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## **Paternalism in International Human Rights Law**

Lucas Lixinski\* and Noam Peleg\*\*

**Abstract:** This article argues that international human rights law (IHRL) at a system-wide level produces paternalistic effects that undermine the work it is meant to do for rightsholders. Analysing the work of four key United Nations human rights treaty bodies, we show how institutional arrangements exclude rightsholders from having a say on their own interests in what IHRL should mean for them, and we are instead left with a body of norms, guidelines, and institutions with self-serving dynamics that reinforce the position of IHRL institutions and only secondarily benefit rightsholders.

**Keywords:** paternalism; vulnerability; international human rights law; United Nations Treaty Bodies.

### I. INTRODUCTION

International human rights law (IHRL) is premised on the idea of protecting people, peoples, and their rights by shaping the conduct of states (and, increasingly, non-state actors). In addressing states, IHRL institutions seek to protect individuals and groups, and thereby to an extent, they act on these individuals' behalf.

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Among IHRL institutions, the United Nations Human Rights Treaty Bodies perform a variety of functions. In overseeing the implementation of the treaties that create IHRL institutions, these bodies engage with states and civil society via their monitoring function; with victims and states via individual communications; and with victims, states, and the larger body of IHRL via their general comments and recommendations. These different types of work, important and worthwhile as they are, make some crucial assumptions about rightsholders that this article seeks to problematize.

In addressing states with a view of redressing or preventing potential or actual human rights violations, outside of adjudicatory contexts, IHRL institutions speak not only *on behalf of*, but, problematically, *instead* or *irrespective of* rightsholders' (concrete or potential) own views and voices. Even if unintentional, doing so can result in conduct that is the very definition of paternalism: replacing someone's will (usually the will of human rights holders) with one's own (the will of IHRL institutions', or even worse, the will of the potential perpetrator's by deferring to the will of the state). Such paternalism can also result in overriding someone's will and preferences due to that individual's characteristics, such as age, disability, or being a member of a racialized group. This pattern seems to be often, but not always, couched in the language of protection and vulnerability. Such language is descriptive of certain forms of victimhood in human rights contexts, but it also has structural consequences: rightsholders are characterized as inherently vulnerable and thus in need of protection (to a greater or lesser extent). Casting rightsholder participation as a burden in this way may further compound vulnerability.

The assumption by IHRL institutions, which largely operate under a liberal (Kantian) understanding of human rights, seems to be that they work for the betterment of the lives of rightsholders, and therefore paternalism will not lead to negative outcomes. This premise itself is worth unpacking, but, for the purposes of this article, we take it at face value and

approach the work of IHRL institutions in their own terms, to point to the paternalistic consequences of their own work. We do not seek to scrutinize this assumption directly or to address the issue of its legitimacy. Nonetheless, it remains the case that not only are the voices of actual human rights holders absent (with all the agency possibilities and opportunities that voice may entail), but also the body of human rights law and IHRL institutions more broadly over time become disconnected from the will of the people they purport to protect.

Paternalism, as we discuss further below, has a complicated and incomplete conceptual history in scholarship, which seldom connects to international human rights norms or institutional dynamics such as the ones that this article examines. This lack of direct engagement with paternalism in IHRL does not mean the concept is irrelevant. Rather, it means, we argue, that the work paternalism does in other contexts is performed by different names in IHRL but essentially performs the same function and is based on the same premise. Thus, paternalism is a useful prism through which to analyze the work of IHRL institutions and norm creation mechanisms, as it offers a glimpse into assumed background dynamics that structure what human rights are and can be at the international level. Therefore, despite our awareness of the limitations of paternalism's conceptual apparatus, we use it as an entry point to ask broader questions about the dynamics of IHRL, particularly in relation to historically disadvantaged groups often conceptualized as vulnerable, like children, women, and people with disabilities.

The lack of thinking about the work of IHRL through the lenses of paternalism is the puzzle with which we grapple in this article. We query the absence of discussion or even acknowledgement of paternalistic risks in IHRL practices and problematize its effects. Paternalism in IHRL operates at both discursive and institutional levels, as we discuss below. It manifests through different means, but with similar effects, on both of these levels.

This is an agenda-setting article, meaning we do not seek to provide answers to this issue (yet) but instead want to call attention to this significant blind spot and shine a light on its stakes. We conclude that IHRL scholars and institutions need to be far more mindful of the paternalistic effects of their determinations about the content and scope of IHRL and need to work more purposefully to include members of historically disadvantaged, marginalized, and racialized groups in the design and broad implementation of IHRL obligations. Alternatively, IHRL institutions should at least abandon their paternalistic attitudes towards rightsholders by acknowledging the distance between Geneva and the rest of the world,<sup>1</sup> conceptually and geographically. Analyzing IHRL through the lenses of paternalism yields significant insight into what David Kennedy has famously referred to as the “dark sides of virtue.”<sup>2</sup> Being more aware of the paternalistic effects of IHRL concepts and practices leads to better human rights law: one that is more connected to its primary purpose of advancing rightsholders’ interests than states’ interests, and one which is more open to evolutionary interpretation and even reimagination of institutions and instruments.

To pursue this thesis and set up our research agenda, we have chosen to first analyze the scholarship on paternalism, with a particular focus on the potential relevance of paternalism to international human rights law IHRL. Following that analysis, we examine the work of four United Nations Human Rights Treaty Bodies, seen through their general comments and recommendations: the Human Rights Committee (HRC),<sup>3</sup> the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>4</sup> the Committee

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<sup>1</sup> See James Thuo Gathii, *The Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)*, 114 AM. SOC'Y INT'L L. PROC. 165, 165–66 (2020).

<sup>2</sup> DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005).

<sup>3</sup> International Covenant on Civil and Political Rights arts. 28–45, Dec. 16, 1966, T.I.A.S. No. 92-908, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination Against Women arts. 17–22, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

on the Rights of the Child (CRC),<sup>5</sup> and the Committee on the Rights of Persons with Disabilities (CRPD)<sup>6</sup>—collectively, the “Committees.”

Focusing on general comments and recommendations from the last ten years allows us to think about the “body” of IHRL in general. This body is removed from the specific circumstances of individual cases not available for all IHRL instruments and in all jurisdictions and is also distinguishable from state reporting obligations (where the addressee is very clearly not the victim of human rights obligations). Individual cases are of course instances in which victims would potentially have a voice that could mitigate paternalistic effects. Nonetheless, the superstructure of IHRL, as embodied by comments and recommendations, presents an obstacle to individual agencies that need not exist in the first place. Pragmatically, this generalized focus also allows us to contain our universe of analysis and draw insights beyond any one specific human rights regime and to try to identify commonalities or differences between the work of the “general” human rights Committees, namely HRC, and the group-specific ones.

After undertaking this analysis, we set out the contours of a research agenda that takes paternalism seriously as a prism through which to examine blind spots and obstacles to the evolution of IHRL doctrines and institutions. Concluding remarks follow, reinforcing the immediate directions for future research.

## II. THE CURRENT DEBATE ON PATERNALISM AND RIGHTS

Our discussion of paternalism and rights is, in the first instance, anchored in the general literature on paternalism, before moving to engage in a conversation about paternalism in the realm of human rights. We show that the conceptual history of paternalism relies on a series

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<sup>5</sup> Convention on the Rights of the Child arts. 43–45, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>6</sup> Convention on the Rights of Persons with Disabilities arts. 34–39, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

of binary classifications of competency, harm, and philosophical traditions of salvation, including some that intersect with IHRL discourse. Despite this relatively robust conceptual apparatus, however, IHRL has thus far largely avoided a conversation about paternalism and its utilities, save for rather narrow contexts which we discuss below.

There is no unified, singular definition for “paternalism,” and subsequently no shared acceptance of neither whether a particular act or policy is paternalistic, nor whether, how, or when a paternalistic act can be justified.<sup>7</sup> Nonetheless, many of the definitions can be presented in pairs. First, paternalism can be viewed in broad or narrow terms. One common “broad” definition for paternalism suggests that it is an act of “interference with a person for her own good,”<sup>8</sup> thus limiting one’s autonomy<sup>9</sup> and agency to make many or most decisions.<sup>10</sup> Alternatively, a more narrow justification-type definition describes paternalism as a harm prevention step, suggesting that one’s autonomy should take the back seat when considering how to protect one’s safety and well-being against one’s own self. While the first definition justifies overriding one’s agency to make decisions altogether, the second nullifies one’s specific decisions in the name of harm prevention or the promotion of future welfare.

Within the two definitions of “broad” and “narrow” paternalism, there are distinctions between soft and hard paternalism<sup>11</sup> and between strong and weak paternalism.<sup>12</sup> Soft paternalism seeks to limit harmful decisions or actions by overriding the will of the ill-

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<sup>7</sup> Jason Hanna & Kalle Grill, *Introduction*, in *THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF PATERNALISM* 1, 3 (Kalle Grill & Jason Hanna eds., 2018).

<sup>8</sup> Dominik Düber, *The Concept of Paternalism*, in *NEW PERSPECTIVES ON PATERNALISM AND HEALTH CARE* 31, 31 (Thomas Schramme ed., 2015).

<sup>9</sup> Gerald Dworkin, *Defining Paternalism*, in *NEW PERSPECTIVES ON PATERNALISM AND HEALTH CARE* 17, 19 (Thomas Schramme ed., 2015).

<sup>10</sup> Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *PHIL. PUB. AFF.* 205, 213, 218 (2000).

<sup>11</sup> JASON HANNA, *IN OUR BEST INTEREST: A DEFENSE OF PATERNALISM* 20 (2018); Daniel Groll, *Paternalism and Rights*, in *THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF PATERNALISM* 119, 120 (Kalle Grill & Jason Hanna eds., 2018); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: VOLUME 3: HARM TO SELF* 12–16 (1986).

<sup>12</sup> Michael N. Barnett, *Paternalism and Global Governance*, 32 *SOC. PHIL. AND POL'Y* 216, 237 (2015).

informed, impaired, or those otherwise incapable of voluntary decision-making.<sup>13</sup> Hard paternalism is an action that asks to prevent voluntary self-regarding harmful decisions or actions<sup>14</sup> by overriding the decision of informed and unimpaired individuals.<sup>15</sup> The distinction between soft and hard paternalism centers on the alleged competency of the paternalized. One can doubt whether soft paternalism is paternalism at all,<sup>16</sup> given that arguably, it can be “easier to justify than ‘hard’ paternalism.”<sup>17</sup> Nonetheless, in both cases the opinion of the paternalizer is prioritized and used to override another individual’s agency.

Whereas the soft/hard pair focuses on the capacity of the rightsholder, the third pairing, strong/weak, focuses on the harm one seeks to avoid. Strong paternalism provides a rationale for the use of coercive force or other interferences, aimed at protection from harm, and lacks accountability for the paternalizer.<sup>18</sup> Conversely, weak paternalism hinders the use of force, restricts the interference in one’s decision, and serves as a temporary protection mechanism to prevent harm to self or others. In principle, an act of weak paternalism enables participation of the paternalized and, in return, may hold the paternalizer to account, at least to some degree.<sup>19</sup> In this way, the same action can be both strong and soft, when the paternalizer unaccountably coerces an impaired person. In practice, there are two common pairings: one set of actions will be soft and weak while the other will be hard and strong.

Both the soft/hard and strong/weak classifications center on the justifications for overriding one’s autonomy,<sup>20</sup> incorporating by default a moral assessment of liberal Kantian theory, and the means that one can use to constrain autonomy. For example, one of the key

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<sup>13</sup> HANNA, *supra* note 11, at 20; Groll, *supra* note 11, at 120; FEINBERG, *supra* note 11, at 12–16.

<sup>14</sup> Jason Hanna, *Hard and Soft Paternalism*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF PATERNALISM 24, 24 (Kalle Grill & Jason Hanna eds., 2018).

<sup>15</sup> Groll, *supra* note 11, at 120; HANNA, *supra* note 11, at 20.

<sup>16</sup> See Dworkin, *supra* note 9, at 19 (explaining that a husband who hides his sleeping pills from a suicidal wife is not paternalistic because he does not violate her rights).

<sup>17</sup> HANNA, *supra* note 11, at 20.

<sup>18</sup> Barnett, *supra* note 12, at 237.

<sup>19</sup> *Id.*

<sup>20</sup> Düber, *supra* note 8, at 31; Danny Scoccia, *The Concept of Paternalism*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF PATERNALISM 11, 11 (Kalle Grill & Jason Hanna eds., 2018); HANNA, *supra* note 11, at 4.



arguments against (hard) paternalism suggests that as a rule of thumb, individuals are the best positioned to judge their own interests and values and therefore should have absolute freedom to choose or act<sup>21</sup> and to face the consequences of their choices.<sup>22</sup> In other words, this approach values the authority of competent adults<sup>23</sup> and their moral development over a paternalistic prioritization of their assumed well-being.<sup>24</sup> This conceptualization approaches libertarianism, which is philosophically where the staunchest opposition to paternalism often lies. Libertarianism finds no justification for paternalistic behaviour, turning the presumption of individuals being best positioned to determine their own fates into an axiom. Hard libertarianism, to use this metaphor once again, can be even found in the 1970s literature on children's rights, where "the child liberation movement" argued, to different degrees, that paternalistic laws and policies towards children, allegedly in place to protect them from themselves given their inherent inability to exercise agency, should be abolished in favour of full liberation and for an equal treatment of children and adults under the law, especially when it comes to constitutional rights.<sup>25</sup>

Another justification for paternalism, which we propose to label as "a paternalistic justification for paternalism," suggests that avoiding interference by resorting only to, for instance, education, persuasion, or other behaviour-changing mechanisms is simply not effective,<sup>26</sup> especially given that some individuals, even those who can be classified as "competent,"<sup>27</sup> are not always best positioned to protect their own interests.<sup>28</sup> Focusing on the

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<sup>21</sup> HANNA, *supra* note 11, at 1.

<sup>22</sup> JOHN STUART MILL, ON LIBERTY 129 (1909 ed. 2009).

<sup>23</sup> Melissa Seymour Fahmy, *Kantian Perspectives on Paternalism*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF PATERNALISM 96, 98 (Kalle Grill & Jason Hanna eds., 2018).

<sup>24</sup> *Id.*

<sup>25</sup> See generally RICHARD EVANS FARSON, BIRTHRIGHTS (1974) (arguing that children must have the right to fully participate in society); Henry H. Foster & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972) (outlining a bill of rights for children that would recognize them as persons with full rights, rather than as minorities).

<sup>26</sup> SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM 1 (2012).

<sup>27</sup> HANNA, *supra* note 11, at 1–2.

<sup>28</sup> ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY 127–28 (Douglas MacLean ed., 1995).

potential consequences of a decision can give rise to the suggestion that respecting individual autonomy and poor decision-making can lead to irreparable self-harm, which in and of itself is disrespectful of human value<sup>29</sup> and therefore that overriding such a decision is justifiable. In other words, all of these explanations boil down to one objective: protecting individuals from themselves.

Other justifications for paternalism may be based on a divine, religious, or metaphysical source,<sup>30</sup> from an epistemic source, based on assumed knowledge or expertise greater or better than that of the patronized,<sup>31</sup> or from a general sense of superiority where one group or individual claims to know what is best for its “others.” In the latter instance, the common examples are men paternalizing women,<sup>32</sup> or racism, which inherently assumes and constructs hierarchal power relations that justify overriding autonomy based on racial identity.

Paternalism can be manifested in the private sphere between individuals,<sup>33</sup> but more relevant to our purpose is paternalism that takes place in a legal-institutional setting built around or at least mediated by the state. This question has two dimensions: the conceptual question and the practical question. The first question pertains to whether and how the moral concept of paternalism fits human rights theory, while the second question is centered on the operation and implications of paternalistic approaches in human rights practice.

In the context of the liberal understanding of human rights, one way to justify paternalism and to mitigate the tension and potential conflict among autonomy, agency, and

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<sup>29</sup> CONLY, *supra* note 26, at 1–2.

<sup>30</sup> Michael N. Barnett, *International Paternalism and Humanitarian Governance*, 1 GLOB. CONST. 485, 503–05 (2012).

<sup>31</sup> See Wojciech Sadurski, *Universalism, Localism, and Paternalism in Human Rights Discourse*, in HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 141, 146–47 (András Sajó ed., 2004) (providing an example of Muslim women resisting extension of their human rights because they do not have the necessary information or political freedom to decide).

<sup>32</sup> Barnett, *supra* note 30, at 504.

<sup>33</sup> HANNA, *supra* note 11, at 24; Gerald Dworkin, *Paternalism*, THE STAN. ENCYC. OF PHIL. (Edward N. Zalta ed., 2020); Hanna & Grill, *supra* note 7, at 4.

the prospect of self-harm is Joel Feinberg's theory of rights. In a nutshell, Feinberg suggests that one's autonomy will not be overridden unless there is an immediate and concrete threat to one's physical safety or overall wellbeing. Further, if one's autonomy is restricted or fully ignored due to this consideration, Feinberg argues that it should not be seen as a permanent state of things, but rather as a temporary measure that aims to ensure long-term ability to exercise autonomy. In other words, this paternalistic approach is not based on one's permanent character (cognitive capabilities or being a member of a racialized or marginalized group) but rather on the paternalizer's ability, and sometimes duty when it comes to a parent-child relationship, to prevent concrete harm (or at least, what the paternalizer considered as "harm").

Looking at paternalism from a rights point of view, one can ask whether the violation of individual autonomy can be justified if it advances a collective good. Daniel Groll, for example, argues that taxation can be seen as a violation of one's property rights and a paternalistic interference with one's control over their property, but a violation that can be justified given public support.<sup>34</sup> In a similar vein, Kalle Grill argues that if the rationale for an action is to benefit a majority of those affected, and provided that this majority is not paternalized, the action should not be considered paternalistic.<sup>35</sup> Groll and Grill, therefore, posit constructions of paternalism that focus on the way norms mediate paternalistic behaviours, without focusing much on either the paternalizer or the paternalized. This posture, while seamless for human rights scholarship, can also present problems by foregrounding the structures of IHRL, allowing agency (particularly that of rightsholders) to disappear into the background. This entrenches the relative invisibility of rightsholders'

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<sup>34</sup> Groll, *supra* note 11, at 121.

<sup>35</sup> Kalle Grill, *Paternalism by and Towards Groups*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF PATERNALISM 46, 55 (Kalle Grill & Jason Hanna eds., 2018).

voices that we believe is central not only to the theocratization of paternalism, but maybe more importantly in the context of IHRL, the undoing of paternalism.

At this stage we should also pay attention to paternalism's "sister" concept, vulnerability,<sup>36</sup> used to justify intervention and override one's or a group's autonomy in order to save them from themselves. Vulnerability appears frequently in human rights legal and institutional discourse, and, we suggest, it essentially does similar work to paternalism.<sup>37</sup> Specifically, even though the concept of "vulnerability" aims to elevate vulnerable persons,<sup>38</sup> in IHRL<sup>39</sup> where the recognition of powerlessness is central to the attribution of rights and a necessary consequence of rights-giving, vulnerability is therefore a reduction of agency to victimhood.<sup>40</sup> The vulnerable person is perceived as in need of (paternalistic) protection, partially due to their relatively lesser capability to make decisions, and relies on a stronger party such as the IHRL body to assist them, creating an opening for the replacement of the vulnerable person's will with that of the IHRL body.<sup>41</sup>

In addition to the question of the legitimacy of either action-focused or reason-focused justifications<sup>42</sup> of paternalism, effectiveness and participation are two related sub-questions of justification. In other words, whether the quest to save someone from herself is successful to the extent that the result justifies the means (overriding her autonomy), and what space, if at all, is given to the paternalized person or people to express their preference and explain it,

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<sup>36</sup> Olivier De Schutter, *Waiver of Rights and State Paternalism Under the European Convention on Human Rights*, 51 N. IR. LEGAL Q. 481, 503 (2000).

<sup>37</sup> See generally INGRID NIFOSI-SUTTON, *THE PROTECTION OF VULNERABLE GROUPS UNDER INTERNATIONAL HUMAN RIGHTS LAW* (2017) (comprehensively mapping vulnerability in international human rights law norms and institutions).

<sup>38</sup> See *id.* at 15 (looking at domestic contexts).

<sup>39</sup> See *id.* at 104 (examining the CRPD committee).

<sup>40</sup> See *id.* at 78 (examining the HRC); *id.* at 149 (arguing that vulnerability reduces the agency of vulnerable persons and contributes to "marginalization" and "disadvantage" in the context of economic, social, and cultural rights); *id.* at 164 (explaining how the CRC interprets the "legal status" of vulnerability to mean that children should have a say in matters affecting them).

<sup>41</sup> See generally Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

<sup>42</sup> Grill, *supra* note 35, at 48.

before deciding to override it. In human rights law, participation is an explicit right of children,<sup>43</sup> for example, and a right of individuals and collectives as part of their right to development.<sup>44</sup> For Amartya Sen, individual freedom cannot be achieved without direct participation and without enabling all human beings, especially those who were previously deemed as incapable, to make decisions about their own lives.<sup>45</sup> A similar shortcoming can be seen in humanitarian interventions, Michael Barnett claims, where the voice of the beneficiaries is ignored as paternalism has become institutionalized.<sup>46</sup>

At this point, our discussion of paternalism and IHRL reveals the tension between IHRL as: (1) an emancipatory project<sup>47</sup> that is inexplicitly based on the assumption of the competency and agency of the rightsholder, who is, inexplicitly and historically, envisioned to be a (wealthy) white man, thus excluding, to different degrees, anyone else; and (2) paternalism, which is a manifestation of liberal politics employed by the same white men in justifying the override of key IHRL principles in order to save everyone else from themselves. The governance system of IHLR, to a large extent, is the embodiment of that tension, where the implementation of mostly liberal human rights frameworks is physically monitored from Geneva, the symbolic heart of white Europe. In a similar fashion, Barnett argues that “international liberalism has not eradicated paternalism but merely changed its forms and placed more justificatory demands and institutional restraints on international actors who desire to interfere in the lives of others for their own good.”<sup>48</sup>

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<sup>43</sup> CRC, *supra* note 5, at 4.

<sup>44</sup> G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993).

<sup>45</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 5 (1999).

<sup>46</sup> Barnett, *supra* note 30, at 487.

<sup>47</sup> See generally David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002) (acknowledging the achievements of the international human rights movement in liberating victims while raising critiques about it); Ruth Blakeley, *Human Rights, State Wrongs, and Social Change: The Theory and Practice of Emancipation*, 39 REV. INT'L STUD. 599 (2013) (holding that human rights played a pivotal role in emancipatory politics).

<sup>48</sup> Barnett, *supra* note 30, at 491.

That description, however, does not do justice to some of the instruments<sup>49</sup> or contemporary memberships of the different human rights treaty bodies—or their operation—as discussed below. But our point of departure is conceptual. We look at the general law that these IHRL Committees have developed over the years, which is detached from country specific context. As we will discuss in further detail below, the work of these treaty bodies can be used to explore if and how paternalism features in contemporary IHRL.

### III. PATERNALISM IN THE WORK OF UN TREATY BODIES

#### *A. Paternalism within Institutional Design*

Post-Second World War human rights projects essentially focused on the linear relationship between sovereign states and individuals, and were premised on liberal ideas of autonomy and individualism.<sup>50</sup> Subsequently, the UN human rights treaty instruments were entrenched in the liberal discourse of individuality, agency, and limiting states' power—especially the earlier ones (the 1948 Universal Declaration of Human Rights and the 1966 Covenants).<sup>51</sup> These mechanisms are based on the image of the competent rights holder whose autonomy and choices should be respected and protected, and the notion that a state's intervention in one's autonomy should happen only in exceptional circumstances and for the protection of the rights of others, or the greater good. To borrow the United States Supreme Court's terminology, the UN human rights mechanism provides a “zone of privacy” for the

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<sup>49</sup> CRPD, *supra* note 6, art. 3(a); CEDAW, *supra* note 4, art. 8; CRC, *supra* note 5, art. 12.

<sup>50</sup> TODD LANDMAN & EDZIA CARVALHO, MEASURING HUMAN RIGHTS 13 (2009); Scott Sheeran & Sir Nigel Rodley, *The Broad Review of International Human Rights Law*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 4 (Scott Sheeran & Sir Nigel Rodley eds., 2014); M. Christian Green & John Witte, *Religion*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 30 (Dinah Shelton ed., 2013); Stephen May, *Language Rights: The “Cinderella” Human Right*, 10 J. HUM. RTS. 265, 265 (2011).

<sup>51</sup> JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 36–91 (Bert B. Lockwood, Jr. ed., 1999); Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”*, 16 IND. J. GLOB. LEGAL STUD. 437, 437 (2009); John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 527 (1975).

individual rights holder.<sup>52</sup> Consequently, it is expected that this logic should create a legal regime that rejects paternalistic interventions.

As the human rights projects developed, scholars, activists, and institutions increasingly recognized, and paid more attention, to the positionalities and needs of rights holders, who, experience showed, benefit less from the allegedly comprehensive, inclusionary, neutral, and bias free system that the 1966 covenants, namely ICCPR and ICESCR, represent. CEDAW, CRC, and CRPD are, to an extent, premised on the realization that the 1966 covenants do not benefit all humans equally, and are attempts to develop group-specific rights protection mechanisms that consider the socio-legal positionalities of women, children, and persons with disabilities, respectively. These treaties try to create rights protection mechanisms that will better serve their specific cohorts, partly by trying to remedy past attitudes that inherently conceptualized these groups as “not as competent as white men.”

Each of the UN human rights treaties establish a committee of experts tasked with monitoring the implementation of the relevant convention (or conventions, as in the case of the Human Rights Committee) by states parties. The Committees execute this role by two main mechanisms: reviewing individual states’ progress on a periodical basis,<sup>53</sup> and publishing General Comments (or “General Recommendations” in the language of the CEDAW Committee).<sup>54</sup> Some Committees also have the power to consider individual complaints,<sup>55</sup> either as an integral element of the treaty itself, or as a result of adopting an additional protocol (a theme to which we return later).

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<sup>52</sup> *Roe v. Wade*, 410 U.S. 113, 152 (1973).

<sup>53</sup> ICCPR, *supra* note 3, art. 18; CRPD, *supra* note 6, arts. 26–27; CEDAW, *supra* note 4, art. 8; CRC, *supra* note 5, art. 13.

<sup>54</sup> ICCPR, *supra* note 3, art. 19; CRPD, *supra* note 6, arts. 28–29; CEDAW, *supra* note 4, art. 8; CRC, *supra* note 5, arts. 13–14.

<sup>55</sup> Optional Protocol to the International Covenant on Civil and Political Rights arts. 1–7, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171; G.A. Res. 61/106, annex II, Optional Protocol to the Convention on the Rights of Persons with Disabilities arts. 1–4 (Dec. 13, 2006); G.A. Res. 54/4, annex, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women arts. 1–8 (Oct. 15, 1999); Human Rights Council Res. 17/18, U.N. Doc. A/HRC/RES/17/18, annex, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure arts. 5–11 (July 14, 2011).

For the most part, all Committees follow a similar process when it comes to developing General Comments. The decision as to when and why a General Comment about a specific issue will be published is not transparent, but in recent years, Committees have announced their intention to make it so, and invited states parties, UN agencies, civil society, and any other interested parties to submit their views on the issue. After a period of deliberation, a draft is published, with another invitation for short comments, before the General Comment is adopted by the Committee.

This paper focuses on the work of four committees: the Human Rights Committee (HRC), which oversees the implementation of the International Covenant on Civil and Political Rights; the Committee on the Rights of the Child (CRC) overseeing the Convention on the Rights of the Child; the Committee on the Elimination of Discrimination Against Women (CEDAW) overseeing the Convention on the Elimination of All Forms of Discrimination Against Women; and the Committee on the Rights of Persons with Disabilities (CRPD) overseeing the Convention on the Rights of Persons with Disabilities.

We ground our analysis in the ‘interpretive’ power of the Committees, namely their General Comments. General Comments provide a Committee’s views on the adequate interpretation of certain provisions of a convention, for example, interpretation of Article 9 of CRPD,<sup>56</sup> or a comprehensive approach to thematic issues, for instance, the rights of children in street situations.<sup>57</sup> Our aim is not to question the documents, their premises, promises, or objectives, not least because the ICCPR, CEDAW, CRC, and CRPD have been analysed, interpreted, and critically examined in the literature before.<sup>58</sup> Rather, we try and learn

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<sup>56</sup> Comm. on the Rts. of Persons with Disabilities Gen. Comment No. 2 (2014), Article 9: Accessibility, U.N. Doc. CRPD/C/GC/2, ¶¶ 10–13 (May 22, 2014) [hereinafter CRPD General Comment No. 2].

<sup>57</sup> Comm. on the Rts. of the Child Gen. Comment No. 21 (2017), Children in Street Situations, U.N. Doc. CRC/C/GC/21, ¶ 3 (June 21, 2017) [hereinafter CRC General Comment No. 21].

<sup>58</sup> See, e.g., PAUL M. TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE UN HUMAN RIGHTS COMMITTEE’S MONITORING OF ICCPR RIGHTS (2020); SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND



something new about them through the prism of paternalism. More specifically, we analyse the outputs of the embedded monitoring mechanisms that these treaties have created in order to examine whether and how paternalism informs, animates, or structures IHRL governance.

We apply discourse analysis<sup>59</sup> to the General Comments (or Recommendations) published between 2010 and 2020 by these four Committees. Our analysis involves close reading of the Committees' approaches, interpretations, and expectations from states, and probably more importantly, the Committees' attitudes and approaches to core elements of paternalism: namely, overriding choices in the name of promoting greater good or preventing harm, and the related but distinct question of the conceptualizing of competency and agency.

While the discourse on paternalism in general, and on paternalism and human rights in particular, as we have shown in the previous part, focuses on the competency, or lack thereof, of individuals, the monitoring processes of the UN human rights Committees focus on state parties as the main duty bearers, and to a much smaller extent, on other duty holders like the international community, the business sector and civil society. We assume that reading these documents through the prism of paternalism can shed light on the attitudes and relationships between the governing bodies of IHRL and states. General Comments, inasmuch as they crystallize jurisprudential attitudes and rely on both individual communications and state reporting as sources, are good sources to explore.

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COMMENTARY (3d ed. 2014); OXFORD COMMENTS. ON INT'L L., THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY (Marsha A. Freeman, Beate Rudolf, & Christine Chinkin eds., 2012); SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1999); OXFORD COMMENTS. ON INT'L L., THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (Ilias Bantekas, Michael Ashley Stein, & Dimitris Anastasiou eds., 2018).

<sup>59</sup> Benedikt Pirker & Jennifer Smolka, *International Law and Linguistics: Pieces of an Interdisciplinary Puzzle*, 11 J. INT'L DISP. SETTLEMENT 501, 503–06 (2021); Edoardo Stoppioni, *National Contestations of the Legal Reasoning of International Courts and Tribunals: A Gramscian Discourse Analysis Approach*, 12 J. INT'L DISP. SETTLEMENT 178, 181–82 (2021); Amanda Potts & Anne Lise Kjær, *Constructing Achievement in the International Criminal Tribunal for the Former Yugoslavia (ICTY): A Corpus-Based Critical Discourse Analysis*, 29 INT. J. SEMIOT. L. 525, 528–30, 531–32 (2016). See generally WILEYBLACKWELL, THE HANDBOOK OF DISCOURSE ANALYSIS (Deborah Schiffrin, Deborah Tannen, & Heidi E. Hamilton eds., 2001); STEPHANIE TAYLOR, WHAT IS DISCOURSE ANALYSIS? (2013).

Another reason to study this mechanism is that general comments allow us to challenge and rethink the rigid distinction between individuals and states. General comments are a place where the binary of states and victims ((states as perpetrators on one side, humans as victims on the other) gets blurred in favour of a discourse that, while technically aimed at states, also speaks to an abstract idea of human rights. To the extent that the literature on paternalism tends to focus on paternalizers or the paternalized, at the expense of institutions, the focus on general comments allows us to move beyond this duality, even if necessarily creating another one (the silencing of certain voices), with which we engage further below. Our analysis shows a growing trend (by some of the Committees) to articulate the positionality of individuals and groups, and their rights, in direct terms, shifting away from the traditional focus on states. By speaking directly to rights holders, these bodies do not need to discursively embody their voices in speaking to states, and risks of paternalism are lowered.

In our close reading of these texts, we were careful not to make a mountain out of a molehill. Specifically, we are aware that we are trying to find paternalism “between the lines,” and that doing so can be a dangerous exercise of projection. None of the Committees we discuss are explicit in saying that their approach is paternalistic, or that autonomy and (free) choice of individuals, communities, or states should be ignored or overridden due to some sort of inherent incompetency. But, as our analysis shows, paternalism features in more ingrained ways, and still does pervasive work in human rights jurisprudence, particularly by deploying the language of vulnerability and calling into doubt states’ capacity, especially bureaucratic capacity, to mobilize its power to protect human rights of its inhabitants.

### *B. Manifestations of Paternalism in the Jurisprudential Guidance by United Nations Treaty Bodies*

This section examines the approach of four UN Treaty Bodies in relation to paternalism. Through analyzing their general comments or recommendations, we shed light

on how paternalism permeates the practice of these bodies, and consequently IHRL itself. Even if many of the choices these bodies make are bounded natural responses to institutional constraints on the implementation of the treaties they monitor, these choices have discursive effects that go far beyond these same constraints. Therefore, while the background rules that create and guide these bodies can help explain some of the paternalistic turns in their work, the fact that these effects are silent and can flow on to other IHRL settings does not justify these same turns. Paternalism creeps into the cracks of the frame, rather than being what is framed itself. It is therefore worth documenting how, despite best intentions, IHRL can work against its own aspirations.

As the discussion in the remainder of this section shows, however, it is not all doom and gloom. The same frames through which paternalism penetrates can be adjusted to promote the opposite effect once the question of paternalism becomes central. Our survey below maps these moves against autonomy, vulnerability, the role of the state, the mission of these bodies in adopting these general comments and recommendations, and the fundamental role of these bodies as gatekeepers of what IHRL means. Each of these turns reveals a different facet to the work that assumed paternalism and explicit anti-paternalism can do in IHRL.

*1. The exclusionary effects of state-centrism and Treaty Body gatekeeping*

An ongoing problem that seems to prevent the articulation of the voices of rightsholders and leads to them being replaced by that of IHRL institutions is that IHRL norms and institutions are addressed at states from a technical legal standpoint, as the parties to the legal instruments. Therefore these Treaty Bodies, when speaking to states on whose resources and willingness they rely to fulfill the objectives of their respective instruments, it is relatively easy for them to operate in a form of binary communication. Treaty bodies speak to states about the interests of rightsholders, and therefore effectively on the behalf of these

rightsholders. This factor contributes to paternalism in that it makes it easy (and even required) for the IHRL body to channel the voices of rightsholders through its own. Further, instead of acting as a mediator of those voices, factors like resource constraints, urgency, and the vulnerability of rightsholders that are seen to compromise their ability to articulate their own claims (as we discussed above) facilitate Treaty Bodies' (however well-meaning) replacement of rightsholders' voices and wishes with their own judgment. This dynamic is also a result of expert rule, on which IHRL increasingly relies.<sup>60</sup>

It is no coincidence that these Treaty bodies are so central to our analysis . After all, they are universality-aspiring bodies under the aegis of a global organization, monitoring the implementation of (near) universal law, with the participation of most countries in the world. What this centrality means for an analysis of IHRL through the prism of paternalism, however, may need further unpacking. As central players, these bodies have a significant and privileged voice. By comparison, rightsholders have a much smaller voice in the decisions around what IHRL means and how it should be implemented and limited, and have infrequent, institutional opportunities to express it. So, the entities in charge of implementing IHRL are also the ones who say what IHRL means, and, because of the communication binary, they do not need to engage directly with rightsholders.

This gatekeeping function of IHRL institutions is a natural product of their institutional setup, and a precondition for it. It means that, in the communication binary between states and Treaty Bodies, it is not only the state that deserves scrutiny, but IHRL institutions themselves. Unlike other factors we have discussed so far that contribute to paternalism in IHRL, this communication binary has more to do with the specific institutional characteristics and constraints of these bodies (and IHRL norms more generally), and less with their substance. But the paternalistic effects remain similar, thus underscoring for our present

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<sup>60</sup> KENNEDY, *supra* note 2, at xxiii, 349–50.

purposes that any concerted anti-paternalistic engagement in IHRL needs to engage both substantive and institutional norms, and query the backstage management rules of human rights commitments.

General comments and recommendations routinely direct states to undertake certain actions that should result in protection of rightsholders, including training and “the regular review, updating and enforcement of robust legislative, regulatory and institutional frameworks . . . ”<sup>61</sup> These actions, while important, are often undertaken in one-directional ways: the state is told to do something, but not necessarily to do it with the input, participation or any other meaningful involvement of rightsholders. Moreover, rightsholders can be the recipients of these measures (particularly training), but not necessarily the trainers themselves.<sup>62</sup> Nor are rightsholders explicitly consulted as to whether those are the right actions to be adopted; rather, it is assumed the course of actions is appropriate, because the Treaty Body has said so, taking into account the whole of IHRL norms.

Similarly, Treaty Bodies tell states to adopt legislative frameworks on equality to address vulnerability, with detailed instructions on how to achieve that equality, but still assume that equality is a desirable goal, with no confirmation from the perspective of rightsholders.<sup>63</sup> Emphasis on formal equality, however, can undermine autonomy, as we discuss later, and in this sense, equality is not necessarily always a desirable goal. While it is possible that rightsholders were consulted in the process, particularly through NGOs and other civil society actors, the lack of clarity leaves a dangerous opening for consultation to simply not happen, or happen in a tokenistic way. Elsewhere, the CRC speaks directly to the

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<sup>61</sup> Comm. on the Rts. of the Child, Gen. Comment No. 25 (2021), Children’s Rights in Relation to the Digital Environment, U.N. Doc. CRC/C/GC/25, ¶ 82 (Mar. 2, 2021) [hereinafter CRC General Comment No. 25].

<sup>62</sup> *Id.* ¶ 15.

<sup>63</sup> CRC General Comment No. 21, *supra* note 57, ¶ 27.

importance of implementation initiatives being “initiated and implemented by both State and civil society actors under the responsibility of the State.”<sup>64</sup>

Also in relation to the rights of the child, the HRC seems to acknowledge the responsibility of actors other than states, even though “the Covenant does not indicate how such responsibility is to be apportioned.” However, “in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority . . . ,” meaning that the state can (paternalistically) step in to protect the (vulnerable) child.<sup>65</sup> Note that there is no reference to children’s own opinions. The will of the child, as that of other rightsholders in these general comments and recommendations, is replaced with “the will of IHRL.” The CRC, especially in recent years, have taken a different approach. Its General Comments about children and the digital environment and about budgets were developed with robust consultations with children themselves.<sup>66</sup>

The assumption that the rightsholders lack the expertise or capacity to identify threats to their own rights, or to offer their views about the meanings of IHRL, contributes to this exclusion of rightsholders from the conversation. While rightsholders are sometimes acknowledged to be “uniquely placed to identify actual or potential victims of harmful practices,”<sup>67</sup> they are also thought to lack training,<sup>68</sup> which the state must provide (as per the dictates of the IHRL body),<sup>69</sup> often with a view to helping those trained to identify

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<sup>64</sup> Comm. on the Rts. of the Child, Gen. Comment No. 13 (2011), The Right of the Child to Freedom from All Forms of Violence, U.N. Doc. CRC/C/GC/13, ¶ 44 (Apr. 18, 2011) [hereinafter CRC General Comment No. 13].

<sup>65</sup> Hum. Rts. Comm. Gen. Comment No. 17 (1989), Article 24: Rights of the Child, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), ¶ 6 (Apr. 7, 1989).

<sup>66</sup> See CRC General Comment No. 25, *supra* note 61, ¶ 5; Comm. on the Rts. of the Child, Gen. Comment No. 19 (2016), Public Budgeting for the Realization of Children’s Rights (art. 4), U.N. Doc. CRC/C/GC/19, ¶ 8 (July 20, 2016).

<sup>67</sup> Comm. on the Elimination of Discrimination Against Women & Comm. on the Rts. of the Child, Joint Gen. Recommendation No. 31/Gen. Comment No. 18, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18, ¶ 49 (Nov. 14, 2014) [hereinafter CEDAW/CRC Joint General Recommendation].

<sup>68</sup> *Id.* ¶ 70.

<sup>69</sup> *Id.* ¶ 50.

vulnerability specifically.<sup>70</sup> While training and education are important, the focus on vulnerability, and the lack of clear co-design, allows those directing (IHRL bodies) and implementing (states) the training to make assumptions about the condition and needs of rightsholders.

This type of reasoning extends to general comments and recommendations on harmful practices, general equality,<sup>71</sup> the rights of migrants,<sup>72</sup> older persons and persons with disabilities,<sup>73</sup> and women in disaster situations.<sup>74</sup> With the exception of women in disaster situations, who are called on specifically to participate in decision-making on matters of climate change mitigation and adaptation,<sup>75</sup> the pattern is the same. A rightsholder (particularly a vulnerable one with intersecting identities that cause vulnerability) requires that their needs addressed by the state, with a view to promoting their equality, but without being involved in decisions about what the measures to be adopted by the state are. That these instances occur most often in contexts of intersectional vulnerability is perhaps not surprising, since that is the context in which voicelessness seems to be at its lowest in these general comments and recommendations. And, because the response to vulnerability is couched in terms of equality,<sup>76</sup> it also erases difference and the opportunity to hear those different voices, as we discuss further below. As a consequence, in those times when the

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<sup>70</sup> *Id.* ¶ 71.

<sup>71</sup> Hum. Rts. Comm., Gen. Comment No. 28 (2000), Article 3 (The Equality of Rights Between Men and Women), U.N. Doc. CCPR/C/21/Rev.1/Add.10, ¶ 5 (Mar. 29, 2000) [hereinafter HRC General Comment No. 28].

<sup>72</sup> Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families & Comm. on Rts. of the Child, Joint Gen. Comment No. 4/No. 23, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23, ¶ 46 (Nov. 16, 2017) [hereinafter CMW/CRC Joint General Comment].

<sup>73</sup> Comm. on the Elimination of the Discrimination Against Women, Gen. Recommendation No. 27 (2010), Older Women and Protection of Their Human Rights, UN Doc. CEDAW/C/GC/27, ¶ 33 (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 27]; Comm. on the Rts. of Persons with Disabilities, Gen. Comment No. 4 (2016), Right to Inclusive Education, U.N. Doc. CRPD/C/GC/4, ¶ 46 (Nov. 25, 2016) [hereinafter CRPD General Comment No. 4].

<sup>74</sup> CEDAW General Recommendation No. 27, *supra* note 73, ¶ 35.

<sup>75</sup> *Id.*

<sup>76</sup> Comm. on the Elimination of the Discrimination Against Women, Gen. Recommendation No. 28 (2010), Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/GC/28, ¶ 20 (Dec. 16, 2010) [hereinafter CEDAW General Recommendation No. 28].

reduction of autonomy is absolutely necessary, the ability to tailor that reduction to an individual's specific needs is also eliminated. Lack of capacity, if couched in terms of equality, applies too broadly. Instead of looking for solutions that minimize the loss of autonomy necessary, it favours restrictions that suit the (admittedly limited) capabilities of states (exemplified by overworked social workers, for instance).

## *2. Autonomy as the declared yet sometimes elusive goal of IHRL*

Paternalism fundamentally centers on its effect on autonomy – specifically, how actions, policies, or laws can deprive someone of their autonomy, or are taken irrespective of any manifestation of autonomy, or without giving individuals or people the opportunity to express their views or exercise their autonomy. In an IHRL context, it could mean that this body of law works to promote and enhance autonomy, at least in a liberal, liberty- or freedom-based reading of human rights. Therefore, actions that impinge on autonomy will be seen as infringing a right even if not necessarily violating it, given available defenses such as proportionality. This assessment creates in theory a presumption against the infringement of autonomy in IHRL, without considering manifestations of paternalism, often non-explicit ones, that have the same impact but are not considered as a rights violation.

Autonomy translates into legal capacity as a precondition for the exercise of rights. In the words of the CRPD:

Legal capacity has been prejudicially denied to many groups throughout history, including women (particularly upon marriage) and ethnic minorities. However, persons with disabilities remain the group whose legal capacity is most commonly denied in legal systems worldwide. The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive



rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.<sup>77</sup>

In other words, autonomy and legal capacity are the basis of rights, and in many ways their protection and enhancement should therefore be a primary goal of IHRL. Yet, autonomy is often taken for granted, particularly in relation to historically disadvantaged groups.

The general comments and recommendations of the four UN Treaty Bodies we examine in this article engage with autonomy in similar ways, for the most part attempting to enhance or respect autonomy of individuals or collectives. The HRC, for instance, speaks of the right of religious groups to determine their own affairs, including the choice of their religious leaders, establishment of religious schools, and the preparation of religious publications,<sup>78</sup> or about the equal right of men and women to willingly and freely consent to marriage.<sup>79</sup> One implication of this emphasis on autonomy has translated in the CRC and CRPD as a call for providing a space for the voices of rights-holders to be heard. For instance, the CRC's General Comment on the rights of children in street situations follows Article 12 of the CRC<sup>80</sup> and goes to great lengths to quote these very children asking IHRL institutions and states to “[g]ive us the opportunity to change our story.”<sup>81</sup> Elsewhere, the CRC states the importance of “empowering children to take the necessary precautions to enhance their own safety,” to which “listening to children’s experiences and concerns should be mediating principles.”<sup>82</sup> Children are “experts on their own lives,” and “should participate

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<sup>77</sup> Comm. on the Rts. of Persons with Disabilities, Gen. Comment No. 1 (2014), Article 12: Equal Recognition Before the Law, U.N. Doc. CRPD/C/GC/1, ¶ 8 (May 19, 2014) [hereinafter CRPD General Comment No. 1].

<sup>78</sup> Hum. Rts. Comm., Gen. Comment No. 22 (1993), Article 18: Freedom of Thought, Conscience and Religion, U.N. Doc. CCPR/C/21/Rev.1/Add.4, ¶ 4 (Sept. 27, 1993) [hereinafter HRC General Comment No. 22].

<sup>79</sup> HRC General Comment No. 28, *supra* note 71, ¶ 23.

<sup>80</sup> CRC, *supra* note 5, art. 12.

<sup>81</sup> CRC General Comment No. 21, *supra* note 57, ¶ 1.

<sup>82</sup> Comm. on the Rts. of the Child, Gen. Comment No. 17 (2013), Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts, U.N. Doc. CRC/C/GC/17, ¶ 39 (Apr. 17, 2013) [hereinafter CRC General Comment No. 17]. *See also* Comm. on the Rts. of the Child, Gen. Comment No. 20 (2016), Implementation of the Rights of the Child During Adolescence, UN Doc. CRC/C/GC/20, ¶ 19 (Dec. 6, 2016) [hereinafter CRC General Comment No. 20] (commenting on the importance for children to be “enabled to exercise agency progressively in their own protection.”).

in developing and implementing strategies.”<sup>83</sup> This recognition of autonomy and attempt to amplify children’s voices in the process of defining their own rights is anti-paternalistic in its essence.

Conversely, the enhancement of autonomy is not always paramount. The HRC assumes that autonomy is not available to all on the same footing, particularly when it comes, for instance, to determining the age of consent for things like marriage, particularly, the HRC claims, bearing in mind the pressures women experience unequally to men.<sup>84</sup> In this instance, autonomy gives way to a broader (and potentially idealized) mandate for equality. This assumption that rightsholders do not operate on equal footing prompts IHRL to intervene. This intervention might reflect an intention to correct the power imbalance between men and women. But it does so without considering the different social positions of women, nor the heterogeneity of this group, and thus results in replacing the autonomy of the rightsholders. However well-meaning, this type of position in IHRL is invariably an expression of soft paternalism.

This type of position is also, fortunately, on the wane in the work of the UN Treaty Bodies, even if the specific language has yet to be replaced. For instance, CEDAW in one specific context (disaster risk reduction) is very clear in that the “categorization of women and girls as passive ‘vulnerable groups’ in need of protection [...] is a negative gender stereotype that fails to recognize the important contributions of women”.<sup>85</sup> Extrapolating this into a broader paternalism context, the focus on vulnerability and on locking rightsholders into a status in which their will is replaced by IHRL locks these rightsholders in vulnerability as well (even if arguably of a different type). This type of hard paternalism that ignores or

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<sup>83</sup> CRC General Comment No. 21, *supra* note 57, ¶ 13.

<sup>84</sup> HRC General Comment No. 28, *supra* note 71, ¶ 23. However, the CRC committee calls time and again to equalize the minimum age for marriage for boys and girls and to set it on 18.

<sup>85</sup> Comm. on the Elimination of Discrimination Against Women, Gen. Recommendation No. 37 (2018), Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change, U.N. Doc. CEDAW/C/GC/37, ¶ 7 (Feb. 7, 2018) [hereinafter CEDAW General Recommendation No. 37].

replaces the will of a rightsholder falls short of the emancipatory promise of IHRL and essentially runs counter to it.

A compromise position on the matter of autonomy is arguably to be found within the CRPD. This treaty body speaks of “supported decision-making” as a means to correct historical paternalistic attitudes that silenced and marginalized people with disabilities by explicitly recognizing their right to make decisions about their lives. As the CRPD clarifies, it “should never amount to substitute decision-making,” whatever form the support takes.<sup>86</sup> This practice, while specific to the context of disability rights, merits serious consideration in IHRL more broadly. It performs the role of IHRL in correcting past paternalism and power asymmetries, but it is also a serious attempt to avoid replacing the will of the rightsholders and making sure their voices are a very central part of the process. Because of the centrality of this lesson, it is worth quoting the CRPD’s key principles on voice and supported decision-making in full:

While supported decision-making regimes can take many forms, they should all incorporate certain key provisions [...]: (a) Supported decision-making must be available to all. A person’s level of support needs, especially where these are high, should not be a barrier to obtaining support in decision-making; (b) All forms of support in the exercise of legal capacity, including more intensive forms of support, must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests; (c) A person’s mode of communication must not be a barrier to obtaining support in decision-making, even where this communication is non-conventional, or understood by very few people; (d) Legal recognition of the support person(s) formally chosen by a person must be available and accessible, and States have an obligation to facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community. [...]; (e) In order to comply with the requirement [...] for States parties to take measures to “provide access” to the support required, States parties must ensure that support is available at nominal or no cost to persons with disabilities and that lack of financial resources is not a barrier to accessing support in the exercise of legal capacity; (f) Support in decision-making must not be used as justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty; (g) The person must have the right to refuse support and

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<sup>86</sup> CRPD General Comment No. 1, *supra* note 77, ¶ 17.

terminate or change the support relationship at any time; (h) Safeguards must be set up for all processes relating to legal capacity and support in exercising legal capacity. The goal of safeguards is to ensure that the person's will and preferences are respected. (i) The provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.<sup>87</sup>

The position of the CRPD in privileging autonomy and being in effect at the forefront of anti-paternalistic language in UN Treaty Bodies is a trend that will reoccur as our analysis of these general comments and recommendations progresses. It is important to note here the obvious: in many respects, disability rights propose a full reorientation of the IHRL paradigm.<sup>88</sup> While this reorientation does not seem, as far as we can tell from the literature, to specifically take aim at paternalism in IHRL, it does seem to have that effect. It shifts the rightsholders from the margin to the center and from the position of potential victim in the face of an omnipotent state to one in which the rightsholders are supported by the state and an integral part in making vital decisions about their rights and their interests. This shift in some respects echoes the idea in liberal IHRL circles of whether rights are to be accomplished against or through the state,<sup>89</sup> but it also transcends this duality, to reimagine IHRL as existing not in relation primarily to the state as the addressee of international legal obligations, but first and foremost in relation to the rightsholders, with the state's role being to support them in their own terms.

Therefore, the discourse on autonomy in these general comments and recommendations shows that, while there are important anti-paternalism moves, there are still lingering discourses of the will of rightsholders being replaced by the state's assumptions about said will. This type of language, while on the wane in relation to autonomy, is grounded on a discourse of vulnerability.

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<sup>87</sup> *Id.* ¶ 29.

<sup>88</sup> Michael Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75 (2007).

<sup>89</sup> Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 32–3 (1996).

### 3. *When vulnerability enhances victimhood*

As we indicated above in Section 2, vulnerability plays a central role in the context of paternalism. It is a trigger to eclipse autonomy, and to prompt state action to correct a power imbalance that ultimately locks the rightsholder in a position of victimhood and in an inherent need for help. As much as vulnerability can work as a powerful rallying cry for IHRL action, and play well to the perception of IHRL as a subfield of a discipline that only thrives in responses to crises,<sup>90</sup> it can have essentializing effects on autonomy. It is therefore important for us to further flesh out how vulnerability appears in the general comments and recommendations of UN Treaty Bodies.

The term “vulnerability” appears relatively late in the practice of the HRC when it emphasizes the vulnerability of persons deprived of liberty.<sup>91</sup> But tones of vulnerability seem to appear elsewhere in the practice of the HRC as well, when, for instance, it notes that “special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment.”<sup>92</sup> The focus here, however, is on the obligations of the state in relation to vulnerable persons, rather than their autonomy, underscoring vulnerability as a gateway for lesser or even disposable autonomy, to be replaced by the state, guided by IHRL norms and institutions, as the saviour. The state, as the HRC puts it, has a “heightened duty of care” towards persons in vulnerable contexts, but it does not seem victims have a voice in what this duty entails nor how it is executed, at least in the context of the right to life, despite the extension of these obligations in all state institutional contexts.<sup>93</sup>

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<sup>90</sup> Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 378–79 (2002).

<sup>91</sup> Hum. Rts. Comm., Gen. Comment No. 21, Article 10: Humane Treatment of Persons Deprived of Their Liberty, U.N. Doc. CCRP/C/21/Rev.1/Add.3, ¶ 3 (Apr. 7, 1992).

<sup>92</sup> Hum. Rts. Comm., Gen. Comment No. 20, Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 7 (Mar. 10, 1992).

<sup>93</sup> Hum. Rts. Comm., Gen. Comment No. 36 (2019), Article 6: International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/GC/36, ¶ 25 (Sept. 3, 2019) [hereinafter HRC General

Similar contexts of vulnerability for persons under control of the state appear in relation to the death penalty.<sup>94</sup> In other words, and perhaps somewhat surprisingly, when persons are under the custody of the state, the HRC gives even lesser weight to their autonomy, at least to the extent that autonomy means their own voice and choice about their fates as rightsholders. The assumption seems to be that the state is so overwhelmingly powerful in relation to the rightsholder that the most one can hope for is to ask the state to behave, or to refrain from behaving in certain ways with respect to the rightsholder without asking the latter what respect would entail. Largely drawn from the context of incarcerated persons, this practice assumes that the rightsholder is vulnerable and therefore in effect somewhat “less” capable, or even worse, less entitled to exercise autonomy given that their physical liberty is denied. Also in the criminal or administration of justice context, the HRC goes as far in replacing the will of the vulnerable person as to say that it can act in certain instances “against the wishes of the accused, particularly in cases of persons [...] facing a grave charge but being unable to act in their own interests [...].”<sup>95</sup> Even if this restriction needs to be proportional and narrowly tailored, it still is an opening to replace the will of a rightsholder in a vulnerable

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Comment No. 36] (citing Hum. Rts. Comm., *Leach v. Jamaica*, Comm. No. 546/1993 (2011), U.N. Doc. CCPR/C/57/D/546/1993, ¶ 9.5 (July 19, 2011) (persons deprived of liberty by the state in general); Hum. Rts. Comm., *Zhumbaeva v. Kyrgyzstan*, Comm. No. 1756/2008 (2011), U.N. Doc. CCPR/C/102/D/1756/2008, ¶ 8.6 (Aug. 24, 2011); Hum. Rts. Comm., *Dermit Barbato v. Uruguay*, Comm. No. 84/1981 (1982), U.N. Doc. CCPR/C/17/D/84/1981, ¶ 9.2 (Oct. 21, 1982) (states are responsible for the lives of vulnerable persons); Hum. Rts. Comm., *Lantsova v. Russian Federation*, Comm. No. 763/1997 (2002), U.N. Doc. CCPR/C/74/D/763/1997, ¶ 9.2 (Mar. 22, 2002) (lack of financial resources or other logistical problems do not reduce the responsibility of the state); Hum. Rts. Comm., *Edwards v. United Kingdom*, 2002-II Eur. Ct. H. R. 139, ¶ 60 (2002) (the duty extends to inter-prisoner violence); Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], 2014-V Eur. Ct. H. R. 1, ¶ 131 (2014) (extension of the duty to mental health facilities); Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, UN Doc. CCPR/C/ARM/CO/2, ¶ 15 (Aug. 31, 2012) (extension of the duty to military camps); Hum. Rts. Comm., U.N. Doc. CCPR/C/UNK/CO/1, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 14 (Aug. 14, 2006) (extension of the duty to refugee and internally displaced persons camps); *Jonson v. Jamaica*, Comm. No. 588/1994 (1996), U.N. Doc. CCPR/C/56/D/588/1994, ¶ 8.5 (Mar. 22, 1996); *Kindler v. Canada*, Comm. No. 470/1991 (1993), U.N. Doc. CCPR/C/48/D/470/1991, ¶ 15.2 (July 30, 1993); *Martin v. Jamaica*, Comm. No. 317/1988 (1993), U.N. Doc. CCPR/C/47/D/317/1988, ¶ 12.2 (Mar. 24, 1993) (extension of the duty to “juvenile institutions and orphanages”) (illustrating an extensive jurisprudence and practice on the different aspects of this duty of care towards vulnerable persons).

<sup>94</sup> HRC General Comment No. 36, *supra* note 93, ¶ 40.

<sup>95</sup> Hum. Rts. Comm., Gen. Comment No. 32 (2007), Article 14: Right to Equality Before Courts and Tribunals and To a Fair Trial, U.N. Doc. CCPR/C/GC/32, ¶ 37 (Aug. 23, 2007) [hereinafter HRC General Comment No. 32].

context, partly in this instance by demonizing the same rightsholder in relation to society as a whole, which is a common dynamic of paternalism. In this, like in other instances, paternalism comes through as a form of limitation on the exercise of a right.<sup>96</sup>

Vulnerability is often associated with overlapping characteristics. For children, for example, one of the traditional justifications for recognizing their rights is their state of and status as vulnerable.<sup>97</sup> But some children, the CRC concludes, are even “more vulnerable”: “An important element to consider is the child’s situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc.”<sup>98</sup> Other examples of vulnerability for children also arising from compound situations of rights vulnerability include indigeneity, sexual orientation or gender identity, chronic illness, low socio-economic status, and children affected by conflicts or natural disasters, among other characteristics.<sup>99</sup> In other words, vulnerability can be enhanced when multiple rights are actually or potentially infringed simultaneously, and this situation of “greater” victimhood locks the rightsholder into a situation where their voices matter the least, and the saviour (whether the IHRL body or the state itself) steps in to rescue and protect them against a yardstick set by the saviour themselves.

The same trend of compounded victimhood as a creator, or at least enhancer, of vulnerability can be seen in relation to the right to life in the work of the HRC, which identifies “persons in situations of vulnerability” as those “whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence.”<sup>100</sup> These

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<sup>96</sup> See Hum. Rts. Comm., Gen. Comment No. 25 (1996), Article 25: Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add.7, ¶ 4 (Aug. 27, 1996) (permitting countries to impose objective and reasonable conditions on the right to participate in public affairs and/or to vote).

<sup>97</sup> Michael Freeman, *The Limits of Children’s Rights*, in THE IDEOLOGIES OF CHILDREN’S RIGHTS 29, 34 (Michael D. A. Freeman & Philip E. Veerman eds., 1992).

<sup>98</sup> Comm. on the Rts. of the Child, Gen. Comment No. 14 (2013), Article 3: Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, UN Doc. CRC/C/GC/14, ¶ 1 (May 29, 2013) [hereinafter CRC General Comment No. 14].

<sup>99</sup> CRC General Comment No. 13, *supra* note 64, ¶ 72(g).

<sup>100</sup> HRC General Comment No. 36, *supra* note 93, ¶ 23.

include victims of gender-based violence, children, members of minorities, indigenous persons, LGBTIQ+ persons, and refugees and asylum seekers. The state must, in the event of threats to the life of these persons, “respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures [...] and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.”<sup>101</sup> Here, the need for consent appears for the first time in the surveyed language, highlighting a gradual evolution in the thinking in UN Treaty Bodies, even if this thinking does not deal with the legacy of paternalism elsewhere.

In the practice of specific instruments, the CRC may be where paternalism first becomes evident, especially given the notion of “best interest of the child,” which need to be protected.<sup>102</sup> In the CRC’s words, it is for the state to assess and determine the best interests of the child.<sup>103</sup> Further, the best interests of each child in a specific situation of vulnerability will differ from another child’s needs in the same situation, and state authorities must consider the different degrees of vulnerability in individualized assessments.<sup>104</sup> In other words, it is for the state, and not the rightsholder itself, to make an assessment of what the rightsholder’s best interests are. But, as the CRC clarified in General Comment 14, a best interests’ analysis must incorporate children’s own voices.<sup>105</sup> But in some circumstances, the CRC authorizes states to replace the child’s will when scientific arguments about brain development and their impact on cognitive capabilities can be made.<sup>106</sup> But more so, the CRC continues to characterize children as a vulnerable group irrespective of any such assessment,

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<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., Helen Stalford, *The Broader Relevance of Features of Children’s Rights Law: The ‘Best Interests of the Child’ Principle*, in CHILDREN’S RIGHTS LAW IN THE GLOBAL HUMAN RIGHTS LANDSCAPE 37, 37 (Eva Brems, Ellen Desmet & Wouter Vandenhole eds., 2017) (characterizing the “best interest of the child” principle as a substantial right).

<sup>103</sup> CRC General Comment No. 14, *supra* note 98, ¶ 71.

<sup>104</sup> *Id.* ¶ 76.

<sup>105</sup> *Id.* ¶ 43.

<sup>106</sup> Comm. on the Rts. of the Child, Gen. Comment No. 24 (2019), Children’s Rights in the Child Justice System, U.N. Doc. CRC/C/GC/24, ¶ 22 (Sept. 18, 2019) [hereinafter CRC General Comment No. 24].



problematic as it may be. Two instances of this characterization are children in the digital context,<sup>107</sup> or when a child is involved with the justice system (not least due to the state's enhanced control).<sup>108</sup>

Vulnerability of children in the latter context is endorsed by the HRC, which speaks in particular of the “extreme vulnerability and need for care of unaccompanied minors,”<sup>109</sup> as well as that of persons with disabilities in the justice system.<sup>110</sup> The lack of vulnerable children's voices in the work of the HRC is also noticeable in relation to religious education, where educational institutions and the state must “accommodate the *wishes of parents and guardians*,”<sup>111</sup> but the wishes of children are excluded. The HRC starts moving towards a greater emphasis on the rights of individuals in this general comment (compared to its previous comments, which barely consider rightsholders and are almost entirely about states' obligations). However, it is worth noting that, like with other practices discussed above, only certain, presumably non- or less vulnerable, rightsholders are to be heard, and vulnerable ones have their autonomy ignored, discounted or replaced on account of their vulnerability. This approach, it seems, is a manifestation of hard paternalism.

Asking for the will of a weaker or vulnerable rightsholder to be replaced with that of a stronger party is also a theme for the HRC in relation to women. For instance, in relation to women's reproductive rights, it is for states to report on public and private actions that violate women's rights. The HRC makes no acknowledgement of the actual dynamics, and how relying on states for providing said information inevitably will leave paternalistic processes

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<sup>107</sup> See CRC General Comment No. 25, *supra* note 61, ¶ 54 (suggesting that states should protect children from harmful and/or untrustworthy digital content).

<sup>108</sup> See CRC General Comment No. 24, *supra* note 106, ¶ 59 (suggesting a prohibition on coercion that causes a child to confess and/or provide self-incriminating testimony).

<sup>109</sup> Hum. Rts. Comm., General Comment No. 35 (2014), Article 9: Liberty and Security of Person, U.N. Doc. CCPR/C/GC/35, ¶ 18 (Dec. 16, 2014).

<sup>110</sup> *Id.* ¶ 28 (emphasis added).

<sup>111</sup> HRC General Comment No. 22, *supra* note 78, ¶ 6.

unaffected (even if at least rendering them visible).<sup>112</sup> This focus on states providing information, but not necessarily scrutinizing the dynamics at play, extends to broader discriminatory laws affecting women's legal capacity,<sup>113</sup> including their vulnerability in marriage.<sup>114</sup>

A joint general comment by CEDAW and the CRC acknowledges that the vulnerability of women is compounded when speaking about girls (i.e. the intersection of gender and age).<sup>115</sup> Vulnerability is also compounded for older women, particularly those with a disability,<sup>116</sup> and in women experiencing the effects of disasters.<sup>117</sup> Equality for CEDAW becomes a pathway through which to undo vulnerability, with little acknowledgement of whether equality is the desired goal of these rightsholders.<sup>118</sup> As indicated in the previous subsection, equality partially replaces autonomy, similar to what the CRC does when it speaks to the vulnerability of girls due to culturally traditional gender roles and expectations.<sup>119</sup> Difference is used to highlight vulnerability,<sup>120</sup> and to replace vulnerability with a broad mandate on equality. Autonomy is left by the wayside in favour of articulating obligations to states, instead of looking at rights to rightsholders. It is the latter that should

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<sup>112</sup> See HRC General Comment No. 28, *supra* note 71, ¶ 20 (requiring states to report on laws or actions that interfere with women's reproductive rights, but not accounting for dynamics).

<sup>113</sup> See *id.* ¶ 19 (requiring states to provide information about women's legal rights but failing to account for dynamics at play).

<sup>114</sup> See *id.* ¶ 24 (requiring states to provide information about women's marital rights but failing to account for dynamics at play).

<sup>115</sup> CEDAW/CRC Joint General Recommendation, *supra* note 67, ¶ 67.

<sup>116</sup> CEDAW General Recommendation No. 27, *supra* note 73, ¶ 16.

<sup>117</sup> CEDAW General Recommendation No. 37, *supra* note 85, ¶ 61.

<sup>118</sup> See Comm. on the Elimination of Discrimination Against Women, Gen. Recommendation No. 36 (2017), Right of Girls and Women to Education, U.N. Doc. CEDAW/C/GC/36, ¶ 16 (Nov. 16, 2017) (failing to acknowledge whether rightsholders desire equality).

<sup>119</sup> See CRC General Comment No. 17, *supra* note 82, ¶ 48 (encouraging states to promote equality by challenging gender stereotypes in children's recreation).

<sup>120</sup> See CMW/CRC Joint General Comment, *supra* note 72, ¶ 41 (acknowledging that certain children such as girls, children with disabilities, or children who are LGBTIQ+ may be extra vulnerable to trafficking); Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 38 (2020), Trafficking in Women and Girls in the Context of Global Migration, U.N. Doc. CEDAW/C/GC/38, ¶ 7 (Nov. 6, 2020) (acknowledging that girls are more vulnerable to trafficking compared to women due to their age difference).

give rise to the former, but what it seems to us is that a deeply paternalistic approach results in overlooking the rightsholders and focusing solely on the duty bearers.

Intersectionality therefore becomes key to trigger the work that vulnerability does in freezing IHRL norms and institutions into a binary between IHRL and the state.

Intersectionality is often understood by these bodies to lead to greater discrimination. In the words of CEDAW:

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties. . . . The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.<sup>121</sup>

Note that the response to intersectional vulnerability is equality. Intersectionality translates as discrimination, which triggers an equality response targeted at states, and not at rightsholders themselves. In other words, IHRL seems ill-equipped to help rightsholders navigate intersectionality, other than to say it boils down to a claim against difference, disregarding whether, and the extent to which, difference may matter to these same rightsholders. The CRPD connects intersectional discrimination to stereotyping, mapping said stereotypes in potentially revelatory ways, but still falling short of a clear mandate for autonomy.<sup>122</sup> It acknowledges compounded vulnerability of disabled women and disabled older persons, without offering a clear roadmap for their autonomy, thereby implicitly adding to the discourse of vulnerability as a gateway for paternalism.<sup>123</sup>

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<sup>121</sup> CEDAW General Recommendation No. 28, *supra* note 76, ¶ 18.

<sup>122</sup> Comm. on the Rts. of Pers. with Disabilities, Women and Girls with Disabilities, Gen. Comment No. 3 (2016), U.N. Doc. CRPD/C/GC/3, ¶ 37 (Nov. 25, 2016) [hereinafter CRPD General Comment No. 3].

<sup>123</sup> See generally CRPD General Comment No. 2, *supra* note 56, ¶ 13 (encouraging paternalistic discourse by requiring states to provide disabled people with equal access to the physical environment).

Vulnerability reduces rightsholders to a position of victimhood from which it is almost impossible to escape, not least due to institutional constraints that exclude these voices and conceptual biases that favour a top-down approach, and from which they need to be saved by IHRL norms and institutions. The general comments and recommendations by the four UN Treaty Bodies we survey in this article make as much clear by their insistence on state obligations, and their lack of acknowledgment of rightsholder perspectives. Further, vulnerability triggers equality as a response, which effectively replaces autonomy. Doing so may still be a desirable goal in certain contexts, as it moves the needle of IHRL towards acknowledgement of the infringements of these rightsholders' rights. However, it still falls short of accepting the will of rightsholders as paramount, despite more recent language (particularly by the CRC and CRPD) which focuses states' obligations to correct informational asymmetries to enable better decision-making. By attempting to correct a power imbalance between states and other powerful entities for the benefit of vulnerable rightsholders, these IHRL institutions engage in paternalistic behaviour. The focus on the state as the addressee of norms needs further unpacking if one is to understand the dynamics of the binary of IHRL institutions and states as their addressees. But, before we get to those specific dynamics, it is worth querying the role that a characterization of the state, like a characterization of victims, can play in our reading of IHRL norms and institutions through the prism of paternalism.

#### *4. When state capacity is in question*

Our discussion so far has focused on the rightsholder and how they are perceived by the four UN Treaty Bodies on which we focus. But these bodies' role is to scrutinize not only the rightsholders, but also the state which owes those obligations. Whether through the language of "progressive realization" found in the International Covenant on Economic, Social and

Cultural Rights,<sup>124</sup> or more broadly through proportionality analysis in human rights,<sup>125</sup> states and their capacity and duty to protect and promote human rights are those at the center of scrutiny. In relation to paternalism, the capacity of states to comply with or fulfill IHRL obligations is thus closely related to their ability to provide responses that are more or less paternalistic.<sup>126</sup>

The ability of states to collect data, for instance, can result in tailored responses to human rights requirements.<sup>127</sup> And data, to the extent it points out to who is affected by IHRL in more precise ways, allows for a clearer picture as well of the interests of those rightsholders, diminishing the necessity for the state or IHRL institution to make assumptions on their behalf, which can often be problematic given its paternalistic nature.

A state's capacity to act is also affected by its ability to engage with, and potentially transform, customary law practices, which are often pointed out as key causes of vulnerability, particularly for women, children and people with disabilities or members of other marginalized groups like racial minorities or LGBTIQ+.<sup>128</sup> These dynamics can be seen, for example, in CEDAW's consideration of the rights of rural women, who are assumed to be more vulnerable and to lack access to institutions, defaulting to certain traditional

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<sup>124</sup> See International Covenant on Economic, Social and Cultural Rights art. 2(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 14, 431 [hereinafter ICESCR]; Audrey R. Chapman, *A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 23 (1996).

<sup>125</sup> Proportionality analysis explicitly links a state's capacity to their corresponding international duty. See generally Stephen Humphreys, *Climate Change and International Human Rights Law*, in INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE 29, 51–53 (Rosemary Rayfuse & Shirley V Scott eds., 2012) (acknowledging that compared to richer countries, poorer countries with citizens struggling to meet their basic needs are less obligated to reduce greenhouse gas emissions); Wanhong Zhang & Peng Ding, *On the Rights Protection of Vulnerable Groups under the Prevention and Control of a Public Health Crisis: A Literature Review and Perspective for Future Directions*, 16 FRONTIERS L. CHINA 104, 106 (2021) (acknowledging that public health laws should take proportional measures to protect the rights of vulnerable groups and secure their basic living standards); ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 163–65 (2019) (stating that the proportionality principle is perpetuated by international courts promulgating "general principles of law" that states' apex courts adopt).

<sup>126</sup> See Aoife Nolan, Rory O'Connell & Colin Harvey, *Introduction*, in HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS 1, 1–2 (Aoife Nolan, Rory O'Connell & Colin Harvey eds., 2013) (stating that the capacity for states to comply with their international economic and social rights' obligations depends on the states' budgetary decisions and public finance).

<sup>127</sup> CRC General Comment No. 20, *supra* note 82, ¶ 3.

<sup>128</sup> CEDAW/CRC Joint General Recommendation, *supra* note 67, ¶ 43.

practices.<sup>129</sup> Although demonized as culturally relativistic, the abolition of these laws does not automatically result in rightsholders' autonomy. One set of legal norms is replaced with another, this time imposed by the state with guidance from IHRL norms and institutions,<sup>130</sup> and making the assumptions on the same grounds about the wishes of rightsholders that rendered the previous set of norms problematic and non-compliant. These traditional institutions are deemed untrustworthy from the perspective of IHRL. Yet, their replacement is assumed reliable (at least by comparison), without asking those for whom the institutions (at least in theory) are being abolished what they desire in the design of state responses that will take their rights and autonomy into account. This form of interference, by definition, is paternalistic.

The CRC and CRPD both emphasize the need for data and institutional design in different, sometimes converging, contexts. The CRC emphasizes the need for data on initiatives to prevent and respond to violence against children, while highlighting the inadequacy of institutional design and resourcing.<sup>131</sup> Little attention is paid to co-design as a pathway to address these gaps, once again excluding the voices of rightsholders. The CRPD, conversely, goes much further and denounces institutional settings because, even though they “may offer persons with disabilities a certain degree of choice and control,” “these choices are limited to specific areas of life and do not change the segregating character of institutions. Therefore, policies of deinstitutionalization require implementation of structural reforms which go beyond the closure of institutional settings.”<sup>132</sup> In other words, state-designed institutions, no matter how they are resourced, will always fall short of fulfilling the

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<sup>129</sup> Comm. on the Elimination of All Forms of Discrimination against Women, Gen. Recommendation No. 34 (2016), Rights of Rural Women, U.N. Doc. CEDAW/C/GC/34, ¶ 4 (Mar. 7, 2016).

<sup>130</sup> See HRC General Comment No. 32, *supra* note 95, ¶ 24 (requiring states with courts based on customary law or religious courts to follow IHRL due process standards as defined in Article 14).

<sup>131</sup> CRC General Comment No. 13, *supra* note 64, ¶ 12.

<sup>132</sup> Comm. on the Rts. of Pers. with Disabilities Gen. Comment No. 5 (2017), Living Independently and Being Included in the Community, U.N. Doc. CRPD/C/GC/5, ¶ 16(c) (Oct. 27, 2017).

autonomy of rightsholders. States' laws and policies approaching "disability through charity and/or medical models" are incompatible with the Convention and fail "to acknowledge persons with disabilities as full subjects of rights and as rights holders." Instead, the CRPD asks that "persons with disabilities, through their representative organizations, play a central role in the development of legal and policy reforms."<sup>133</sup>

Other general comments and recommendations emphasize the role of the state in creating or protecting public spaces, and how the states' failure to do so can lead to a diminution of expression needed for the exercise of autonomy. The CRC puts particular emphasis on this aspect, focusing on children's right to cultural life,<sup>134</sup> but also the rights of children in street situations to organize.<sup>135</sup> The HRC also emphasizes the need for safe spaces for the protection of collective autonomy, and in light of the right of peaceful assembly,<sup>136</sup> emphasizes again the needs of vulnerable individuals.<sup>137</sup> However, vulnerability is used here as a vehicle for promoting inclusion, rather than as a reason or excuse for paternalistic assumptions and decisions.

The question of state resources therefore reveals the leeway that these addressees of IHRL norms and institutions can receive in the design of solutions. For the most part, our survey of general comments and recommendations shows that there is a fair amount of leeway for institutional design, as long as it complies with IHRL mandates, but without the requirement that rightsholders affected by these institutions be consulted or participate meaningfully in their design. At most, states have to make room for rightsholders to vent

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<sup>133</sup> Comm. on the Rts. of Pers. with Disabilities Gen. Comment No. 6 (2018), Equality and Non-Discrimination, U.N. Doc. CRPD/C/GC/6, ¶ 2 (Apr. 26, 2018) [hereinafter CRPD General Comment No. 6].

<sup>134</sup> See CRC General Comment No. 17, *supra* note 82, ¶ 37.

<sup>135</sup> See CRC General Comment No. 21, *supra* note 57, ¶¶ 37–38.

<sup>136</sup> Hum. Rts. Comm. Gen. Comment No. 37 (2020), Right of Peaceful Assembly, U.N. Doc. CCPR/C/GC/37, ¶ 25 (Sept. 17, 2020).

<sup>137</sup> *Id.* ¶ 80.

their opinions through rights like assembly, but there is no requirement to attend to their expressed autonomy.

The way state resources are considered, therefore, when read through the prism of paternalism, indicates that the key to unlock the work that paternalism does in IHRL does not lie solely with the treatment of rightsholders. Institutions designed domestically to address IHRL mandates are important and are another instance of exclusion of the voices of rightsholders. This exclusion can benefit the dialogue between domestic and IHRL institutions, ultimately entrenching IHRL norms and strengthening international institutions.<sup>138</sup> But it comes at the price of turning a blind eye to the autonomy of rightsholders, or at least perpetuating certain assumptions that can be considered paternalistic. The next section further queries the role of institutions and institutional design, this time looking more closely at IHRL bodies themselves and their own internal dynamics in their dialogue with states parties, as well as their fundamental role in dictating what IHRL means.

##### *5. Moving beyond the liberal paradigm of rights to address paternalism*

Different paradigms of rights can suggest different relationships between rightsholders and IHRL institutions. The disability paradigm in the CRPD in particular seems to have put much more emphasis on combatting paternalism. Similarly, the CRC has also more openly tackled the issue of the subordination of the child as a rights holder, particularly in its more recent general comments and as a departure from the conception of “the child” that underpinned the drafting of the Convention. These two bodies have gone further than CEDAW and HRC in recognizing the risks of paternalism in IHRL.

It is perhaps unsurprising that paternalism has played a larger role in the CRPD and CRC, since the thrust of these bodies is much more attuned to matters of capacity and

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<sup>138</sup> David Kosař & Lucas Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109 AM. J. OF INT'L L. 713, 747 (2015).



autonomy. Also, unlike CEDAW (which should also be concerned with these matters), the CRC and CRPD treaties are not couched on the language of equality and non-discrimination, which, as we have indicated throughout, can act as a gateway for paternalistic IHRL. It is worth therefore querying what these paradigms mean beyond the superficial description of these bodies. But at the same time, in keeping with the tone of this section, we wish to inquire into these paradigms as articulated by the Treaty Bodies themselves. While there is extensive literature theorizing these different paradigms,<sup>139</sup> we wish to tease them out focused on general comments and recommendations, as a means to inform whether and how these self-perceptions influence a reading of IHRL through the prism of paternalism.

The CRC spells out a number of possible paradigms in its general comment on the rights of children in street situations:

There are different approaches used with respect to children in street situations, sometimes in combination. They include a child rights approach, whereby the child is respected as a rights holder and decisions are often made with the child; a welfare approach, involving the “rescue” of children perceived to be an object or victim from the street and whereby decisions are made for the child without serious consideration for her or his views; and a repressive approach, whereby the child is perceived to be a delinquent. The welfare and repressive approaches fail to take into account the child as a rights holder and result in the forcible removal of children from the streets, which further violates their rights. Indeed, claiming that welfare and repressive approaches are in the best interests of the child does not make them rights based. To apply the Convention, it is essential to use a child rights approach.<sup>140</sup>

The welfare approach in particular is most closely associated with paternalism. It is therefore important that the CRC articulates a different paradigm, one that makes children and their voices central parts of the Committee’s work. This practice is not always consistent,

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<sup>139</sup> See generally AARON XAVIER FELLMETH, *PARADIGMS OF INTERNATIONAL HUMAN RIGHTS LAW* (2016); Mayo Moran, *Recourse to International Human Rights: Challenges to the Traditional Paradigm*, in *PROGRESS IN INTERNATIONAL LAW* 723 (Russell A. Miller & Rebecca M. Bratspies eds., 2008); Sophie Bessis, *International Organizations and Gender: New Paradigms and Old Habits*, 29 *SIGNS* 633 (2004); Thomas Waldock, *Theorising Children’s Rights and Child Welfare Paradigms*, 24 *INT’L J. CHILD.’S RTS.* 304 (2016); Peter Mittler, *The UN Convention on the Rights of Persons with Disabilities: Implementing a Paradigm Shift*, 12 *J. POL’Y & PRAC. INTELL. DISABILITIES* 79 (2015).

<sup>140</sup> CRC General Comment No. 21, *supra* note 57, ¶ 5.

and even if reflective of the current approach, there is still work that needs to be done in wiping out paternalistic undertones from previous work. Nonetheless, this centrality of children's experiences in the articulation of rights, through which children can "be heard in judicial and administrative proceedings; carry out their own [child-led] initiatives; and fully participate at the community and national levels" in all stages of policies and programs affecting them, "rather than being seen as objects for whom decisions are made,"<sup>141</sup> is an important position to combat paternalism.

The CRC further articulates this approach elsewhere:

Definition of a child rights approach. Respect for the dignity, life, survival, wellbeing, health, development, participation, and non-discrimination of the child as a rights-bearing person should be established and championed as the pre-eminent goal of States parties' policies concerning children. This is best realized by respecting, protecting, and fulfilling all of the rights in the Convention (and its Optional Protocols). It requires a paradigm shift away from child protection approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders entitled to nonnegotiable rights to protection. A child rights approach is one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights, guided at all times by the rights to non-discrimination (art. 2), consideration of the best interests of the child (art. 3, para. 1), life, survival and development (art. 6), and respect for the views of the child (art. 12). Children also have the right to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children's evolving capacities (art. 5). This child rights approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.<sup>142</sup>

CEDAW, in working alongside the CRC, has attempted to articulate a similar idea, even if more meekly, in pointing to the centrality of participation in the drafting of legislation against harmful practices. In their words, "[e]ngaging with and soliciting input from practising communities, other relevant stakeholders and members of civil society is central [...]. Care should be taken, however, to ensure that prevailing attitudes and social norms that

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<sup>141</sup> *Id.* ¶ 33.

<sup>142</sup> CRC General Comment No. 13, *supra* note 64, ¶ 59.

support harmful practices do not weaken efforts to enact and enforce legislation.”<sup>143</sup> Note here the caveat, in which rightsholders are not fully trusted, and their will needs to be measured against an external yardstick. They are considered to be influenced by the rights-infringing context in which they live, and therefore not fully capable of realizing or articulating a way out that is IHRL-compliant.

The HRC has also engaged with the idea of participation by rightsholders, but with fewer caveats, in the context of minority protection (thus reaffirming the ICCPR, ICESCR and its own work as beneficial to, and accountable for, the hegemony). In its words, the enjoyment of minority rights “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>144</sup> But note that, as discussed above, religious education rights for the HRC can still be reserved only to parents, and not to the children being educated. In that respect, the CRC’s equivalent pronouncement puts the differences between the HRC and CRC in stark contrast: “it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence.”<sup>145</sup>

The CRPD, in contrast, is the one most clearly committed to an anti-paternalistic stance in its general comments. It often facilitates direct cooperation with persons with disabilities in its work,<sup>146</sup> particularly to “shift from the substitute decision-making paradigm to one that is based on supported decision-making” in the human rights-based model of disability.<sup>147</sup> It further establishes a “human rights model of disability [which] recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or

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<sup>143</sup> CEDAW/CRC Joint General Recommendation, *supra* note 67, ¶ 45.

<sup>144</sup> Hum. Rts. Comm. Gen. Comment No. 23 (1994), Article 27: Rights of Minorities, U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 7 (Apr. 8, 1994).

<sup>145</sup> CRC General Comment No. 20, *supra* note 82, ¶ 43.

<sup>146</sup> CRPD General Comment No. 1, *supra* note 77, ¶ 2.

<sup>147</sup> *Id.* ¶ 3.

restriction of human rights”; thus, disability laws and policies must consider the diversity of persons with disabilities and acknowledge “that human rights are interdependent, interrelated and indivisible.”<sup>148</sup> This model rejects other rights paradigms which perceive impairment “as a legitimate ground for restricting or denying rights,” thus preventing “the application of the equality principle to persons with disabilities.”<sup>149</sup> Such models also do not recognize these persons as rights holders, “but are instead ‘reduced’ to their impairments.”<sup>150</sup> Note here the couching of the model on equality, which, as we have been insisting, can work as a gateway for paternalism. When seen through a different and clearly articulated paradigm, however, it seems that the CRPD still sees possibilities in equality to promote anti-paternalism. In this respect, the CRPD explicitly articulates its own model of equality as a break from other versions in IHRL and from a paternalistic understanding of it:

Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality.<sup>151</sup>

To promote anti-paternalism, the CRPD emphasizes the compatibility between an “active and informed participation of everyone in decisions that affect their lives and rights” with the human rights-based approach in public decision-making processes.<sup>152</sup> It also underscores the centrality of consultation with persons with disabilities and their meaningful

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<sup>148</sup> CRPD General Comment No. 6, *supra* note 133, ¶ 9.

<sup>149</sup> *Id.* ¶ 8.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* ¶ 11.

<sup>152</sup> Comm. On the Rts. of Pers. with Disabilities Gen. Comment No. 7 (2018), Participation of Persons with Disabilities, Including Children with Disabilities, Through Their Representative Organizations, in the Implementation and Monitoring of the Convention, U.N. Doc. CRPD/C/GC/7, ¶ 2 (Nov. 9, 2018).

participation in determining their rights.<sup>153</sup> In particular, the CRPD notes how persons with disabilities' involvement through representative organizations in negotiating the Convention is an example "of the principle of full and effective participation, individual autonomy and the freedom to make one's own decisions," which not only led to the international recognition of persons with disabilities as "subjects" of all human rights,<sup>154</sup> but also improved the Convention's quality and relevance.<sup>155</sup> This ambition also extends into intersectionality, in the CRPD's view, since it emphasizes the importance of organizations of persons with disabilities in the implementation and monitoring of the Convention, requiring states to:

consult closely and actively involve such organizations, which represent the vast diversity in society, including children, autistic persons, persons with a genetic or neurological condition, persons with rare and chronic diseases, persons with albinism, lesbian, gay, bisexual, transgender or intersex persons, indigenous peoples, rural communities, older persons, women, victims of armed conflicts and persons with an ethnic minority or migrant background.<sup>156</sup>

Only then there could be an expectation that "all discrimination, including multiple and intersectional discrimination, will be tackled."<sup>157</sup> One might query whether involvement is emphasized because the CRPD gets into more detail in the design of solutions by states, or if rather the CRPD is simply more prone to not making decisions about people with disabilities without them in the room (which reflects the committee's composition, and is in tune with the disability rights paradigm under which the CRPD was adopted). If the latter, it seems that one of the keys to untangling the gordian knot of subconscious paternalism is to have people in the room with personal experience of having their rights infringed, and that the devil of paternalism is in the (lack of) detail within IHRL institutions. In other words, in attempting to universalize IHRL norms, it may seem that voice and nuance are sacrificed, allowing for

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<sup>153</sup> *Id.* ¶ 4.

<sup>154</sup> *Id.* ¶ 6.

<sup>155</sup> *Id.* ¶ 1.

<sup>156</sup> CRPD General Comment No. 6, *supra* note 133, ¶ 33. *See also* CRPD General Comment No. 3, *supra* note 122, ¶ 64(e); CRPD General Comment No. 4, *supra* note 73, ¶ 47 (on children with disabilities).

<sup>157</sup> CRPD General Comment No. 6, *supra* note 133, ¶ 33.

paternalistic tendencies (whether institutional or substantive) to creep into the work of UN Treaty Bodies. The inevitable result of this move is, once again, to cement the marginal role and positionality of those who are already there, thus working once again against the liberation and liberty missions of IHRL.

The work of these bodies in articulating their own visions of rights performs an important role in promoting clearer engagement with structural premises of IHRL norms and institutions, which, as we have revealed in this article, enable or actively contribute to paternalistic effects of IHRL. Therefore, it seems important for these bodies to acknowledge the possible negative impacts of their own work, and, in this self-reflexive exercise, to engage with the (unwelcome) possibility that, despite best intentions, they are not always they saviours they aspire to be, or pretend to be, and that perhaps it is not for them to be saviours at all times. This saviour complex is perhaps the best manifestation of the deeply rooted paternalistic paradigms that underpin the work of these Committees.

Of course, our findings are based on a survey of selected materials from selected bodies, and more work is needed to shine a light on the full presence and effect of paternalism in IHRL norms and institutions. The next section starts to sketch out the contours of such a broad research agenda, based on our preliminary findings.

#### IV. PATERNALISM IN INTERNATIONAL HUMAN RIGHTS LAW AND INSTITUTIONS: A RESEARCH AGENDA

Given our exposition of the practice of UN Treaty Bodies in relation to their General Comments and Recommendations, it is apparent that there are significant paternalistic undertones to the practice of IHRL. Some of which are drawn from the very nature of IHRL, and some which seem to be a consequence of the institutional design and background rules

within which these bodies operate. Overall, these UN Committees purporting to behave as saviors of vulnerable victims shoulder much of the paternalistic work in the field.

Nevertheless, more analytical work is needed to not only trace the manifestations of paternalism and the work they do in the context of monitoring and implementing IHRL, but also understand and deconstruct their root causes and how structures and instruments can be reformed. This section examines some of the further work needed in this realm, based on our insights from the practice we examined.

A first step in expanding this work is, of course, to examine the remaining UN Treaty Bodies, and other IHRL regimes. The study would also benefit from expanding its temporal scope. Whereas we tended to focus on the last decade of the work of the four UN Treaty Bodies, because our intention was to capture the current state of the field, it is worth going further into the past work of HR bodies, too, to trace a historical evolution of engagement with paternalism. Doing so will present three interrelated advantages: first, a fuller picture of the field, as well as greater insights into how paternalism may have been present at the foundational moments of the field (and, for being largely unspoken, has never been captured or dealt with by notions like evolutionary interpretation) and to identify changes in patterns and commonalities and differences between the different treaties and treaty bodies. Second, a longer historical view will also allow us to consider whether paternalism can and has been addressed by more recent instruments (like the CRPD, notably) which attempt to embody new rights paradigms. This possibility needs more verifying. And third, a longer and more detailed historical view allows us to query the extent to which individual personalities can shift the tone of IHRL in the practice of these bodies, particularly based on the composition of committees at the time critical General Comments or Recommendations, or other key documents, are adopted. This should be done by analyzing the professional and personal

backgrounds of Committees members, and in-depth interviews with as many former and current members as possible.

Relatedly, research on paternalism in IHRL needs more insight into the operation of economic, social, and cultural rights (ESCR). There is a dedicated UN Treaty Body on the matter,<sup>158</sup> but for the most part IHRL operates on the basis of civil and political rights. ESCR, because their implementation more clearly involves direct state action and is often translated into public policy rather than law, needs closer attention through the analytical prism of paternalism.

Conceptually, too, our analysis would possibly benefit from greater insights from fields of critical inquiry into IHRL like gender and postcolonial and decolonial studies,<sup>159</sup> as well as other theories of human rights more specially beyond the liberal approach that underpins the practice of IHRL institutions. These theoretical pathways can help us further flesh out the ways in which paternalism manifests in IHRL, especially with respect to racialized, marginalized and excluded communities and individuals. While we drew some of these connections above, more engagement with these fields would help us understand the lack of focus on paternalism as an analytical lens in the field of IHRL, and also map the functionally equivalent work that other analytical lenses do in relation to IHRL norms and institutions.

Further, we acknowledge that our choice to focus on General Comments and Recommendations has its limits in that these are only one of the types of documents these bodies adopt. To query international human rights through the analytical prism of paternalism

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<sup>158</sup> ICESCR, *supra* note 124, arts. 16–20.

<sup>159</sup> See generally RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL (2018); Ben Golder, *Critical Humanities and the Human of International Human Rights Law*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW AND THE HUMANITIES 148 (Shane Chalmers & Sundhya Pahuja eds., 2021); Ben Golder, *Human Rights Trouble? Judith Butler and the Performative Refusal of Human Rights*, in CRITICAL PERSPECTIVES ON HUMAN RIGHTS 25 (Birgit Schippers ed., 2019); Ratna Kapur, *Precarious Desires and Ungrievable Lives: Human Rights and Postcolonial Critique s of Legal Justice*, 3 LONDON REV. INT'L L. 267 (2015); Audrey Osler, *Human Rights Education, Postcolonial Scholarship, and Action for Social Justice*, 43 THEORY & RES. SOC. EDUC. 244 (2015); Alex Cistelean, *Which Critique of Human Rights? Evaluating the Postcolonialist and the Post-Althusserian Alternatives*, 5 INT'L J. ZIZEK STUD. 1 (2011).



and the work it does allows us to reimagine human rights and its place in the world, particularly as a purported discourse of emancipation. To look specifically at general comments allows us to focus on a (largely ineffable) jurisprudential view of IHRL seen through the eyes of bodies charged with monitoring these rights in practice. Focusing on General Comments / Recommendations enabled us to analyse the Committees' attitudes and views about specific rights, issues and positionalities of people, which is detached from specific time and place – as represented in their state-focused mechanism, namely Concluding Observations. Further, examining individual communications in particular will allow us to better grasp the ways in which these bodies speak to, and about, rightsholders themselves.

We also need to learn more and understand more about the discursive and institutional operations of these mechanisms, to the extent that paternalism operates at both these levels. Doing so will yield greater insights for institutional and substantive reform of IHRL. As we indicated throughout this piece, there is a mixture of institutional design (especially rules of procedure, attempts to unify the works of the Committees, introducing unified reporting and monitoring protocols, and other measures) and substantive factors (rights paradigms, and understandings of autonomy and vulnerability) contributing to paternalistic effects in IHRL. These require greater analysis on the basis of a wider range of sources. In relation to institutional reform, we acknowledge that IHRL bodies' mandates are unlikely to change, and that their members are elected by the State parties to the treaties. But UN Treaty Bodies in particular can change their rules of procedure<sup>160</sup> to ensure that marginalized voices are heard

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<sup>160</sup> See generally Hum. Rts. Comm. Rules of Procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.8 (Sept. 22, 2005); Hum. Rts. Comm. Rules of Procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.9 (Jan. 13, 2011); Hum. Rts. Comm. U.N. Doc. CCPR/C/3/Rev.10, Rules of Procedure of the Human Rights Committee (Jan. 11, 2012) [hereinafter HRC 2012 Rules of Procedure]; Hum. Rts. Comm. U.N. Doc. CCPR/C/3/Rev.12, Rules of Procedure of the Human Rights Committee (Jan. 4, 2021) [hereinafter HRC 2021 Rules of Procedure]; Comm. on the Elimination of Discrimination Against Women, U.N. Doc. HRI/GEN/3/Rev.3, Rules of Procedure of the Committee on the Elimination of Discrimination Against Women

in the process of drafting General Comments and Recommendations. Further, but also more challengingly, these voices should become part of the individual states' periodic reporting obligations, which can also be accomplished through amendments to existing rules of procedure, and Treaty Bodies themselves can be proactive in this space. For instance, in response to a state party's implementation report that excludes vulnerable groups, the Committee's List of Issues<sup>161</sup> can invite states to remedy that gap.

In terms of promoting substantive reform, the first thing on the agenda is to identify pathways to, or examples of, IHRL bodies moving beyond the declaration of a violation of a right and move more constructively towards remedies that can address paternalism as part of a guarantee of non-repetition. Whereas the competence of UN Treaty Bodies in this space is fairly limited by the treaties and optional protocols that have established each committee's competency to hear individual complaints in the first place, the deficiencies in their work are also by design, and can change. Reform can include, for example, the binding nature of their findings, and the creation of enforcement mechanisms. Other IHRL bodies, particularly the Inter-American Court of Human Rights, have much broader mandates on reparations and it would therefore be useful to query reparations mandates more broadly, and particularly the Inter-American Court's, to see whether and how paternalism plays a role in the shaping and implementation of remedies, and whether remedies can be a fruitful substantive change avenue for IHRL.

Lastly, our analysis of IHRL through the lenses of paternalism might benefit from adding comparators from fields that are adjacent to, but technically separate, from IHRL.

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(May 28, 2008) [hereinafter CEDAW Rules of Procedure]; Comm. on the Rts. of the Child, U.N. Doc. CRC/C/4/Rev.5, Rules of Procedure (Mar. 1, 2019); Comm. on the Rts. of Pers. with Disabilities, U.N. Doc. CRPD/C/1/Rev.1, Rules of Procedure (Oct. 10, 2016) [hereinafter CRPD 2016 Rules of Procedure].

<sup>161</sup> The List of Issues comprises of questions and issues arising from States reports that the Committee submits to the State in order for it to update, clarify or complete the information provided in its report to the former, prior to consideration of the report in plenary session. See HRC 2021 Rules of Procedure, *supra* note 160, at Rules 71.2, 73; HRC 2012 Rules of Procedure, *supra* note 160, at Rule 70; CEDAW Rules of Procedure, *supra* note 160, at Rule 4.2; CRPD 2016 Rules of Procedure, *supra* note 160, at Rule 5.1, Rule 48bis. Note that a List of Issues is not mentioned in the Rules of Procedure for the CRC.

Two key examples are international refugee law and international criminal law. International refugee law can offer important historical and contemporary insights to the works and effects of paternalism, particularly given the presence of individuals with lived experience of being refugees during the drafting of the Refugee Convention.<sup>162</sup> Further, international criminal law can also offer insights into how to bring certain voices to bear on the normative and institutional development of the field, given initiatives such as the greater participation of victims and their expanded mandate for reparations via the victims fund, and the different sets of enforcement mechanism presented in this space, including, but not limited to, the Rome Treaty that created the International Criminal Court.<sup>163</sup>

Lastly, and beyond the international realm, it might also be useful to expand this research to assess the functionally equivalent work that national human rights institutions do, and whether scrutiny of their work through a paternalism lens would yield useful insights about the operation of IHRL. To the extent that IHRL addresses states and their institutions in the first instance, it seems like it would be a natural extension of our work to also query how national institutions, on their own or in responding to international mandates, consider the potential paternalistic effects of their activities.

## V. CONCLUDING REMARKS

There is a structural problem with the work of the four treaty bodies on which we focus in this article, at least in the genre of general comments and recommendations, which makes paternalism possible. Paternalism operates as a gatekeeper to exclude certain claims and

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<sup>162</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Jane McAdam, *The Enduring Relevance of the 1951 Refugee Convention*, 29 INT'L J. REFUGEE L. 1, 2 (2017) (highlighting the participation of refugees in the drafting of the Convention).

<sup>163</sup> See Rome Statute of the International Criminal Court, arts. 68, 75, ¶ 2, 79, July 17, 1998, 2187 U.N.T.S. 3 (providing for the participation and protection of victims and reparations in the International Criminal Court). See also, e.g., CHRISTOPHER SAFFERLING & GURGEN PETROSSIAN, VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: DEFINITION, PARTICIPATION, REPARATION 68–78 (2021); Jérôme de Hemptinne, *Victim's Participation in International Proceedings*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 562–64 (Antonio Cassese et al. eds., 2009); CONOR MCCARTHY, REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT 225–96 (2012); Carla Ferstman, *The International Criminal Court's Trust Fund for Victims: Challenges and Opportunities*, 6 Y.B. INT'L HUMANITARIAN L. 424, 425 (2003).

possibilities from the vocabulary and institutions of IHRL. After all, if IHRL bodies know better than rightsholders themselves, then it is for these bodies, with their attendant liberal assumptions and biases, to make sense of the goals of IHRL. Because general comments and recommendations are aimed at states and a broader, diffuse audience of the “IHRL community,” including UN agencies, civil society, and individuals, they fail to account explicitly for victims’ voices and experiences. Instead, it is IHRL bodies that speak on their behalf. Ideally, these bodies would simply channel victim voices as directly as possible, only reframed in the language of rights in the relevant instrument. But, as critiques of expert rule have shown in IHRL and a number of other international legal domains, it is easy for the expert to replace the voice of those on whose behalf they advocate with their own, and to put their own interests front and centre. In this case, said interests can be the perpetuation of the bodies’ own legitimacy and mandate, state compliance (which can create an incentive for less stringent recommendations from the bodies themselves), and the preservation of a seemingly unified body of IHRL norms and institutions, rather than one that is plural and messy in accommodating divergent interests. Therefore, well-meaning as experts can be, there is a constant and very real risk that rightsholders and their interests, which IHRL was ostensibly designed to serve, will be left behind unless they are directly part of the conversation. This tension, prompted here by the formal institutional framework that creates the Treaty Body, has deep substantive implications as well, particularly when the body becomes the gatekeeper of what IHRL means, which is often the case in particular with general comments and recommendations. Gatekeeping is not just about voice, of course; but voice and agency are preconditions for the inclusion of transformative goals and claims, and for enlivening the evolutionary potential of IHRL in line with the will of rightsholders.

All of these issues considered, it is important to bear in mind that, even if not to the same extent as rightsholders, these bodies are also not monolithic. Each instrument has its

idiosyncrasies, which reflect not only their purported goals, but also political compromises, and the thinking about IHRL norms and institutions at the time the instruments were adopted. In other words, despite sharing many common features, some of these bodies also operate under different paradigms of human rights, which can have different effects on our reading of their work through the prism of paternalism.

More work is needed to fully map and analyse the work that paternalism does in IHRL, discursively and institutionally. But one thing is clear: IHRL norms and institutions have fallen short of their full emancipatory promise, and, in doing so, may have perpetuated a version of the very exclusion they were created to resolve. It is incumbent upon us to investigate the full extent of these effects, and attempt to undo them, whether within or despite these norms and institutions.