

**Hauser Globalization Colloquium Fall 2008:  
Global Governance and Legal Theory**

NYU Law School

Professors Benedict Kingsbury and Richard Stewart  
Furman Hall 324, 245 Sullivan St. (unless otherwise noted)  
Wednesdays 2.15pm-4.05pm

*Provisional Semester Program - Attached Paper is shown in Bold*

- August 27- Teaching Session: Introductory Class (course instructors)
- September 3- No class (legislative Monday)
- September 10- Speaker: David Dyzenhaus, University of Toronto, NYU Global Law Professor  
Topic: The Concept of (Global) Administrative Law
- September 17- Panel Discussion on the September 2008 ECJ Decision in Kadi.  
Professors Stewart, Kingsbury, and members of the international law faculty.
- September 24- Speakers: Eyal Benvenisti (Tel Aviv/NYU) and George Downs (NYU)  
Topic: Toward Global Checks and Balances
- October 1- Speakers: Nico Krisch (LSE); and Euan MacDonald and  
Eran Shamir-Borer (NYU)  
Topic: Global Constitutionalism and Global Administrative Law (two papers)
- Friday October 3 - SPECIAL SESSION Furman Hall 310, 3pm-5pm*  
Speaker: Neil Walker, Edinburgh  
Topic: Beyond boundary disputes and basic grids: Mapping the global disorder  
of normative orders  
*Background reading: Constitutionalism Beyond the State*
- October 8- Speaker: Meg Satterthwaite (NYU)  
Topic: Human Rights Indicators in Global Governance**
- October 15- Speaker: Janet Levit, Dean, University of Tulsa College of Law  
Topic: Bottom-Up Law-Making Through a Pluralist Lens: The ICC Banking  
Commission and the Transnational Regulation of Letters of Credit
- October 22- Speaker: Jack Goldsmith, Harvard Law School. *Pollack Room, Furman Hall 900.*  
Topic: Law for States: International Law, Constitutional Law, Public Law (paper  
co-authored with Daryl Levinson)  
Guest Commentator: Prof Georges Abi-Saab, Geneva, former Chair of WTO  
Appellate Body
- October 29- [*The IILJ will convene jointly with JILP a conference on International Tribunals, on  
Wed Oct 29, 9am-6pm, at the Law School. Global governance issues will feature. Students should  
attend this conference during the regular Colloquium time slot, and are welcome to attend other  
parts of the conference also. See the IILJ Website for details.*]
- November 5- Speaker: Robert Keohane, Princeton and Kal Raustiala (UCLA)  
Topic: Toward a Post-Kyoto Climate Change Architecture: A Political Analysis
- November 12- Speaker: Jeremy Waldron (NYU)  
Topic: International Rule of Law
- November 19- Speaker: Benedict Kingsbury (NYU)  
Topic: Global Administrative Law: Conceptual and Theoretical Problems
- November 26- Student paper presentations [may be rescheduled, due to Thanksgiving break]
- December 3- Student paper presentations and wrap up.

Program and papers available at: <http://iilj.org/courses/2008HauserColloquium.asp>

# The Trust in Indicators: Measuring Human Rights<sup>1</sup>

AnnJanette Rosga<sup>2</sup>  
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## Introduction

When this Article was first conceived several years ago, human rights practitioners around the world were facing increasing pressure to produce indicators: rights-sensitive indicators to measure the Millennium Development Goals; indicators to measure the enjoyment of rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR); rights-based indicators for use by United Nations agencies in measuring the impact of development programming in various sectors. Each of the authors has been, in various capacities, involved in projects to help develop and/or analyze such indicators. As a cultural anthropologist (Rosga) and human rights legal scholar (Satterthwaite) respectively, we initially drafted this Article as a way of thinking through the interdisciplinary functions of human rights indicators, as they seemed to embody an especially powerful intersection of law and social science.

In an early draft version of this Article, we drew critical conclusions about the dangers inherent in an enthusiastic embrace of quantitative indicators as a central tool in assessing states' compliance with international human rights treaties. Since that time, however, there have been significant developments in the arena of human rights indicators. The number and variety of institutions involved in crafting indicators has proliferated exponentially.<sup>4</sup> In addition, the analyses brought to bear by human rights

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<sup>1</sup> This title is adapted from THEODORE M. PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE* (1995). Work on this Article was supported by the Filomen D'Agostino Research Fund at New York University School of Law. The authors wish to thank the following individuals for discussions of indicators and/or their comments on early drafts of this Article: Philip Alston, Yulia Krieger, Alice M. Miller, Madeleine Rees, Annelise Riles, Mindy Roseman, Sara Steen, Lee Waldorf, and Jill Williams. They also thank more recent readers: Amanda Conley, Sally Engle Merry, and Alison Nathan. The authors are grateful to Samantha Rowe (NYU LL.M. '08) for outstanding research assistance and in-depth suggestions, and Shannon Kunath (NYU J.D. expected '09) for research assistance. Remaining errors are solely the responsibility of the authors.

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<sup>4</sup> In the last several years, a wide variety of international organizations, including the U.N. Development Fund for Women (UNIFEM), the United Nations Children's Fund (UNICEF), as well as the Office of the High Commissioner for Human Rights and several U.N. Special Rapporteurs, have undertaken human rights indicators projects. International NGOs including the Centre on Housing Rights and Evictions (COHRE) and the American Association for the Advancement of Science (AAAS) have embarked on the creation of their own human rights indicators. Finally, national and regional human rights institutions such as the Danish Institute for Human Rights, the German Institute for Human Rights, and the Inter-American Commission on Human Rights have begun work on human rights indicators. For a discussion of numerous human rights indicators initiatives, see Rajeev Malhortra & Nicolas Fasel, *Quantitative Human Rights*

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professionals in their own attempts to “standardize” the assessment of states’ human rights performance across space and time have grown more sophisticated and complex. Along the way, these attempts have become less panoptic in their reach, more cautious, and increasingly insistent on the vital necessity of participation by a multitude of stakeholders. In sum, “the turn to indicators” which we initially viewed from a predominantly critical perspective, has developed in unexpected ways worthy of more a more open-ended assessment, which we offer here.<sup>5</sup>

Notably, we have come to conclude that—while there is much in our original, largely skeptical, analyses that we find well-worth retaining—the turn to indicators by human rights practitioners may actually present unique opportunities to initiate vital political contestation. We remain vigilantly watchful for signs that the seemingly quenchless thirst for more and better quantitative data will, as shall be discussed in subsequent sections of this Article, have largely negative effects: replacing substantive political debate with the techno-bureaucratic language of audits and/or attempting to disguise real differences in geopolitical power arrangements with the putative point-of-view-less-ness of social scientific statistics. Nevertheless, we believe that a careful study of what has actually occurred in the field of human rights indicators reveals that something considerably more complicated is going on. In brief, debates over numbers provide lively venues for discussion of one of the most enduring challenges of international human rights: its sources of authority and the role of judgment in assessing State compliance with its rules. Attempts to create standardized universal indicators with which to assess states’ human rights performance, *in their very concrete failure*, we believe, may yet provide new opportunities to think through long unresolved issues of inter-governmental, transnational rule.

We came together to begin drafting this Article because in the immediately preceding years, we had each been separately asked to consult in the development of rights indicators in distant nations, for very different projects.<sup>6</sup> From the point of view of most human rights practitioners who use them (or who would like to have them *to use*), human rights indicators are (as Maria Green has put it), “piece[s] of information used in

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*Indicators: A Survey of Major Initiatives* (2005), available at <http://www.jus.uio.no/forskning/grupper/humrdev/indicators.html>.

<sup>5</sup> This “turn” is by no means complete. As of this writing, the U.N. Office of the High Commissioner for Human Rights is mid-process in what promises to be a very long, ongoing, transnational conversation about how best to assess states’ changing performance over time at the task of improving human rights and complying with international human rights law. See discussion, *infra* Section III.

<sup>6</sup> Rosga spent 2002 in Bosnia-Herzegovina conducting ethnographic fieldwork on democratic police reform initiatives. While in residence, she also provided consultation to the U.N. Office of the High Commissioner for Human Rights (OHCHR) on human rights indicators for use in a nationwide “Municipal Assessment Project” and to UNICEF on social science methodologies relevant to the assessment of the nature and extent of child trafficking. More recently, she facilitated a meeting for OHCHR on the development of indicators for monitoring/assessing human trafficking throughout Europe. Satterthwaite served as a consultant to the Human Rights Section of UNIFEM during 2002-2003, where she helped to develop a methodology and set of CEDAW indicators for use in Central and Eastern Europe. She was also an invited expert at the December 2006 Experts Meeting on Human Rights Indicators hosted by the U.N. Office of the High Commissioner for Human Rights in Geneva.

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measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.”<sup>7</sup>

More broadly, human rights indicators require the identification, creation, collection, analysis, and dissemination of social science data. They are used to accomplish many, often contradictory, ends. They take their place among many manifestations of what scholars have identified as an exponential growth of “global governance” projects.<sup>8</sup> As such, they are situated at the nexus of international human rights law, demographic and other quantitative social science methodologies, multiple administrative and regulatory apparatuses, global, regional and local advocacy projects, and the transnational spread of technocracies and expert knowledges mobilized in the service of “standardization.”<sup>9</sup>

In our work as consultants on indicators-related projects, we were most struck by the confidence—indeed, at times near reverence—with which our colleagues spoke of this new kind of tool. At that moment, many believed indicators would allow the human rights community to accomplish at least three things:

- (1) To monitor compliance with, and fulfillment of, human rights commitments.<sup>10</sup>
- (2) To measure the progress of human development in human rights terms. For instance, the Office of the High Commissioner for Human Rights had developed “a list of simple development indicators, designed to measure ‘what is’, on a right-by-right basis.”<sup>11</sup>

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<sup>7</sup> Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062, 1065 (2001). Paul Hunt, U.N. Special Rapporteur on the Right to Health, has offered the following definition: “...a human rights indicator derives from, reflects and is designed to monitor realization or otherwise of a specific human rights norm, usually with a view to holding a duty-bearer to account.” Paul Hunt, WHO Workshop on Indicators for the Right to Health, A Background Note (2003), *available at* <http://www.jus.uio.no/forskning/grupper/humrdev/indicators.html>.

<sup>8</sup> See Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance* (July 17, 2008) (unpublished manuscript, on file with authors). For a discussion of global governmentality, see, e.g. James Ferguson & Akhil Gupta, *Spatializing States: Toward an Ethnography of Neoliberal Governmentality*, 29 AM. ETHNOLOGIST 980 (2002); David Kennedy, *Challenging the Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5 (2005); Tania Murray Li, *Beyond “the State” and Failed Schemes*, 107 AM. ANTHROPOLOGIST 383 (2005); Nikolas Rose and Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRITISH J. SOCIOLOGY 173 (1992).

<sup>9</sup> See, e.g., Winton Higgins & Kristina Tamm Hallström, *Standardization, Globalization, and Rationalities of Government*, 14 ORGANIZATION 685 (2007); and Suzan Ican and Lynne Phillips, *Making Food Count: Expert Knowledge and Global Technologies of Government*, 40 CANADIAN REV. SOC. & ANTHRO. 441 (2003).

<sup>10</sup> See, e.g., Green, *supra* note 7.

<sup>11</sup> Craig G. Mokhiber, *Toward a Measure of Dignity: Indicators for Rights-Based Development*, IAOS Conference on Statistics, Development and Human Rights (Montreux, 4-8 September 2000) [hereinafter Montreux] (available online at: <http://www.statistik.admin.ch/about/international/index2.htm>): at p. 5, n. 18. For a discussion of the differences between human rights indicators and rights-based development

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- (3) To measure the impact/success of particular rights-based development programming. At the time of our writing, many U.N. agencies, for example, had begun to use socioeconomic data disaggregated to highlight gender, race, and other axes of discrimination to measure the impact of their programming on specific beneficiary populations.<sup>12</sup>

This Article restricts its analysis to the first of these categories; however, it is likely that a number of points apply across all three. It is important to note that the turn to indicators was not itself new. As early as the 1980s, assessments of the role of statistics in measuring human rights contained variously embedded discussions of indicators.<sup>13</sup> Many of the concerns we raise in this Article were raised more than a decade ago in such assessments. One of our central arguments in the early draft of this Article was that, in spite of early warnings about problems with indicators,<sup>14</sup> a convergence of social, political, economic forces and their accompanying epistemological shifts had, if anything, dramatically increased the *power* of indicators without accompanying attention to their limitations. Without arguing whether indicators are inherently good or bad, we suggested that those caught up in the rush to create and apply indicators within the field of human rights would do well to recognize the ways in which the demand for indicators was—and we argue now, is still—inextricable from a widespread turn to “accounting culture” in which *tests of measurability* often prevail over accurate and contextually sensitive assessments of substance or actions.

In 1994, economic analyst Michael Power identified what he called an “audit explosion,” which he described as having “roots in a programmatic restructuring of organizational life and a new ‘rationality of governance.’”<sup>15</sup> For Power, the audit, with its financial accounting origins, exemplifies both literally and metaphorically a number of monitoring and control practices characteristic of late modern social organization such as inspections, assessments, and other evaluative technologies.

Audit has become a benchmark for securing the legitimacy of organizational action in which auditable standards of performance have been created not merely to provide for substantive internal improvements to the quality of service but to make these improvements externally verifiable via acts of certification.<sup>16</sup>

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indicators, *see* UNDP, *Using Indicators for Human Rights Accountability*, in HUMAN DEVELOPMENT REPORT 2000 89-92 (2000).

<sup>12</sup> UNICEF, for example, had begun to use such indicators as net school enrollment ratios disaggregated by gender and dropout rates by grade, gender and age, to measure the impact of their programming to improve girls’ education in various countries. *See* UNICEF, *Girls’ Education: A Framework for Action 7* (2000).

<sup>13</sup> *See* Section I *infra* for a partial account of this history.

<sup>14</sup> *See* especially Russel Barsh, *Measuring Human Rights: Problems of Methodology and Purpose*, 15 HUM. RTS. Q. 87 (1993).

<sup>15</sup> MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* 10 (1997), *quoting* ROSE AND MILLER (1992).

<sup>16</sup> *Id.* at 10-11.

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Increasing demands for “indicators”—used to measure the degree to which States are living up to their obligations under international human rights treaties—are inextricable from the privileging of abstract, quantifiable, and putatively transferable data bits. These demands arise not only from the perceived need within international human rights circles for governmental accountability, but also from the replication of verification and monitoring techniques used in a wide variety of business, non-profit, and governmental management contexts.<sup>17</sup> As such, indicators partake of both the strengths and weaknesses of auditing practices. This Article is our effort to distill some of those strengths and weaknesses, through a careful examination of the turn toward indicators in the human rights context, a consideration of insights from science studies scholars, and an assessment of the current state of play.

We conclude that while there are very real drawbacks involved in the indicators project, debates about indicators may provide advocates with new opportunities to use the language of science and objectivity as a powerful tool to hold governments to account. However, because indicators purport to turn an exercise of judgment into one of technical measurement, advocates of human rights would do well to remain vigilant to effects of the elision at work in this transformation. As we will show, the failure to clearly locate responsibility for judgment in international human rights assessment exercises is less a product of the tools chosen to carry out those exercises than it is a structural problem, foundational to international human rights law as it exists today. Thus, some of the core problems we argue are inherent in the indicators project would still be present even if quantitative indicators were banished from human rights assessment projects. Nonetheless, the use of quantitative indicators tends to disguise those problems as technical ones of measurement and data availability.

The Article unfolds as follows: in Section I, we explore some of the conditions leading to the increasing reliance on indicators for the use of ensuring the fulfillment and/or enjoyment of international human rights. Using the example of the International Covenant on Economic, Social and Cultural Rights, we consider the way in which that treaty’s monitoring committee has shifted from attempting to create and directly apply indicators in the measurement of compliance with treaty obligations to calling on States to identify and implement their own indicators. In Section II, we discuss several of the problems integral to the use of indicators in human rights contexts and what those difficulties have in common with the wider turn to auditing practices in management and control contexts. In Section III, we examine the ongoing efforts of the human rights treaty bodies and the U.N. Office of the High Commissioner for Human Rights to create international indicators applicable to all States, and we assess that effort in light of the problems discussed in Section II, as well as considering issues of authority and judgment in human rights law. In Section IV, we consider the relationship between human rights indicators and modes of global governance.

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<sup>17</sup> *Id.* at 4-6.

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## I. Indicating Lack of Trust: The Evolving Approach to Human Rights Indicators

*The crucial point is that faith in the objectivity of quantitative methods is not quite the same thing as acceptance of the validity of their conclusions. The “objectivity” of quantitative policy studies has more to do with their fairness and impartiality than with their truth.*

*Theodore M. Porter*<sup>18</sup>

A sense of the history surrounding the use of compliance indicators in the human rights context may be helpful. This Section will consider some of that history, examining the overdue emphasis on economic, social and cultural rights; the quest to hold States accountable for a set of rights that at first appeared indeterminate; and the ultimate articulation of the role of international scrutiny as one of assessing the State’s own monitoring. In requesting States parties to create their own indicators and assigning itself the task of reviewing these indicators, U.N. Committee on Economic, Social and Cultural Rights (CESCR) relies upon well-trod assumptions about how to ensure impartiality in conditions of mutual mistrust. We will suggest that this turn to monitoring of monitoring, or “control of control,” replaces—at least in part—the Committee’s task of assessing the fulfillment or enjoyment of substantive rights with an auditing role.

### A. The Overdue Emphasis on Economic, Social and Cultural Rights

It is almost a cliché now to say that economic, social and cultural rights (ESC rights) were ignored by the international community, and by the human rights world, for too long. But in 1993, when the international community gathered for the World Conference on Human Rights in Vienna, the point still had to be made forcefully. In a speech to the World Conference, a spokesperson for the CESCR summarized the situation this way:

The shocking reality... is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action... The fact that one fifth of the world’s population is afflicted by poverty, hunger, disease, illiteracy and insecurity is sufficient grounds for concluding that the economic, social and cultural rights of those persons are being denied on a massive scale. Yet there continue to be staunch human rights proponents—individuals, groups, and Governments—who completely exclude these phenomena from their concerns.<sup>19</sup>

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<sup>18</sup> Theodore M. Porter, *Objectivity as Standardization: The Rhetoric of Impersonality in Measurement, Statistics, and Cost-Benefit Analysis*, in *RETHINKING OBJECTIVITY* 197, 207 (Alan Megill ed., 1994).

<sup>19</sup> *Statement to the World Conference on Human Rights on Behalf of the Committee on Economic, Social and Cultural Rights*, U.N. Doc. E/1993/22, Annex III (paras. 5 and 8).

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The response to this kind of critique—the adoption in Vienna of language in the Declaration and Programme of Action that explicitly recognized and emphasized the universality, indivisibility and interdependence of all human rights—should not have been revolutionary.<sup>20</sup> Indeed, from the inception of the modern human rights system (about the time of the adoption of the Universal Declaration of Human Rights (UDHR) in 1948,<sup>21</sup> to take an unsatisfactory but not altogether arbitrary moment), ESC rights lived alongside civil and political rights.<sup>22</sup> The UDHR includes both types of rights, and the U.N. system could have developed equally robust treaties, monitoring systems, and assistance in implementation for the two categories. Instead, the idea of human rights was held captive to the Cold War and to colonial, and then postcolonial, factionalism.<sup>23</sup> Two treaties instead of one were created to implement the UDHR<sup>24</sup>; the international community took civil and political rights far more seriously on the whole than ESC rights<sup>25</sup>; and theoretical arguments about the nature of the different categories, and the priority that should be accorded to each, proliferated.<sup>26</sup> On the whole, ESC rights suffered a long-term marginalization, characterized by the late creation of a treaty-

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<sup>20</sup> Article 5 of the Declaration and Programme of Action reads: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF/157/23 (1993).

<sup>21</sup> Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT’L L. 127 (Supp. 1949).

<sup>22</sup> See articles 3 and 4 (the right to life, liberty and the security of person, and the right to be free of slavery) and articles 22 and 25 (the right to social security, and the right to an adequate standard of living) for examples.

<sup>23</sup> For a discussion of these issues, see “Economic and Social Rights,” in HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (3d ed., 2008), at 263-280. See also MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (1995), at 7-16.

<sup>24</sup> These are, of course, the International Covenant on Economic, Social and Cultural Rights (*adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR]), and the International Covenant on Civil and Political Rights (*adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR]). The creation of two treaties—one concerning civil and political rights, and one on ESC rights—was a product of politics much more than an outgrowth of any specific understanding of human rights. Indeed, as Craig Scott notes, the UDHR had seamlessly included both categories of rights. See Craig Scott, *Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights,”* 21 HUM. RTS. Q. 633 (1999) (“One of the dominant normative features of the Universal Declaration of Human Rights (UDHR) is the relatively integrated translation of the aspiration to protect human dignity into the enumeration of fundamental human rights. The bifurcation of what is now thought of as the two grand categories of human rights (so-called ‘civil and political rights’ and ‘economic and social rights’) had yet to occur at the time of the UDHR’s adoption. These categories were progeny of the UDHR, later created through two instruments: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).”) (citations omitted).

<sup>25</sup> For a discussion of these issues, see STEINER, ALSTON & GOODMAN, *supra* note 23. See also Rhoda Howard, *The Full Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 9 HUM. RTS. Q. 467 (1987).

<sup>26</sup> For a discussion of these issues, see STEINER, ALSTON & GOODMAN, *supra* note 23.



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monitoring body for the ICESCR<sup>27</sup>, general assumptions that ESC rights were either non-justiciable or merely aspirational or both<sup>28</sup>, and a lack of infrastructure for their advancement in the form of NGOs, professional experts, and legal norms.<sup>29</sup> In this context, the Vienna Declaration's assertion of the indivisibility, universality, and interdependence of all human rights brought the struggle for ESC rights one large step forward.<sup>30</sup>

Of course, in many ways, that giant step embodied a recognition of some developments that had already taken place. The CESCR, established in the mid-1980s, had developed strong, professional working methods by 1993, including the adoption of concluding observations<sup>31</sup> and the promulgation of a number of substantively rigorous General Comments.<sup>32</sup> A group of eminent scholars and practitioners had gathered in the Netherlands in 1987, developing the Limburg Principles, a framework for understanding the nature and scope of the obligations of States Parties to the ICESCR.<sup>33</sup> And national judiciaries began to interpret and thereby give content to ESC rights included in domestic

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<sup>27</sup> Unlike the other major human rights treaties, the ICESCR did not include provision for a treaty monitoring body. As the U.N. Office of the High Commissioner for Human Rights explains, "Unlike the five other human rights treaty bodies, the Committee on Economic, Social and Cultural Rights was not established by its corresponding instrument. Rather, the Economic and Social Council (ECOSOC) created the Committee, following the less than ideal performance of two previous bodies entrusted with monitoring the Covenant. The Committee was established in 1985, met for the first time in 1987 and ... [now] convenes twice a year..." U.N. OHCHR, *Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights*, available at <http://www.unhchr.ch/html/menu6/2/fs16.htm#6>.

<sup>28</sup> See CRAVEN, *supra* note 23.

<sup>29</sup> See Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q 81 (1998) (noting that "Of all the domains where state and intergovernmental action on human rights have failed to achieve anything more than modest success, the development of effective measures for the prevention and remedying of violations of economic, social and cultural rights must surely classify as one of the most glaring. Although the international community has consistently reiterated the proposition that all human rights are intertwined within a coherent system of law, responses to violations of economic, social and cultural rights--both procedural and substantive--have paled in comparison to the seriousness accorded infringements of civil and political rights," *id.*, at 81-2.)

<sup>30</sup> Many others have emphasized that the rhetorical progress in the Vienna Declaration and Program of Action was not matched by substantive advances within the document or programmatic steps in the program of action. See Audrey R. Chapman, *A "Violations Approach" to Monitoring the Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 18 (1996) 23, at 25, n. 3.

<sup>31</sup> For a discussion of the development of the CESCR's concluding observations, see CRAVEN, *supra* note 23, at 87-89.

<sup>32</sup> See, for example, *The Right to Adequate Housing, General Comment No. 4*, U.N. ESCOR, Comm. on Econ., Soc. And Cultural Rts., 6<sup>th</sup> Sess., U.N. Doc. E/1992/23 (1992). See also discussion, *infra* n. 134 and accompanying text.

<sup>33</sup> The Limburg Principles were developed by a group of experts gathered at the University of Limburg in 1986 in an effort to define, under international law, the nature and scope of States parties' obligations under the ICESCR. The Limburg Principles assert, among other important principles, that: some rights in the Covenant are immediately justiciable, while others become justiciable over time; States parties have an immediate obligation to take steps toward fulfilling the rights under the Covenant; and progressive realization was not an excuse to deter indefinitely measures aimed at fulfilling Covenant rights. See *Limburg Principles on the Implementation of the International Covenant on Social, Economic and Cultural Rights*, U.N. GAOR, Hum. Rts. Comm., 43<sup>rd</sup> Sess., Annex, U.N. Doc. E/CN.4/1987/17 (1987).

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constitutions and legislation.<sup>34</sup> This work was important because—taken together—it gave the lie to the idea that ESC rights were unwieldy, illegitimate, or lacking content. Still, these developments were largely ignored by the world’s superpowers—and indeed, by various governments of all stripes—and much remained to be done.<sup>35</sup>

Since Vienna, some major advances have taken place. The U.N.’s human rights field offices, administered largely by the U.N. High Commissioner for Human Rights, have begun to promote and monitor ESC rights.<sup>36</sup> The Limburg Principles were supplemented by the Maastricht Guidelines, which entail a conceptual framework for violations of ESC rights.<sup>37</sup> And the ICESCR has moved to center stage, now recognized in the literature and in advocacy campaigns as equally important as the ICCPR.<sup>38</sup> As practice scrambled to catch up with rhetoric, the human rights community began searching for appropriate tools and methodologies for the advancement of ESC rights.

There are a number of reasons why the tools and professional practices developed to monitor and implement civil and political rights have proved in some ways inadequate to the task of monitoring and implementing ESC rights. Several of those reasons will be examined briefly here, including: the different formulation of States’ obligations and individuals’ rights in the ESC context; the qualification of States’ duties according to the availability of resources; and the fact that ESC rights have been perceived to be more indeterminate than civil and political rights.

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<sup>34</sup> See, for example, a discussion of the ways in which courts have played a role in enabling litigation for ESC rights in specific contexts, see STEINER, ALSTON & GOODMAN, *supra* note 23, at 313-358, and Mario Gomez, *Social Economic Rights and Human Rights Commissions*, 17 HUM. RTS. Q 155 (1995), at 155-157 (discussing ESC rights litigation under the Indian Constitution).

<sup>35</sup> For a discussion of the “ambivalence” of the world’s governments concerning ESC rights, see STEINER, ALSTON & GOODMAN, *supra* note 23, at 263-264.

<sup>36</sup> For example, the field office in Bosnia-Herzegovina has identified ESC rights as one of its priority areas for action. See <http://www.unhchr.ch/html/menu2/5/bosnia.htm>.

<sup>37</sup> The Maastricht Guidelines were developed ten years later in a similar fashion. Experts gathered at the renamed Maastricht University and adopted a set of principles that were aimed at “elaborat[ing] on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.” The Guidelines include sections addressing, *inter alia*: the obligations to respect, protect and fulfill; obligations of conduct and result; minimum core obligations; and availability of resources. *Maastrich Principles*, available on the web as: [www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html).

<sup>38</sup> A review of the website of the Office of the U.N. High Commissioner for Human Rights demonstrates the extensive resources available to those working on both categories of rights. See [www.ohchr.org](http://www.ohchr.org). In recent years, there has been a proliferation of NGOs in both the global North and the global South working on ESC rights. For a snapshot of some of these organizations, see the Organizations and Individuals Directory on the ESCR-Net website: <http://www.eschr-net.org/EngGeneral/home.asp>. ESCR-Net is itself a testament to the growth in this field: established over the last several years, it describes itself as follows: “The International Network for Economic, Social and Cultural Rights (ESCR-Net) is an emerging coalition of organizations and activists from around the world dedicated to advancing economic, social and cultural rights. This website contains four interactive, searchable databases (or directories) of organizations and individuals, project and activities, regional and domestic case law, and events.” The project is funded by the Ford Foundation and housed at the Center for Economic and Social Rights in Brooklyn, NY. Its inaugural conference was held in Thailand in June 2003.

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B. The Quest to Hold States Accountable: How to Identify an Individual’s Rights and Determine When a State Has Fulfilled its Obligations

Anyone reading the ICCPR and the ICESCR side by side will immediately notice a significant difference in the way the rights of individuals are described. Beyond the content of the rights themselves, the framing of the rights is quite different. For example, article 7 of the ICCPR declares that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” while article 7 of the ICESCR reads “[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work...” The difference in phraseology is instantly apparent: on the one hand, “no one shall be subjected to” violations of their civil and political rights, and on the other hand “States parties recognize” certain ESC rights. While this difference is striking, its significance is not inherently obvious. In the early years of attention to ESC rights, however, the “States Parties recognize” formula was characterized as “programmatic,” or “aspirational,” meaning that it did not directly create a right to which an individual could unproblematically cling.<sup>39</sup> Instead, the phrase was seen as creating an obligation in States parties to construct programs, to design policies, or to set up regulatory systems that would allow individuals to enjoy the full realization of their rights. Such programs and policies would demonstrate that the State “recognizes” the right. The enjoyment of the right was less important, it seemed, than the fact that means had been identified to effect that enjoyment.

Rights theorists tended to construct a dichotomy in which civil and political rights were perceived to be obligations of result, while ESC rights were understood to be qualitatively different: obligations of conduct.<sup>40</sup> What kind of program would States need to set up to demonstrate that they “recognize” the right to just and favorable conditions of work, for example? Was there any check on effectiveness, or a way to make sure individuals actually benefited from such programs? To take the example of just and favorable working conditions, could an advocate conclude from the fact that an individual worker was unable to secure a living wage that she was suffering from a rights violation?

Practitioners used to dealing with the seemingly clear rights of individuals under the ICCPR were accustomed to asking questions about state actions that appeared to flow directly from the right guaranteed. For instance, the right to be free from torture implied the question, “Have individuals in a given state been subjected to torture?” The answer to this question would almost always determine whether a right had been violated or not: if there was a case of torture, there was almost always a violation.<sup>41</sup> Conversely, the

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<sup>39</sup> See Leckie, *supra* note 29, and STEINER, ALSTON & GOODMAN, *supra* note 23, for a discussion of this line of thought.

<sup>40</sup> For a discussion of obligations of conduct and obligations of result in the context of ESC rights, see Craven, *supra* note 23, at 107-109.

<sup>41</sup> Of course this assumed simplicity was misleading. An answer to the question of whether or not someone has been tortured will not necessarily answer the question of whether a State has violated the Covenant. Usually, the answer to the question of State compliance will come through the application of one of several standards that all require States to prevent, investigate, and punish those who have committed torture;

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same form of question seemed not to address crucial issues with respect to ESC rights: if a practitioner asked whether people in a given State were working for a wage that would not support a decent life, the answer to the question might—or might not—determine whether there was a violation of the right. This was because a State, for example, could be earnestly working to set up a minimum wage regime while large numbers of individual workers still suffered. Such earnest and concrete steps by a State would suggest that the State was living up to its obligation to “recognize” the right and thus not be violating the treaty. On the other hand, the State could be turning a blind eye to the problem, taking no action to improve workers’ wages, a situation that would suggest the State was not “recognizing” the rights of those under its jurisdiction, and thus presumably be violating the Covenant.

Over the years, the differences between these categories of rights,<sup>42</sup> and between the thresholds of “violations” and “fulfillment” have diminished.<sup>43</sup> Concepts, tools, and

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whether a specific State has violated the Covenant or not will be determined based on its efforts to take these steps. In essence, then, the obligation not to torture entails obligations of both conduct and result. Further, certain treaties, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* December 10, 1984, G.A. Res. 39/46, U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (*entered into force* June 26, 1987) [hereinafter CAT], apply only to certain acts of torture: those carried out by or with the acquiescence of a State official with specific enumerated aims. *See* CAT, article 1 (qualifying the definition of torture with the requirement that the acts must have been carried out “for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind” and have been “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”).

<sup>42</sup> For example, consider the way in which even the obligations of “conduct” and obligations of “result”—once thought to demonstrate the difference between ESC rights and civil and political rights—came to be understood as implicated in both regimes. *Compare*, for example, *The Nature of States Parties Obligations, General Comment No. 3*, U.N. ESCOR, Comm. On Econ. Soc., and Cultural Rts., 5<sup>th</sup> Sess., Supp. No. 3, at 83, U.N. Doc. E/1991/23 (1990) [hereinafter *General Comment No. 3*] (stressing that the Convention includes obligations of conduct and result), and *Article 6: The Right to Life, General Comment No. 6, reprinted in* U.N. ESCOR, Hum. Rts. Comm., 16<sup>th</sup> Sess., U.N. Doc. HRI/GEN/1/Rev.5 (2001) (specifying obligations of result, such as not imposing the death penalty except as punishment for the “most serious crimes,” as well as obligations of conduct, including effective investigations into cases of missing and “disappeared” persons and measures to reduce infant mortality). In the end, the difference is best understood as one of emphasis rather than one of kind. The decline of the result/conduct bifurcation as an explanatory tool has been echoed in the work of the International Law Commission as well. While the distinction was included in the First Reading of the Draft Articles on State Responsibility, it was rejected on the Second Reading in 1999 and omitted in the final version. *See* JAMES CRAWFORD, *Introduction, in THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002), at 20-22; *see also Drafting History, in id.*, at 344 (distinction between obligations of conduct and result deleted but “indirectly reflected” in art. 12 and its commentary).

<sup>43</sup> There was once a debate in the literature about whether a “violations approach” was appropriate to the ICESCR. Audrey Chapman, the main proponent of this approach, argued that the CESC should focus on identifying violations of the ICESCR, rather than attempting to assess compliance with the treaty’s norm of progressive implementation. *See* Chapman, *supra* note 30. Distinctions between these two purported “approaches” have become less important over time, though the CESC now clearly point out actions—or omissions—that would count as violations under the Covenant in its General Comments. *See*, for example, the Committee’s “Guidelines for Drafting General Comments,” available at:

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analytical frameworks developed in one realm have migrated across regimes to apply in the other.<sup>44</sup> A detailed examination of such migrations and cross-fertilization is beyond the scope of this Article; what is significant here is that practitioners faced with the reality of *doing* ESC rights work felt they needed new tools. Indicators were one of the tools to which they turned, since they seemed to promise a way to monitor whether the State's conduct resulted in the fulfillment of individual and group rights.<sup>45</sup>

Ironically, at roughly the same time that ESC rights advocates began the difficult task of articulating the connections between indicators and rights, social scientists interested in applying statistical tools to civil and political rights assumed that ESC advocates—unlike civil and political rights advocates—already had the data they needed to assess the degree to which ESC rights were being fulfilled. To these social scientists, practitioners studying ESC rights were miles ahead, since they could presumably rely upon the widely available social and economic indicators used by such international development organizations as the U.N. Development Programme (UNDP) and the World Bank, as well as the definitions and concepts used in those contexts. Goldstein posited that

The area of social and economic rights lends itself to much easier definition and operationalization than the political, civil, and personal

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<http://www.unhchr.ch/html/menu2/6/cescrnote.htm#outline> (including “Violations” as one of the core elements of the Committee’s General Comments).

<sup>44</sup> Perhaps the most striking example of this cross-fertilization comes in the “respect, protect, fulfill” rubric introduced to the U.N. human rights world by G.J.H. van Hoof and based on the work of Henry Shue. See G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, in THE RIGHT TO FOOD (Alston and Tomasevski, eds., 1984). Once thought to apply only to ESC rights, this framework is now invoked by advocates, treaty bodies, and other human rights mechanisms to describe the duties of governments for the whole spectrum of rights. See, for example, Amnesty International, *Respect, Protect, Fulfill - Women’s Human Rights: State Responsibility for Abuses by Non-State Actors* (2000) (advocacy document using, *inter alia*, the “respect, protect, fulfill” rubric to describe the State’s duties for abuses by non-State actors); HUMAN RIGHTS WATCH, *Summary, TAINTED HARVEST: CHILD LABOR AND OBSTACLES TO ORGANIZING IN ECUADOR’S BANANA PLANTATIONS* (2002) (applying the “respect, protect, fulfill” framework to rights under the ICCPR); CEDAW, General Recommendation on Women and health (No. 24, 1999) (describing States parties obligations to respect, protect, and fulfil women’s right to health); and *Report of Mr. Jiri Dienstbier, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, E/CN.4/1999/42 (using the respect, protect, fulfill standard in relation to human rights concerns in the former Yugoslavia). See also CRAVEN, *supra* note 23, at 109-114 (arguing that the rubric is applicable to civil and political rights as well as ESC rights).

<sup>45</sup> In another incarnation of the cross-fertilization referred to above, indicators have migrated back across the ESC boundary and are being developed to monitor certain civil and political rights as well. See, for example, UNICEF-Turkey, CEDAW Indicators, [www.unicef.org/turkey/w\\_in\\_tr/cedawind.htm](http://www.unicef.org/turkey/w_in_tr/cedawind.htm) (including indicators concerning civil and political rights, such as the right to equal participation in political and public life and the right to equal protection of the law). See also discussion, *infra* Section III.

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security rights area. Thus, there is general agreement on the definition of terms such as infant mortality, life expectancy, and caloric intake.<sup>46</sup>

Similarly, Richard Claude and Thomas Jabine asserted that

On the whole nations provide enough data of moderate to good quality on the subjects so that anyone who wants to can determine how well the citizens of a country are faring with respect to economic, social, and cultural rights included in the Universal Declaration and, at least roughly, how they compare with people in other countries.<sup>47</sup>

Civil and political rights researchers were convinced that they needed what they thought ESC advocates already had: measurement tools that would enable cross-national comparisons. To achieve this, they sought to create single or composite assessments of human rights performance: indicators, or sets of indicators, that would measure the status of civil and political rights in a given country. There were two especially well-known and controversial efforts. The first was an annual report entitled *Freedom in the World: Political Rights and Civil Liberties*, which was produced by the Washington-based non-governmental organization Freedom House. This report used two variables (called “political rights” and “civil liberties,” which were further disaggregated into “checklists”) to assign numerical scores to countries in order to compare their relative “freedom.”<sup>48</sup> Second, Charles Humana’s *World Human Rights Guide* assigned percentage ratings to countries based on scores concerning forty human rights. Countries were then labeled “good, fair, poor, or bad.”<sup>49</sup>

Civil and political rights analysts were also interested in establishing causal connections between a state’s human rights performance and other conditions such as economic development or form of government. Their struggle was first to identify *which* violations should be counted in this composite assessment as representative of a country’s essential civil and political rights performance. Andrew McNitt, for instance, suggested

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<sup>46</sup> Robert Justin Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT 40 (Thomas B. Jabine and Richard P. Claude, eds., 1992).

<sup>47</sup> Richard P. Claude and Thomas B. Jabine, *Exploring Human Rights with Statistics*, in Jabine and Claude, *supra* note 46, at 13.

<sup>48</sup> FREEDOM HOUSE, *FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES* (1978-2003). The methodology used to arrive at the numerical scores can be briefly summarized this way: Freedom House developed two checklists (one concerning political rights, the other pertaining to civil liberties), which are applied to each country under review by a survey team. For example, the political rights checklist contained, *inter alia*, items such as “Is the head of state and/or head of government or other chief authority elected through free and fair elections?” and “Are the legislative representatives elected through free and fair elections?” In response to these questions, the team assigns 0 to 4 points per item on the checklist, with some variation allowed for situations of “extreme violence.” Countries are then placed in the categories “free,” “partly free,” and “not free” based on their numerical scores. The methodology has varied somewhat over the years, but has stayed generally true to this approach. See Freedom House, “Survey Methodology,” available at <http://www.freedomhouse.org/research/freeworld/2000/methodology.htm>.

<sup>49</sup> CHARLES HUMANA, *WORLD HUMAN RIGHTS GUIDE* (1983, 1986).

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that a “core” set of civil and political rights (specifically, “freedom from torture, freedom from imprisonment for the mere expression of a belief, and freedom from political execution”) should be used to measure the single phenomenon of “human rights” performance across nations.<sup>50</sup>

Once representative violations were agreed upon, other concerns were identified that seemed especially challenging in relation to civil and political rights measurement. The most pressing of these concerns were data reliability and availability across nations. As Robert Goldstein noted, “Where data are available, they will often be extremely difficult and expensive to obtain and are likely to be fragmentary, controversial, or of dubious reliability.”<sup>51</sup> This was true since governments were likely to hide data concerning civil and political rights violations (such as the number of deaths in custody), or to never have collected such data at all (such as the number of cases of torture).<sup>52</sup> Finally, researchers attempted to develop statistical models that would allow them to draw conclusions about causality. For example, Kathleen Pritchard used path analysis to “provide information about the underlying causal process of human rights,” suggesting relationships of causality between economic resources, judicial independence, “constitutional acknowledgment” and “overall human rights conditions.”<sup>53</sup>

Thus, as civil and political rights researchers struggled with how to acquire valid and reliable data across nations and to construct composite assessments that would allow comparisons of relative levels of “freedom,” they assumed that many of the problems they encountered had already been resolved in relation to ESC rights.<sup>54</sup> What they did not recognize was that social and economic indicators were designed to measure relative

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<sup>50</sup> Andrew D. McNitt, *Some Thoughts on the Systematic Measurement of the Abuse of Human Rights*, in HUMAN RIGHTS: THEORY AND MEASUREMENT 89, 93 (David Louis Cingranelli, ed., 1988). See also Kathleen Pritchard *Comparative Human Rights: Promise and Practice*, in *id.*, at 139, and George A. Lopez and Michael Stohl, *Problems of Concept and Measurement in the Study of Human Rights*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT 216, 224-225 (Thomas B. Jabine and Richard P. Claude, eds., 1992).

<sup>51</sup> Robert Justin Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, in Jabine and Claude, *id.*, at 35, 41.

<sup>52</sup> See McNitt, *supra* note 50, at 95-96. Samuelson and Spierer suggest a methodology for assessing incomplete, distorted, and missing data concerning human rights issues. Douglas Samuelson & Herbert F. Spierer, *Use of Incomplete and Distorted Data in Making Inferences about Human Rights Violations*, in Jabine & Claude, *supra* note 46.

<sup>53</sup> Pritchard, *supra* note 50, at 144-146.

<sup>54</sup> For a discussion of more recent initiatives to create “justice and human rights indicators,” see Bard A. Andressen, Luba Beardsley, Christina Biebesheimer, Adriam Di Giovanni and Richard Hustad, *Justice and Human Rights Indicators: Towards an Operational Framework* (2006), available at <http://www.jus.uio.no/forskning/grupper/humrdev/indicators.html> (background paper for a workshop on developing justice and human rights indicators), and Justice and Human Rights Initiative, *Workshop on Developing Justice and Human Rights Indicators: Workshop Report* (2006), available at <http://www.jus.uio.no/forskning/grupper/humrdev/indicators.html> (report from workshop on developing justice and human rights indicators).

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national levels of human development and not the compliance with, and fulfillment of ESC rights.<sup>55</sup>

C. Measuring Implementation: “Available Resources,” Immediate Obligations, and Indications of Progress

A second major difference in the way the ICCPR and the ICESCR are crafted is in the way the State’s obligations are described. The relevant articles in each Covenant describe the obligations quite differently:

ICCPR, Article 2(1)

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized within the present Covenant...

ICESCR, Article 2(1)

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<sup>55</sup> Throughout this period, of course, CPR researchers were cognizant of the problems inherent in constructing composite assessments, relying on simplistic quantitative measures, and in any effort to compare disparate national situations in relation to one another. Barsh, *supra* note 14, was a particularly thorough critic. Goldstein also disparaged a number of these efforts:

The danger posed by an excessive and automatic quantitative orientation to all problems—a sort of quantitative fetishism—can be clearly demonstrated by referring to several recent publications which have attempted to develop schemes for comparing overall human rights violation levels between different countries... Barnett Rubin and Paula Newberg seriously state that a fundamental ‘dilemma’ in human rights research is to determine ‘how many reports of torture are equivalent to a murder’; Gloria Valencia-Weber and Robert Weber suggest a formula which answers such a question by equating 70 murders with 100 ‘disappearances’; and Kenneth Bollen suggests creating a system whereby a hypothetical country might be assigned a baseline score of 100 with regard to, for example, freedom of party organization, and then ‘a real country judged to have party liberties a fifth of the standard would receive a score of twenty while one 18 times greater would have 1800 as a value.’ John McCamant reports having actually carried out such an endeavor, and that, for example, with regard to the overall human rights climate, he concluded that East Germany was ‘probably 200 times more severe in 1976 than was the Federal Republic of Germany, but Uganda was still 100 times worse.’ Chile, under Pinochet was assessed as 10 times more repressive than the Philippines and ‘100 times worse than India.’

Goldstein *supra* note 46, at 50. *See also* Lopez and Stohl, *supra* note 50 (critiquing ranking exercises that do not situate their analyses in political context, and calling for multiple “dimensions” of composite assessments), and James McCormick and Neil J. Mitchell, *Human Rights Violations, Umbrella Concepts, and Empirical Analysis*, 49 *WORLD POLITICS* 510 (1997) (arguing that the “umbrella concept” of “repression of human rights” must be disaggregated into discrete violations). For a recent rejection of attempts to create composite assessments, *see* Philip Alston, *Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council*, 15 *J. TRANSNAT’L L. & POL’Y* 49, 87 (2005) (noting that “very few experts—be they economists, statisticians, or human rights specialists—consider that a composite index of human rights performance is likely to be feasible, credible or useful in the foreseeable future.”). For examples of very recent social science considerations of the use of quantitative methods in human rights contexts, *see* *STATISTICAL METHODS IN HUMAN RIGHTS* (Jana Asher, David Banks & Fritz J. Scheuren, eds., 2008).



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Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...

The difference between the obligation “to respect and to ensure” Covenant rights and the duty to “take steps... to the maximum of [the State’s] available resources with a view to achieving progressively” the Covenant rights has been much analyzed.<sup>56</sup> Commentators long feared that the progressive realization and resource limitations provisions would be used to excuse States’ inaction.<sup>57</sup> Others were concerned that these provisions inherently limited the ability to measure States’ compliance.<sup>58</sup> For the purpose of this Article, the significance lies less in the type of obligations imposed on States parties than in the linked question of how such different obligations should best be measured.<sup>59</sup> Here is where indicators entered the picture for economic and social rights practitioners.

In 1990, Danilo Türk, then U.N. Special Rapporteur on the Realization of Economic, Social and Cultural Rights, reported on the possibility of using indicators to measure ESC rights.<sup>60</sup> He suggested that indicators could be useful in the following ways, stressing in particular their role in progressive realization:

The use of indicators within the field of economic, social and cultural rights can, if applied in a precise and systematic manner, contribute to the realization of these rights in a variety of ways. Indeed, without the availability of a measurement device based on some form of statistical data, there is little chance of obtaining an overall picture which shows the extent which these rights are realized. Indicators can provide one means of assessing progress over time towards the “progressive realization” of these norms. Additionally, indicators can help to reveal some of the difficulties associated with fulfilling these rights. They can assist in the development of the “core contents” of some of the less developed rights in this domain, and can provide a basis from which a “minimum threshold approach” can

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<sup>56</sup> See, e.g., Chapman, *supra* note 30, at 22 (asserting that “‘Progressive realization,’ the current standard used to assess state compliance with economic, social, and cultural rights, is inexact and renders these rights difficult to monitor”); *but see* Scott Leckie, *supra* note 29, at 92-95 (stressing that the progressive realization provisions of the ICESCR should not be misconstrued to diminish the specific legal obligations placed on States under the Covenant).

<sup>57</sup> See, for example, Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social and Cultural Rights*, 16 HUMAN RTS Q. 693, 694 (1994).

<sup>58</sup> See Chapman, *supra* note 30, at 31.

<sup>59</sup> For a careful consideration of methods for measuring compliance with the “maximum available resources” obligation, see Robert Robertson, *Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social and Cultural Rights*, 16 HUM. RTS. Q. 693 (1994).

<sup>60</sup> *Report of the Special Rapporteur on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/Sub.2/1990/19 (1990).

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be developed. Indicators can reveal information about the extent to which certain rights are enjoyed or not enjoyed within the gambit of States, information which might not generally be available if other forms of measuring progress were employed. Similarly, they can provide yardsticks whereby countries can compare their own progress with that of other countries, especially countries at the same level of socio-economic development.<sup>61</sup>

Thus, indicators were seen as a way of measuring progress over time, of capturing the extent to which ESC rights were being realized—and thus enjoyed by the beneficiaries of these rights—and of helping to develop the core content of ESC rights. Indicators were also seen as a way of allowing for comparison across countries, and within countries across time. It is important to note, however, that this early exploration was framed in terms of the use of traditional social and economic indicators—data sets developed by social scientists and economists—in the human rights context.<sup>62</sup>

The Special Rapporteur’s early identification of indicators as a possible way to make the seemingly vague obligations of States parties to the ICESCR more concrete is echoed in the early work of the CESCR surrounding the treaty obligation that each State take steps “to the maximum of its available resources.” For practitioners schooled in the seemingly absolute standards of civil and political rights, this term seemed to inject an unacceptable degree of subjectivity into the question of treaty compliance. What counted as “available” resources, and how would the threshold for “maximum” be determined? Who would make these determinations, for that matter? Finally, were there any scientific and objective standards upon which to base these assessments?

In response to these questions and the resulting crisis of legitimacy they posed for the ESC rights regime, the CESCR answered in two principal ways: first, by referring to immediate obligations under the Covenant, and second, by requiring States to monitor their own progress toward full realization of rights for all in a way that would be reviewable by the Committee. Concerning the first response, the CESCR made clear in its General Comment on the Nature of States parties’ obligations (No. 3, 1990) that States must immediately ensure that everyone is enjoying the “minimum essential levels of each right”:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every

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<sup>61</sup> *Id.*, at para. 7.

<sup>62</sup> *See id.* at paras. 7-30. Todd Landman argues that “Development indicators are thus seen as suitable proxy measures to capture the degree to which states are implementing these [human rights] obligations. For example, literacy rates and gender breakdown of educational attainment are seen as proxy measures of the right to education. . .” Landman, *Measuring Human Rights*, in *STUDYING HUMAN RIGHTS* 74, 90 (2006).

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State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

States, therefore, were immediately responsible for meeting a minimum core obligation for each right; the substance of those cores remained—and in many instances, still remains—under development.<sup>63</sup> In the meantime, however, the minimum core concept was to act as a burden-shifting device in reporting before the Committee: if a State asserted that it had been unable to meet the minimum core obligation due to resource constraints, it was up to that State to demonstrate that it had attempted to use all available resources for the purpose of ensuring core rights for all. Similarly, the Committee asserted that there was an immediate obligation on all States parties to ensure that ESC rights were guaranteed without discrimination, and to ensure that judicial and other State organs recognized non-discrimination and other immediately implementable obligations as justiciable.<sup>64</sup>

The CESCR made a second important move to counter concerns about the vagueness of the “maximum available resources” clause: it called on States to set up adequate means of monitoring their own progress in ensuring ESC rights for all. Here, the Committee reminded States that they must continually make good faith efforts to guarantee ESC rights for all, and that these efforts should be measurable:

The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise

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<sup>63</sup> See Leckie, *supra* note 29, at 100-102. For an excellent recent discussion of the minimum core approach, see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

<sup>64</sup> CESCR, *General Comment No. 3*, at para. 5.

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strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.<sup>65</sup>

While States were not obliged by the treaty text to adopt any particular method for documenting and monitoring their progress in implementing Covenant rights, the Committee suggested—very early on—that they should use benchmarks<sup>66</sup> as “indication[s] of progress”:

[I]t may be useful for States to identify specific bench-marks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health care provider, etc. In many of these areas, global bench-marks are of limited use, whereas national or other more specific bench-marks can provide an extremely valuable indication of progress.<sup>67</sup>

Although the examples given above are quantitative, the Committee underlined the importance of qualitative data as well, noting that “it is clear that qualitative, as well as quantitative, data are required in order for an adequate assessment of the situation to be made.”<sup>68</sup> Importantly, these benchmarks were to be created and applied by the States,

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<sup>65</sup> *Id.* at para.11.

<sup>66</sup> There has been extensive discussion in human rights circles of the difference between indicators and benchmarks. As Green has written, “Benchmarks can be defined as goals or targets that are specific to the individual circumstances of each country. As opposed to human rights indicators, which measure human rights observation or enjoyment in absolute terms, human rights benchmarks measure performance relative to individually defined standards.” Green, *supra* note 7, at 1080, n. 45. Prominent ESC rights analysts have proposed various procedures in which international indicators would be developed and national benchmarks agreed upon. The distinction between benchmarks and indicators is, for the purposes of this Article, less relevant than the distinction between universal and nation-specific measurement devices. However, it should be noted that such persistent efforts to fix in place the differences between indicators and benchmarks highlight the former’s tendency to become conflated with the latter. We discuss this issue substantively below in Section II, but it is worth noting here that similar concerns often emerge in human rights debates in terms of the *procedures* for the creation of indicators and benchmarks. See for example, Paul Hunt, *cited in* Green, *supra* note 7, at 1081 and n. 48; Interview with Philip Alston, New York, NY, October 16, 2002 (suggesting a process in which the various treaty bodies would adopt an approved procedure for the creation of benchmarks, States would identify benchmarks using that procedure, and the treaty body would monitor their implementation over time).

<sup>67</sup> *Reporting by States parties, General Comment No. 1*, U.N. ESCOR, Comm. on Econ. Soc. and Cultural Rights, 3<sup>rd</sup> Sess. (1989), *reprinted in* U.N. Doc. No. HRI/GEN1/Rev.5, 12 para. 6 [hereinafter *General Comment No. 1*].

<sup>68</sup> *Id.*, at para. 7. Nancy Thede makes a similar point in *Human Rights and Statistics—Some Reflections on the No-Man’s-Land Between Concept and Indicator*, International Centre for Human Rights and Democratic Development (2000), *available at* <http://serveur.ichrdd.ca/english/commdoc/publications/demDev/statisticsIndicators.html> (calling for the “fostering [of] a culture of statistics amongst international human rights and democracy organizations and national partners in the field,” and noting further that “[o]ur overriding concern must be how to ensure that [sets of] common indicators effectively bind together both quantitative data and its qualitative interpretation ... to ensure ... that the analysis is not ‘shaved off’ [to leave us] with the bare statistics”).

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with the Committee in a supervisory, reviewing role. Finally—and perhaps most significantly for our purposes—while resource constraints could therefore legitimately have explained a State’s inability to fully implement each right for all individuals, they would not be allowed to excuse a failure to *monitor* State efforts toward full realization of ESC rights.

A few years after the CESCR made these recommendations, a U.N. seminar on “appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights” was held, in preparation for the World Conference on Human Rights in Vienna in 1993. Convened on the basis of a recommendation from the then-Special Rapporteur on the Realization of Economic, Social and Cultural Rights in 1990 that more work be done to encourage the use of indicators in ESC rights contexts, the seminar assigned to itself the goal of “[s]etting ideal indicators for each of the substantive rights in the International Covenant on Economic, Social and Cultural Rights drawing upon the work on indicators that had been carried out by the United Nations and its agencies...”<sup>69</sup> Evident in this formulation is the expectation—similar to that expressed above by the Special Rapporteur in 1990—that indicators created in the development context could be drawn upon and perhaps imported into the human rights context—for monitoring (enjoyment or compliance with) human rights standards.

During the workshop, some key issues surfaced that will be explored in later in this Article. First, the problem of what was being “indicated” arose and appeared to be elided, as demonstrated in the “and” emphasized in the following passage from the conference report:

Following the suggestion of the Special Rapporteur, the seminar decided that it would focus on developing indicators to assess the progressive realization of economic, social and cultural rights *and*, more specifically, to monitor States parties’ compliance with their obligations under the International Covenant on Economic, Social and Cultural Rights.<sup>70</sup>

What then would be “indicated”—realization/enjoyment of rights, or compliance with the treaty? The imprecision exemplified in this sentence would surface repeatedly during the workshop and would not be resolved.

The second major issue evident in the conference report is closely tied to the first: the lack of clarity concerning the substantive content of the various rights under discussion was seen as a severe constraint in developing indicators. The problem was summarized this way:

A clear definition and consensus of what had to be assessed was considered to be a *conditio sine qua non* for the use of indicators. On

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<sup>69</sup> *Report on the Seminar on appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights*, U.S. Doc. A/CONF.157/PC/73 (1993), para. 2.

<sup>70</sup> *Id.* at para. 12 (emphasis added).

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numerous occasions the fact was brought up that some economic, social and cultural rights needed more conceptualization, which in itself was seen as a limitation in the use and application of indicators. Although some thought that there was more need for standard setting and further elaboration of certain categories, others thought that human rights standards were firmly in place. It was questioned how disaggregation could be achieved if some rights were not well defined. . . .<sup>71</sup>

The third relevant concern that emerged during the workshop was a worry about the apparent privileging of quantitative data over qualitative information when designing and applying indicators: “Quantitative measures obscured the qualitative and subjective nature of human rights.”<sup>72</sup> However, the contours of the “subjective” nature of human rights were not discussed at length at the workshop.

The final relevant issue raised in the 1993 seminar was embodied in the conclusions of the conference: instead of producing a set of indicators to measure the core ESC rights, the conference concluded that it was impossible—at that early stage of the development of ESC rights—to identify and agree on indicators.

The seminar concluded that the first priority was to identify and clarify the content of the various rights and obligations. Only then would it be possible to identify the most appropriate way to assess progressive achievement, which may or may not involve the use of statistical indicators.<sup>73</sup>

Thus, the seminar ended with a non-conclusion: called together to agree on a set of indicators, the participants instead agreed that it was too early to identify appropriate indicators for rights whose contents remained indeterminate.

#### D. Indeterminacy, Indicators, and the Turn toward Monitoring of Monitoring<sup>74</sup>

In the intervening years, the CESCR has developed a fairly consistent approach to using indicators in its monitoring role. The Committee has continually requested that States parties develop and apply indicators to *monitor* their own progress in implementing various provisions of the treaty. For example, when reviewing Australia’s progress in 1993, the Committee recommended “that due attention be given to the development of indicators for measuring progress in the implementation of the rights covered by articles 13 to 15 of the Covenant.”<sup>75</sup> Similarly, the Committee chided Georgia for failing to identify and use indicators during the economic transition: “A lack

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<sup>71</sup> *Id.* at para. 142.

<sup>72</sup> *Id.* at para. 108.

<sup>73</sup> *Id.* at para. 4.

<sup>74</sup> In a paper presented at the IAOS Conference on “Statistics, Development and Human Rights” in Montreux, Switzerland in 2000, Thomas Hammarberg described the tendency of treaty monitoring bodies to “monitor the monitoring.” See Thomas Hammarberg, *Searching for the Truth: The Need to Monitor Human Rights with Relevant and Reliable Means*, 6, available at <http://www.statistik.admin.ch/about/international/index2.htm>.

<sup>75</sup> CESCR, Concluding Observations Concerning Australia, U.N. Doc. E/C.12/1993/9 (2000), para. 16.

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of clearly established guidelines and indicators hinders the transition process.”<sup>76</sup> The Committee has also congratulated States on effective use of indicators, as exemplified in this comment concerning Norway: “the Committee welcomes the adoption by the Ministry of Local Government and Labour of a plan of action which provides, *inter alia*, for the development of indicators for measuring racial discrimination...”<sup>77</sup>

In its General Recommendations, the CESCR has taken a further step, placing the major onus of proof on States to demonstrate either that they have set up monitoring systems, including—but not limited to—indicators, in relation to certain rights, or that they are not needed.<sup>78</sup> In its General Comment on the Right to Education, the Committee found that:

The State party has an immediate obligation “to take steps” (art. 2(1)) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.<sup>79</sup>

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<sup>76</sup> CESCR, Concluding Observations Concerning Georgia, U.N. Doc. E/C.12/1/Add.42 (2002), para. 8.

<sup>77</sup> CESCR, Concluding Observations Concerning Norway, U.N. Doc. E/C.12/1995/13 (2005), para. 8.

<sup>78</sup> The CRC has taken a similar approach to the use of indicators, though a thorough consideration of its practices in this regard are beyond the scope of this Article. By way of a tentative description, the Committee on the Rights of the Child has requested that States parties develop and apply indicators to monitor the various provisions of the Convention on the Rights of the Child. *See* Children’s Rights Committee, *General guidelines regarding the form and content of initial reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention*, U.N. Doc. CRC/C/5 (1991), at paras. 7, 18, 20, 22, and 24 (requesting the inclusion of indicators and statistical data in initial reports), *General guidelines for periodic reports*, U.N. Doc. CRC/C/58 (1996), at paras. 7, 18, 20, 64, 94, 103, 154, 159, 161, and 164 (requesting the identification and inclusion of indicators in periodic reports), concluding comments concerning Bolivia, U.N. Doc. CRC/C/15/Add.1 (recommending the use of indicators), Cape Verde, U.N. Doc. CRC/C/15/Add.168 (suggesting the identification and use of indicators), and Norway, CRC/C/15/Add.23, para. 17 (same). It is worth noting that unlike their sibling bodies, the CEDAW, CERD and Human Rights Committees appear not to use indicators consistently, and appear not to have made their development a requirement, or even a consistent suggestion to States under review. Those bodies do, however, use statistics in one way or another. We believe there is a useful distinction to be drawn between the ways in which the CRC and the CESCR, on the one hand, and the Human Rights Committee, CEDAW, and CERD, on the other, tend to use statistics and indicators. The difference lies in the ways in which the different treaty monitoring bodies have—or have not—integrated the responsibility to create and/or use indicators into the very obligations States have under the various human rights treaties. The CRC and the CESCR now ask States parties to design and use indicators to monitor the implementation of Convention rights. The other treaty bodies seek statistical information as part of their overall consideration of the situation in the country under examination. Surveying the use of statistical information and indicators by U.N. treaty bodies, Maria Green notes that all of the U.N. treaty bodies ask for statistical information, and sometimes use the term “indicator” to describe this data. *See* Green, *supra* note 7, at 1091-1094.

<sup>79</sup> *The Right to Education, General Comment No. 13*, U.N. ESCOR, Comm. on Soc., Econ. and Cultural Rts., 21<sup>st</sup> Sess. (1999), *reprinted in* U.N. Doc. HRI/GEN/1/Rev.5, 74, para. 52.

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This approach was echoed in the Committee’s 2000 General Comment on the Right to the highest attainable standard of health, in which the Committee called on States parties to use indicators as part of their national strategies for achieving the right to health.<sup>80</sup> The duty to so monitor was also examined from the opposite side: in the same General Comment, the CESCR asserted that a State’s failure to demonstratively monitor could amount to a violation of the Covenant:

Violations of the obligation to fulfill [the right to health] occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks...<sup>81</sup>

Once States have identified appropriate indicators, the Committee explains, they should also “set appropriate national benchmarks in relation to each indicator.”<sup>82</sup> Then, “[d]uring the periodic reporting procedure the Committee will engage in a process of scoping with the State party” whereby the Committee will assess the indicators and benchmarks, and the State’s progress using those indicators.<sup>83</sup> This duty to monitor is echoed again in the Committee’s 2002 General Comment on the Right to Water:

To assist the monitoring process, right to water indicators should be identified in the national water strategies or plans of action. The indicators should be designed to monitor, at the national and international levels, the State party’s obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party’s jurisdiction or under their control... Having identified appropriate right to water indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting

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<sup>80</sup> States were urged “to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored...” *The Right to the highest attainable standard of health, General Comment No. 14*, U.N. ESCOR, Comm. on Econ., Soc. and Cultural Rts., 22<sup>nd</sup> Sess. (2000), *reprinted in* U.N. Doc. HRI/GEN/1/Rev.5 (2000), 90, para. 53.

<sup>81</sup> *Id.* at para. 52.

<sup>82</sup> *Id.* at 58.

<sup>83</sup> *Id.*



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procedure, the Committee will engage in a process of “scoping” with the State party.<sup>84</sup>

Very similar language calling on States to create indicators, set benchmarks, and engage in scoping appears in each of the most recent general comments from the CESCR: the 2005 General Comments on the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights<sup>85</sup>, the Right to Work<sup>86</sup>, and the Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He or She is the Author<sup>87</sup>, and the 2008 General Comment on the Right to Social Security.<sup>88</sup> In its latest general comment, on the Right to Social Security, the CESCR identified the failure to monitor the substantive right under consideration as a violation of the obligation to fulfill that right, and the creation and use of indicators is the only monitoring device specifically identified by the CESCR.<sup>89</sup>

The step the CESCR has taken in the last fifteen years or so—from suggesting to States that benchmarks might be “useful” in 1990, to asserting that the creation and use of monitoring systems including indicators is a treaty obligation from 1999 onward—is striking. In effect, it shifts the onus of conceptualizing and applying indicators from the international community to the States themselves. In relation to indicators, then, the Committee’s most vital role has become the highly technical one of monitoring the State’s monitoring.<sup>90</sup>

It is important to note, however, that despite the apparently consistent assertion by the CESCR that it is the State’s duty to develop and apply its own monitoring measures, and the Committee’s duty to review the use of such indicators by the State, the CESCR continued to express hope that universally applicable, rights-specific indicators could be

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<sup>84</sup> CESCR, *The Right to Water, General Comment No. 15*, U.N. ESCOR, Comm. on Econ., Soc., and Cultural Rts., U.N. Doc. E/C.12/2002/11 (2002), para. 54.

<sup>85</sup> The equal right of men and women to the enjoyment of all economic, social and cultural rights, General Comment No. 16, UNESCOR, Comm. on Econ., Soc., and Cultural Rts., U.N. Doc. E/C.12/GC/16 (2005), para. 39.

<sup>86</sup> CESCR, *The Right to work, General Comment No. 18*, U.N. ESCOR, Comm. on Econ., Soc., and Cultural Rts., U.N. Doc. E/C.12/GC/18 (2006), paras. 46-47.

<sup>87</sup> *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author*, General Comment No. 17, UNESCOR, Comm. on Econ., Soc., and Cultural Rts., U.N. Doc. E/C.12/GC/17 (2006), paras. 49-50.

<sup>88</sup> CESCR, *The Right to social security, General Comment No. 19*, U.N. ESCOR, Comm. on Econ., Soc., and Cultural Rts., U.N. Doc. E/C.12/GC/19 (2008), paras. 74-76.

<sup>89</sup> CESCR, *supra* note 86, at para. 36.

<sup>90</sup> In its periodic review of State reports, the Committee has recently called on States to create and use indicators. *See, e.g.*, CESCR, Concluding Observations Concerning Latvia, U.N. Doc. E/C.12/LVA/CO/1 para. 49 (2008), CESCR, Concluding Observations Concerning Paraguay, U.N. Doc. E/C.12/PGY/CO/3 paras. 23, 30 (2008), CESCR, Concluding Observations Concerning El Salvador, U.N. Doc. E/C.12/SLV/CO/2 para. 36 (2007), CESCR, Concluding Observations Concerning Liechtenstein, U.N. Doc. E/C.12/LIE/CO/1 para. 35, CESCR, Concluding Observations Concerning Mexico, U.N. Doc. E/C.12/MEX/CO/4 para. 42 (2006), CESCR, Concluding Observations Concerning Bosnia, U.N. Doc. E/C.12/BIH/CO/1 para. 49 (2006).

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developed. In 1999, the CESCR proposed that a workshop be held on indicators and benchmarks for the right to education. In the proposal, the Committee asserted that the outcome of the 1993 workshop on indicators—which ended with agreement on the fact that the content of ESC rights were as yet too indeterminate—led it to conclude that “the next step is to focus on indicators in relation to specific economic, social and cultural rights,” a focus that would result in “identification and agreement on key [ESC rights] indicators.”<sup>91</sup> As will be explored in Section III below, the U.N. Office of the High Commissioner for Human Rights is currently engaged in a project aimed at making this hope concrete. Several years ago, the chairpersons of the various human rights treaty bodies—including the chairperson of the ICESCR— requested that the OHCHR construct indicators for key human rights enshrined in the international human rights treaties. Since then, professional staff of the OHCHR, together with experts gathered from a variety of disciplines, have been hard at work constructing indicators to measure the efforts of States and the enjoyment of human rights all over the world. Those efforts will be discussed in Section III. First, Section II will consider the CESCR’s turn toward monitoring of monitoring, suggesting that insights from social scientists who have identified similar shifts in other areas may be usefully applied to human rights indicators.

## II. Audit, Distance, and the Problem with Trusting Indicators

Leaving unresolved the question of whether to construct transnational or national indicators allowed the CESCR to hold in abeyance the difficult choice between either fully inhabiting the role of rights compliance monitors or completely embracing States parties’ control of the mechanics of measurement, thereby consigning itself primarily to the position of auditor. To understand how human rights indicators function as an *audit practice*, and further, to understand how audit practices bring human rights treaty bodies into the world of global governance, it will be useful to take a brief detour away from legal scholarship and into the social studies of science and technology.

### A. Indicators as Audit Practice

In 1994, economic analyst Michael Power identified what he called an “audit explosion,” which he described as having “roots in a programmatic restructuring of organizational life and a new ‘rationality of governance.’”<sup>92</sup> For Power, the audit, with its financial accounting origins, exemplified both literally and metaphorically a number of monitoring and control practices characteristic of late modern social organization such as inspections, assessments, and other evaluative technologies.

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<sup>91</sup> *Proposal of the Committee for a Workshop on Indicators, Benchmarks and the Right to Education*, U.N. ESCOR, Comm. on Econ., Soc. and Cultural Rights, Annex VIII to *Report on the Twentieth and Twenty-First Sessions*, U.N. Doc. E/C.12/1999/11 (1999).

<sup>92</sup> POWER, *supra* note 15 at 10 (quoting ROSE AND MILLER (1992)).

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Audit has become a benchmark for securing the legitimacy of organizational action in which auditable standards of performance have been created not merely to provide for substantive internal improvements to the quality of service but to make these improvements externally verifiable via acts of certification.<sup>93</sup>

Social scientists have noted that systems of auditing—and in particular the language of quantification—are demanded when the following three conditions exist. One, there is “a relation of accountability” in which one party is mandated to provide an account of itself to another.<sup>94</sup> Two, “the relation of accountability must be complex such that [auditors] are distant from the actions of [auditees] and are unable personally to verify them.”<sup>95</sup> Three, there are conditions of mutual distrust between the auditor and the auditee.<sup>96</sup> In the field of human rights, all three conditions are met. First, States that have ratified the principal human rights conventions are required to provide to the various treaty bodies periodic accounts of their efforts to ensure those rights. Second, particularly in the international realm, distance between parties is created and maintained along numerous axes, including geography, language, culture, economic capacities, etc. Third, distrust is common on the part of human rights monitors concerning governmental self-representation in the context of rights fulfillment and reporting. At the same time, States frequently mistrust those responsible for monitoring their human rights performance.

The best that the ESCR Committee could do at this stage of its work was to maintain a balance between mutually mistrusting parties—the auditor (in this case, the treaty body) and the auditee (in this case, the States parties). In ways that foreshadowed the tight-rope-walking solutions arrived at by the OHCHR in the latter body’s subsequent efforts, the Committee effectively maintained this balance concerning the need for universal indicators by turning to an audit-like structure. On one hand, a comprehensive set of international indicators created by the Committee might have been perceived as an imposition, suggesting the Committee’s mistrust of States parties. This may have resulted in an exacerbation of any existing mistrust that States parties had of the Committee. In their favor, a set of international indicators could, by their very appearance of cross-national comparability, have offered the imprimatur of objectivity. If identical indicators were to be applied transnationally, no single State could argue it had been subjected to unreasonable, or unfairly targeted, standards of accountability. Uniformity would serve as a symbol of impartiality.

On the other hand, a series of *nationally*-constructed indicators, while allowing for important cultural and economic specificity, could by this very specificity risk appearing to both States and international treaty bodies as arbitrary. This is in part because indicators are assumed to be valuable only insofar as they are cross-nationally

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<sup>93</sup> *Id.* at 10-11.

<sup>94</sup> *Id.* at 5, citing Flint.

<sup>95</sup> *Id.* at 5.

<sup>96</sup> POWER, *supra* note 15; Porter, *supra* notes 1 and 18.

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comparable.<sup>97</sup> Nation-specific indicators might also risk exacerbating the Committee’s mistrust of States parties, since the work done to link the rights with the indicators might appear to provide opportunities for political manipulation.

The decision to abdicate the task of developing international indicators in favor of assigning itself the role of *monitor* of States’s indicators efforts, handing off the task of indicator development to States themselves was a rather neat solution, and a remarkable transformation for the Committee. In this way, through the above-described processes, the Committee shifted its position from that of *direct monitor* of States’ compliance with human rights treaty obligations—including the obligation to ensure that promised rights were being enjoyed—to that of *auditor*. The Committee required States to develop and implement procedures to monitor *themselves* for appropriate compliance and guaranteed rights enjoyment, while the Committee in turn would monitor the States’ own *monitoring*. For our purposes, however, it was most notable that the Committee undertook so important a shift in roles with so little discussion of its significance or ramifications.<sup>98</sup>

#### B. The Problems with Trusting Indicators

What are the ramifications of the Committee’s removal from direct, substantive monitoring to what global governance scholars, to whom we shall turn later in this Article, have called “rule at a distance?” What significance can be read from the Committee’s effective abdication of one form of authority in favor of another in this instance? In our initial analysis of these events, we focused primarily on the significance of *audits* as a technology of control.

We argued that the explosive demand for “indicators,” which could be used to determine the degree to which States were living up to their human rights obligations, was intimately connected with the trust in data that was understood to be abstract, quantifiable, and putatively transferable. The demands arose both from the quest within international human rights circles for better ways to hold governments to account, and from the proliferation of certain types of verification and monitoring methods becoming

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<sup>97</sup> Hans-Otto Sano identifies “Comparative and ranking assessment” as one of several purposes for human rights indicators. See Hans-Otto Sano, *Human Rights Indicators: Purpose and Validity, Paper for Turku/Åbo Expert Meeting on Human Rights Indicators*, 11-13 March 2005, available at [www.abo.fi/institut/imr/research/seminars/indicators/Human.doc](http://www.abo.fi/institut/imr/research/seminars/indicators/Human.doc). Similarly, Kate Raworth identifies the desire for “cross-country comparisons” as driving human rights indicators projects, though she concludes that universal indicators are neither possible nor desirable. See Kate Raworth, *Measuring Human Rights*, in *PERSPECTIVES ON HEALTH AND HUMAN RIGHTS* 393, 404-411 (Gruskin, Grodin, Annas, Marks, eds., 2005).

<sup>98</sup> For a critique of the CESCR’s approach in the context of the right to health, see Audrey R. Chapman, *The Status of Efforts to Monitor Economic, Social, and Cultural Rights*, in *ECONOMIC RIGHTS: CONCEPTUAL MEASUREMENT, AND POLICY ISSUES* 143-181, 161 (Shareen Hertel & Lanse Minkler, eds., 2007) (“Although admirable in its conceptualization, this process is problematic for its implementation. The dilemma, of course, is that the states parties are in no better position than the Committee to develop rights-based health indicators. Nor does the Committee have the expertise, let alone the time, to engage in the scoping process envisioned in the General Comment.”)

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popular in a wide range of business, non-profit, and governmental management fields.<sup>99</sup> This remains the case: indicators then and now partake of both the strengths and weaknesses of auditing practices.

Audit practices entail “sampling, reliance on external expertise, and the assessment of internal control systems.” As Power argues,

audits have value because they seek to draw general conclusions from a limited examination of the domain under investigation. But despite statistically credible foundations for sampling, audit practice is driven by economic pressures to derive more, or at least as much, assurance from fewer inputs... Reliance on other experts enables the unauditible to be auditible by creating a chain of opinions in which the auditor distances himself from the first order judgements of the expert... [R]eliance on others substitutes for directly checking the thing itself.<sup>100</sup>

Audits—and in our case, indicators—are further constrained by the limits of measurability and affordability. One U.N. staff member involved in the creation of indicators concerning children’s rights explained: “People try to get the information that they can. What is available? What information can you get? Because if you can’t get this information, you can’t get it.”<sup>101</sup> For instance, if vaccinating children has been determined to enhance their right to the highest attainable standard of health, one could use as an indicator the number of children vaccinated. This is a number that would usually be inexpensive and easy to obtain. However, in a country like Bosnia-Herzegovina, where there was a dearth of post-war census information, such a number would also be meaningless, since the percentage of the total population of children who have been vaccinated could not be calculated. As former CESCR Chair Philip Alston explained, “For the most part, [indicators] are essentially statistical in nature. That in turn means that their subject matter must be potentially quantifiable, not only in a technical sense but in practical terms as well.”<sup>102</sup>

Chief among our concerns has been the seemingly inevitable drift from this persistent demand for “potentially quantifiable” information to situations in which technical questions end up playing a more determining role in the choice of human rights indicators than more substantive considerations of the best way to assess rights. As the critics of quantification cited in this Article have pointed out, questions such as “Can it be counted? If so, when and how? How accurately? By whom?” are never merely technical. There are a number of important conceptual problems that beset measurement by indicator as well—problems that should be considered by human rights practitioners. When the Special Rapporteur on the Realization of Economic, Social and Cultural Rights

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<sup>99</sup> Power, *supra* note 15, at 4-6.

<sup>100</sup> Power, *supra* note 15, at 12.

<sup>101</sup> Yulia Krieger, UNICEF Program Officer, Bosnia-Herzegovina, personal interview with AnnJanette Rosga, Sarajevo, Bosnia-Herzegovina, November 9, 2002 (concerning the use of indicators in rights-based development programming).

<sup>102</sup> 1998 U.N. Workshop on Benchmarks, cited in Green at 1077, n. 32.

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made a plea in 1990 for statistical data (“without the availability of a measurement device based on some form of statistical data, there is little chance of obtaining an overall picture which shows the extent which these rights are realized”), he was evincing a widespread preference for quantitative over qualitative measures.<sup>103</sup> This is consistent with post-Enlightenment development of discourses of objectivity, in which “suspicion of certain aspects of subjectivity—namely, of ‘interpretation, selectivity, artistry, and judgment itself’—became ... a prominent feature of objectivity in science.”<sup>104</sup> And “scientization,” as Evan Schofer calls the increasing reliance on social scientific consultants and organizations by NGOs, is rampant internationally.

[T]his trend toward the “scientization” of social activity is particularly pronounced at the international level, where world-polity values of rationality and universalism are strong. ... There is a tendency in both lay and academic discussion to treat the scientization of social planning and governance as a purely instrumental response to the efficacy of science. While this is certainly the case in many domains, it is hardly the whole story. Much scientization takes place in domains where there is little scientific consensus or the efficacy of science is questionable – e.g. ... [concerning] issues of economic underdevelopment.<sup>105</sup>

But numbers, statistics, and the language of quantification generally are still seen as uniquely capable of reducing or eliminating subjectivity. In his seminal history of the association between objectivity and quantification, Theodore Porter observed that “quantification is a technology of distance”<sup>106</sup>:

The language of mathematics is highly structured and rule-bound. ... In public and scientific uses... [it] has long been almost synonymous with rigor and universality. Since the rules for collecting and manipulating numbers are widely shared, they can easily be transported across oceans and continents and used to co-ordinate activities or settle disputes. Perhaps most crucially, reliance on numbers and quantitative manipulation minimizes the need for intimate knowledge and personal trust. Quantification is well suited for communication that goes beyond the boundaries of locality and community.<sup>107</sup>

Thus, the reliance on the language of quantification rests on an assumption that quantification will—at least partially—solve the problem of mistrust. The presentation of

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<sup>103</sup> *Report of the Special Rapporteur on the Realization of Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/Sub.2/1990/19 (1990).

<sup>104</sup> Alan Megill, *Four Senses of Objectivity*, in MEGILL, *supra* note 18, at 11 (quoting Lorraine Daston and Peter Galison, *The Image of Objectivity*, 40 REPRESENTATIONS 81, 98 [1992]).

<sup>105</sup> Evan Schofer, *Science Associations in the International Sphere, 1875-1990: The Rationalization of Science and the Scientization of Society*, in CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875, 249, 264 (John Boli and George M. Thomas eds., 1999).

<sup>106</sup> Porter, *supra* note 1, at ix.

<sup>107</sup> *Id.*

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neatly tabulated numbers erases the means and messiness of their own generation.<sup>108</sup> It obscures evidence of the human judgment involved in statistical production.

No one in the human rights field pretends that indicators can ever really be *apolitical*, but the need for information that is as accurate, reliable, and meaningful as possible is pressing. Unfortunately, discussions of criteria for good indicators tend not to specify which form of objectivity is at work. Wendy Lesser identifies two different senses of objectivity: the first sense of objectivity is the “sense that an objective report is disinterested, honest, reliable, impartial.”<sup>109</sup> The second sense of the term suggests that “only something which is not subjective—which does not partake of the individual human viewpoint—can be fully objective, neutrally conveying things and events that are out in the world without the distorting coloration of human consciousness.”<sup>110</sup> Lesser points out that only a machine (her example is a television camera) can ever hope to approach the second sense:

And even that possibility seems remote... for in order to become a functional picture of reality, even television’s images need to be absorbed by our particular minds. The picture itself can have no meaning until viewers make something of it...<sup>111</sup>

But humans, with human judgment and interpretation, she reminds us, are necessary for the first sense.

I depend on people to give objective—is in the sense of disinterested and impartial—interpretations to videotape... Objectivity, in the first of the two senses, is a quality that only the human mind can have.<sup>112</sup>

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<sup>108</sup> Describing the process by which indicators were developed for an assessment Bosnia-Herzegovina’s fulfillment of certain children’s rights obligations, a UNICEF staff person explained: “It [was] such an ad hoc thing how this [production of indicators] worked. [A handful of employees from different U.N. agencies] sort of all [sat] down and agreed on these indicators. Then [they were] translated into Bosnian and ... the [Bosnian] consultants [took them] to their own government institutions to consult ... saying, ‘What do you think? Are there any other ones you want?’ The ...local consultants [had to insist] on [unified] methodology [because] here, the statistical institute sometimes uses different methodologies and different entities from the same data. [Findings aren’t even] comparable at the state level.” Krieger, *supra* note 101. As this comment suggests, the dual assumptions that (a) social science methodologies – even statistical ones – are universal, and (b) similar types of data are, or should be, equally available everywhere, are disproved in practice.

<sup>109</sup> WENDY LESSER, PICTURES AT AN EXECUTION: AN INQUIRY INTO THE SUBJECT OF MURDER 139 (1993).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Of course, exegeses and critiques of various conceptions of objectivity are numerous and reflect considerably more complexity and nuance than Lesser’s more succinct summation here. For a sampling across disciplines, see MEGILL, *supra* note 18 (an especially useful collection of essays); RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS VOLUME I (1991); OBJECTIVITY AND ITS OTHER (Wolfgang Natter, Theodore R. Schatzki & John Paul Jones III, eds., 1995); Sandra Harding, *Rethinking Standpoint Epistemology: What is “Strong Objectivity?”* in FEMINIST EPISTEMOLOGIES 49 (Linda Alcoff & Elizabeth Potter eds., 1993); Marsha P. Hanen, *Feminism, Objectivity, and Legal Truth*, in

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Discussions of “objective” indicators are vulnerable to both the tendencies to conflate these two senses of objectivity (valuing less those indicators which require obvious human interpretation, such as qualitative assessments) and/or to privilege those (generally numerical) indicators whose interpretive work is invisible.

As discussed with regard to the work of the CESC, chief among the strengths of auditing practices is their rhetorically powerful capacity for transferability. Indicators are said ideally to allow comparisons between nations at similar levels of economic development, and over time within a given nation. As Power puts it, “the general principles of quality control systems ... can be made to look similar and enable them to be compared at an abstract level.”<sup>113</sup>

### C. Goodhart’s Law: The Tendency for Measures to Become Targets

Yet even to the degree indicators “can be made to look similar and ... compared at an abstract level,”<sup>114</sup> across geographical space, they tend to lose their efficacy as accurate and adequate measures over time. Scholars suggest that this is a characteristic of all measurement mechanisms that are tied to the goal of *improvement*. As the social anthropologist Marilyn Strathern puts it, “When a measure becomes a target, it ceases to be a good measure.”<sup>115</sup> Applied to the use of indicators in the human rights context, this principle explains the phenomenon of the “expectations gap”<sup>116</sup> in which a nation’s reporting of successful fulfillment of treaty obligations has a more or less distant relationship to the actual enjoyment of rights by its citizens.

[A]uditing works by virtue of actively *creating* the external organizational environment in which it operates. ...Audit is never purely neutral in its

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FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHODS AND MORALS 29 (Lorraine Code, Sheila Mullett & Christine Overall eds., 1988); and KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992). For a particularly important trio of sources outlining the key fault-lines of political and methodological debates about the uses of the languages of objectivity, along with some possible bridging strategies, see: Donna Haraway, *Situated Knowledges*, in *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 183 (1991); and the conversation between Robin West and Barbara Herrnstein Smith in the following publications: Robin West, *Relativism, Objectivity and Law*, 99 *YALE L.J.*, 1473 (1990); and Barbara Herrnstein Smith, “*The Unquiet Judge*”: *Activism without Objectivism in Law and Politics*, in *MEGILL supra* note 18 at 289.

<sup>113</sup> Power, *supra* note 15, at 12.

<sup>114</sup> *Id.*

<sup>115</sup> Marilyn Strathern, ‘*Improving Ratings*’: *Audit in the British University System*, 5 *EUROPEAN REVIEW* 305, 308 (1997) (referring to Keith Hoskin’s discussion of the many possible applications of “Goodhart’s law” (citing Keith Hoskin, *The ‘awful idea of accountability’: inscribing people into the measurement of objects*, in *ACCOUNTABILITY: POWER, ETHOS AND THE TECHNOLOGIES OF MANAGING* 265 (Rolland Munro and Jan Mouritsen eds., (1996))). Goodhart’s law originates in economic theory and describes the processes by which targets become measures in financial control practices. Goodhart’s law, as paraphrased in *PEARS CYCLOPAEDIA G27*(1990), states that “[a]s soon as the government attempts to regulate any particular set of financial assets, these become unreliable as indicators of economic trends.” See Michael McIntyre, *Lucidity and Science, Parts I, II, III*, available at

<http://www.atm.damtp.cam.ac.uk/people/mem/papers/LHCE/goodhart.html>.

<sup>116</sup> Power, *supra* note 15, at 9-10.



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operations... New motivational structures emerge as auditees develop strategies to cope with being audited; it is important to be seen to comply with performance measurement systems while retaining as much autonomy as possible.<sup>117</sup>

Strathern cites an account by Haridimos Tsoukas to demonstrate this phenomenon:

In 1993, new regulations [required] local authorities in the UK...to publish indicators of output, no fewer than 152 of them, covering a variety of issues of local concern. The idea was, [Tsoukas] reports, to make councils' performance transparent and thus give them an incentive to improve their services. As a result, however,... even though elderly people might want a deep freeze and microwave rather than food delivered by home helps, the number of home helps [was] the indicator for helping the elderly with their meals and an authority could only improve its *recognised* performance of help by providing the elderly with the very service they wanted less of, namely, more home helps. ...The language of indicators takes over the language of service.<sup>118</sup>

Applied to human rights indicators, this principle underlies the risk that, to the extent that governments do actively try to meet benchmarks and standards set in relation to international human rights treaties, the incentive to demonstrate success—or, say, “progressive realization”—according to given indicators may become greater than any incentive to substantively ensure the fulfillment and/or enjoyment of human rights themselves. For example, efforts abound to measure States' compliance with the right to gender equality in education. A common indicator for this right is the ratio of girls to boys enrolled in primary education.<sup>119</sup> Given that States will be rewarded for demonstrating narrow ratios, there is a built-in incentive to document female school enrollment. However, such figures do not allow substantive rights fulfillment to be assessed. Important contextual information that would do so includes the existence of curricula assessed as qualitatively equitable, the absence of sex segregation in schools, and actual school attendance of girls as compared to boys.

While the ratio of female to male enrollment may—when situated within sufficient contextual information—initially be a good indicator, the tendency for measures to become targets means that the link between the indicator and the right purportedly being measured attenuates over time. Thus, the demand for indicators to be

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<sup>117</sup> *Id.*, at 13.

<sup>118</sup> Marilyn Strathern, *The Tyranny of Transparency*, 26(3) BRIT. ED.RESEARCH J. 309, 314 (2000).

<sup>119</sup> For a discussion of this indicator, see *Report of the Special Rapporteur on the Right to Education, Katarina Tomasevski*, E/CN.4/2002/60 (2002), at paras 40-43, and UNESCO, *Overcoming Obstacles to Educating Girls* (2002), available at: [http://www.unesco.org/education/efa/wef\\_2000/strategy\\_sessions/session\\_I-2.shtml](http://www.unesco.org/education/efa/wef_2000/strategy_sessions/session_I-2.shtml). Note also that the ratio of boys to girls in education is an indicator for Millennium Development Goal No. 3, “Promote Gender Equality and Empower Women.” See *MDGS: Goals, Targets, and Indicators*, available at: <http://www.undp.org/mdg/Millennium%20Development%20Goals.pdf>.

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“consistently measurable” carries with it an inherent weakness: applying the same indicators over time does not guarantee consistent measurement of rights fulfillment. Instead, indicators lose value as States adjust their practices to improve their standing according to those indicators.

Furthermore, it is particularly the case with economic and social rights that States must continually make difficult prioritization choices. Which should receive the State’s most concentrated attention? The right to clean water or childhood vaccination? Gender equality in schools or ensuring non-discriminatory employment conditions? And how should government authorities *make* such determinations? Who should decide and by what means? It is easy enough to demand in principle that all rights receive equal attention and priority, but in practice this is seldom, if ever, possible—especially in resource-poor countries. The Goodhart’s law phenomenon—the tendency for measures to become targets—not only has potentially negative effects on the scientific quality of the measure. Fundamentally, this effect may also distort the very goals that human rights indicators were designed to achieve in the first place. States may well end up over-privileging their performance according to externally imposed international indicators rather than making holistic assessments of the relative economic and social rights-related needs of their populations and prioritizing accordingly.

If human rights indicators have not been developed through any democratic process by which the people under a State’s jurisdiction—whose enjoyment of rights is putatively being measured—are able to weigh in on the question of States’ priorities, then those people may end up like the elderly people in the U.K. example cited above: lacking freezers and microwaves but awash in home food deliveries they would just as soon not rely upon.

An example from Rosga’s ethnographic research will help to illustrate this point.<sup>120</sup> Rosga was a participant-observer at a meeting of consultants and representatives from intergovernmental and non-governmental human rights organizations who had gathered to discuss human trafficking indicators. All attendees had significant expertise on the topic of trafficking for exploitative labor, especially trafficking of women and children, and trafficking for the purpose of sexual exploitation. All were concerned with victims’ rights. Much of the meeting was devoted to the question of data: both the need for more—and more accurate—information about human trafficking.<sup>121</sup> In the following exchange taken from Rosga’s field notes (regarding “the users of information” about

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<sup>120</sup> These data are taken from research for Rosga’s book-in-progress, *Trafficking in the Rule of Law: Police and Human Rights Advocates in Emerging Democracies*. Detailed information on the field site and participants is omitted to protect informant confidentiality, per agreements made under Protocol Number 0505.07 of the University of Colorado-Boulder’s Human Research Committee.

<sup>121</sup> Notably, the meeting participants defied any effort to sort them into professional categories. At various points in their careers, they had been advocates and experts—sometimes simultaneously, sometimes with deliberate separation between these roles. One participant had been a prominent “local” NGO member but was now an expert consultant working for intergovernmental organizations. Another was a leader in a regional anti-trafficking network and pursuing her Ph.D. in the social sciences. Yet another had worked in shelters with trafficking victims in her home country but now worked as an economics analyst for an IGO.

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human trafficking), the participants clearly articulate their concern with the way that indicators can, rather than simply providing information, come to shape governments' framing of social problems, and thereby their relative prioritization of resources.

Participant 1: [Noting that the quality of information changes over time as its producers become more skilled at formulating it strategically]: My first effort at collecting information [about human trafficking] was easiest because no one knew what I was talking about. My second effort was harder, because they [government agency representatives] were anticipating me. The third was worst because they were deliberately creating reality to suit their own ends. They understood by then the meaning of what they were saying about trafficking. In the beginning, no one knew or cared what the grounds were for the Minister of Security to claim there had been one victim of trafficking in the past year and for NGOs to say there had been sixty-nine. But in time they became aware of the consequences to themselves of painting particular kinds of pictures.

As this participant's succinct account of her experience with data collection suggests, while it is valuable in some respects to use the same indicators over time, as standardization produces the ability to make both transnational and longitudinal comparisons, there are accompanying downsides to standardization as well. *Even as* governments' infrastructure may in fact improve, enabling greater *technical* accuracy in the reporting of indicator-driven data, government reporters of such data will likely develop accompanying sophistication in their abilities to manipulate informational presentations, raising yet again the twin specters of trust and accountability. No amount of statistical finesse will eliminate the need to ask how much political manipulation is involved when governments respond to demands for information—all the more so to the degree that their answers actually *do* have an impact on their standing in the international community.

### **III. Enter the Experts: Renewed Efforts to Create International Human Rights Indicators**

As foreshadowed in Section I above, the Committee on Economic, Social and Cultural Rights did not abandon its hopes for universal indicators when it assigned itself the role of auditor. Instead, it turned to experts for help. In 2005, the Chair of the CESCR, together with the chairpersons of the other U.N. human rights treaty bodies, requested the U.N. Office of the High Commissioner for Human Rights to study the issue of human rights indicators and produce a report on that topic for their consideration in

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2006.<sup>122</sup> The 2006 “Report on Indicators for Monitoring Compliance with International Human Rights Instruments” explained that during 2005 and 2006, the OHCHR embarked on a process aimed at determining whether the:

use of appropriate quantitative indicators for assessing the implementation of human rights—in what is essentially a qualitative and quasi-judicial exercise—could contribute to streamlining the process, enhance its transparency, make it more effective, reduce the reporting burden and above all improve follow-up on the recommendations and concluding observations, both at the committee, as well as the country, levels.<sup>123</sup>

In other words, the OHCHR was tasked with determining how quantitative data, organized as indicators, could be used to make a function that was admittedly “quasi-judicial”—the assessment of whether States were living up to their human rights commitments—more feasible, transparent, and effective. The nature of the “effectiveness” desired as an outcome of assessment is somewhat opaque: the use of indicators is sought to “improve follow-up on the recommendations and concluding observations” of the treaty bodies. Just what form this follow-up might take is never clearly specified, though presumably it involves States conforming with the treaty bodies’ recommendations.

By asking the OHCHR—a body of professional staff mandated to support the work of the treaty bodies—to undertake the task of developing universal indicators for human rights, the treaty bodies were asking a group of human rights professionals to achieve what they themselves had been unable to do: to transform a judgment-laden process into one that appeared technical, scientific, and therefore—in the context in which the treaty bodies’ authority is often in doubt—more legitimate. Embedded in the 2006 Report was the assumption that an “appropriate” set of indicators would at once garner the support of social scientists, States, and civil society. Having done this, such indicators could then be used by treaty bodies in what would appear to be a technical exercise of application, moving the treaty bodies beyond mere auditing to actual assessment of State compliance with the human rights standards set out in the treaties. This would have two advantages. First, it would be an assessment that appeared to be objective because it was based on quantitative, scientifically validated methods, embodied in measurement indicators, rather than in more visibly subjective (and therefore more apparently open to politicization) exercises of human judgment. Second, this very focus on indicators would effectively foreground the end-product of (apparently neutral) measurement made possible by indicators, in the form of conclusions concerning States’ progress on rights, compliance with treaty obligations, and recommended next steps. Simultaneously, the focus on indicators would *background* the acts of interpretation necessary to transform abstractly worded international laws into human rights standards both capable of and appropriate for transnational measurement.

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<sup>122</sup> OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, U.N. Doc. HRI/MC/2006/7 (2006) at para 1 [hereinafter 2006 Report on Indicators].

<sup>123</sup> *Id.*, para 2.

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### A. The Troubled Authority of the Human Rights Treaty Bodies in International Law

This ambitious goal—to create a set of indicators capable of attracting the agreement of States, human rights advocates, and social scientists—is understandable given the longstanding and unresolved issue of the status of the treaty bodies—and thus of their assessments—in international law. Indeed, the turn toward mechanics of measurement and notions of scientific objectivity may appear to offer a kind of authority that the treaty bodies have never been able to achieve through the “quasi-judicial exercise[s]” that make up their core functions.

As a general matter, the human rights treaty bodies were set up to monitor States’ implementation of and compliance with the treaties to which they are parties. With the exception of the CESCR, provision for the composition, functions, and powers of each treaty body is set out in the instrument itself<sup>124</sup>; the CESCR was created by the U.N. Economic and Social Council to carry out the functions described for ECOSOC in the treaty.<sup>125</sup> Each of the seven main treaty bodies review periodic State reports on their efforts to implement and comply with the treaties; five are empowered to review complaints from individuals; two can act pursuant to an inquiry procedure that allows them to investigate “grave” or “systematic” violations; and four have the ability to entertain complaints by one State concerning another (though no State has ever utilized this procedure).<sup>126</sup> Made up of independent experts elected by the States parties, the treaty bodies meet for several short periods each year, during which they carry out their mandated functions.<sup>127</sup>

Over the years, the treaty bodies have become more and more evaluative in their approach. While once their role was understood to be almost entirely that of a supportive guide for States in implementing the treaties, the Committees now assess State performance through several procedures.<sup>128</sup> All of the treaty bodies work pursuant to treaty-specific Rules of Procedure, and they all formally review State practice in hearings in which State representatives are invited to present their periodic reports and to answer questions from members of the treaty bodies. These sessions are called “constructive dialogues,” and the official approach is non-adversarial, as the OHCHR explains:

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<sup>124</sup> See ICCPR, *supra* note 24, arts. 28-45; CAT, *supra* note 41, arts. 17-24; Convention on the Elimination of All Forms of Discrimination Against Women, 1240 U.N.T.S. 13, arts. 17-22; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, arts. 8-16; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *reprinted in* 30 ILM 1517, arts. 72-78.

<sup>125</sup> See U.N. Office of the High Commissioner for Human Rights, “Committee on Economic, Social and Cultural Rights,” available at <http://www2.ohchr.org/english/bodies/cescr/index.htm>.

<sup>126</sup> OHCHR, *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/2 at para. 3 (2006) [hereinafter OHCHR, *Concept Paper*].

<sup>127</sup> See generally U.N. Office of the High Commissioner for Human Rights, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies* (undated), available at <http://www2.ohchr.org/english/bodies/treaty/index.htm>.

<sup>128</sup> See STEINER, ALSTON & GOODMAN, *supra* note 23, at 844-918 (examining the changing role of the treaty bodies over time, using the Human Rights Committee as an example).

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This procedure is not adversarial and the committee does not pass judgment on the State party. Rather the aim is to engage in a constructive dialogue in order to assist the Government in its efforts to implement the treaty as fully and effectively as possible. The notion of constructive dialogue reflects the fact that the treaty bodies are not judicial bodies, but were created to monitor the implementation of the treaties and provide encouragement and advice to States.<sup>129</sup>

In practice, however, the “constructive” dialogues range from extremely collegial to quite contentious. They are followed by written concluding comments or observations, in which the Committees review both positive and negative aspects of the State party’s performance under the treaty.<sup>130</sup> While the treaty bodies avoid overt findings of specific violations during this periodic review process, a number of the treaty bodies come very close to making such determinations.<sup>131</sup> For example, the Human Rights Committee, which monitors the ICCPR, makes pointed statements of “concern” about specific practices or allegations, and follows those with recommendations for how the State can ensure compliance with the treaty.<sup>132</sup> In recent years, a number of treaty bodies have taken significant steps to follow up on these recommendations.<sup>133</sup> Informally, NGOs often use concluding comments in their advocacy efforts, and they can become the subject of intense domestic and international pressure as a result.

As explored earlier in this Article, the treaty bodies also issue General Comments (also called General Recommendations by some treaty bodies). While General Comments began largely as vehicles to explain procedural matters or to provide guidance for States in preparing their reports to the committees, they have, over time, come to emphasize interpretation, explicating in some detail the substantive provisions of the

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<sup>129</sup> OHCHR, Concept Paper, *supra* note 126, at 31.

<sup>130</sup> The treaty bodies only began issuing collective written concluding comments (or “concluding observations”) in the 1990s, though some of the bodies allowed their members to submit written individual observations before that. For a discussion of the evolving nature of concluding comments, see Michael O’Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27 (2006).

<sup>131</sup> *Id.* O’Flaherty summarizes the legal status of concluding comments as follows: “(a) They have no binding status for States; (b) Nevertheless, as outputs of the treaty bodies they have a notable authority, albeit ill-specified; (c) This authority is most apparent in situations where the treaty bodies pronounce on issues of violation of the treaties and where they otherwise purport to interpret treaty provisions; (d) The authority is less clear where the treaty bodies provide general advice on strategies for enhanced implementation of a treaty and when they opine on matters which seem to have little or nothing to do with the actual treaty obligations of the State Party.” *Id.* at 36.

<sup>132</sup> See, e.g., Human Rights Committee, Concluding Observations Concerning France, U.N. Doc. CCPR/C/FRA/CO/4 para. 20 (2008) (Human Rights Committee, reviewing report of France, stating that the Committee “is concerned by reports that foreign nationals have in fact been returned by the State party to such countries, and subjected to treatment that violates article 7 of the Covenant,” and that, accordingly, “The State party should ensure that the return of foreign nationals, including asylum seekers, is assessed through a fair process that effectively excludes the real risk that any person will face serious human rights violations upon his return.”).

<sup>133</sup> See OHCHR, Concept Paper, *supra* note 126, at 32. See also O’Flaherty, *supra* note 130, at 47-51.

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relevant treaty.<sup>134</sup> As a general matter, General Comments have become more and more reasoned, formally structured, and far-ranging.<sup>135</sup> They have set out the content of key rights, articulated State duties in relation to those rights, and explored issues such as remedies and monitoring. Some famous General Comments have sought to resolve—in favor of broad human rights principles—basic issues in international law; when they have done so, some States have taken strong objection.<sup>136</sup> Despite this, some General Comments have become extremely influential through formal and informal channels by guiding State policies<sup>137</sup>, influencing U.N. agency actions<sup>138</sup>, and becoming the framework for NGO action.<sup>139</sup>

Treaty bodies that decide individual petitions have an even more judicial, or court-like role than those that do not. They must decide, based on written submissions by the petitioner and the responding State, whether there has been a violation of the relevant treaty, and if so, what actions the State should take to remedy the violation.<sup>140</sup> Even at

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<sup>134</sup> See STEINER, ALSTON & GOODMAN, *supra* note 23, at 877-884. See also Philip Alston, *The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB 763 (L. Boisson de Chazournes & V. Gowland Debbas, eds., 2001).

<sup>135</sup> See *id.*

<sup>136</sup> Perhaps the most well-known example of such a controversy involves the Human Rights Committee’s General Comment No. 24 on reservations to the ICCPR. Reservations are statements made by States at the time they ratify a treaty that purport to alter the legal content of the treaty being ratified. See Vienna Convention on the Law of Treaties, art. 2., May 23, 1969, 1155 U.N.T.S. 331. In General Comment No. 24, the Human Rights Committee asserted its power to review the validity of reservations to the ICCPR, and to sever—essentially to ignore—those reservations it determines are contrary to the object and purpose of the Covenant. See U.N. Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/69c55b086f72957ec12563ed004ecf7a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a?Opendocument). The United States, France, and the United Kingdom all lodged official objections to the General Comment. See “Observations by the United Kingdom on General Comment No. 24” in *Report of the Human Rights Committee*, U.M. Doc. A/50/40, vol. 1 (1995); “Observations by the United States of America on General Comment No. 24” in *id.*; and “Observations by France on General Comment No. 24 on Reservations to the ICCPR” in *Report of the Human Rights Committee*, U.N. Doc. A/51/40, vol. 1 (1995).

<sup>137</sup> For example, in 2006, the U.K. government recognized that there is a right to water under international law. See U.K. Department for International Development (DFID), Press Release: UK recognises the right to water as Hilary Benn launches call for Global Action Plan to solve water crisis (Nov. 6, 2006), available at <http://www.dfid.gov.uk/news/files/pressreleases/human-dev-report06.asp>. It cited the CESCR’s General Comment No. 15 on the Right to Water in its background document released at the time of the announcement. See DFID, *The Human Right to Water* paras. 3-5, available at <http://www.dfid.gov.uk/news/files/pressreleases/human-dev-report06.asp>.

<sup>138</sup> For example, see UNDP, HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS 60-74 (2006) (citing the CESCR’s General Comment No. 15 on the Right to Water and setting out U.N. policies to support that right).

<sup>139</sup> For example, see CENTER FOR HUMAN RIGHTS & GLOBAL JUSTICE, PARTNERS IN HEALTH, RFK CENTER FOR HUMAN RIGHTS, AND ZANMI LASANTE: WÒCH NAN SOLEY: THE DENIAL OF THE RIGHT TO WATER IN HAITI 27 (2008), available at <http://www.chrgj.org/publications/reports.html#escr> (describing the CESCR General Comment No. 15 on the Right to Water as the basis for a collaborative effort to document and denounce violations of the right to water in Haiti).

<sup>140</sup> OHCHR, *Human Rights Treaty Bodies—Individual Communications*, available at

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this, the height of the Committees’ “quasi-judicial” role, the decisions of the treaty bodies are not binding as a matter of treaty law.<sup>141</sup> Despite this limitation, the normative impact of the treaty bodies’ decisions are significant.<sup>142</sup> As the OHCHR has explained:

It is through individual complaints that human rights are given concrete meaning. In the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect. When applied to a person's real-life situation, the standards contained in international human rights treaties find their most direct application. The resulting body of decisions may guide States, non-governmental organizations (NGOs) and individuals in interpreting the contemporary meaning of the texts concerned.<sup>143</sup>

The decisions of the treaty bodies in individual cases often have a wide-ranging impact. Notwithstanding the formal non-binding nature of the Committees’ recommendations, the relevant State may act in accordance with them, extending compensation to victims, or changing laws or policies.<sup>144</sup> Even when this is not the case, NGOs and other civil society actors often use such decisions as the basis for advocacy efforts.

Finally, General Comments, decisions in individual cases, and even concluding comments have been cited by international<sup>145</sup>, regional<sup>146</sup>, and domestic courts.<sup>147</sup> For example, the International Court of Justice cited approvingly the reasoning of the Human Rights Committee in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004.<sup>148</sup> In that case, the ICJ cited to individual cases, a General Comment, and concluding comments of the

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<http://www2.ohchr.org/english/bodies/petitions/individual.htm>.

<sup>141</sup> OHCHR, Concept Paper, *supra* note 126, at 34.

<sup>142</sup> Some influential commentators have argued that the decisions of the treaty bodies in individual cases are much more than recommendations. *See, e.g.*, MARTIN SCHEININ & RAJIA HANSKI, *LEADING CASES OF THE HUMAN RIGHTS COMMITTEE* 22 (2003) (arguing that “it would be wrong to categorize the Committee’s views as mere ‘recommendations’. They are the end result of a quasi-judicial adversarial international body established and elected by the States Parties for the purpose of interpreting the provisions of the Covenant and monitoring compliance with them.”).

<sup>143</sup> OHCHR, *Human Rights Treaty Bodies—Individual Communications*, available at <http://www2.ohchr.org/english/bodies/petitions/individual.htm>.

<sup>144</sup> For a discussion of State responses to the decisions of the Human Rights Committee, *see* “Comment on Outcome of the Communications Procedures,” in STEINER, ALSTON & GOODMAN, *supra* note 23, at 913-914.

<sup>145</sup> *See, e.g.*, *Prosecutor v. Tadic*, Case No. ICTY- IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at para. 46 (2 October 1995) (citing and deploying the reasoning of the Human Rights Committee as reflected in individual cases and a General Comment).

<sup>146</sup> *See, e.g.*, *Kurt v. Turkey*, 27 Eur. Ct. H.R. 373, para. 65 (1998) (referring to the case law of the Human Rights Committee concerning enforced disappearances).

<sup>147</sup> *See, e.g.*, *State v. Makwanyane & Mchunu*, reprinted in 16 HUM. RTS. L. J. 154, 160 (1995) (Const. Ct. 1995) (S. Afr.) (discussing, as an interpretive tool, the approach of the Human Rights Committee to the death penalty).

<sup>148</sup> *See* *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 2004 I.C.J. 131, ¶¶ 109, 110, 136 (July 9).



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Human Rights Committee.<sup>149</sup> Through such frequent and high-level references, the work of the treaty bodies takes on an authoritative quality that, at times, approaches that of an international court or tribunal.

Thus, the treaty bodies walk a difficult tightrope: constrained by positive international law, their greatest power is often normative. They are at the height of their authority when they are most persuasive, when their legal analysis—their *judgment*—is valued. A power based on persuasion can be severely limiting, however. In the case of indicators, as explored below, the treaty bodies seem to be hoping that the power of social science will have greater “compliance pull” than well-reasoned General Comments or persuasive decisions in individual cases.

## B. Expert Indicators: The OHCHR Indicators Initiative

To carry out the task entrusted to it by the treaty bodies, the OHCHR itself turned to professionals, convening several meetings of experts from the academy, international agencies and non-governmental organizations, as well as members of the treaty bodies themselves, to discuss indicators. The goal of these meetings—held initially in August 2005 and March 2006, with follow up meetings in December 2006<sup>150</sup>, December 2007, and April 2008<sup>151</sup>—was to design a conceptual framework for the creation and implementation of human rights indicators that could be used for “monitoring the compliance of State parties with international human rights instruments” by the treaty bodies.<sup>152</sup> Since the work was undertaken at the request of the treaty bodies, the 2006 Report assumed that the indicators being developed would be used by the treaty bodies in their assessment of State compliance with the relevant treaties.

The result was a framework that made an enormous contribution in terms of conceptually clarifying human rights indicators, while also significantly scaling down expectations for the use of those indicators. Whereas the initial hope was, ambitiously, for a set of indicators that could be used for “monitoring compliance” with human rights treaties<sup>153</sup>, the final product is a framework that “seeks neither to prepare a common list of indicators to be applied across all countries irrespective of their social, political and economic development, nor to make a case for building a global measure for cross-country comparisons on the realization of human rights.”<sup>154</sup> Through the experts’

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<sup>149</sup> See Advisory Opinion, *supra* note 148, at ¶¶ 109 (individual cases), 110 (concluding comments), and 136 (General Comment).

<sup>150</sup> Satterthwaite was a participant at the December 2006 meeting.

<sup>151</sup> OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, U.N. Doc. HRI/MC/2008/3 (2008) at note 17, page 15 [hereinafter 2008 Report on Indicators].

<sup>152</sup> *Id.* at para 33.

<sup>153</sup> See OHCHR, 2006 Report on Indicators, *supra* note 122, at para. 12 (“In the use of indicators for monitoring the implementation of human rights, the first step should be to have a general agreement on the choice of indicators. This should be followed by setting performance benchmarks on those selected indicators.” (citations omitted)).

<sup>154</sup> OHCHR, 2008 Report on Indicators, *supra* note 151, at para. 43.

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consultations, then, the goal of creating universally applicable indicators for the use of treaty bodies in measuring compliance with treaties was transformed into a framework and attendant list of *illustrative* indicators that “allows a balance between the use of a core set of human rights indicators that may be universally relevant and at the same time retain the flexibility of a more detailed and focused assessment on certain attributes of the relevant human rights, depending on the requirements of a particular situation.”<sup>155</sup> In short, an effort that was initially aimed at giving the treaty bodies a new tool to help in the “quasi-judicial” exercise of assessing State compliance with treaties was transformed into an initiative aimed at giving all human rights practitioners a tool to conduct that assessment—implicitly now seen as a technical exercise.

At a conceptual level, the OHCHR’s framework responds to a number of the concerns discussed in Section I of this Article. For example, the confusion over whether indicators would measure human rights enjoyment by populations under a State’s jurisdiction or efforts made by States to fulfill their treaty obligations<sup>156</sup> was resolved in favor of measuring both enjoyment *and* State effort in order to allow for assessment of compliance. The framework adopts the same approach for all rights—whether civil and political, or social, economic, and cultural, eschewing earlier divisions between types of rights.<sup>157</sup> Each substantive right is broken down into several elements, or “characteristics” based on the normative content of the right as set out in relevant treaties and General Comments produced by the relevant treaty bodies. The framework adopted by the OHCHR therefore draws on the increasing conceptual clarity concerning the human rights set out in the core treaties. The right to life, for example, was given the following “attributes”: arbitrary deprivation of life, disappearances of individuals, health and nutrition, and the death penalty.<sup>158</sup> One of the limitations of this approach, of course, is that those rights that have not been as carefully explicated by the treaty bodies will not be as easily translated into the indicators framework. Several experts have suggested that indicators should be created only for those rights that had been the subject of at least one General Comment by the relevant treaty body.<sup>159</sup> Otherwise, as our initial critique suggested and others also worry, the experts might—in effect—get ahead of the treaty bodies, articulating human rights norms and standards through their measurement indicators, rather than the other way around.<sup>160</sup>

Once attributes were identified for a given right, three types of indicators were designed for each right: *structural, process, and outcome*. Briefly, *structural indicators* “reflect the ratification and adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of a human right.

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<sup>155</sup> *Id.* at para. 43.

<sup>156</sup> For a discussion of this confusion in earlier efforts, see Kate Raworth, *supra* note 97.

<sup>157</sup> See OHCHR, 2008 Report on Indicators, *supra* note 151, at para 5.

<sup>158</sup> See *id.* at para. 7.

<sup>159</sup> Personal communications with Satterthwaite.

<sup>160</sup> A related concern is expressed by Todd Landman, who states that “Tremendous progress in human rights measurement has been achieved but there are serious and significant lacunae in the field that need to be addressed that include [. . .] the *content of rights that remain unmeasured*. . . .” Landman, *supra* note 62, at 91 (emphasis in original).

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They capture commitments or the intent of the State in undertaking measures for the realization of the concerned human right.”<sup>161</sup> Quite literally, these indicators include things like—for the right to adequate housing—“[i]nternational human rights instruments, relevant to the right to adequate housing, ratified by the State.”<sup>162</sup> *Process indicators* measure the efforts of States as they implement and enforce human rights; they measure things like the amount of money spent on a program to fulfill a given right, or the number of complaints processed by the authorities concerning alleged violations of the right being assessed. Process indicators are meant to capture the *cause* element of a cause and effect relationship between the efforts of States and the fulfillment of the right under examination.<sup>163</sup> Outcome indicators, explained below, are meant to capture the *effect* element. Importantly, process indicators are said to be “more sensitive to changes than outcome indicators and hence are better at capturing progressive realization of the right or in reflecting the efforts of the State parties in protecting the rights.”<sup>164</sup>

*Outcome indicators* aim to measure the actual enjoyment of the human right under consideration by the relevant population. It is in this category that the familiar socioeconomic indicators can most prominently be found. For example, in relation to the right to life, “life expectancy at birth” can be found alongside “number of deaths in custody per 1,000 detained or imprisoned persons, by cause of death (e.g. illness, suicide, homicide).”<sup>165</sup> If the appropriate process indicators have been chosen, there will be a cause and effect relationship between the State efforts measured by the process indicators and the fulfillment of rights measured by outcome indicators. By using all three types of indicators to measure an individual right, the idea is to “reflect the commitment-effort-results aspect of the realization of human rights through available quantifiable information.”<sup>166</sup> This cause and effect relationship may be among the hardest elements to achieve using the conceptual framework adopted by the OHCHR. This is true because understanding cause and effect requires extremely detailed, comprehensive and context-specific analysis.<sup>167</sup> As the framework stands, only “illustrative” indicators are chosen for

<sup>161</sup> See OHCHR, 2008 Report on Indicators, *supra* note 151, at para.18.

<sup>162</sup> See *id.* at page 29.

<sup>163</sup> See *id.* at para. 19.

<sup>164</sup> See *id.* at para. 19.

<sup>165</sup> See *id.* at page 22.

<sup>166</sup> See *id.* at para. 17.

<sup>167</sup> For a discussion of the difficulty of reflecting cause and effect through indicators, see Erik Andre Andersen and Hans-Otto Sano, *Human Rights Indicators at Programme and Project Level – Guidelines for Defining Indicators, Monitoring and Evaluation*, The Danish Institute for Human Rights (2006), available at

[http://www.humanrightsimpact.org/fileadmin/hria\\_resources/human\\_rights\\_indicators\\_at\\_prog\\_and\\_proj\\_level.pdf](http://www.humanrightsimpact.org/fileadmin/hria_resources/human_rights_indicators_at_prog_and_proj_level.pdf) (discussing the difficulty of properly “attributing” an impact to a specific intervention in the context of project management and evaluation). Furthermore, causal relationships in the social world are notoriously difficult to measure using non-experimental methods (methods without entirely known and strictly controlled variables). As sociologist Stanley Lieberon reminds us, “Empirical data can tell us what is happening far more readily than they can tell us why it is happening.” STANLEY LIEBERSON, MAKING IT COUNT: THE IMPROVEMENT OF SOCIAL RESEARCH AND THEORY 219 (1987). Yet, “there is a tendency to make explained variance or the well-behaved data set a good in itself. As a consequence, the researcher is prone to judge the optimal outcome in terms of the closest fit or the most variance explained” *Id.* at 91. In other words, social researchers—often in spite of themselves—will tend to *suggest* that when “statistically

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any given right; it would therefore seem impossible to guarantee that a specific cause and effect relationship will be captured in relation to a specific right in a given country.

In the last two years, the OHCHR has piloted its framework and illustrative indicators through national and regional workshops.<sup>168</sup> Through these consultations, the OHCHR has refined its procedural approach to developing and using human rights indicators. The result seems to be a significant emphasis on participation in the development and use of indicators. Whereas earlier work seemed to assume that experts at the international level could develop universal indicators that would apply across countries, the most recent report from the OHCHR calls for participation in the selection of indicators as an essential element of their use.<sup>169</sup> While this participatory aspect is to be welcomed, it also calls into doubt the coherence of a framework that seeks to reflect certain kinds of relationships. If a group of stakeholders, for example, selects two or three process indicators that are not in any logical sense the “cause” of the outcome indicators also chosen, which body will make sense of the results?

There is also an improvement in inclusiveness concerning sources of data: OHCHR sees both official socio-economic data sources and NGO sources of events-based data as valuable for assessing government efforts and outcomes.<sup>170</sup> The OHCHR suggests that data from official statistical agencies should be “of primary importance” for treaty bodies, since such data is produced by the State itself through “a standardized methodology.”<sup>171</sup> Such data includes the familiar socio-economic data collected by State

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significant” *correlative* relationships can be identified between an independent and dependent variable, and/or one independent variable can be associated much more strongly than another with a relevant dependent variable—that a *causal* relationship can be inferred from this finding. Of course, even when social researchers are very careful *not* to make such suggestions, consumers of social science data often draw causal inferences from correlative or associative data, in spite of researchers’ strongest cautions to the contrary. Elaborating upon this general tendency, Lieberson identifies the following more specific dangers haunting non-experimental social research: First, in “pursuit of variance . . . researchers . . . pick certain problems and ignore others, depending on whether they can obtain data sets that are ‘appropriate’ (i.e. that incorporate variation in the crucial variables). [And second,] . . . the level of empirical analysis is often determined not simply by the substantive nature of the problem but by a *statistical* requirement, to wit, the need for variation in the data set so as to allow for variance-based statistical analyses.” *Id.* at 91. This second tendency in particular, according to Lieberson, “is a remarkably deceptive and widespread practice that gums up our ability to . . . generate conclusions about what is causing what.” *Id.* This is because data may only be *collected* about a limited range of potentially “causal” factors, due to the fact that only data about these factors are available in statistically valid, measurable forms. Once the data are gathered and compared, it becomes nearly impossible even for researchers—let alone the ultimate consumers of research findings who are less familiar with what has been excluded—to recall and take appropriate account of the potential causal weight of *that which has not been measured*.

<sup>168</sup> See OHCHR, 2008 Report on Indicators, *supra* note 151, at paras. 27-33.

<sup>169</sup> See *id.* at para. 11.

<sup>170</sup> See *id.* at para. 13.

<sup>171</sup> See *id.* at para. 13 (“The use of a standardized methodology in the collection of information, whether it is through census operations, household surveys or through civil registration systems, and usually with high level of reliability and validity, makes indicators based on such a methodology vital for the efforts to bring about greater transparency, credibility and accountability in human rights monitoring.”).

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agencies that is frequently utilized by development professionals.<sup>172</sup> With respect to “alleged or reported cases of human rights violations,” NGO sources are lauded.<sup>173</sup> Though nowhere stated, the assumption here is that—of course—States will not accurately report on their own abuses, and that NGO accounts must therefore be relied upon as the primary sources for such data, despite their much-criticized lack of uniformity<sup>174</sup> and alleged subjectivity.<sup>175</sup> OHCHR deals with this by suggesting that NGO data can be “processed in a standardized manner” by U.N. agencies or national human rights institutions before being used in the indicators framework.<sup>176</sup>

OHCHR also recognizes that indicators should be designed holistically, given the intertwined nature of rights. For example, the framework recognizes that a process indicator for one right may be an outcome indicator for another.<sup>177</sup> For example, the indicator “Proportion of population using an improved drinking water source,” currently included as a process indicator for the right to life, also appears as an outcome indicator for the right to adequate housing.<sup>178</sup> In other words, access to an improved drinking source (a process indicator for the right to life) is a *cause* of improved life expectancy among children under five (an outcome indicator for the right to life), while access to an improved drinking source is itself reasonably assumed to be *caused by*—at least in part—the “Share of public expenditure on provision and maintenance of sanitation, water supply, electricity and physical connectivity of habitations” (a process indicator for the right to adequate housing).

While the OHCHR states that “qualitative and quantitative indicators are both relevant in the work of treaty bodies,” it explicitly designed the framework around the use of quantitative indicators since that is what it was requested to do by the treaty bodies.<sup>179</sup> The resulting silence on how qualitative indicators can be used is highly problematic, since it creates the impression that qualitative indicators are largely irrelevant when assessing a State’s compliance with its human rights obligations. Issues

<sup>172</sup> A recent article suggests that such familiar data could be the basis for assessing state compliance with the ICRSCR. See Clair Apodaca, *Measuring the Progressive Realization of Economic and Social Rights*, in Hertel & Minkler, *supra* note 98, at 165, 174 (noting that “The indicators are chosen because of their direct connection to the enumerated rights” in the ICESCR).

<sup>173</sup> See *id.* at para. 14 (“Events-based data consists mainly of data on alleged or reported cases of human rights violations, identified victims and perpetrators. Indicators, such as alleged incidence of arbitrary deprivations of life, enforced or involuntary disappearances, arbitrary detention and torture, are usually reported by NGOs and are or can also be processed in a standardized manner by, for instance, national human rights institutions and special procedures of the United Nations.”)

<sup>174</sup> For concerns about lack of uniformity, see, e.g., Landman, *supra* note 62, at 88 (“Events-based data are prone to either under-reporting of events that did occur or over-reporting of events that did not occur, creating problems of selection bias and misrepresentative data.”).

<sup>175</sup> For a discussion of critiques of events-based data, see, e.g., Todd Landman, *Map-making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance: Report to the European Commission* (2003), available at <http://www.oecd.org/dataoecd/0/28/20755719.pdf>.

<sup>176</sup> See OHCHR, 2008 Report on Indicators, *supra* note 151, at para. 14.

<sup>177</sup> See *id.* at paras. 24-25.

<sup>178</sup> See *id.* at pages 22 and 29.

<sup>179</sup> See *id.*, n. 5, page 4.

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of feasibility have also come center stage: the OHCHR has made efforts “to keep the identified indicators simple, based on standardized methodology for data collection and, to the extent feasible, with an emphasis on disaggregation of information by prohibited grounds of discrimination and by vulnerable or marginalized population groups, who have to be the target for public support in furthering the realization of human rights.”<sup>180</sup> Because populations—and discrimination—differ across countries, the framework encourages users to identify the most relevant categories for disaggregation, recognizing that the process of producing disaggregated data is expensive and time consuming. For example, an indicator such as “net primary enrollment ratio by target groups,” listed as a process indicator for the right to education, will need to be disaggregated on grounds such as “sex, disability, ethnicity, religion, language, social or regional affiliation of people.”<sup>181</sup> Discrimination on all of these grounds is prohibited by human rights law, meaning that enrollment rates that differ across these categories would be highly relevant in assessing the adequacy of a State’s efforts to dismantle discrimination and enhance equality. However, it is often too expensive for national bodies to break down information along all of these axes given competing demands.<sup>182</sup> This means that the internationally-identified indicators will need to be adapted to the national situation, so that national bodies collect and report on those categories of the population most likely to experience discrimination.

Despite these significant advances, the framework set out by the OHCHR reflects a continuing lack of clarity about a number of crucial issues. Perhaps most importantly, the OHCHR does not specify who, in addition to the treaty bodies, should *use* the indicators it has identified, but instead suggests that they will be useful both for assessing compliance with human rights commitments, and for rights-based monitoring of development projects.<sup>183</sup> Rights-based monitoring is an activity that is distinct from monitoring States’ compliance with human rights treaties. While it necessarily involves a close examination of States’ efforts in areas covered by relevant treaties, the goals of each type of monitoring are different. When assessing compliance with a treaty, the assessor is determining the extent to which a State has met its duties under a legal standard. When assessing a development project from a rights-based perspective, the assessor is determining the extent to which the project has advanced human development while also enhancing human rights. Indicators, therefore, are likely to differ significantly based on their use.

With respect to monitoring of State compliance with human rights treaties, the OHCHR specifies that “[i]t is the objective of the work undertaken by OHCHR for the treaty bodies to identify relevant quantitative indicators that could be used in undertaking

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<sup>180</sup> See *id.* at para. 44.

<sup>181</sup> See *id.* at para. 10.

<sup>182</sup> An illustrative anecdote may be helpful here: while on a human rights field visit for a women’s rights project, Satterthwaite asked the representative of a national women’s ministry why they did not demand that the national statistical office disaggregate basic socio-economic indicators by sex. “They have demanded that we pay for each indicator we want disaggregated by sex,” the ministry employee explained. “We simply do not have the resources to pay for this.”

<sup>183</sup> See *id.* at paras. 35-36.

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human rights assessments.”<sup>184</sup> Toward this end, the OHCHR concludes that further work is needed to identify a “treaty-specific list of illustrative indicators.”<sup>185</sup> Given its determination that indicators also should be context-specific and participatory, the tension between State-specific and universal indicators appears to continue through the OHCHR’s indicators project. What role different actors (the treaty bodies, States, OHCHR, civil society) will have in selecting and using the various indicators in the monitoring process remains unclear. This is striking, not only since it represents a significant shift from the original task of identifying indicators for use by the treaty bodies, but also since there is an enormous difference—legally and politically—among the various potential uses of the indicators forwarded by the OHCHR. For example, the treaty bodies have treaty-bestowed authority since they are charged with monitoring State compliance under the relevant treaty (though this authority is always under contestation); their use of the OHCHR indicators will carry with it a certain weight not present among other users. States have another type of authority—the type drawn on by the CESCRC when it has called on States to themselves create indicators; States’ adoption of the OHCHR indicators would go some distance toward legitimizing the framework, though it certainly would not have binding effect on other States under the international legal regime. The adoption and use of the OHCHR indicators by NGOs and other advocates would carry with it no special authority, though it would potentially lend the aura of “democratic” legitimacy otherwise potentially lacking in this exercise.

Finally, whether the indicators being designed actually do measure what they purport to measure is something that will need to be assessed over time. The OHCHR concludes that its current framework:

allows a balance between the use of a core set of human rights indicators that may be universally relevant and at the same time retain[s] the flexibility of a more detailed and focused assessment on certain attributes of the relevant human rights, depending on the requirements of a particular situation.<sup>186</sup>

In other words, the OHCHR appears to hope that a core set of universal indicators can be agreed upon, but suggests that this core set will be complemented by more contextual indicators. In its report, the OHCHR sets out “indicators for 12 human rights and the approach to the selection and contextualization of indicators with a view to encourage the application of the work at country level and in the treaty bodies.”<sup>187</sup> Thus, the OHCHR nowhere states *who* will adapt the indicators to the national level, or what relationship such choices—if made by actors other than the treaty bodies—will have to the use of indicators by those treaty bodies when assessing State compliance with human rights law. Instead of answering this question, the OHCHR presents the issue as a technical one, explaining that the framework presented “enables the potential users to make an informed choice on the type and level of indicator disaggregation that best reflects their contextual

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<sup>184</sup> See OHCHR, 2008 Report on Indicators, *supra* note 151, at para. 35.

<sup>185</sup> See *id.* at para. 8.

<sup>186</sup> See *id.* at para. 43.

<sup>187</sup> *Id.*, para. 41.

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requirements for implementing human rights or just some of the attributes of a right, while recognizing the full scope of obligations on the relevant human right standards.”<sup>188</sup> Thus transformed, the issue of authority and judgment—always lurking behind the corner of the human rights regime—is again hidden from sight, buried in language concerning “informed choice” to be made by experts.

In this way, human rights indicators share the attributes of other types of standards. As Bengt Jacobsson has said, “Standardization may be regarded as a way of regulating in a situation where there is no legal centre of authority.” Ominously characterizing the brave new “world of standards” that he and his colleagues set out to critically analyze, he continues:

We will have a kind of symbolic and secularized society based on the premise that people voluntarily conform to the decisions of authorized expert knowledge. But while order is being established, responsibility may be vanishing.<sup>189</sup>

Two responsibilities are at risk of vanishing in the context of human rights indicators: first, the responsibility for *transforming into measurable indicators* the more or less fully articulated normative standards that derive from international human rights treaties and the treaty bodies’ interpretations of them; and second, the *choice of indicators* that will be used to measure human rights commitments. Designed by experts who were tasked with the job by the treaty bodies, the work of those experts effectively disappears when one is confronted with the final product: a neat set of one-page matrices that set out structural, process, and outcome indicators for the major human rights set out in international human rights treaty law. Jacobsson points to three significant problems “related to standardization, which stem from reliance on experts: depoliticization, technicalization, and the emergence of regulation without responsibility.”<sup>190</sup>

Technicalization is present in the case of human rights indicators, where expert knowledge is packaged into lists of illustrative indicators and their accompanying explanatory “meta-sheets,” which are forwarded as useful for all involved—States being monitored, individuals whose rights need protection, and treaty bodies who have only contested authority. Seeking voluntary use of these indicators by “human rights stakeholders” including “human rights, development and statistical practitioners,”<sup>191</sup> the OHCHR champions the technical superiority of its conceptual framework and its adaptability to national context. Further, it does so using the language of professional

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<sup>188</sup> *Id.*, para. 43.

<sup>189</sup> Bengt Jacobsson, *Standardization and Expert Knowledge*, in *A WORLD OF STANDARDS* (Nils Brunsson, Bengt Jacobsson & Assocs., 2000). This edited collection traces standardization practices through a diverse array of overlapping geographical and institutional contexts—private, national, local, inter- and non-governmental. David Kennedy makes a similar point about the role of experts and expertise in international legal arenas. See Kennedy, *supra* note 8.

<sup>190</sup> Jacobsson, *supra* note 189, at 49.

<sup>191</sup> OHCHR, 2008 Report on Indicators, *supra* note 151, at para. 33.



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expertise.<sup>192</sup> As Jacobsson explains, “Standards make organizations visible and possible to control and audit. When standards are assumed to embody what the experts have found to be best—that is, treated as technical in nature—it may be held that this control is objective and non-controversial.”<sup>193</sup>

Why is this a problem? Bengt Jacobsson<sup>194</sup> and Sally Engle Merry<sup>195</sup> argue that the danger lies in the potential for standards to depoliticize choices that would otherwise be openly contested in the public sphere. Here, the marketing by OHCHR of its indicators seems intended to bring States *voluntarily* into closer line by persuading those with whom they work—“human rights stakeholders”—that indicators offer a technical answer to what would otherwise appear to be judgment-laden (and thus court-like) or highly contested (and thus political) issues. The auditing role of the CESCR is thereby maintained, but now with States being asked to use the rules set out by international experts rather than those of the State’s choosing.<sup>196</sup> In this way, what might otherwise appear as a bold assertion of authority and power by the treaty bodies is passed off as a technical exercise that should be voluntarily accepted by rational human rights practitioners—including those working for the State.

In the end, however, this effort will never solve the problem that generated the CESCR’s audit practice to begin with: the relationship of distrust between the treaty bodies and the States whose efforts they monitor. This is because, although it appears to do so, the framework forwarded by the OHCHR will never be able to do the real work of assessing where States have fallen short of their obligations under human rights treaties. To take one example: while the framework created by the OHCHR identifies interconnections between rights (recall the example of “Proportion of population using an improved drinking water source” used as a process indicator for one right and an outcome indicator for another), it does not do what will be needed to actually assess compliance

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<sup>192</sup> For example, OHCHR explains that the “expert group peer reviewed all proposals made by the secretariat on the concept, methodology, the choice of illustrative indicators, as well as the process for validating the results at country level,” thus relying on the validation of such peer review as legitimizing its choices. *Id.* at para. 27.

<sup>193</sup> Jacobsson, *supra* note 189, at 45.

<sup>194</sup> *Id.*

<sup>195</sup> Merry, *supra* note 8, at 21.

<sup>196</sup> Theorists of “governmentality” would surely read this—perhaps with good reason—as a profoundly Althusserian/Foucaultian move in that the OHCHR and treaty bodies seem to be interpellating *States* in ways analogous to those states have been described as using to interpellate their citizen-subjects. See Louis Althusser, *Ideology and Ideological State Apparatuses, excerpted in CRITICAL THEORY SINCE 1965* 245 (1971). Althusser uses the term interpellation to describe the processes by which apparatuses of the state, via ideology, ensure we will recognize ourselves as subject to its rule. His famous example is of a citizen who, upon hearing a police officer shout “Hey, you?” is moved almost involuntarily to turn in response, recognizing that the officer may be calling *him*, and in so doing, recognizing that officer’s authority to “hail” him. Foucault describes what, for our purposes, we might simply abbreviate as “subjectification”—the processes by which individuals come to inhabit positions within the structure of language—in a much more thorough-going manner through several books. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977) and *THE HISTORY OF SEXUALITY: AN INTRODUCTION, VOL. 1* (1978). A good summary can be found in Nick Mansfield, *SUBJECTIVITY: THEORIES OF THE SELF FROM FREUD TO HARAWAY* (2000). We will touch briefly upon this literature, *infra*, Section IV.

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with interlocking human rights obligations in real-life situations. For example, how will the user of the indicators framework determine whether the choices that a State has made—to engage in a specific effort that could be measured by a process or outcome indicator—is what is needed in the given context to ensure compliance with the standard set out in the treaty? While the conceptual clarity concerning the standard of progressive realization is helpful, even a pristine level of clarity will never allow a human rights professional to assess *as a technical matter* the adequacy of the State’s measures because adequacy is never only a technical question. To use another example, imagine an assessor seeks to determine the adequacy of a State’s allocations to primary education and to the promotion of higher education for women. Imagine further that the State in question has an extensive primary school system, but that it has systematically undervalued women’s roles in the professions. How will the user of the indicator “share of public expenditure on education devoted to primary education” know whether a State’s choice to allocate proportionally less money to primary education than it allocates to scholarships and professional training for women is permissible when simultaneously confronted with the indicator “proportion of females with professional or university qualification”?<sup>197</sup>

Such can never be a technocratic assessment. It requires, instead, the exercise of *judgment*. By evading possibly the most thorny issue—who will be the final arbiter of which indicators will be used, and how exactly they will be used to assess State compliance with international human rights law—the OHCHR evades the most difficult issue in human rights law: that of authority. In the end, the discussion of human rights indicators requires us to attend to the issue of judgment, and the unique challenges posed by a system of law that fails to locate authority for judgment in any given body. Implicitly recognizing this problem but seeking to elide it, the OHCHR deploys the language of expertise. While its framework for human rights indicators is conceptually clear and may allow for powerful advocacy, it does not resolve the underlying problem that its apparent trust in numbers seeks to fix—the pesky, irreducible core of human judgment.

#### **IV. Conclusion: Indicators As Technologies of Global Governance?**

The original impetus for this Article was our two-fold sense: first, that pressures within the international human rights community for a single set of universally applicable indicators with which to assess States’ compliance with treaty obligations were intense and growing; and second, that human rights practitioners were, rather uncritically, turning to statistical indicators to perform feats of assessment that they simply could not perform. To some degree, our concern stemmed from the ways in which this turn to indicators

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<sup>197</sup> Both of these indicators are included as illustrative of the right to education. See OHCHR, 2008 Report on Indicators, *supra* note 151, at page 28. Kate Raworth has also noted the failure of human rights indicators projects to assess the trade-offs that States often make among competing rights. See Raworth, *supra* note 97, at 399.

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mirrored trends across the landscape of transnational governance. These trends, manifested in part by audit practices like those discussed in Section II and receiving attention from science and technology studies scholars, were also coming under critique from across the disciplines under the rubric of “global governance” and “governmentality” analyses. Particularly in the fields of anthropology, critical development studies and political science, scholars have produced a large body of literature examining the globalizing spread of regulatory regimes that involve statistical reporting requirements and the imposition of universal standards.<sup>198</sup>

The gist of these critiques is well-summarized by Bengt Jacobsson, who warns that:

Greater reliance on standards may involve a danger that so-called technical expert knowledge will become a substitute for ethical and political discourse. . . . There will be a growing focus on how things are done—a focus on form rather than content.<sup>199</sup>

This was indeed one of our early concerns with the way that the CESC’s work on indicators moved the treaty body from a focus on monitoring the compliance of States with their obligations to a monitoring of States’ own monitoring activities. The move to audit, we feared, would risk just such a shift in emphasis from content to form. In her recently initiated ethnographic project to study rights indicators, Sally Engle Merry lodges a similar critique:

[T]he creation and use of indicators often means disappearing politics into the technical. It means creating administrative mechanisms that to varying degrees obscure their political origins and agendas.<sup>200</sup>

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<sup>198</sup> See, e.g., JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998); JOHN BOLI & GEORGE M. THOMAS, *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875* (1999); *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* (Robert O’ Brien, Anne-Marie Goetz, Jan Aart Scholte & Marc Williams, eds., 2000); *THE ANTHROPOLOGY OF DEVELOPMENT AND GLOBALIZATION: FROM CLASSICAL POLITICAL ECONOMY TO CONTEMPORARY NEOLIBERALISM* (Edelman and Haugerud, eds., 2005); *THE ANTHROPOLOGY OF GLOBALIZATION: A READER* (Jonathan Xavier Inda & Renato Rosaldo, eds., 2007); JAMES FERGUSON, *EXPECTATIONS OF MODERNITY: MYTHS AND MEANINGS OF URBAN LIFE IN THE ZAMBIAN COPPERBELT* (1999); *ANTHROPOLOGIES OF MODERNITY: FOUCAULT, GOVERNMENTALITY, AND LIFE POLITICS* (Jonathan Xavier Inda, ed., 2005); ANNA LOWENHAUPT TSING, *FRICTION: AN ETHNOGRAPHY OF GLOBAL CONNECTION* (2004); *GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS* (Aihwa Ong & Steven J. Collier, eds., 2004); *ANTHROPOLOGY AND POLICY: CRITICAL PERSPECTIVES ON GOVERNANCE AND POWER* (Cris Shore & Susan Wright, eds., 1997); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995); *TRANSNATIONALISM FROM BELOW* (Michael Peter Smith & Luis Eduardo Guarnizo, eds., 1998); and *GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW, AND IDENTITY* (Richard Warren Perry & Bill Maurer, eds., 2003).

<sup>199</sup> Jacobsson, *supra* note 189, at 46.

<sup>200</sup> Merry, *supra* note 8, at 21.

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This is the promise and peril of numbers. As Merry points out:

Numbers are the epitome of the modern fact because they seem to be simple descriptors of phenomena and to resist the biases of conjecture and theory since they are subject to the invariable rules of mathematics. Numbers have become the bedrock of systematic knowledge because they seem free of interpretation, as neutral and descriptive. They are presented as objective, with an interpretive narrative attached to them by which they are given meaning.<sup>201</sup>

As the treaty bodies have turned to the OHCHR for assistance with the development of universal human rights indicators, and in thereby extending the turn to expert assistance, it would seem that this danger has, if anything, increased. Scholars who study globalization practices have noted the many ways in which the turn to technocratic numeracy can result in bureaucratic stalemates at best and a range of negative unintended consequences at worst.

In their review of the global trends toward ever-increasing standardization, Nils Brunsson, Bengt Jacobsson and associates identify a range of ways in which even the best universalizing goals of standardizers can fall short in practice. Among other phenomena, they point to the fact that

standards may produce considerable uniformity in what actors *say* that they do, but less uniformity in what they *actually* do. What actors say is more influenced by standards than what they do. This means that many actors talk in one way and act in another. Standardization helps produce ‘decoupling’ and hypocrisy’.<sup>202</sup>

Describing a related pattern in richly ethnographic detail, anthropologist Elizabeth Dunn recounts the effects that the imposition of international food safety standards has had on the Polish meatpacking industry. The European Union (EU) and World Trade Organization (WTO), she notes, began pushing for a “‘harmonization’, or the standardization of standards” with regard to the production of pork and other meat products throughout the European Community on the grounds that the absence of such harmony created both health risks and market inefficiencies. Far from functioning as neutral rules to guarantee health and fairness, however, these new standards were disproportionately burdensome to a significant number of small farms and meatpacking businesses in Poland. Furthermore, evidence for what seemed the most compelling justification for adopting uniform standards—potential health risks—was demonstrably lacking.

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<sup>201</sup> Merry, *supra* note 8, at 26 (citing MARY POOVEY, A HISTORY OF THE MODERN FACT: PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY (1998)).

<sup>202</sup> Nils Brunsson, *Standardization and Uniformity*, in A WORLD OF STANDARDS, *supra* note 189 at 145 (emphasis added) (citations omitted).

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The EU claims that food safety regulations are designed primarily to protect the public from a variety of diseases that can be transmitted by beef and pork. ...However...[bans] on Polish beef exports to the EU...took place several years before Poland’s single case of [mad cow disease] was reported in 2002... and data on the actual incidence of the diseases that standards claim to prevent suggest that the standardization process is a costly response to a problem that is less severe than popular rhetoric suggests.<sup>203</sup>

So it would seem that there is little to applaud in this latest manifestation of the “turn to indicators”—however tentative and “illustrative,” however strewn with caveats they might be—by the OHCHR. And yet, as we have traced the human rights treaty bodies’ ongoing efforts to grapple with the task of holding States accountable to their commitments to human rights treaties, we have come to appreciate new aspects of this project that a “governmentality”-focused analysis risks occluding.

What we are calling a “governmentality-focused analysis” might, as our initial analysis did, focus solely on the dangers inherent in the turn to indicators—on the evasion of difficult questions of judgment represented by the human rights community’s embrace of technocratic numeracy, and on the concomitant submersion of political debates “by technical questions of measurement, criteria, and data accessibility.”<sup>204</sup> Such an analysis is offered in another context by Suzan Ilcan and Lynne Phillips in their examination of the U.N. Food and Agriculture Organization (FAO). They describe the FAO as one among many U.N. agencies making up a “‘bureaucratic machinery’ that has assembled various technologies of government [reliant] upon a variety of specialized knowledges and practices of evaluation to govern food and agriculture, education and

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<sup>203</sup> Elizabeth C. Dunn, *Trojan Pig: Paradoxes of Food Safety Regulation*, 35 ENVIRONMENT & PLANNING 1501, 1501 (2003). Dunn continues, “Trichinosis is a case in point. There were only 36 outbreaks of the disease in the EU between 1966 and 1999, and the majority of them were traced to consumption of horsemeat or wild boar, not pork.” *Id.* at 1501. Yet, “enforcement of EU regulations will force 2 in 3 [pork-producing] firms to go out of business. Most of the firms likely to close are the small and medium meatpackers in the countryside, who buy pigs in small lots from smallholding farmers. For the 14 largest slaughterhouse-and-processing facilities, this comes as a windfall... [because, as] subsidiaries of foreign firms, they have the capital needed to invest in meeting EU standards.” *Id.* at 1498.

<sup>204</sup> Merry, *supra* note 8, at 16 (“In sum, the expansion of the use of indicators in global governance means that political struggles over what human rights mean and what constitutes compliance are submerged by technical questions of measurement, criteria, and data accessibility. Political debates about compliance shift to arguments about how to form an indicator, what should be measured, and what each measurement should represent. These debates typically rely on experts in the field of measurement and statistics, usually in consultation with experts in the substantive topic and in the national and international terrain. They rely on previous research studies and knowledge generated by scholars. The outcomes appear as forms of knowledge, rather than as particular representations of a methodology and particular political decisions about what to measure and what to call it. An indicator provides a transition from ambiguity to certainty, theory to fact, complex variation and context to truthful, comparable numbers. The political process of judging and evaluating is transformed into a technical issue of measurement and counting by the diligent work of experts.”).

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science, and world health issues.”<sup>205</sup> In their reading, the FAO’s use of “statistical expert knowledge” constitutes one among many “global technologies of government”<sup>206</sup> now “produc[ing] the need for so-called less developed countries to change their ways. Professional forms of expert knowledge, such as those based on scientific classification and calculation, were essential in shaping and steering social and economic conduct on a global scale.”<sup>207</sup>

It would be easy enough to apply a similar analysis to the work of treaty bodies and the OHCHR in developing international human rights indicators. Surely this project too could be termed a “global technolog[y] of government.” Certainly the turn to experts for putatively independent, bias-free, and scientifically valid techniques with which to assess the degree to which States are living up to the commitments they make represents the OHCHR’s participation in wider transnational governance trends. Additionally, the fact that OHCHR is part of the United Nations and, as such, is one among many intergovernmental agencies that seek to change policies in rationalized ways, clearly makes it a player in the spread of twenty-first century methods of neo-liberal governance. As Ilcan and Phillips explain,

Within the governmentality literature, *government* is understood as a calculated and rationalized activity undertaken by multiple authorities and agencies employing various kinds of techniques and knowledge designed to shape conduct. In other words, government operates through the capacities of those who govern, including those international agencies like the United Nations. These agencies transform the terrain of government policies and national populations by promoting their engagement with, among other things: acceptable living standards; modern legislative systems; enumeration practices; particular models of development; and statistical accounts of human and nonhuman capacities.<sup>208</sup>

Through human rights indicators, the CESCR and OHCHR are certainly “promoting” the “engagement with” various international standards in order to shape the conduct of governments—that is, they are intending to “transform the terrain of government policies.” However, there are significant differences that should be noted as well. Much of the governmentality literature, while helpfully diversifying our

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<sup>205</sup> Suzan Ilcan and Lynne Phillips, *Making Food Count: Expert Knowledge and Global Technologies of Government*, 40 CANADIAN REV. SOC. & ANTHRO. 441, 445-446 (2003) (internal citations omitted).

<sup>206</sup> *Id.* at 442. See also NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 52 (1999) (“A technology of government is ‘an assemblage of forms of practical knowledge, with modes of perception, practices of calculation, vocabularies, types of authority, forms of judgment, architectural forms, human capacities, non-human objects and device, inscription techniques and so forth, traversed and transected by aspirations to achieve certain outcomes in terms of the conduct of the governed. We extend this term to elaborate what we refer to as *global technologies of government*, namely, the dispersion of a wide range of techniques (e.g., numerical, classificatory, spatial, visual and discursive) that work beyond the nation-state to govern conduct.” (internal citations omitted)).

<sup>207</sup> Ilcan & Phillips, *supra* note 205, at 442 (emphasis added).

<sup>208</sup> *Id.* at 444 (internal citations omitted).

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conceptions of those who *govern*<sup>209</sup>, nonetheless often implicitly assumes—through its choice of examples—that the targets of governance are largely if not solely citizens and populations.<sup>210</sup> Human rights indicators, on the other hand, emerge out of projects aimed at changing the conduct of *governments* toward those same populations.

The governmentality literature is strongest where it eschews excessively abstract generalizations about globalizing practices and demands instead careful empirical studies of these practices in action. Sally Engle Merry’s project on human rights indicators is especially promising in this connection.<sup>211</sup> Similarly, in her critical elaboration on James

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<sup>209</sup> See Andrew Barry, *Ethical Capitalism, Introduction*, GLOBAL GOVERNMENTALITY: GOVERNING INTERNATIONAL SPACES 202 (2004) (“Writers on governmentality, following Foucault, have long emphasized that the activity of government cannot be reduced to the actions of the state. In an era where direct state control and ownership has declined (because of privatization and re-regulation), or is difficult (because of the transnational organization of companies), international institutions, NGOs, auditors, consultants and multinational corporations are together expected to perform the job of government at a distance. Global governmentality has been associated with the dispersion of governmental functions amongst a network of international and non-state institutions. Within this network, clear distinctions between the identities and functions of different institutions may sometimes be difficult to make.”).

<sup>210</sup> The term “governmentality” originates in a series of lectures given by Michel Foucault in 1978, as part of two courses on “the problematic of bio-power.” MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977-1978 (Michel Senellart, ed., 2007). The term originates in Foucault’s studies of the formation of the modern state and its multiplying techniques for exercising power over populations. In his account of the transition from sovereign rule to modern liberal state power, Foucault suggests that the “two great assemblages of political knowledge and technology” were: first, a combination of national military forces and diplomacy that permitted “equilibrium” external to, and between (European) nation-states; and second, a host of consolidating forces *internal* to the state, particularly commercial and monetary forms. *Id.* at 365. Together, all worked “to affirm and increase the power of the state,” and served to maintain “order and discipline, the regulations that tend to make [the lives of the states’ subjects] convenient and provide them with the things they need to live” *Id.* at 366. And according to historians like Porter, these state powers were inextricably intertwined with population demographics. See Porter, *supra* note 1, at 37; see also THEODORE PORTER, THE RISE OF STATISTICAL THINKING: 1820-1900, 156-157 (1988). The very category “society” upon which the reason for the existence of the state rested was “largely a statistical construct”:

The regularities revealed in suicide and crime could not be attributed to individuals. A broader category was needed to account for them, and beginning around 1830, they were designated properties of society. Such regularities were powerful evidence of the autonomous existence of society, of “collective forces,” as Durkheim famously argued.

Wendy Nelson Espeland & Mitchell L. Stevens, *Commensuration as a Social Process*, 24 ANNUAL REVIEW OF SOCIOLOGY 313, 325 (1998).

While Foucault went on, in his studies of sexuality in particular, to study the ways that sovereign power is dispersed at micro-levels and exercised at daily, individual levels, “the center of gravity of the lectures” is definitively on the state and its governing of populations.” Michel Senellart, *Course Context*, in Senellart, *supra* at 370. Thus, the human rights community’s efforts to use statistics as part of a larger project of holding governments accountable to their populations, while it partakes of the same technologies of governmentality, can arguably be said to aim at different ends. Rosga describes a similar phenomenon as “using the state against itself” in her ethnographic account of anti-hate crime activists who strategically employed the legal category “hate crime” in contexts where they knew it to carry inherent risks of troubling new legal precedents. See AnnJanette Rosga, *Policing the State*, 1 GEO. J. GENDER & L. 145, 166 (1999).

<sup>211</sup> Merry, *supra* note 8, at 17 (“This paper is a first step in developing a research project that examines the production of indicators through an ethnographic approach. My goal is to examine the debates and political

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Scott’s influential study of “failed schemes to improve the human condition” in *Seeing Like a State*, Tania Murray Li argues that “[i]mprovement schemes”

are simultaneously destructive and productive of new forms of local knowledge and practice. Rather than attempt to generalize, the effects of planned interventions have to be examined empirically, in the various sites where they unfold—families, villages, towns, and inside the bureaucracy, among others.<sup>212</sup>

Might it be the case that human rights indicators—as a planned intervention with the intent to “improve the human condition”—could present as much possibility as it does danger?<sup>213</sup>

Certainly, Rosga’s ethnographic work suggests not only that those who call for indicators come from multiple locations in governmentalizing networks<sup>214</sup>, but that the social actors involved in projects to create indicators are well aware of both the powers and the risks of invoking the fetishistic magic of numbers<sup>215</sup>, as this final excerpt from Rosga’s field notes concerning a meeting to discuss anti-trafficking indicators illustrates:

Participant 2: We [human rights advocates and experts] need to acknowledge our role here—and what we want to gain. We provide them [government officials] with all this training [on how to collect data] and then object that they’re responding in our terms!

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struggles surrounding the creation of several human rights indicators in order to determine who contributes to their formation and which groups’ interests are represented.”)

<sup>212</sup> Tania Murray Li, *Beyond “the State” and Failed Schemes*, 107 AM. ANTHROPOLOGIST 383, 386, 391(2005).

<sup>213</sup> Merry comes to a similar conclusion. See Merry, *supra* note 8, at 40 (“In sum, indicators are a political technology that can be used for many different purposes, constructive as well as destructive. Like witchcraft, indicators are a form of power that acts in the world both to injure or to heal. And, like witchcraft, they are form of power based on a technology of truth-making. As the world becomes ever more measured and tracked through indicators, it becomes increasingly important to sort out the technical and political dimensions of this new technology.”)

<sup>214</sup> Ethnographic work by Annelise Riles on women’s human rights organizing is groundbreaking in this respect, demonstrating the ways that human rights advocates frequently mobilized many of the same forms and critiques she brought to bear in studying them. See ANNE LISE RILES, *THE NETWORK INSIDE OUT* (2001), and *The Virtual Sociality of Rights: The Case of “Women’s Rights are Human Rights,”* in *TRANSNATIONAL LEGAL PROCESS* (Michael Likosky, ed., 2002).

<sup>215</sup> For a discussion of the fetish of numbers, see Jean Comaroff and John L. Comaroff, *Figuring Crime: Quantifacts and the Production of the Un/Real*, 18 PUBLIC CULTURE 209, 211 (2006) (“[Q]uantifacts — statistical representations that make the world ‘factual’ — [are] at once ...fetish and the object of a lively hermeneutic of suspicion. ...[C]ounter to the commonplace that numbers displace visceral experience into the realm of pattern and probability... it is arguable that they do just the opposite .... As they circulate and are mediated, ...statistics reduce a mass of faceless incidents, disturbing things that happened elsewhere, into the objects of first-person affect: fascination, revulsion, pain.”). See also Goldstein, *supra* note 46, at 50, on “quantitative fetishism” in human rights.



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- Participant 3: [Agencies X and Y] are now giving us figures we like and that we use [on the nature and extent of human trafficking]. But [Agency X's] new report has a methodology that's based on press reports. They're just reporting on what is reported. And numbers have effects...
- Participant 4: Who cares? We just use the numbers. At least it raises awareness. It's not such a problem, is it? The accuracy of the numbers?
- Participant 5: Look at these international organizations and their financial resources before and after trafficking. Look at their field presences, their budgets, their staffs...
- Participant 2: We are not neutral.
- Participant 6: None of us thinks we are neutral. That would be ridiculous.
- Participant 5: This is an agenda [counter-trafficking, dominated by multiple international institutions] with *huge* financial interests and it keeps us alive too. We all take money from them. There's no getting around that. Our actions are limited by our financial dependence.

As the conversation continued, participants discussed the problems with the category “trafficking victim” and the ways it invites a law enforcement-driven approach to the problem because “victims” invite “rescue.” This was counterposed to a formulation of the problem of human trafficking as one that centers on labor exploitation and economic inequality:

- Participant 1: “Victims” are only visible to the extent we have legal remedies in place to help them.
- Participant 2: Yes! What we can count is dependent on whether there are service providers to help. There's no way to count invisible vulnerable populations, and there is little offered to trafficked persons to say they're trafficked besides deportation and detention.
- Participant 1: Right. Remedies are not formulated in terms of economic exploitation. The shelter model [a model in which trafficking victims are predominantly identified through rescue raids that offer them shelter] focuses only on safe housing -- and has failed to provide even that, in many cases.

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[. . .]

Participant 5: We have data on irregular and exploited migrants with rights. The problem is that this number is too large. We're unable to specify levels of exploitation into the small number of trafficking victims that we have decided there are resources to help.

While this excerpt comes from a conversation on regional trafficking indicators, rather than from the more globalizing OHCHR project to design universal indicators on specific international human rights, it exemplifies the kinds of conversations that *can* take place when indicators are up for discussion. This is not a technocratic conversation, drained of political content; nor is it a conversation in which participants are seeking to submerge difficult questions of judgment in the abstract language of numbers. It is a conversation in which engaged social actors are grappling with the very phenomena we have been describing—actors who are fully aware of the limits and misleading qualities that statistics possess. Of course, not all conversations look like this one—which is why it is important that more specific empirical research be done on the many processes involved in indicator-construction.

In sum, the value of *indicators* as a social technology cannot be determined in advance, nor on the basis of the fact that they are largely quantitative. While it may be true that quantitative methods, in their very abstraction and stripping away of contextualizing information have particular—and especially high—risks for misuse by those with the power to mobilize them, they are tools like any other. All tools can be misused; all social actors with power can misuse that power.

In our view, the OHCHR, when presented with an opportunity to do otherwise, has taken considerable protective steps against the potential *misuse* of universal human rights indicators. For example, by refusing to construct international indicators applicable to all countries and instead calling for “contextual information” and choice of “appropriate indicators” from lists, the OHCHR has demanded that the treaty bodies—and States—engage with local forms of knowledge. By inviting contextual information and “events-based data” from NGOs, the OHCHR is calling attention to the need for political contestation even in the midst of this most technical-seeming of exercises.

Thus, while we might bemoan the fact that the OHCHR’s indicators framework nowhere makes clear how the user will be able to determine whether a given State has lived up to its human rights obligations, OHCHR’s refusal to construct a technocratic tool that could be used to mechanically determine compliance with a given human rights standard is not only understandable, it is the only ethically tenable solution. The OHCHR was asked to undertake an impossible task—to solve through technocratic means the problem of authority in international human rights law. Instead of rejecting their charge, the OHCHR did the best it could to design and implement a framework that both tackles

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this task and subverts it productively by opening the indicators project to participation by actors at all levels. Rather than handing a set of pre-defined universal indicators to the treaty bodies, the OHCHR has, implicitly, shown the international community that the technical exercise will go only so far. Beyond this, human judgment and political contestation must enter—in the form of competing indicators, multiply situated assessors of State compliance, deeply contextual information, and qualitative data. Rather than trusting in numbers, those using human rights indicators should embrace the opportunities presented by this new project, injecting local knowledge, advocating for key priorities, and finding ways to utilize human rights indicators as a tool of global governance that allows the *governed* to form strategic political alliances with global bodies in the task of holding their governors to account.<sup>216</sup>

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<sup>216</sup> In this way, consideration of efforts to construct indicators may be enriched through the concept of Global Administrative Law, as formulated by Kingsbury, Krisch, and Stewart. Their focus is on “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.” As “global administrative bodies,” both the OHCHR and the treaty bodies should ensure their decision-making processes are in line with these newly-identified global administrative law principles. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 17 (2005).