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# Dissecting Stakeholder Participation in UN Human Rights Treaty Body Activities with Normative and Empirical Approaches: A Comparison of NGO and NHRI Participation

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## Abstract

By addressing the question “Are the roles and values of stakeholder participation qualitatively different for non-governmental organizations (NGOs) and national human rights institutions (NHRIs), and if so, how?” this article dissects stakeholder participation in UN human rights treaty body activities. First, it normatively posits that stakeholder participation in treaty body activities carries three values, which weigh differently based on the actor and the treaty body activity concerned: facilitating “bounded” national deliberations, promoting international deliberations on human rights treaty standards, and supplementing the treaty bodies’ fact-finding capacity. It offers concrete normative guidance for treaty bodies on their engagement with NGO and NHRI participation to maximize the benefits of these values. It then empirically analyzes their current practice in light of the above-mentioned normative guidance. This article contributes, first, to the theorization of stakeholder participation in treaty body activities, which has been discussed but only in generalized or fragmented ways in previous studies. Second, it supports the effectiveness and legitimacy of treaty bodies by endorsing their practice that is consistent with the guidance and finding space for improvement. Finally, it provides a rationale for establishing and strengthening NHRIs by showing that NHRI participation has unique roles distinct from those of NGOs.

**Keywords:** Non-governmental organizations; national human rights institutions; UN human rights treaty bodies; stakeholder participation; two-tiered bounded deliberative democracy

## A. Introduction

UN human rights treaty bodies have been under constant review within the framework of the UN in an attempt to improve their effective functioning,<sup>1</sup> and stakeholder participation has always been treated as one of the critical issues in these reviews.<sup>2</sup> The final report of the “2020 review,” conducted based on UN General Assembly Resolution 68/268 titled “Strengthening and enhancing the effective functioning of the human rights treaty body system” (2014), reiterated “the integral role that civil society, national human rights institutions and academic platforms play in the engagement with the

<sup>1</sup>See generally, *Treaty Body Strengthening* at the OHCHR’s website, at <https://www.ohchr.org/en/treaty-bodies/treaty-body-strengthening> (last accessed 1 July 2023).

<sup>2</sup>Navi Pillay, *Strengthening the United Nations Human Rights Treaty Body System*, ¶¶66–68 and 82–83, U.N.Doc. A/66/860 (2012).

treaty bodies.”<sup>3</sup> Treaty bodies have implemented multiple reforms to promote such participation (see Section B). Today, their websites, run by the Office of the High Commissioner for Human Rights (OHCHR), commonly display an index titled “Participation: Information for civil society, NGOs and NHRIs”<sup>4</sup> and provide detailed information on their participation.

In these discussions and reforms, non-governmental organizations (NGOs)<sup>5</sup> and national human rights institutions (NHRIs) have largely been lumped together and treated in parallel. This approach is understandable as both NGOs and NHRIs interact with treaty bodies as independent actors from states. They are new actors in the eyes of traditional, state-centric international law. The former challenges its fundamental assumption that states are the only relevant legal entities under international law,<sup>6</sup> and the latter challenges its perception of “states” as unitary and monolithic legal entities.<sup>7</sup> However, although there are several detailed studies on NGO<sup>8</sup> and NHRI participation<sup>9</sup> in treaty body activities, few studies have focused on the qualitative difference between the two.<sup>10</sup> NGOs were the pioneers that paved the way for stakeholder participation in the work of treaty bodies. When NHRIs emerged as human rights treaty actors in the 2000s, following in the NGOs’ footsteps, studies posited that the *sui generis* character of NHRIs is distinct from that of NGOs owing to the former’s official human rights mandate under national laws<sup>11</sup> and described them as a “third type of actor” between states and NGOs.<sup>12</sup> However, although studies have stressed the unique roles of NHRIs as state organs in the context of the implementation of treaty bodies’ recommendations,<sup>13</sup> they failed to establish the added value of NHRIs’ provision of inputs to treaty bodies as distinct from those of NGOs.<sup>14</sup> They considered that the NHRIs’ participatory roles “largely concur”<sup>15</sup> with those of NGOs and that NGOs’ functions are “supplemented”

<sup>3</sup>Rep. on the Process of the Consideration of the State of the United Nations Human Rights Treaty Body System, annexed to the Letter dated 14 September 2020 from the Permanent Representatives of Morocco and Switzerland addressed to the President of the General Assembly, ¶ 58, U.N. Doc. A/75/601 (2020).

<sup>4</sup>See e.g., *Participation: Information for civil society NGOs and NHRIs* at the HRC’s website, at <https://www.ohchr.org/en/treaty-bodies/ccpr/information-civil-society-ngos-and-national-human-rights-institutions> (last accessed 1 July 2023).

<sup>5</sup>As treaty bodies tend to use the terms “NGOs” and “civil society organizations (CSOs)” interchangeably, this article does not address CSOs separately.

<sup>6</sup>See generally, Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348 (2006).

<sup>7</sup>Katrien Meuwissen, *NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System?* 15 HUM. RTS. L. REV. 441, 474–81 (2015).

<sup>8</sup>In addition to the articles cited elsewhere in this paper, see Andrew Clapham, *UN Human Rights Reporting Procedures: An NGO Perspective*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 175 (Philip Alston & James Crawford eds., 2000); Chapters 13–17 of *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21 CENTURY* (Anne Bayefsky ed., 2000).

<sup>9</sup>In addition to the articles cited elsewhere in this paper, see AMREI MÜLLER AND FRAUKE SEIDENSTICKER, *HANDBOOK: THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE UNITED NATIONS TREATY BODY PROCESS* (2007).

<sup>10</sup>International human rights textbooks tend to place them together within the same section. See e.g., Patrick Thornberry, *The Committee on the Elimination of Racial Discrimination (CERD)*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 309, 322 (Frédéric Mégret & Philip Alston eds., 2nd ed., 2020).

<sup>11</sup>Mutaz M. Qafisheh, *The International Status of National Human Rights Institutions*, 31 NORD. J. HUM. RTS. 55, 58 (2013).

<sup>12</sup>GÉRARD FELLOUS, *LES INSTITUTIONS NATIONALES DES DROITS DE L’HOMME: ACTEURS DE TROISIÈME TYPE* 11 (2006). See also Kirsten Roberts, *The Role and Functioning of the International Coordinating Committee of National Human Rights Institutions in International Human Rights Bodies in National Human Rights Institutions*, in *EUROPE: COMPARATIVE, EUROPEAN AND INTERNATIONAL PERSPECTIVES* 223, 227 (Katrien Meuwissen & Jan Wouters eds., 2013); Anne Smith, *The Unique Position of National Human Rights Institutions: A Mixed Blessing?* 28 HUM. RTS. Q. 904, 908 (2006).

<sup>13</sup>Gauthier de Beco, *National Human Rights Institutions in Europe*, 7 HUM. RTS. L. REV. 331, 365 (2007); Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1, 24 (2010).

<sup>14</sup>For a very brief thought on this point, tentatively expressed in my previous article, see Hinako Takata, *Reconstructing the Roles of Human Rights Treaty Organs under the ‘Two-Tiered Bounded Deliberative Democracy’ Theory*, 22 HUM. RTS. L. REV. 1, 22–23 (2022).

<sup>15</sup>Katrien Meuwissen, *NHRI Participation to United Nations Human Rights Procedures: International Promotion Versus Institutional Consolidation?* in *NATIONAL HUMAN RIGHTS INSTITUTIONS IN EUROPE*, *supra* note 12, at 263, 274; RACHEL MURRAY, *THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE INTERNATIONAL AND REGIONAL LEVELS: THE EXPERIENCE OF AFRICA* 65 (2007).

by NHRIs.<sup>16</sup> Some have negatively reflected on the added value of NHRI participation.<sup>17</sup> Whereas one has suggested that the “legitimacy [of NHRI submissions] can be higher than that of NGOs, since [NGOs] might be driven by very specific interests,”<sup>18</sup> there is a contradicting observation that NGOs have greater autonomy and independence than do NHRIs and thus “NHRIs have a more limited function than NGO networks.”<sup>19</sup> Fiona McGaughey emphasized the need for “further exploration of the role of NHRIs vis-à-vis NGOs.”<sup>20</sup>

Against this background, this article addresses the following question from normative and empirical perspectives: “Are the roles and values of stakeholder participation in UN human rights treaty body activities qualitatively different for NGOs and NHRIs, and if so, how?” This question is not an end in itself. It opens a window toward a more profound, underexplored theoretical question: what precisely are the values brought by stakeholder participation to treaty body activities? Many previous studies have taken the benefit of stakeholder participation for granted. However, several studies have argued that it can supplement the treaty bodies’ lack of an independent fact-finding capability<sup>21</sup> by providing them with “on-the-ground” and “first-hand” information.<sup>22</sup> Some studies have observed that their participation can “sensitize” treaty bodies,<sup>23</sup> “maintain the balance of information,”<sup>24</sup> assist treaty bodies “to double-check” state submissions<sup>25</sup> and “to find persuasive legal interpretations,”<sup>26</sup> draw their attention to “the periphery,”<sup>27</sup> and offer “expertise”<sup>28</sup> and “cultural translation”<sup>29</sup> to these bodies. Other studies have emphasized its contribution to inclusion,<sup>30</sup> democratic decision-making,<sup>31</sup> the legitimacy of human rights treaties,

<sup>16</sup>Suzanne Egan, *Strengthening the United Nations Human Rights Treaty Body System*, 13 HUM. RTS. L. REV. 209, 227 (2013). See also, DAVID LANGTRY & KIRSTEN ROBERTS LYER, NATIONAL HUMAN RIGHTS INSTITUTIONS: RULES, REQUIREMENTS, AND PRACTICE 25 (2021).

<sup>17</sup>Beco, *supra* note 13, at 355.

<sup>18</sup>Antoine Buyse, *The Court’s Ears and Arms: National Human Rights Institutions and the European Court of Human Rights*, in NATIONAL HUMAN RIGHTS INSTITUTIONS IN EUROPE, *supra* note 12, at 173, 179. Note that the statement was made in the context of the NHRIs’ roles in the European Court of Human Rights. See also, Chris Sidoti, *National Human Rights Institutions and the International Human Rights System*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 93, 100 (Ryan Goodman & Thomas Pegrum eds., 2012).

<sup>19</sup>Gauthier de Beco, *Networks of European National Human Rights Institutions*, 14 EUR. L. J. 860, 866 (2008) 860–77. See also, Qafisheh, *supra* note 11, at 83.

<sup>20</sup>Fiona McGaughey, *From Gatekeepers to GONGOS: A Taxonomy of Non-Governmental Organisations Engaging with United Nations Human Rights Mechanisms*, 36 NETH. Q. HUM. RTS. 111, 131 (2018).

<sup>21</sup>Yogesh K. Tyagi, *Cooperation between the Human Rights Committee and Nongovernmental Organizations: Permissibility and Propositions*, 18 TEX. INT’L L.J. 273, 286 (1983).

<sup>22</sup>FIONA MCGAUGHEY, NON-GOVERNMENTAL ORGANISATIONS AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM 61 (2021).

<sup>23</sup>Anja Seibert-Fohr, *The UN Human Rights Committee*, in INTERNATIONAL HUMAN RIGHTS INSTITUTIONS, TRIBUNALS, AND COURTS 117, 125 (Gerd Oberleitner ed., 2018).

<sup>24</sup>Ayelet Levin, *The Reporting Cycle to the United Nations Human Rights Treaty Bodies: Creating a Dialogue between the State and Civil Society - The Israeli Case Study*, 48 GEO. WASH. J. INT’L L. REV. 315, 332 (2016).

<sup>25</sup>Mark Thomson, *Defining the Role of Non-Governmental Organizations: Splendid Isolation or Better Use of NGO Expertise?* in THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21 CENTURY, *supra* note 8, at 219, 221. See also Marsha A. Freeman, *The Committee on the Elimination of Discrimination against Women and the Role of Civil Society in Implementing International Women’s Human Rights Norms*, 16 NEW ENG. J. INT’L & COMP. L. 25, 27 (2010).

<sup>26</sup>Eckart Klein & David Kretzmer, *The UN Human Rights Committee: The General Comments -The Evolution of an Autonomous Monitoring Instrument*, 58 GER. Y.B. INT’L L. 189, 216 (2015).

<sup>27</sup>Loveday Hodson, *Women’s Rights and the Periphery: CEDAW’s Optional Protocol*, 25 EUR. J. INT. L. 561, 575 (2014).

<sup>28</sup>Cf. HEIDI NICHOLS HADDAD, THE HIDDEN HANDS OF JUSTICE: NGOs, HUMAN RIGHTS, AND INTERNATIONAL COURTS 19 (2018). Note that this statement concerns NGOs’ participation in human rights courts.

<sup>29</sup>Grainne de Burca, *Human Rights Experimentalism*, 111 AM. J. INT’L L. 277, 291 (2017). The author situates the NGOs’ cultural translation function in a wider theoretical framework of “experimentalism.”

<sup>30</sup>Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment 14* (Centre for Human Rights and Global Justice, New York University School of Law Working Paper No. 17, 2008).

<sup>31</sup>Helen Keller and Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in NATIONAL HUMAN RIGHTS INSTITUTIONS: LAW AND LEGITIMACY 116, 177–92 (Helen Keller and Geir Ulfstein eds., 2012); McGaughey, *supra* note 20, at 129.

subsidiarity,<sup>32</sup> and the legitimacy of international law from the discourse theory perspective.<sup>33</sup> Nevertheless, the comprehensive picture of the rationale for stakeholder participation has not been presented; these studies focused solely on one type of stakeholder (primarily NGOs) and/or on one type of treaty body activity (mostly state reporting procedures) or made generalized statements without defining the scope of their applicability. These various rationales have not been systematized. Moreover, whether and how different weights should be given to those rationales, especially based on the type of stakeholder and treaty body activity concerned, has not been explored.<sup>34</sup> Thus, this article fills the aforementioned gaps in the literature by “dissecting” stakeholder participation, differentiating between NGO and NHRI participation, and analyzing their respective values in different treaty body activities.

The research question has major practical importance when seen from two perspectives. First, in recent years, the “flood of information” provided to treaty bodies constituted a challenge<sup>35</sup> that required prioritization among those inputs.<sup>36</sup> Thus, by finding the unique strengths and advantages of NHRIs’ and NGOs’ participation in treaty body activities, this article contributes to the maximum exploitation of their benefits, which can enhance the effectiveness and legitimacy of treaty bodies and the efficient use of the limited time and resources of treaty bodies.<sup>37</sup> Second, one reason for the reluctance of some established democracies to create NHRIs, despite repeated calls from international human rights bodies, is that they question the benefit of NHRIs, given that active NGOs work in their countries.<sup>38</sup> This article offers a rebuttal by showing the added value of NHRI participation in treaty body activities.

To this end, as a preliminary observation, this article summarizes the historical and current institutional frameworks for the participation of NHRIs and NGOs in treaty body activities (Section B). Second, it normatively analyses the respective values backing NGO and NHRI participation, in each type of treaty body activity, based on three rationales for stakeholder participation: facilitating “bounded” deliberations at the national level, promoting deliberations on human rights treaty standards at the international level, and supplementing treaty bodies’ weak fact-finding capacity. It offers concrete normative guidance for treaty bodies on their engagement with NGO and NHRI participation in their different activities (Section C). Finally, it conducts an empirical study on the weight treaty bodies have granted to NGO and NHRI inputs and examines the extent to which such practice conforms to this article’s normative guidance (Section D).

Regarding this article’s terminology, scope, and limitations, first, it defines NGOs as “organizations not established by a government or by way of intergovernmental agreement, that are freely created by private initiatives and not profit-seeking.”<sup>39</sup> Although different typologies exist for NGOs, this article focuses on two axes: the geographical scope of the NGO’s membership

<sup>32</sup>Hinako Takata, *NHRIs as Autonomous Human Rights Treaty Actors: Normative Analysis of the Increasing Roles of NHRIs in UN Human Rights Treaties*, 24 MAX PLANCK Y.B. U.N. L 170, 192–93 and 198–99 (2020).

<sup>33</sup>ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 22–36 (2005).

<sup>34</sup>Comprehensive studies have been done on the values of stakeholder participation outside of the context of human rights law (See e.g., Nicola Sharman, *Objectives of Public Participation in International Environmental Decision-Making*, 72 INT’L & COMP. L.Q. 333 (2023)). However, they cannot be transplanted to the human rights law context uncritically, especially where they concern the value of democracy. Unlike environmental law, human rights law is “inward looking” (Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?* 16 EUR. J. INT. L. 907, 920–21 (2005)).

<sup>35</sup>Ludovic Hennebel, *The Human Rights Committee in The United Nations and Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 10, at 339, 350.

<sup>36</sup>Suzanne Egan, *Transforming the UN Human Rights Treaty System: A Realistic Appraisal*, 42 HUM. RTS. Q. 762, 778 (2020).

<sup>37</sup>Cf. Egan, *supra* note 16, at 228.

<sup>38</sup>Beco, *supra* note 13, at 399.

<sup>39</sup>See Stephan Hobe, *Human Rights, Role of Non-Governmental Organizations* ¶ 2 (2019), in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Anne Peters ed., online). Although the term “civil society organizations (CSOs)” is broader than “NGOs” [OECD, CIVIL SOCIETY AND AID EFFECTIVENESS: FINDINGS, RECOMMENDATIONS AND GOOD PRACTICE, BETTER AID 26 (2010)], treaty bodies use these terms interchangeably.

and activities and the general or specific scope of their mandate. For example, Amnesty International is an international NGO with a general human rights mandate, whereas the Forum for Refugees Japan is a local NGO with a specific mandate. Nevertheless, this categorization is blurred when NGOs act collectively in an *ad-hoc* manner or under umbrella organizations and networks. Although the UN Economic and Social Council has established a system of accrediting NGOs,<sup>40</sup> its criteria and procedures are unsuitable for human rights treaty body activities. Thus, treaty bodies have not relied on them,<sup>41</sup> nor does this study, when addressing NGO participation in treaty body activities. This article defines NHRIs as “state organs with constitutional and/or legislative mandates to protect and promote human rights,”<sup>42</sup> encompassing all types of NHRIs, namely commissions, ombudsman institutes, hybrid institutions, consultative and advisory bodies, research institutes and centers, civil rights protectors, public defenders, and parliamentary advocates.<sup>43</sup> Despite this broad definition of NHRIs, to acquire A-status from the Global Alliance of National Human Rights Institutions (GANHRI), NHRIs should fulfill additional requirements based on the Principles relating to the Status of National Institutions (“Paris Principles”) and the General Observations prepared by the GANHRI’s Sub-Committee on Accreditation (SCA), especially those requirements concerning independence, pluralism, and effectiveness.<sup>44</sup> Second, this study focuses on the three UN human rights treaty bodies with the most extensive history of work and the richest experiences at the time of writing, namely the Committee on the Elimination of Racial Discrimination (CERD), established under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights (ICCPR); and the Committee on the Elimination of Discrimination against Women (CEDAW) under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention). Third, this study focuses only on the three main activities of the three UN human rights treaty bodies: state reporting and individual communications procedures, and the production of general comments/recommendations. It evaluates the participation and provision of inputs by NGOs and NHRIs in these procedures rather than their contributions toward implementing the treaty bodies’ recommendations. Fourth, although this study drew out normative observations on how treaty bodies should treat NGOs and NHRIs, it does not offer proposals on the concrete and detailed modalities and practicalities concerning their participation. It only serves as evidence for such decision-making.

## B. Institutional Frameworks for the NGO and NHRI Participation

The participation of NGOs and NHRIs was initially developed in the context of each established procedure (sectoral approach) (I). However, since around 2010, treaty bodies have supplemented this approach comprehensively and holistically by producing papers and guidelines to regulate NGOs’ and NHRIs’ participation as a whole (II).

<sup>40</sup>G.A. Res. 1996/31, Consultative Relationship between the United Nations and Non-governmental Organizations (July 25, 1996).

<sup>41</sup>INTERNATIONAL SERVICE FOR HUMAN RIGHTS, A PRACTICAL GUIDE TO THE UN COMMITTEE ON NGOs 8 (2017).

<sup>42</sup>See GANHRI, *National Human Rights Institutions: What are NHRIs?* on the GANHRI’s website at: <https://ganhri.org/nhri/> (last accessed 1 July 2023).

<sup>43</sup>GANHRI, General Observations of the Sub-Committee on Accreditation ¶7 (2018) [hereinafter, “SCA’s General Observations”].

<sup>44</sup>GANHRI is a global organization comprised of NHRIs and its SCA accredits NHRIs in accordance with the Paris Principles, granting “A-status” to those that comply with the principles and “B-status” to those that partially comply. The SCA’s General Observations offer interpretative guidance for the Principles. As for the accreditation criteria and procedure, see generally Langtry & Lyer, *supra* note 16.

## I. Sectoral Approach: Evolution of NGOs' and NHRIs' Participation in Treaty Body Procedures

### 1. State Reporting Procedure

As a mandatory procedure for all state parties, the state reporting procedure constitutes the principal monitoring mechanism for the treaty bodies. In this procedure, state parties submit initial reports within a specified period after the treaty enters into force and provide periodic reports to the treaty bodies thereafter. Treaty bodies examine those reports in a public meeting where state delegations are invited for a “constructive dialogue.” Since the 1990s, treaty bodies have begun addressing “concluding observations” to each state party after examining its report.

Treaty bodies lack an independent fact-finding capability. Relevant treaty provisions, such as Article 40 of the ICCPR, are silent on the source of information that treaty bodies are entitled to rely on in examining state reports. Thus, as soon as treaty bodies were activated, a fierce debate emerged on the admissibility of information emanating from external sources, including NGOs.<sup>45</sup> As treaty bodies were initially reluctant to recognize or institutionalize NGO involvement given the skepticism of some (mainly Eastern) members against the use of external sources in general<sup>46</sup> and the allegedly anti-Second and Third World nature of NGOs in particular,<sup>47</sup> the roles of NGOs were confined to contacting treaty body members unofficially and in their individual capacity, not through the Secretariat.<sup>48</sup> Treaty body members were advised not to refer to NGO documents or mention their names when examining state reports.<sup>49</sup> Nevertheless, in the 1980s, NGOs gradually acquired trust and expanded influence; even Eastern members occasionally began to rely expressly on NGO information.<sup>50</sup> Partly because of the alleviation of the East-West divide within treaty bodies after the Cold War, NGO participation in state reporting procedures was officially recognized<sup>51</sup> and institutionalized in the 1990s.<sup>52</sup>

NHRIs were latecomers vis-à-vis engagement with treaty bodies.<sup>53</sup> The turning point that led to their entry was the adoption of the Paris Principles in 1991<sup>54</sup> and the endorsement of these Principles in the Vienna Declaration and Programme of Action<sup>55</sup> and by the UN General Assembly<sup>56</sup> in 1993, which have extensively promoted the rapid growth of NHRIs worldwide<sup>57</sup>

<sup>45</sup>Rep. of the CERD, ¶¶27–33, U.N. Doc. A/8718 (1972). See Dana D. Fischer, *Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 AM. J. INT'L L. 142, 146–47 (1982).

<sup>46</sup>Torkel Opsahl, *The Human Rights Committee*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 367, 406–07 (Philip Alston ed., 1992). In 1968, Schwelb had already expressed the view that the HRC is “clearly not authorized to use non-governmental material in its work.” See Egon Schwelb, *Civil and Political Rights: The International Measures of Implementation*, 62 AM. J. INT'L L. 827, 843 (1968).

<sup>47</sup>YOGESH TYAGI, THE UN HUMAN RIGHTS COMMITTEE: PRACTICE AND PROCEDURE 217–18 (2011).

<sup>48</sup>Stefanie Grant, *The NGO Role: Implementation, Expanding Protection and Monitoring the Monitors*, in THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21 CENTURY 209 (Anne Bayefsky ed., 2000).

<sup>49</sup>DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 111 (fn. 104) (1994).

<sup>50</sup>WILLIAM A. SCHABAS, NOWAK'S CCPR COMMENTARY: U.N. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 902–03 (3rd ed., 2019). See also, McGoldrick, *supra* note 49, at 77–79.

<sup>51</sup>See e.g., Rep. of the Third Meeting of Persons Chairing the Human Rights Treaty Bodies, annexed to U.N. Secretary General, *Effective implementation of United Nations Instruments on Human Rights and Effective Functioning of Bodies Established Pursuant to Such Instruments*, ¶¶ 38 and 68, U.N. Doc. A/45/636 (1990).

<sup>52</sup>See e.g., CERD's Decision I (XL) at the 40th Session, cited in Rep. of the CERD, at 104 U.N. Doc. A/46/18 (1992).

<sup>53</sup>Anne Gallagher, *Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 8, at 201, 208.

<sup>54</sup>Economic and Social Council, Rep. of the International Workshop on National Institutions for the Promotion and Protection of Human Rights, ¶ 254 U.N. Doc. E/CN.4/1992/43 (1991) [hereinafter, “Paris Principles”].

<sup>55</sup>World Conference on Human Rights, Vienna Declaration and Programme of Action ¶ 36 U.N. Doc. A/CONF.157/23 (June 25, 1993).

<sup>56</sup>G.A. Res 48/134, National Institutions for the Promotion and Protection of Human Rights (Dec. 20, 1993).

<sup>57</sup>Katerina Linos and Tom Pegram, *Architects of Their Own Making: National Human Rights Institutions and the United Nations*, 38 HUM. RTS.Q. 1109, 1114–15 (2016).

and their recognition as independent human rights actors.<sup>58</sup> The status of NHRIs in the state reporting procedure<sup>59</sup> was initially unstable,<sup>60</sup> as treaty bodies have occasionally treated them as part of government delegations.<sup>61</sup> However, since 2000s, NHRIs have gradually commenced interacting with treaty bodies in their own right.<sup>62</sup> In the fourth Inter-Committee Meeting of Human Rights Treaty Bodies in 2005, the participants agreed to develop “harmonized criteria for the participation of [NHRIs] in treaty body sessions in order to enhance the quality of information provided to the treaty bodies.”<sup>63</sup> Around that time, treaty bodies amended their procedures to expressly authorize NHRIs to provide information to their members in the same manner as NGOs.<sup>64</sup>

Today, both NGOs and NHRIs can submit written reports and address treaty body members in formal and informal meetings before preparing lists of issues and examining state reports.<sup>65</sup> The modalities for such participation are widely publicized as “NGO information note” and “NHRI information note,” which are posted on treaty bodies’ websites in advance of the session. Most modalities, such as the submission deadline, word limit, and venue, are common between NGOs and NHRIs.<sup>66</sup> Nevertheless, a crucial difference is that the CERD and CEDAW permit A-status NHRIs to present oral statements during constructive dialogues with state parties.<sup>67</sup>

## 2. Elaboration of General Comments/Recommendations

General comments (HRC) and general recommendations (CERD and CEDAW) are today known as non-binding guidance on specific treaty provisions and/or the relationship between treaty provisions and specific themes. They do not concern specific situations and states and are addressed to all state parties in general. Treaty provisions remain silent on the procedure for adopting general comments/recommendations. However, as such documents developed into “substantial and highly detailed commentaries on each aspect of a given article,”<sup>68</sup> especially after the Cold War, stakeholder participation became vital for their legitimacy.<sup>69</sup> Thus, in 1997, the CEDAW adopted a decision stating that NGOs are encouraged to participate in the discussion on draft general recommendations and to prepare informal background papers.<sup>70</sup> Other treaty bodies followed suit.<sup>71</sup> While NGOs have been the primary participants, several NHRIs have also been involved. Since the 2000s, treaty bodies have posted invitations for stakeholder comments on draft

<sup>58</sup>See generally, Takata, *supra* note 32.

<sup>59</sup>For an early example of NHRI participation, see the CERD’s positive comment on the participation of Australia’s NHRI. Rep. of the CERD ¶519, U.N. Doc. A/49/18 (1994).

<sup>60</sup>See statements of the Malawian NHRI cited in Murray, *supra* note 15, at 16.

<sup>61</sup>CERD, General Recommendation XVII on the Establishment of National Institutions to Facilitate the Implementation of the Convention, cited in the Rep. of the CERD at 117, ¶ 2, U.N. Doc. A/48/18(SUPP) (1993).

<sup>62</sup>U.N. Secretariat, Rep. on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process, at ¶¶ 94-5, U.N. Doc. HRI/MC/2005/4 (2005).

<sup>63</sup>Rep. of the Fourth Inter-committee Meeting of Human Rights Treaty Bodies, annexed to G.A., Rep. of the Chairpersons of the Human Rights Treaty Bodies on Their Seventeenth Meeting, ¶ 35-XIV, U.N. Doc. A/60/278 (2005).

<sup>64</sup>See e.g., Rep. of the CERD, Annex IV, B, U.N. Doc. A/58/18 (2003).

<sup>65</sup>See e.g., HRC, Paper on the Relationship of the Human Rights Committee with National Human Rights Institutions, ¶¶ 14-5, U.N. Doc. CCPR/C/106/3 (2012) [hereinafter, “HRC’s Paper on NHRIs”]; HRC, The Relationship of the Human Rights Committee with Nongovernmental Organizations ¶ 10, U.N. Doc. CCPR/C/104/3 (2012) [hereinafter, “HRC’s Paper on NGOs”].

<sup>66</sup>See e.g., HRC, NHRI Information Note: 137th session (27 February to 24 March 2023) (2023); HRC, NGO Information Note: 137th session (27 February to 24 March 2023) (2023).

<sup>67</sup>See *infra* note 113.

<sup>68</sup>M O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34*, 12 HUM. RTS. L. REV. 627, 645 (2012).

<sup>69</sup>Blake, *supra* note 30, at 14.

<sup>70</sup>Rep. of the CEDAW, ¶480, U.N. Doc. A/52/38/Rev.1 (1997).

<sup>71</sup>U.N. Secretariat, *supra* note 62, ¶ 107. See the HRC’s Working Methods, IX. General Comments/Recommendations, at <https://www.ohchr.org/en/treaty-bodies/ccpr/rules-procedure-and-working-methods> (last accessed 1 July 2023).

general comments/recommendations,<sup>72</sup> and since the 2010s, they have made these comments publicly available on their websites.<sup>73</sup>

In 2021, the CERD adopted “Guidelines on the elaboration of general recommendations” to formalize stakeholder participation,<sup>74</sup> broadly representing common practice among treaty bodies.<sup>75</sup> The guideline states that stakeholders, including NGOs and NHRIs, may engage in their elaboration in various ways, such as suggesting relevant topics for elaborating general recommendations,<sup>76</sup> and providing inputs in days of general discussions<sup>77</sup> and on the first draft posted on the CERD’s webpage.<sup>78</sup> For example, before drafting General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials, the CERD held a thematic discussion on “Racial discrimination in today’s world: Racial profiling, ethnic cleansing, and challenges” in 2017. A background note was circulated to invite stakeholders to participate;<sup>79</sup> 22 NGOs and 1 NHRI made statements in the discussion, along with state delegations and UN experts.<sup>80</sup> When the CERD produced the Draft General Recommendation No. 36 in 2019, it invited all stakeholders to send in their comments, which led to submissions by 15 NGOs and 9 NHRIs, among other stakeholders.<sup>81</sup>

### 3. Individual Communications Procedure

The individual communication procedure is optional, unlike the state reporting procedure. For those state parties that accepted the treaty bodies’ competence, treaty bodies may receive and consider individual communications alleging a violation of the human rights enshrined in the respective treaties. At the end of this quasi-judicial procedure, treaty bodies issue “Views” (HRC and CEDAW) or “Opinions” (CERD), which contain their findings on the existence or otherwise of a violation and, if necessary, provide recommendations for a remedy. The provisions concerning the *locus standi* for individual communications are termed differently in the three treaties. Whereas the Optional Protocol to the ICCPR limits the authors of communications to “individuals” who claim to be victims (Articles 1 and 2), the CERD can receive communications from “individuals or groups of individuals” (Article 14 of the ICERD) and the CEDAW can receive communications submitted “by or on behalf of individuals or groups of individuals” (Article 2 of the Optional Protocol to the CEDAW Convention). The broader scope established in the Optional Protocol to the CEDAW Convention was the outcome of a compromise between those who had emphasized the indispensable roles of NGOs as authors of communications given “the obstacles women may face in seeking remedies, including danger of reprisals, low levels of literacy and legal literacy and resource constraint,”<sup>82</sup> and those concerned with the abuse of such roles.<sup>83</sup>

<sup>72</sup>Keller and Grover, *supra* note 31, at 186.

<sup>73</sup>See e.g., HRC, *General Comment No. 35 on Article 9, Liberty and security of person: Inputs received*, at <https://www.ohchr.org/en/calls-for-input/general-comment-no-35-article-9-liberty-and-security-person> (last accessed 1 July 2023).

<sup>74</sup>CERD, *Guidelines on the Elaboration of General Recommendations*, U.N. Doc. CERD/C/504 (2021) [hereinafter, “CERD’s Guidelines on General Recommendations”].

<sup>75</sup>See e.g., the CEDAW’s Working Methods, VII, at <https://www.ohchr.org/en/treaty-bodies/cedaw/rules-procedure-and-working-methods> (last accessed 1 July 2023).

<sup>76</sup>CERD’s Guidelines on General Recommendations, *supra* note 74, at ¶ 5.

<sup>77</sup>*Id.*, at ¶ 10.

<sup>78</sup>*Id.*, at ¶ 13.

<sup>79</sup>CERD, *Racial Discrimination in Today’s World: Racial Profiling, Ethnic Cleansing and Current Global Issues and Challenges: Background Note* (2017).

<sup>80</sup>CERD, 94th Sess., 2600th mtg, U.N. Doc. CERD/C/SR.2600 (Nov. 29, 2017).

<sup>81</sup>*Call for submissions: Draft General Recommendation No. 36 on Preventing and Combating Racial Profiling* at the CERD’s website, at <https://www.ohchr.org/en/calls-for-input/call-submissions-draft-general-recommendation-ndeg-36-preventing-and-combating> (last accessed 1 July 2023).

<sup>82</sup>Amnesty International, *The Optional Protocol to the Women’s Convention*, AI Index IOR 51/04/97, at 9 (1997).

<sup>83</sup>For a summary of the discussions in the CEDAW’s travaux préparatoires on this point, see Jane Connors, *Optional Protocol*, in *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*:



NGOs have participated in individual communications procedures through four channels: (i) acting as representatives of victims with their consent; (ii) submitting communications on behalf of victims without their consent when they are unable to communicate on their own; (iii) submitting communications as victims of violations suffered on their own and/or by their own members; and (iv) submitting briefs as third parties/*amicus curiae*.<sup>84</sup> The first type is the most common and uncontested form of NGO participation.<sup>85</sup> It has been utilized since the early days,<sup>86</sup> as the treaties do not restrict the qualification of representatives.<sup>87</sup> In rare cases, NHRIs have represented victims.<sup>88</sup> Regarding the second pattern, according to the implicit intention of the drafters embedded in the term “on behalf of the victims” mentioned above, the CEDAW has permitted NGOs to serve as communications authors.<sup>89</sup> In *V.C. (deceased) v. Moldova* in 2020, given that the author NGO could not have obtained the victim’s consent owing to her death, that she was an orphan with no next of kin, that she had been paralyzed, and that the NGO had obtained consent from her closest friend and executor of her will, the CEDAW admitted the communication “in the interest of justice and the prevention of impunity.”<sup>90</sup> Even without a comparable phrase within the text of the treaties, the HRC and CERD have recognized submissions on behalf of victims without their consent as long as “the author(s) can justify acting on their behalf without such consent.”<sup>91</sup> However, given the strict application of these requirements, they have mostly denied NGOs the opportunity to serve as representatives in this sense.<sup>92</sup> Treaty bodies are divided on the admissibility of the third pattern. Whereas the HRC has been reluctant to admit the *locus standi* of legal persons, including NGOs based on the term “individuals” in the above-mentioned provision,<sup>93</sup> the CERD and CEDAW have not precluded the admissibility of NGO submissions based on the term “individuals or group of individuals.”<sup>94</sup> Nevertheless, these bodies are careful not to allow *actio popularis* in substance under the guise of NGOs’ submissions as victims.<sup>95</sup> Whereas the three channels mentioned above permit NGOs and NHRIs to pursue individual victims’ redress, the fourth channel allows them to act more flexibly by representing arguments, interests, and perspectives strategically or unintentionally overlooked by the parties, to enhance public interest and promote broader mobilization for

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A COMMENTARY 607, 624–26 (Marsha A. Freeman et al. eds., 2012). See also, Interpretative Statements on the Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, in Rep. of the Comm. on the Status of Women, at 59–71, U.N. Doc. E/1999/27 (1999).

<sup>84</sup>Katarzyna Sękowska-Kozłowska, *The Role of Non-governmental Organisations in Individual Communication Procedures before the UN Human Rights Treaty Bodies*, 4 CZECH Y.B. INT’L L., 367, 370 (2014).

<sup>85</sup>*Id.*

<sup>86</sup>See e.g., HRC, *Hertzberg v. Finland* (Apr. 2, 1982), Comm. No. 61/1979, 161, ¶11, U.N. Doc. A/37/40 (1982).

<sup>87</sup>There is a general expectation, however, that lawyers represent the victims. See Rep. of the HRC, ¶ 580, U.N. Doc. A/33/40 (1978).

<sup>88</sup>CESCR, *Marcia Cecilia Trujillo Calero v Ecuador*, Comm. No. 10/2015, ¶ 9.2, U.N. Doc. E/C.12/63/D/10/2015 (Mar. 26, 2018).

<sup>89</sup>See e.g., CEDAW, *Şahide Goekce (deceased) v. Austria*, Comm. No. 5/2005, ¶ 3.13, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007). In this case, the descendants of the deceased consented to the submission.

<sup>90</sup>CEDAW, *V.C. (deceased) v. Moldova*, Comm. No. 105/2016, ¶ 6.7, U.N. Doc. CEDAW/C/76/D/105/2016 (July 9, 2020). This decision may have been affected by the particular fact of this case that the state party did not challenge its admissibility. See Joint Opinion of Committee Members Hiroko Akizuki et al., ¶ 2.

<sup>91</sup>Rule 91 of the HRC’s Rules of Procedure, U.N. Doc. CCPR/C/3/Rev.12 (2021); Rule 91 (b) of the CERD’s Rules of Procedure, U.N. Doc. CERD/C/35/Rev.3 (1986).

<sup>92</sup>Nevertheless, the HRC has implied such a possibility where the NGO was the council of the victim in the domestic proceedings. HRC, *Humanitarian Law Center v. Serbia*, Comm. No. 1355/2005, ¶6.4, U.N. Doc. CCPR/C/89/D/1355/2005 (Mar. 26, 2007).

<sup>93</sup>HRC, *A Group of Associations for the Defence of the Rights of Disabled and Handicapped Persons in Italy, and Persons Signing the Communication v. Italy* (Apr. 10, 1984), Comm. No. 163/1984, at 47, ¶ 5, U.N. Doc. CCPR/C/OP/2 at 47 (1990).

<sup>94</sup>CERD, *The Jewish Community of Oslo et al. v. Norway*, Comm. No. 30/2003, ¶ 7.4, U.N. Doc. CERD/C/67/D/30/2003 (Aug. 15, 2005); CEDAW, *Polish Society of Anti-Discrimination Law v. Poland*, Comm. No. 136/2018, ¶6.3, U.N. Doc. CEDAW/C/73/D/136/2018 (July 19, 2019).

<sup>95</sup>See e.g., CEDAW, *Polish Society of Anti-Discrimination Law v. Poland*, *supra* note 94, at ¶ 6.5.

structural reforms.<sup>96</sup> The CEDAW was the pioneer in admitting third-party/*amicus curiae* interventions,<sup>97</sup> and the HRC and CEDAW both adopted guidelines on third-party intervention.<sup>98</sup> Nevertheless, their approaches differ in that the former permits “autonomous” third-party interventions (those without authorization by one of the parties to the dispute) while the latter requires authorization.<sup>99</sup> Treaty bodies face multiple and increasing third-party NGO interventions, including those currently pending.<sup>100</sup> The CERD is the first and only body to have admitted an *amicus curiae* brief by an NHRI.<sup>101</sup>

## II. Comprehensive and Holistic Approach: Current Institutional Frameworks Governing the Participation of NGOs and NHRIs

Since around 2010, treaty bodies have taken a comprehensive approach toward regulating NGOs’ and NHRIs’ participation across all activities, thus supplementing the sectoral approach. In 2011, the HRC held a meeting with NGOs and NHRIs to consider ways to improve their cooperation with the HRC,<sup>102</sup> which resulted in the adoption of papers on its relationship with NGOs<sup>103</sup> and NHRIs,<sup>104</sup> respectively, in 2012. The CERD adopted guidelines for cooperation with NGOs<sup>105</sup> and NHRIs<sup>106</sup> in 2021. The CEDAW adopted a statement on its relationship with NHRIs in 2008,<sup>107</sup> produced a paper on cooperation with NHRIs in 2019,<sup>108</sup> and made a statement on its relationship with NGOs in 2010.<sup>109</sup> The adoption of these documents symbolizes treaty bodies’ recognizing them as autonomous actors that should be regulated in a unified manner instead of a patchwork fashion. The fact that NGO and NHRI participation is dealt with in separate documents demonstrates that treaty bodies consider them distinct entities.<sup>110</sup> The HRC’s paper on its relationship with NHRIs states that:

[NHRIs] have an independent and distinct relationship with the Committee. The relationship is different from, yet complementary to, those of State parties, civil society,

<sup>96</sup>Frans Viljoen & Adem Kassie Abebe, *Amicus Curiae Participation Before Regional Human Rights Bodies in Africa*, 58 J. AFR. LAW 22, 25–28 (2014).

<sup>97</sup>See Table 3 in Section D-III.

<sup>98</sup>CEDAW, Guidelines on Third-party Interventions under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2022) [hereinafter, “CEDAW’s Guidelines on Third-party Interventions”]; HRC, Guidelines on Third-party Submissions, U.N. Doc. CCPR/C/160 (2019) [hereinafter, “HRC’s Guidelines on Third-Party Submissions”].

<sup>99</sup>CEDAW’s Guidelines on Third-party Interventions, *supra* note 98, at preambular ¶ 2.

<sup>100</sup>INTERNATIONAL SERVICE FOR HUMAN RIGHTS, GUIDE FOR THIRD PARTY INTERVENTIONS BEFORE UN HUMAN RIGHTS TREATY BODIES 58 (2022).

<sup>101</sup>See TBB-Turkish Union in Berlin/Brandenburg v. Germany, described in Table 3 of Section D-III.

<sup>102</sup>HRC, 102nd Sess., 2803rd mtg., U.N. Doc. CCPR/C/SR.2803 (July 11, 2011).

<sup>103</sup>HRC’s Paper on NGOs, *supra* note 65.

<sup>104</sup>HRC’s Paper on NHRIs, *supra* note 65.

<sup>105</sup>CERD, Guidelines on the Cooperation of the Committee on the Elimination of Racial Discrimination with Non-governmental Organizations, U.N. Doc. CERD/C/506 (2021).

<sup>106</sup>CERD, Guidelines on the Cooperation of the Committee with National Human Rights Institutions, U.N. Doc. CERD/C/505 (2021) [hereinafter, “CERD’s Guidelines on NHRIs”].

<sup>107</sup>CEDAW, Statement by the Committee on the Elimination of Discrimination against Women on its Relationship with National Human Rights Institutions (2008), in Note of the U.N. Secretary-General, Annex II, U.N. Doc. E/CN.6/2008/CRP.1 (2008).

<sup>108</sup>CEDAW, Paper on the Cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions (2019) [hereinafter, CEDAW’s Paper on NHRIs].

<sup>109</sup>CEDAW, Statement by the Committee on the Elimination of Discrimination against Women on its Relationship with Non-governmental Organizations (2010).

<sup>110</sup>Furthermore, treaty bodies have collectively endeavored to take a comprehensive approach to NHRIs’ participation. See Note by the Secretariat, Common Approach to Engagement with National Human Rights Institutions, U.N. Doc. HRI/MC/2017/3 (2017).

non-governmental organizations and other actors. Accordingly, the Committee provides ICC [today's GANHRI]-accredited national human rights institutions with opportunities to engage with it that are distinct from those of other actors.<sup>111</sup>

Other treaty bodies have adopted similar formulae.<sup>112</sup> However, the HRC's papers do not mark a substantial difference in the treatment of NGOs and NHRIs. By contrast, the other two bodies give NHRIs greater opportunities for participation. In the state reporting procedure, they offer A-status NHRIs an opportunity to present an opening statement during a formal dialogue with the state party.<sup>113</sup> The CEDAW expressly encourages NHRIs to provide it with reliable and evidence-based information in individual communications procedures,<sup>114</sup> whereas it does not do so for NGOs.

### C. Normative Analysis: Three Values of Stakeholder Participation

The values brought by stakeholder participation in treaty body activities are categorized into the following three components: (I) facilitating "bounded" deliberations at the national level, (II) promoting deliberations on human rights treaty standards at the international level, and (III) supplementing treaty bodies' weak fact-finding capacity. Whereas (III) corresponds to what many studies have referred to as "supplementing the treaty bodies' fact-finding capability," (I) and (II) integrate and reconstruct what previous studies have described under various other concepts (see the Introduction) so that these values can function as normative frameworks guiding the treaty bodies' practice on stakeholder participation in a comprehensive manner. These three values carry different weights for the differing activities of treaty bodies. First, for the state reporting procedure, (I) and (III) mainly apply directly. Second, for elaborating general comments/recommendations, (II) applies. Third, for the individual communications procedure, (III) concerns the fact-finding phase, and (I) applies to the phase involving the application of the treaty standards to the specific facts of the case, especially while having to balance the rights and interests involved. As regards the treaty interpretation phase, especially when evolutive interpretation is concerned, (II) applies.

#### I. Facilitating "Bounded" Deliberations at the National Level

This value is based on the author's theory of the "two-tiered bounded deliberative democracy."<sup>115</sup> Given that democratic legitimacy challenges against human rights treaties have become serious owing to the increasing intrusion of human rights treaties into national legal orders, and because the international community has come to share a denser conception of democracy, this theory builds on the notion of deliberative democracy to harmonize human rights protection and democracy at the global level. It posits that we live in globalized democratic societies comprised of two tiers of deliberations: national and international. In this theory,

[D]eliberations should primarily take place within each *national* society, as only national societies are equipped with dense public spheres, sufficiently shared values, and approximately equal stakes, which are preconditions for rich and meaningful deliberations. However, deliberations in national societies inevitably suffer from some deficits . . . . To address this gap, . . . "bounds" on national deliberations should be established through long-term and matured deliberations at the international level.<sup>116</sup>

<sup>111</sup>HRC's Paper on NHRIs, *supra* note 65, ¶ 7.

<sup>112</sup>CERD's Guidelines on NHRIs, *supra* note 106, ¶ 7; CEDAW's Paper on NHRIs, *supra* note 108, ¶ 8.

<sup>113</sup>CEDAW's Paper on NHRIs, *supra* note 108, ¶ 26; CERD's Guidelines on NHRIs, *supra* note 106, ¶¶ 7 and 17.

<sup>114</sup>CEDAW's Paper on NHRIs, *supra* note 108, ¶ 31.

<sup>115</sup>Takata, *supra* note 14.

<sup>116</sup>*Id.*, at 10–1.

The value of facilitating “bounded” deliberations at the national level corresponds to the first tier of deliberations within this theory. Human rights treaty standards should primarily be realized through national deliberations, where local conditions and needs are considered within the framework of human rights treaty standards and affected individuals, including minorities, are represented most effectively. To enable such deliberations, human rights treaty standards must be embedded in national formal and informal public spheres. Treaty bodies must respect and facilitate such deliberations. The state reporting procedure and the treaty application phase in the individual communications procedure provide opportunities to respect and facilitate “bounded” deliberations at the national level, especially where they involve a review of the balancing exercise between rights and interests, which is particularly apt for decisions based on national deliberations.

As Jürgen Habermas posited, deliberative democracy can function properly and be a source of political legitimacy only with continuous interaction between the two processes of deliberation (“two-track model”): non-institutionalized deliberations in the informal public sphere, where civil society is situated in its core,<sup>117</sup> and institutionalized deliberations in the formal public sphere in the political system such as the parliament and court.<sup>118</sup> The former constitutes a locus for an open-ended debate on all sorts of issues, political and otherwise.<sup>119</sup> It serves as a “context of discovery”<sup>120</sup>—sensitively detecting new problem situations<sup>121</sup> as “a sounding board.”<sup>122</sup> The latter serves as the “context of justification,”<sup>123</sup> where deliberations are conducted under pressure to decide within restricted forms, procedures, time, and reasons, leading to binding decisions.<sup>124</sup> The quality of the deliberations in the formal public sphere depends mainly on the supply of public opinions generated in the informal public sphere.<sup>125</sup> However, the active interplay between these processes of deliberations is often hampered by the fact that “the signals [that movements and initiatives within the civil society] send out and the impulses they give are generally too weak” to reach the formal public sphere in the short run.<sup>126</sup>

Against this background, NHRIs, especially those with A-status, can serve as a unique bridge between the two processes of deliberations. The Paris Principles and the SCA’s General Observations require NHRIs to collaborate closely with civil society in terms of their composition and activities, thus reaching “sections of the populations who are geographically, politically or socially remote” and “engag[ing] with vulnerable groups,”<sup>127</sup> while advising the national parliament, the government, and the court actively and regularly.<sup>128</sup> Given their broad human rights mandate and their resultant “home-made” human rights expertise,<sup>129</sup> they can ensure that national deliberations are properly “bounded”—conducted within the framework of human rights treaty standards—without neglecting local values and realities. This way, A-status NHRIs, which largely fulfill the above-mentioned requirements under the Paris Principles and the General Observations, are located at the pivot of bounded national deliberations. Accordingly, their views should enjoy special weight as a reflection of such deliberations. Thus, the opportunity for A-status NHRIs to make oral statements during the constructive dialogue should be encouraged for its symbolic effect in empowering NHRIs vis-à-vis their national governments and civil

<sup>117</sup>JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 367 (William Rehg trans., 1996)

<sup>118</sup>*Id.*, 307–08 and 371.

<sup>119</sup>Jeffrey Flynn, *Communicative Power*, in THE CAMBRIDGE HABERMAS LEXICON 53 (Amy Allen and Eduardo Mendietta eds., 2019).

<sup>120</sup>Habermas, *supra* note 117, at 307.

<sup>121</sup>*Id.*, 308.

<sup>122</sup>*Id.*, 359.

<sup>123</sup>*Id.*, 307.

<sup>124</sup>Flynn, *supra* note 119, at 53.

<sup>125</sup>Habermas, *supra* note 117, at 308.

<sup>126</sup>Habermas, *supra* note 117, at 373.

<sup>127</sup>SCA’s General Observations, *supra* note 43, 1.5.

<sup>128</sup>SCA’s General Observations, *supra* note 43, 1.6 and 1.11.

<sup>129</sup>Qafisheh, *supra* note 11, at 73.

society. Furthermore, citing NHRIs' views is desirable, both in constructive dialogue and concluding observations in the state reporting procedure and in Views or Opinions in the individual communications procedure. By doing so, treaty bodies can signal respect for and facilitate bounded national deliberations instead of imposing their own value judgements from outside.<sup>130</sup> Treaty bodies should consider requesting NHRIs on their own initiative to intervene as third parties in individual communications procedures for appropriate cases.<sup>131</sup>

By contrast, international NGOs, which are outsiders and distanced from the national society, have little place in national deliberations, in principle.<sup>132</sup> Local NGOs that are part of national civil society have an avenue to engage in national deliberations by lobbying the political systems; such voices should primarily be considered and addressed by national political systems rather than directly by treaty bodies in a manner that circumvents the national deliberative process.<sup>133</sup> Therefore, when bounded national deliberations appear to work well, treaty bodies should refrain from giving substantial and decisive weight to NGOs' views, as that would upset the balance of rights and interests that have been or that should be delicately achieved through national deliberations. However, local NGOs can catalyze treaty bodies' intervention when bounded national deliberations are dysfunctional. Local NGOs may provide treaty bodies with the views, positions, and perspectives that have not been properly taken up in the political system, based on which treaty bodies give guidance on the orientations for bounded national deliberations.<sup>134</sup>

## II. Promoting Deliberations on Human Rights Treaty Standards at the International Level

This category corresponds to the second tier of deliberations, namely international deliberations within the ambit of the "two-tiered bounded deliberative democracy." In this theory, human rights treaty standards, which restrict and guide national deliberations as "bounds," must be developed based on thorough deliberations at the international level where a more comprehensive range of positions and interests are heard and considered, including those that are overlooked and ignored in national deliberations.<sup>135</sup> Given the absence of a centralized political body at the international level, treaty bodies must proactively serve as a forum for deliberation where treaty standards are adapted and evolutively interpreted in light of social change and accompanying needs. This value applies to the elaboration of general comments/recommendations, most directly, where treaty bodies substantially produce new human rights norms in a general manner,<sup>136</sup> thus assuming a lawmaking function.<sup>137</sup> It concerns the individual communications procedure when treaty bodies develop new standards based on evolute interpretation.<sup>138</sup>

From the perspective of promoting international deliberations, the identity of the stakeholders is not as important as the actual diversity of opinions, positions, and perspectives brought into the

<sup>130</sup>Jan Jařab, *Perspectives on the Need for National Human Rights Institutions in Europe and the World*, in NATIONAL HUMAN RIGHTS INSTITUTIONS IN EUROPE, *supra* note 12, at 287, 294–95.

<sup>131</sup>See HRC's Guidelines on Third-Party Submissions, *supra* note 98, ¶ 3; CEDAW's Guidelines on Third-party Interventions, *supra* note 98, preambular ¶ 3 and ¶ 1.

<sup>132</sup>See Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT. L. 91, 117–18 (2000).

<sup>133</sup>This recommendation should be implemented alongside reforms to improve the national process of preparing state reports. See Jeremy Sarkin, *The 2020 United Nations Human Rights Treaty Body Review Process: Prioritising Resources, Independence and the Domestic State Reporting Process over Rationalising and Streamlining Treaty Bodies*, 25 INT'L J. HUM. RTS. 1301, 1315 (2021).

<sup>134</sup>Cf. Hodson, *supra* note 27, at 575.

<sup>135</sup>Takata, *supra* note 14, at 10–1.

<sup>136</sup>Max Lesch and Nina Reiners, *Informal Human Rights Law-Making: How Treaty Bodies Use 'General Comments' to Develop International Law*, 12 GLOBAL CONSTITUTIONALISM 378, 382–83 (2023).

<sup>137</sup>Klein and Kretzmer, *supra* note 26, at 203.

<sup>138</sup>Although the individual communications procedure is quasi-judicial in nature, adjudication can serve as a forum for deliberation. See generally, CONRADO HUBNER MENDES, CONSTITUTIONAL COURTS AND DELIBERATIVE DEMOCRACY (2013).

deliberations by their participation. The CERD has stated in its Guidelines on the Elaboration of General Recommendations that stakeholder participation aims to provide the Committee with a “wider spectrum of views on the subject matter, encompassing as many relevant issues as possible.”<sup>139</sup> Thus, the roles and values of NGO and NHRI participation do not differ qualitatively for this purpose. For the same reason, the values of their participation are not distinguishable from that of state parties for this particular purpose, even though the traditional rules of treaty interpretation codified in the 1969 Vienna Convention on the Law of Treaties accord a privileged status for state parties (see especially, Article 31 (3) (a) and (b)).

That said, NGOs, especially international ones with specific expertise on the subject matter of a given general comment/recommendation, hold a relative advantage over NHRIs in playing a role as they have the most updated and comprehensive data, information, and knowledge on the matter, including relevant international standards and practice and challenges common in various states and regions. Many such NGOs are fully acquainted with the relevant jurisprudence of regional human rights courts and national legislation and jurisprudence. They can assist treaty bodies, which chronically lack human resources<sup>140</sup> and are often dominated by non-international lawyers,<sup>141</sup> to cover such material. Thus, treaty bodies can promote international deliberations on human rights standards by considering the information and views of such NGOs. Moreover, the active transnational communications led by international NGOs contribute to the emergence of the “transnational” public sphere and deliberations,<sup>142</sup> which can enrich the quality of international deliberations. Thus, treaty bodies should not hesitate to cite and name the NGOs they consulted. The fact that they have consulted a wide range of NGOs positively affects the democratic legitimacy, within the meaning of the “two-tiered bounded deliberative democracy,” of the resultant human rights treaty standards.

By contrast, a general assumption exists that NHRIs play limited roles in international deliberations, as the information and views provided by NHRIs tend to focus on the national situations of a particular state, owing to their national scope of mandate. Nevertheless, where some states and regions are especially affected by the subject matter but are inadequately covered by international NGOs, NHRIs can fill the gaps. NHRIs may contribute more to international deliberations by acting collectively, just like NHRIs in Europe, which have actively and regularly made third-party submissions to the European Court of Human Rights collectively to provide the Court with detailed comparative law data.<sup>143</sup>

### III. Supplementing the Treaty Bodies’ Weak Fact-Finding Capacity

The treaty bodies’ lack of independent fact-finding capacity, including its lack of expertise in national legal systems and jurisprudence, constitutes a weakness for the effective functioning of state reporting and individual communications procedures.<sup>144</sup> In the former, the state parties under review tend to present a favorable version of the relevant information or submit a very descriptive report on the state of the law.<sup>145</sup> For treaty body members to pose questions and

<sup>139</sup>CERD’s Guidelines on General Recommendations, *supra* note 74, ¶ 14.

<sup>140</sup>Rep. of the HRC, ¶¶ 35-6, U.N. Doc. A/76/40 (2021).

<sup>141</sup>Hiroko Akizuki, *Kokuren josei sabetsu teppai iinkai dai 73, 74, 75, 76 kaiki ni okeru shingi jokyo* [Deliberations at the 73rd, 74th, 75th and 76th sessions of the United Nations Committee on the Elimination of Discrimination against Women], 30 KOKUSAI KANKEI KIYO, 303, 315 (2021).

<sup>142</sup>See e.g., JOHN DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (2002) Chapter 5; Hauke Brunkhorst, *Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism*, 31 MILLENNIUM 675, 682–83 (2002).

<sup>143</sup>For a recent example, see ENNHRI, *Written observations in application no. 40119/21* (2022), [https://ennhri.org/wp-content/uploads/2022/03/FINAL\\_Third-Party-Intervention-M.L.-v.-Poland\\_to-the-Court.pdf](https://ennhri.org/wp-content/uploads/2022/03/FINAL_Third-Party-Intervention-M.L.-v.-Poland_to-the-Court.pdf) (last accessed 1 July 2023).

<sup>144</sup>Tyagi, *supra* note 21, at 276.

<sup>145</sup>Hennebel, *supra* note 35, at 349.

comments and issue concluding observations that properly reflect society's current human rights realities and priorities, they require access to the most updated, detailed, and objective information. In the latter, although treaty bodies normally defer to the fact-finding and the interpretation and application of national laws by national courts in the absence of procedural irregularities and manifest arbitrariness,<sup>146</sup> cases occur where national judgments do not cover disputed facts or the independence of the national court itself is under dispute. Unlike the International Court of Justice or other international judicial bodies that ensure that a judge of the nationality of each party to the dispute is present on the bench, treaty bodies exclude members of the same nationality to ensure impartiality<sup>147</sup> and thus do not benefit from the national expertise of such members.

From this perspective, NGOs, especially the local and grassroots ones, have the most significant advantage because they have the latest and most detailed information on a particular issue or case. Nevertheless, they have several weaknesses. First, without a centralized evaluation system for NGOs like the GANHRI, it is difficult to objectively determine whether and to what extent the NGO concerned is reliable.<sup>148</sup> Second, some states have few local NGOs that can report grassroots information.<sup>149</sup> Although international NGOs often supplement such a gap, they are selective,<sup>150</sup> and overreliance on them would create a perception of "human rights imperialism."<sup>151</sup> Third, NGOs risk intimidation and reprisals in some countries for acting against the government.<sup>152</sup> Therefore, treaty bodies and their members should refrain from citing the information provided by a single NGO in a definitive manner. However, they can rely on NGOs' information wherever such information converges. They should avoid naming the NGOs as it may create a controversy on the reliability of the NGO in question<sup>153</sup> and enhance the risk of intimidation and reprisals it may face.

By contrast, NHRIs with A-status have the guarantee that they largely comply with the Paris Principles and the SCA's General Observations, including the criteria of independence, pluralism, and effectiveness.<sup>154</sup> They are presumed to have the mandate under national law to obtain statements or documents and inspect and examine any public premises, documents, equipment, and assets.<sup>155</sup> Thus, they have access to information that NGOs do not. As A-status NHRIs are supposed to collaborate closely with national NGOs, information from the latter should be appropriately integrated into that of the former. Additionally, as A-status NHRIs are mandated to

<sup>146</sup>See e.g., HRC, *Ashby v. Trinidad and Tobago*, Comm. No. 580/1994, ¶ 10.3, UN Doc. CCPR/C/74/D/580/1994 (Mar. 21, 2002).

<sup>147</sup>U.N. Secretary-General, *Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights*, ¶67, U.N. Doc. A/52/507 (1997).

<sup>148</sup>Several states have indeed suggested instituting a verification process for NGO information. U.N. Secretary-General, *Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights*, ¶17, U.N. Doc. A/63/280 (2008). Nevertheless, as Young noted, the strength of NGOs lies in the fact that they are diverse, plural, and uncoordinated among one another. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 189 (2000).

<sup>149</sup>David Kretzmer, *Human Rights, State Reports*, ¶ 45 (2021) in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, *supra* note 39.

<sup>150</sup>Tyagi, *supra* note 47, at 223.

<sup>151</sup>McGaughey, *supra* note 22, at 9–10.

<sup>152</sup>For recent reports on intimidation and reprisals against NGOs and human rights defenders for cooperating with the UN in promoting human rights, see U.N. Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights*, U.N. Doc. A/HRC/48/28 (2021).

<sup>153</sup>For example, when an HRC member expressly relied on the report of Amnesty International, the Indian delegation called it "one-sided and not impartial." HRC, 41st Sess., 1041st mtg, ¶ 75, U.N. Doc. CCPR/C/SR.1041 (Mar. 27, 1991).

<sup>154</sup>Although there are inconsistencies and uncertainties in the accreditation procedure, the GANHRI has taken various steps to improve it. Hinako Takata, *How are the Paris Principles on NHRIs Interpreted? Towards a Clear, Transparent, and Consistent Interpretative Framework*, 40 *NORD. J. HUM. RTS.* 285, 293–304 (2022).

<sup>155</sup>Paris Principles, *supra* note 54, Sections B.1, 2, and 3 (a) [Although the original Paris Principles text does not use the A, B, C, and D numbering, this article follows the SCA's numbering. See Takata, *supra* note 154, at fn. 72]; SCA's General Observations, *supra* note 43, 1.2.

monitor human rights situations of a given state continuously, covering all categories of human rights,<sup>156</sup> they must have a precise understanding of the human rights realities and priorities in the state concerned and the context in which the given human rights issue is situated. Therefore, the information provided by A-status NHRIs has sufficient reliability and authority. The other distinctive feature of NHRIs is that they are state organs. States endorse their NHRIs' independence and credibility. Treaty bodies' direct and express reliance on NHRIs' information is unlikely to be challenged by states.<sup>157</sup> Nevertheless, because NHRIs are state organs, they may be incentivized to keep their criticism to a tolerable level. Also, as many NHRIs, including those with A-status, struggle for richer resources, they may be unable to cover all issues and cases.

## D. Empirical Analysis: Do Treaty Bodies Give Different Weights to NGOs and NHRIs?

### 1. State Reporting Procedure

Although previous studies have examined the impact of NGO and NHRI participation in the examination of state reports, they are primarily anecdotal based on personal experience<sup>158</sup> and do not provide an objective and overall picture. Some studies have conducted documentary and linguistic matching analyses between NGO/NHRI recommendations and treaty bodies' concluding observations.<sup>159</sup> However, these methodologies cannot fully trace the causal link between participation and outcome. As treaty body members may rely on sources outside of those submitted by NGOs and NHRIs,<sup>160</sup> including documents from the previous reporting cycle, the probability that matches are merely coincidental cannot be excluded. Thus, this article adopts a methodology that focuses on the direct reference to the source by treaty body members, which uncontestedly shows that the source made a decisive impact and/or that the treaty body members considered the sources worth mentioning for their credibility and authority. The current study focuses on the summary records of the constructive dialogue in the state reporting procedure in the three latest sessions of each treaty body. It examines when and how often treaty body members expressly relied on NGO or NHRI information and views to ask questions, request information, or make recommendations.

Table 1 shows the statistics concerning the participation of NGOs and NHRIs in the sessions under study. Whereas NGO reports have been submitted for almost all state parties examined, NHRI reports have been submitted for only around half of the states. Therefore, to directly compare their participation under identical conditions, among the state parties whose reports are considered in the sessions ("state parties examined"), only those for whom both NGOs and NHRIs have submitted reports and/or have made oral statements ("state parties under study") are studied. From the normative perspective of facilitating "bounded" national deliberations, the fact that few NHRIs have exploited opportunities to make oral statements is regrettable (see Section C-I).

Table 2 shows the number of direct references by treaty body members to NGO and NHRI submissions within the summary records of the constructive dialogue with the state parties under

<sup>156</sup>Paris Principles, *supra* note 54, Section A. 3 (a); SCA's General Observations, *supra* note 43, 1.6.

<sup>157</sup>Qafisheh, *supra* note 11, at 73. Some states expressly request treaty bodies to give information from NHRIs greater weight over that from NGOs. See e.g., Statement by Ms. Pierre-Wade (Canada), CERD, 79th Sess., 2116th mtg., ¶ 9, U.N. Doc. CERD/C/SR.2116.

<sup>158</sup>Felice D. Gaer, *Implementing International Human Rights Norms: UN Human Rights Treaty Bodies and NGOs*, 2 J. HUM. RTS. 339, 344 (2003). As an example, see Brice Dickson, *The Contribution of Human Rights Commissions to the Protection of Human Rights*, 2003 PUBLIC LAW 272, 277.

<sup>159</sup>Domenico Zipoli, *NHRI Engagement with UN Human Rights Treaty Bodies: A Goal-based Approach*, 37 NORD. J. HUM. RTS. 259, 274–77 (2019); Gamze Erdem Turkelli and Wouter Vandenhoe, *The Convention on the Rights of the Child: Repertoires of NGO Participation*, 12 HUM. RTS. L. REV. 33, 54–60 (2012). Fiona McGaughey, *Advancing, Retreating or Stepping on Each Other's Toes? The Role of Non-Governmental Organisations in United Nations Human Rights Treaty Body Reporting and the Universal Periodic Review*, 35 AUSTL. Y.B. INT'L L. 187, 198 (2017).

<sup>160</sup>See e.g., Akizuki, *supra* note 141, at 308.



**Table 1.** NGO and NHRI participation

	Number of state parties whose reports are considered in the Session (“state parties examined”) <sup>161</sup>	Number of state parties examined for whom both NGOs and NHRIs participated (“state parties under study”) <sup>162</sup>	Number of NGOs’ reports for the Session concerning state parties under study	Number of NHRIs’ reports for the Session concerning state parties under study	Number of NHRIs that made oral statements concerning the state parties under study <sup>163</sup>
HRC (135 <sup>th</sup> , 136 <sup>th</sup> , 137 <sup>th</sup> Sessions)	17 <sup>164</sup>	8	93	8	N/A
CERD (106 <sup>th</sup> , 107 <sup>th</sup> , 108 <sup>th</sup> Sessions)	17	6	38	6	1
CEDAW (82 <sup>nd</sup> , 83 <sup>rd</sup> , 84 <sup>th</sup> Sessions)	24	12	70	13	7

**Table 2.** Number of treaty body members’ references to external sources

	Number of treaty body members’ references to external information without citation	Number of treaty body members’ references to NGOs’ information and views	Number of treaty body members’ references to NHRIs’ information and views (Among them, number of references concerning states for whom NHRIs made oral statements)
HRC (135 <sup>th</sup> , 136 <sup>th</sup> , 137 <sup>th</sup> Sessions)	141	4	3 (N/A)
CERD (106 <sup>th</sup> , 107 <sup>th</sup> , 108 <sup>th</sup> Sessions)	65	4	3 (1)
CEDAW (82 <sup>nd</sup> , 83 <sup>rd</sup> , 84 <sup>th</sup> Sessions)	45	2	9 (5)

study. Treaty body members have often resorted to external sources while asking questions, requesting information, or making recommendations without explicitly naming their source, such as “that the Committee had received a number of credible reports concerning ...”<sup>165</sup> and “according to reliable sources.”<sup>166</sup> The ratio of express references to NGOs and NHRIs is not high. Whereas CEDAW members tended to give greater weight to NHRI submissions, members of the other two bodies referred to NGO and NHRI submissions equally. Nevertheless, given that the number of NHRIs’ submissions and the total quantity of information contained therein are far less

<sup>161</sup>This excludes state parties that had not submitted their reports and/or were absent for the examination.

<sup>162</sup>This includes NGOs and NHRIs that have submitted reports for the consideration of state reports, and NHRIs that have made oral statements in the constructive dialogue. Submissions for the list of issues are not included. When multiple NGOs jointly submitted one report, it is counted as one.

<sup>163</sup>This excludes NHRIs that spoke as part of the delegation.

<sup>164</sup>China (Hong Kong) and China (Macau) were counted separately.

<sup>165</sup>CERD, 108th Sess., 2929th mtg., ¶ 42, U.N.Doc. CERD/C/SR.2929 (Nov. 15, 2022).

<sup>166</sup>HRC, 137th Sess., 3958th mtg., ¶ 16, U.N. Doc. CCPR/C/SR.3958 (Feb. 28, 2023).

than those of NGOs (see Table 1), the substantial frequency of direct reference to NHRI submissions was higher than that of NGO submissions.

The NHRIs' opportunities to make oral statements have not affected the frequency of references to NHRI submissions in the CERD and CEDAW. In that sense, their primary effects are symbolic (see Section C-I). Nevertheless, a qualitative look at the references shows that such opportunities sometimes increased the weight and attention given to NHRI information and views. For example, a National Human Rights Commission representative made a speech in the CEDAW's consideration of Gambia's report in its 83rd Session.<sup>167</sup> Regarding what was said there, Committee member Ms. Reddock asked: "whether, as recommended by the National Human Rights Commission, a study would be carried out into best practices relating to non-discriminatory personal status laws in other predominantly Muslim countries."<sup>168</sup>

While treaty body members expressly named NHRIs, they refrained from naming NGOs and instead treated them collectively. They have stated, for example, "the concerns expressed by non-governmental organizations (NGOs) with respect to . . ." <sup>169</sup> This implies that while treaty body members believe that the information from and views of NHRIs have credibility and authority, those of NGOs are only worth relying on when they sufficiently converge, and that such a reference should not include specific names. Such practices are consistent with the normative guidance made in Section C-III concerning supplementing treaty bodies' weak fact-finding capacity.

## II. Elaboration of General Comments/Recommendations

Whereas the HRC holds the readings of general comments in public meetings, the CERD and CEDAW draft general recommendations in closed meetings. Therefore, an approach similar to the previous subsection (evaluating the impact of NGO and NHRI submissions by examining the treaty body members' direct reference) is possible, but only for the HRC.<sup>170</sup> This article focuses on the summary records of the second readings of General Comments No. 36 (2019) and No. 37 (2020). It examines when and how treaty body members relied on NGOs/NHRIs to (consider to) add, delete, or change terms and phrases and/or the drafting policy.<sup>171</sup> The second reading is the most appropriate target of analysis because, as Mr. Heyn, the rapporteur for General Comment No. 37, said, "[t]he main purpose of the second reading was to reflect on the draft in the light of [stakeholders'] submissions."<sup>172</sup>

Before the HRC's second reading of draft General Comment No. 36 on Article 6 (Right to life), 107 reports were received from NGOs, 33 from academic institutions/individual experts, 23 from state parties, 7 from UN-associated bodies and experts, 2 from NHRIs, and 1 from parliamentarians. The second reading was held at the HRC's 3431st meeting in October 2017 and continued to the 3561st meeting in October 2018.<sup>173</sup> The comprehensive examination of their summary records showed that out of the 382 references by the HRC members to stakeholder

<sup>167</sup>CEDAW, 83rd Sess., 1925th mtg., ¶¶ 14-18 (especially ¶18), U.N. Doc. CEDAW/C/SR.1925 (Oct. 20, 2022).

<sup>168</sup>CEDAW, 83rd Sess., 1926th mtg., ¶24, U.N.Doc., CEDAW/C/SR.1926 (Oct. 20, 2022).

<sup>169</sup>CERD, 108th Sess., 2929th mtg., *supra* note 165, ¶ 36.

<sup>170</sup>From the normative perspective of promoting deliberations on human rights treaty standards at the international level (Section C-II), such meetings should be held publicly so that debates can be scrutinized in terms of the diversity of views and perspectives considered and the thoroughness of such considerations.

<sup>171</sup>When more than two actors submit a report collectively, they are treated as one for the purpose of statistical analysis. When a treaty body member does not identify the name or number of the actors, for example, by stating "some NGOs," it is counted as one reference to such an actor.

<sup>172</sup>HRC, 129th Sess., 3710th mtg., ¶2, U.N.Doc. CCPR/C/SR.3710 (June 30, 2020). See also The Rapporteur of the general comment Mr. Shany's comment in similar terms (HRC, 121st Sess., 3431st mtg., ¶ 2, U.N. Doc. CCPR/C/SR.3431 (Oct. 27, 2017)).

<sup>173</sup>The 3431st, 3437th, 3439th, 3477th, 3481st, 3485th, 3491st, 3498th, 3513rd, 3521st, 3525th, 3526th, 3538th, 3547th, 3553rd, and 3561st meetings were allocated for the second reading.

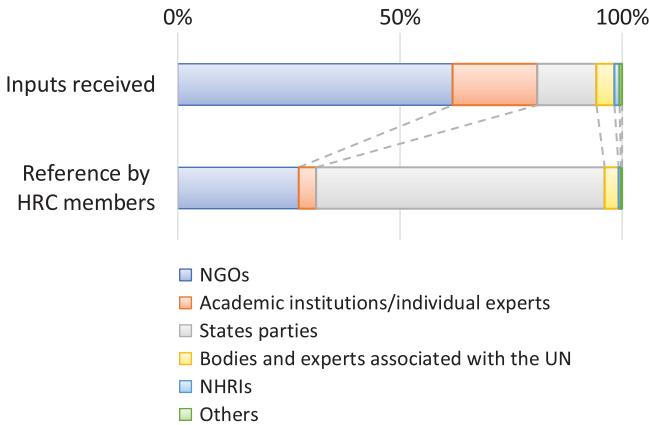


Figure 1. General Comment No. 36: Number of inputs received and references made by treaty body members.

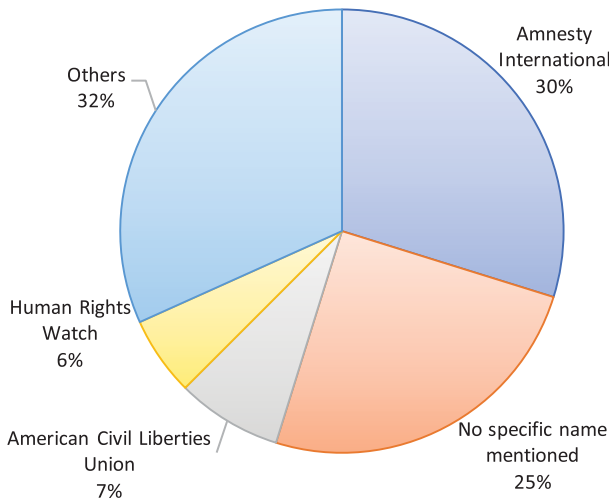


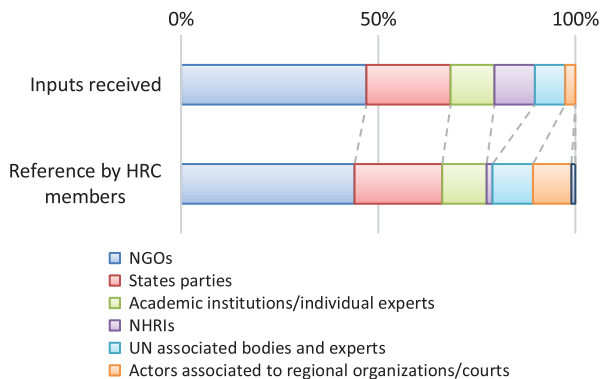
Figure 2. General Comment No. 36: Breakdown of references to NGOs.

submissions, 248 came from state parties, 104 from NGOs, 15 from academics, 12 from actors associated with the UN and other UN human rights treaty bodies, and 2 from NHRIs. Another actor submitted one report. Figure 1 illustrates this breakdown. The only NHRI submission mentioned was from France’s *Commission nationale consultative des droits de l’homme*. Among the NGO submissions, Amnesty International was cited most (31 times), followed by the American Civil Liberties Union (8 times) and Human Rights Watch (6 times) (see Figure 2).

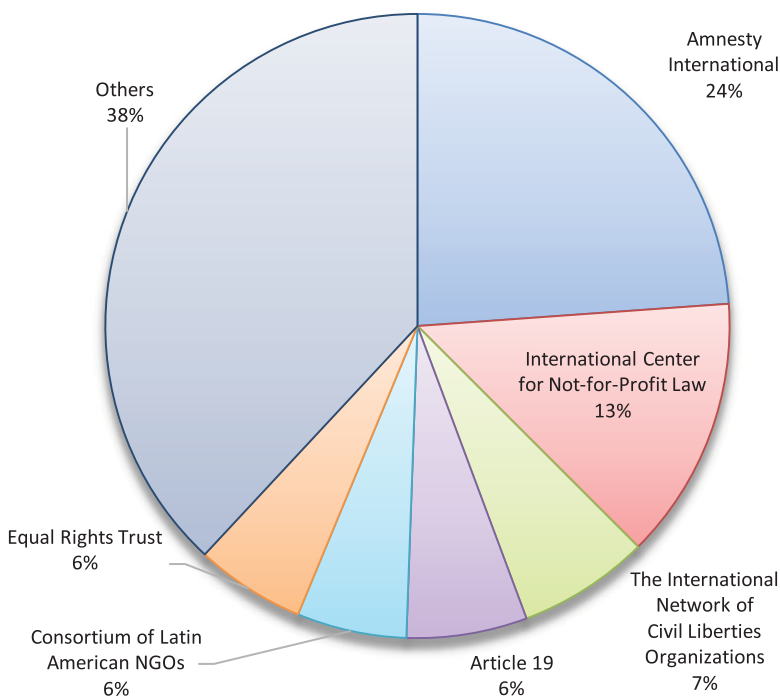
In drafting General Comment No. 37 on Article 21 (Right of peaceful assembly), 55 NGOs, 25 state parties, 13 academic institutions/individual experts, 12 NHRIs, 9 bodies and experts associated with the UN, 3 actors associated with regional organizations and/or courts submitted written comments in advance of the second reading.<sup>174</sup> The comprehensive examination of the summary records of the second reading<sup>175</sup> shows that of the 400 direct references to stakeholder submissions by the HRC members, 176 came from NGOs, 89 from state parties, 45 from academic institutions or individual experts, 41 from actors associated with the UN and other UN treaty bodies, 39 from actors associated with regional organizations and/or courts, 6 from NHRIs, and 4

<sup>174</sup>Call for Comment: No. 37 on Article 21 of the International Covenant on Civil and Political Rights – Right of peaceful assembly at the HRC’s website (Sep. 17, 2020), <https://www.ohchr.org/en/calls-for-input/call-comment-no-37-article-21-international-covenant-civil-and-political-rights> (last accessed 1 July 2023).

<sup>175</sup>The 3707th, 3710th, 3711th, 3712nd, 3713rd, 3714th, 3715th, 3716th, 3717th, 3718th, 3719th, 3720th, 3721st, 3722nd, 3724th, 3725th, 3726th, 3727th, 3728th, 3730th, 3731st, and 3733rd meetings were covered.



**Figure 3.** General Comment No. 37: Number of inputs received and references by treaty body members.



**Figure 4.** General Comment No. 37: Breakdown of references to NGOs.

were drawn from other sources. This distribution is illustrated in Figure 3. References to NHRIs include mentions of the Commission on Human Rights of the Philippines<sup>176</sup> and the Kenya National Commission on Human Rights.<sup>177</sup> Among the NGOs, Amnesty International was cited most (42 times), followed by the International Center for Not-for-Profit Law (24 times), the International Network of Civil Liberties Organizations (12 times), Article 19 (11 times), Consortium of Latin American NGOs (10 times), and the Equal Rights Trust (10 times) (Figure 4).

<sup>176</sup>HRC, 129th Sess., 3714th mtg., ¶ 7, U.N. Doc. CCPR/C/SR.3714 (July 3, 2020); HRC, 129th Sess., 3718th mtg., ¶ 52, U.N.Doc. CCPR/C/SR.3718 (July 9, 2020); HRC, 129th Sess., 3726th mtg., ¶ 39, U.N. Doc. CCPR/C/SR.3726 (July 20, 2020).

<sup>177</sup>HRC, 129th Sess., 3715th mtg., ¶ 55, U.N. Doc. CCPR/C/SR.3715 (July 6, 2020); HRC, 129th Sess., 3724th mtg., ¶ 60, U.N.Doc. CCPR/C/SR.3724 (July 17, 2020); HRC, 129th Sess., 3730th mtg., ¶ 49, U.N. Doc. CCPR/C/SR.3730 (July 22, 2020).

As the rapporteur takes the initiative in the discussion by introducing relevant stakeholder submissions and making proposals in the second reading, their approach affects the number of references and their sources.<sup>178</sup> However, in both second readings examined above, four tendencies were discerned, all of which largely endorsed the normative guidance made in Section C-II from the perspective of promoting deliberations on human rights treaty standards at the international level. First, the rapporteur and other HRC members heavily relied on NGO submissions, especially those with a global reach, such as Amnesty International. Second, when combined with a qualitative analysis, the above statistics show that the rapporteur and other members did not privilege the views of state parties over those of NGOs and other stakeholders but treated them equally. For example, in drafting Paragraph 48 of General Comment No. 37, which concerns the degree to which restrictions on the right of peaceful assembly were justified in the interests of national security, the rapporteur, Mr. Heyns, introduced the contradicting views of Russia and the Consortium of Latin American NGOs, and proposed the wording that “represented [a] middle ground between those two approaches.”<sup>179</sup> Third, references to NHRIs are low relative to the total number of references and NHRI submissions. The reason for this discrepancy may be that the scope of most of their submissions is limited to their national experience. For example, the NHRI of Cyprus surveyed children’s opinions on the right to peaceful assembly but covered only Cypriot children.<sup>180</sup> Finally, in contrast to the examination of state reports, where treaty body members have refrained from naming NGOs, HRC members have not hesitated to do so in elaborating general comments.

### III. Individual Communications Procedure

Section B-I-3 examined four channels through which NGOs/NHRIs may address treaty bodies in the individual communications procedure. Among the four channels, channel (iv), submitting a brief as a third-party/*amicus curiae*, most effectively provides the opportunity for NGOs/NHRIs to make unique and independent contributions to the individual communications procedure beyond seeking individual victims’ redress. Thus, only the fourth type is studied.

Table 3 shows that in a limited number of cases, treaty bodies have admitted third-party/*amicus curiae* briefs from NGOs/NHRIs. The CEDAW has admitted them in five cases and the HRC in two. In all these cases, the submissions were made by international or local NGOs. The CERD has received an *amicus curiae* brief in only one case from a German NHRI (German Institute of Human Rights, or GIHR). In most cases, briefs have been submitted through the authors. The scarcity of third-party/*amicus curiae* participation in general and “autonomous” participation (not submitted through one of the parties) in particular can be explained by the fact that the CERD does not make the table of pending cases available to the public and that the CEDAW and HRC publish such tables with very brief descriptions, which only include the name of the state party concerned, the articles involved, and the subject matter in one phrase.<sup>181</sup>

The third-party/*amicus curiae* submissions addressed one or more of the following aspects: (i) supplementing the facts of the case; (ii) elaborating on the national legal system and

<sup>178</sup>Nevertheless, a summary of stakeholder submissions has been distributed to other members (HRC, 129th Sess., 3710th mtg., *supra* note 172, ¶ 2). They rely on such submissions intermittently (See e.g., HRC, 129th Sess., 3726th mtg., ¶46, U.N. Doc. CCPR/C/SR.3726 (July 20, 2020)).

<sup>179</sup>HRC, 129th Sess., 3718th mtg., ¶ 33, U.N. Doc., CCPR/C/SR.3718 (July 9, 2020).

<sup>180</sup>The Commissioner for Children’s Rights Office of Cyprus, Comments on the Committee’s Revised Draft General Comment No 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights (Feb. 11, 2020), [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle21/Cypriot\\_Commissioner\\_Children\\_Rights.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle21/Cypriot_Commissioner_Children_Rights.pdf) (last accessed 1 July 2023).

<sup>181</sup>The HRC’s table of pending cases is available on the “Individual Communications” page on its website: <https://www.ohchr.org/en/treaty-bodies/ccpr/individual-communications> (last accessed 1 July 2023). The CEDAW’s table of pending cases is available on the Individual Communications page on its website: <https://www.ohchr.org/en/treaty-bodies/cedaw/individual-communications> (last accessed 1 July 2023).

Table 3. List of cases with NGO and NHRI participation

Treaty Body and the Comm. No.	Case name and summary	Date of adoption	Third-party/Amicus curiae intervenor	Submitted autonomously/through the author	Does the treaty body provide a summary of the submission?	Substance of the submission (facts of the case/national law/wider national context/ treaty interpretation/ broader international context)	How is the submission referred to as?	Does the treaty body provide opportunities for the parties to comment on the submission? If yes, are such opportunities actually used?	Is the submission cited in the treaty body's consideration?
CEDAW 4/2004	A.S. v. Hungary (Sterilization of a Roma woman without informed consent)	14 August 2006	Centre for Reproductive Rights	Through the author	Detailed summary (paras. 9.5-9.11)	Broader international context	Brief	No	No
CEDAW 17/2008	Alyne da Silva Pimentel Teixeira (deceased) v. Brazil (Death of a women owing to the failure to secure her safety during pregnancy and childbirth)	25 July 2011	Latin American and Caribbean Committee for the Defence of Women's Rights; International Commission of Jurists; Amnesty International	Presumably autonomously	Very brief and general summary (fn 1)	Wider national context	Amicus curiae brief	No	No
CEDAW 22/2009	L.C. v. Perú (the refusal to perform the therapeutic abortion for a girl aged 13 years who became pregnant as a result of repeated sexual abuse)	17 October 2011	International Commission of Jurists	Through the author	Detailed summary (para. 7.17)	Treaty interpretation	Legal opinion	No	No
CEDAW 102/2016	J.D. et al. v. Czech Republic (Sterilization of Roma women without informed consent)	16 July 2019	Center for Reproductive Rights	Through the author	Brief summary (para. 7.2)	Treaty interpretation	Expert opinion	No	No
CEDAW 149/2019	N.A.E v. Spain (obstetric violence during childbirth)	27 June 2022	Centre for the Monitoring of Obstetric Violence in Spain; Migjorn Childbirth House (Barcelona); Birth Rights Platform; Association of Home Birth Midwives of Catalonia; Centre for the Monitoring of Obstetric Violence in Chile; Home Birth Association; Balearic Childbirth Association; Information Group on Reproductive Choice (Mexico); Network for the Humanization of Labour and Birth (Brazil)	Autonomously	Detailed summary for main submissions (paras. 6-11)	Wider national context/ broader international context	Third-party intervention	Yes. No substantial comments were made by the parties.	No

(Continued)

Table 3. (Continued.)

Treaty Body and the Comm. No.	Case name and summary	Date of adoption	Third-party/Amicus curiae intervenor	Submitted autonomously/ through the author	Does the treaty body provide a summary of the submission?	Substance of the submission (facts of the case/national law/wider national context/ treaty interpretation/ broader international context)	How is the submission referred to as?	Does the treaty body provide opportunities for the parties to comment on the submission? If yes, are such opportunities actually used?	Is the submission cited in the treaty body's consideration?
HRC 1932/2010	Irina Fedotova v. Russia (conviction of a lesbian woman for an administrative offense of propaganda of homosexuality among minors)	31 October 2012	International Commission of Jurists	Through the author	Detailed summary (paras. 5.8-5.14)	Treaty interpretation	Legal opinion	No	No
HRC 2348/2014	Nell Toussaint v. Canada (denying an illegal resident healthcare coverage under the federal government's program for healthcare for immigrants and the resulting risk to her life and health)	24 July 2018	International Network for Economic, Social and Cultural Rights; Amnesty International Canada	Through the author	Detailed summary (paras. 7.4-7.9)	Treaty interpretation/ national law	Legal opinion	No	No
CERD 48/2010	TBB-Turkish Union in Berlin/ Brandenburg v. Germany (failure to provide protection under the Criminal Code against racially discriminatory statements)	26 February 2013	German Institute for Human Rights	Through the author	Detailed summary (paras. 8.1-8.4)	Facts of the case/wider national context/national law	Amicus curiae brief	Yes. The State party made a counter-argument (paras. 10.1-10.2)	No

jurisprudence,<sup>182</sup> (iii) explaining a wider national context relevant to the balancing of rights and interests in the case, such as social repercussions caused by the act in question,<sup>183</sup> (iv) providing legal materials and rationales for treaty interpretation, such as the relevant jurisprudence of other judicial bodies<sup>184</sup> and explanations differentiating the case from previous ones,<sup>185</sup> and (v) explaining the broader international context relevant to the case, such as international medical standards and guidelines.<sup>186</sup> Items (i) and (ii) correspond to the value of supplementing the treaty bodies' weak fact-finding capacity (Section C-III), item (iii) to the value of facilitating "bounded" deliberations at the national level (Section C-I), and items (iv) and (v) to the value of promoting deliberations on human rights treaty standards at the international level (Section C-II). As a general tendency, international NGOs have engaged in items (iv) and (v). By contrast, NHRIs and local NGOs were devoted to items (i), (ii), and (iii), which largely reflect their areas of strength (see Section C).

Unlike state reporting procedures and the HRC's drafting of general comments, where meetings are held in public, individual communications are examined in closed meetings. Thus, to analyze the impact of NGO and NHRI participation on Views and Opinions, this subsection first examines whether their submissions are referred to by the treaty body in their consideration of admissibility and/or merits of a case under the title "Issues and proceedings before the Committee." As Table 3 shows, in no case did the treaty body expressly refer to NGO and NHRI submissions. Second, it studied whether such submissions were transmitted to the parties, whether they have been allowed to comment on these submissions, and whether they have in fact commented on them. Table 3 shows that in two cases, *N.A.E v. Spain* (CEDAW, 2022) and *TBB-Turkish Union in Berlin/Brandenburg v. Germany* (CERD, 2013), the parties were given the opportunity to respond to NGO and NHRI submissions. In the latter case, the state party provided detailed counterarguments against the GIHR's submissions and stated that "it rejects [GIHR's] opinions and regards them as wrong and deplorable."<sup>187</sup> Thus, although the CERD did not expressly refer to the GIHR's submissions in its consideration, the GIHR contributed significantly to the examination by eliciting the state party's detailed rebuttal on the disputed point, thus promoting deliberation. From the normative points of view of facilitating "bounded" national deliberation (Section C-I) and international deliberation (Section C-II), opportunities for the parties to comment on third-party or *amicus curiae* submissions, and the treaty bodies' readiness to consider such comments along with these submissions, are essential. Treaty bodies are headed in that direction, as newly adopted guidelines on the third-party intervention of the HRC and CEDAW make it clear that the parties to the communication are entitled to submit written observations and comments and that the Committees may use third-party submissions in their deliberations and Views.<sup>188</sup>

## E. Conclusion

This study dissects stakeholder participation in treaty body activities, whose benefits and problems have only been discussed in a generalized or fragmented manner in the literature. It systematizes the multifaceted values of stakeholder participation in treaty body activities in an original manner. In addition, it normatively evaluates and empirically analyzes the relative weights of those values for the two main stakeholders, NGOs and NHRIs, and for different activities, namely state reporting and individual communications procedures, and the elaboration of general comments/recommendations.

<sup>182</sup>CERD, *TBB-Turkish Union in Berlin/Brandenburg*, Comm. No. 48/2010, ¶¶ 8.2 and 8.4, U.N. Doc. CERD/C/82/D/48/2010 (Feb. 26, 2013).

<sup>183</sup>*Id.*, ¶ 8.1.

<sup>184</sup>CEDAW, *L.C. v. Peru*, Comm. No. 22/2009, ¶ 7.17, U.N.Doc. CEDAW/C/WG/20/DR/22/2009 (Oct. 17, 2011).

<sup>185</sup>HRC, *Irina Fedotova v. Russia*, Comm. No. 1932/2010, ¶ 5.9, U.N.Doc. CCPR/C/106/D/1932/2010 (Oct. 31, 2012).

<sup>186</sup>CEDAW, *A.S. v. Hungary*, Comm. No. 4/2004, ¶ 9.8, U.N.Doc. CEDAW/C/36/D/4/2004 (Aug. 14, 2006).

<sup>187</sup>CERD, *TBB-Turkish Union in Berlin/Brandenburg*, *supra* note 182, ¶¶ 10.1 and 10.2.

<sup>188</sup>HRC's Guidelines on Third-Party Submissions, *supra* note 98, ¶ 9, and the last sentence; CEDAW's Guidelines on Third-party Interventions, *supra* note 98, ¶¶ 8 and 9.



This study offers concrete normative guidance for treaty bodies and critical evaluations of their current practice, which the literature has generally lacked. These findings can be used to legitimize the current practice to the extent that it is in line with this article's normative guidance, and to further develop treaty body procedures and practices on stakeholder participation, which are currently being consolidated. This article also shows that NHRIs, especially those with A-status, are normatively expected to and, in fact, do play unique roles distinct from NGOs when they participate in treaty body activities. A-status NHRIs have a significant advantage in supplementing treaty bodies' weak fact-finding capabilities in a trustworthy manner and connecting the formal and informal public spheres in facilitating "bounded" national deliberations. They can contribute to international deliberations on human rights treaty standards if they act collectively. This finding can be used to persuade states without A-status NHRI to create one or strengthen existing ones.

Finally, a few tasks remain for future research. First, this study focused on the value and effect of stakeholder participation in the form of provision of inputs, thus excluding the implementation of treaty bodies' recommendations from its scope. However, both aspects are closely interrelated in reality. Many previous studies have demonstrated that domestic and transnational mobilization is crucial for implementing human rights treaties and treaty body recommendations and that NGOs and NHRIs play central roles in such mobilization by invoking treaty bodies' concluding observations, general comments/recommendations, and Views/Opinions.<sup>189</sup> Moreover, other studies have implied a correlation between NGOs' participation in treaty body activities and their leading roles in mobilization.<sup>190</sup> Stakeholder participation by NGOs and NHRIs may create an opportunity for treaty bodies to inform, educate, and empower them and foster an effective partnership toward domestic and transnational mobilization. Thus, future studies should integrate the implementation aspect into the theoretical frameworks provided in this study. Second, whereas this study empirically examined the treaty bodies' practice on engagement with NGO and NHRI participation under an original normative framework, it has left unexplored the sociological factors that may have affected the practice, such as the relationship between individual treaty body members' professional trajectories and their openness to engagement.<sup>191</sup> Future studies to address such sociological factors to draw policy implications, for example, concerning the composition of treaty bodies, would be interesting and valuable. Finally, the increase in stakeholder participation and the accompanying normative and practical challenges are global phenomena.<sup>192</sup> Therefore, future research should examine the applicability and limits of this study's normative frameworks and findings, not only to other UN human rights treaty bodies and other treaty body activities such as the inquiry procedure, but also to regional human rights courts and judicial and non-judicial mechanisms in other fields.

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<sup>189</sup>See, e.g., Jasper Krommendijk, *The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies*, 10 REV. INT. ORG. 489, 504–08.

<sup>190</sup>See, e.g., Freeman, *supra* note 25, at 43–48.

<sup>191</sup>Cf. Murray, *supra* note 15, at 48.

<sup>192</sup>See, e.g., RETHINKING PARTICIPATION IN GLOBAL GOVERNANCE: VOICE AND INFLUENCE AFTER STAKEHOLDER REFORMS IN GLOBAL FINANCE AND HEALTH (Joost Pauwelyn et al. eds., 2022).