversy is particularly acute with respect to international human rights treaties, which lack an authoritative body with the coercive powers necessary to insist upon the adoption of a particular interpretation. For some, the limitations of the VCLT may represent a form of liberation, allowing the pursuit of a meaning for a human right that accords with their own personal preferences and expectations. Such an approach might even be welcomed when the relevant interpretive community shares such preferences and expectations. The reality, however, is that this is not often the case. While a treaty body, NGO, or special rapporteur may share a common vision as to the meaning of a right, other actors responsible for its implementation, such as states, may take an entirely different view. As a consequence, the absence of a common understanding with respect to the meaning of a right will always compromise its effective implementation. The task of interpretation must therefore be seen not simply as the attribution of meaning to a legal text but also as an attempt to persuade the relevant interpretive community that *a* particular meaning from within a suite of potential meanings should be adopted.

This paper has sought to articulate an interpretive methodology apposite for this purpose. Such a methodology consists of four factors. First, given the expectations within the legal interpretive community, an application of the general rule of interpretation under the VCLT is a necessary part of any strategy to frame an interpretive exercise. This process may constrain the range of potential meanings, but it will not yield *the* meaning of a human right. As Weiler has explained, “Article 31 has turned into a straight-jacket” on discussions concerning interpretation and represents “an ‘unreal’ signpost of contemporary treaty interpretation.”²³⁰ In an attempt to move beyond this constraint, three other factors are relevant: the interpretation offered should be clear and practical, coherent, and context-sensitive. It is important to stress that these features are neither mutually exclusive nor capable of being applied in a precise way so as to produce some determinate and uncontested vision as to the meaning of a human right. Rather, they are intended to act as benchmarks by which to guide the inevitable exercise of discretion that accompanies interpretation and to provide a more reflective and transparent account of the process by which the meaning of a human right is produced. Importantly, they are not severable and as such cannot be applied in a selective way.

The underlying objective of these factors is to generate *a* meaning for a human right which is capable of bridging the impasse that all too often characterizes the understanding of a human right within the relevant interpretive community. It is accepted that these “diverging interpretations [are] more difficult to reconcile through consultation and negotiation” than in the case of bilateral treaties.²³¹ But as Ian Johnstone explains, unity and

230. Weiler, *supra* note 13 at 5, 15.

231. Johnstone, *supra* note 4, at 407.

an agreed meaning can be achieved when the “participants in the enterprise share an interest in preserving the overall relationship.”²³² This last point is especially critical. It warns against the autonomous style of reasoning often adopted with respect to human rights treaties in preference for an approach that accepts the need to entertain a certain level of deference to the varied and often potentially conflicting interests within the relevant interpretive community.

The requirement of a principled interpretation seeks to accommodate the *legal* nature of international human rights treaties. The requirement of a practical interpretation accepts Sen’s warning that a theory of human rights cannot be sensibly confined to the juridical model within which it is frequently incarcerated.²³³ The requirement of coherence in reasoning demands that the views of those with relevant expertise must be considered and assessed in order to develop a common understanding as to the meaning of a human right. The requirement of system coherence recognizes that there is a broader system of law within which the understanding of a specific human right must be located. And finally, the requirement for a context-sensitive interpretation accepts the reality that the successful implementation of a human right must occur within both a local and global socio-political context in which the power of states and their legitimate interests cannot be dismissed. The cumulative impact of these requirements is designed to generate an interpretation of a human right that will make a persuasive and constructive contribution to what must be seen as ongoing process by which the abstract formulations captured in the text of international human rights treaties are transformed into a common understanding of the measures required to secure their effective implementation.

232. *Id.*

233. Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 319–20 (2004).