ASSEMBLIES OF PARTIES TO MULTILATERAL TREATIES AND THEIR NORMATIVE AUTHORITY

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Abstract

Assemblies of states parties to multilateral treaties are of a twofold nature: those that are active, entrepreneurial, and rally both the political and financial dimensions as well as the stakeholders of their underlying constitutive instrument and those that are content to merely serve as meeting mechanisms. Several assemblies have undertaken extensive funding campaigns, without which their mandate could not have been achieved. In turn, these progressive assemblies have made significant inroads in respect to transnational contracting and forging their limited international personality in such a way as to become credible entities in international relations. This model should be replicated in multilateral human rights treaties.

This Article suggests the emergence of international political normativity, whereby the functions of assemblies reflect normative outcomes despite the absence of normative powers. The moralistic underpinnings of the assemblies' functions have allowed them to adopt a range of measures that are susceptible to unopposed compliance. The Article demonstrates that not all assemblies venture or desire to undertake actions on the basis of international political normativity and are just as happy to serve as mere facilitators. This is the case of the assembly of the Disabilities Convention.

I. INTRODUCTION

The drafters of the 1969 Vienna Convention on the Law of Treaties (VCLT)[1] had not envisaged the existence of a mechanism, composed of the treaty's member states and endowed with some degree of personality, that would assume an active role in the treaty's life cycle.[2] The VCLT merely reflected customary international law and simply iterated the parties' *inter se* rights and obligations. There is very little room for collective action in the VCLT, other than the effects of subsequent practice by several states or its abandonment, among others.[3] Although some treaties conceived of the notion of oversight mechanisms, such as administrative tribunals[4] and (human rights)

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[1] Vienna Convention on the Laws of Treaties, *opened for signature* May 23, 1969, 115 U.N.T.S. 331 [hereinafter VCLT].

[2] *See* J. S. Stanford, *The Vienna Convention on the Law of Treaties*, 20 U. TORONTO L.J. 18 (1970); VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018).

[3] Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907, 907–51 (2003); Ilias Bantekas, *Uniformity in Model Laws as Subsequent Practice Under Article 31 of the Vienna Convention on the Law of Treaties*, 20 AUSTRIAN REV. INT'L & EUR. L. 145 (2018).

[4] *See* Chittharanjan F. Amerasinghe, *International Administrative Tribunals*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 669 (Cesare Romano et al. eds., 2013); *see also* Joan S. Powers, *The Evolving Jurisprudence of the International*

treaty bodies,[5] there was no standardized process whereby states parties could discuss, amend, and ultimately strengthen the underlying treaty. This task was generally undertaken by the parliamentary entity of those treaties upon whom the status of intergovernmental organization (IGO) was conferred, as is the case with the General Assembly of the United Nations or the Committee of Ministers of the Council of Europe.[6] For those multilateral treaties that were not organized under the IGO model, change and adaptation became difficult, and implementation was solely entrusted to member states' good faith. With the end of the Cold War, it became evident that in order for a multilateral treaty to be both meaningful and a "living instrument,"[7] it was imperative that ample financing for its objectives be made available, including capacity building,[8] as well as some degree of oversight for its implementation and constant adaptation. This led to a paradigmatic shift from the state-to-state approach in the VCLT, to now encompassing treaty-based bodies composed of all member states, endowed with administrative, fundraising, enforcement capacity, and occasionally capacity to set up international legal persons.[9] While this model

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Administrative Tribunals: Convergence or Divergence?, 1 ASIAN INFRASTRUCTURE INV. BANK Y.B. INT'L L. 108 (2019).

[5] TINA STAVRINAKI, LE REGIME DES PROCEDURES DE COMMUNICATIONS INDIVIDUELLES DANS LE SYSTEME DES TRAITES DES NATIONS UNIES RELATIFS AUX DROITS DE L'HOMME (2016); WOUTER VANDENHOLE, THE PROCEDURES BEFORE THE UN HUMAN RIGHTS TREATY BODIES: DIVERGENCE OR CONVERGENCE? (2004). Some treaty bodies, such as the Human Rights Committee, have been instrumental in pushing the boundaries (and the patience of member states) of their respective treaties. *See* Kasey L. McCall-Smith, *Reservations and the Determinative Function of the Human Rights Treaty Bodies*, 54 GERMAN Y.B. INT'L L. 521 (2012).

[6] The authority assumed by the Council of Europe's Committee of Ministers was recently exemplified by its decision to suspend the Russian Federation from its rights of representation. *See Council of Europe Suspends Russia's Rights of Representation*, COUNCIL OF EUR. (Feb. 25, 2022), https://www.coe.int/en/web/portal/full-news/-/asset_publisher/y5xQt7QdunzT/content/council-of-europe-suspends-russia-s-rights-of-representation.

[7] I use this notion as applied chiefly by the European Court of Human Rights (ECHR) as an interpretative tool by which to adapt the ECHR to present-day conditions. This doctrine was first developed in Tyrer v. UK, 26 Eur. Ct. H.R. (ser. A) at 15 (1978). *See* George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, *in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 106 (Andreas Føllesdal et al. eds., 2013).

[8] *See* Matiangai Sirleaf, *Ebola Does Not Fall from the Sky: Global Structural Violence and International Responsibility*, 51 VAND. J. TRANSNAT'L L. 477 (2018) (arguing that global health epidemics cannot be overcome in the absence of international cooperation and capacity building of poor developed state healthcare infrastructure).

[9] Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Fourth Session, Held in Poznan from 1 to 12 Dec. 2008*, ¶ 11, U.N. Doc. FCCC/KP/CMP/2008/11/Add.2 (Mar. 19, 2009) ("such legal personality as [is] necessary for the discharge of its functions with regard to direct access by eligible parties and

may not have been useful to those treaties predicated on an IGO, it was certainly a revolution for the many treaties and inter-government trust funds[10] lacking IGO status. In many cases, these conferences of parties (COP), otherwise known as assemblies of parties (ASP), meetings of states parties (MOP), and conferences of states parties (COSP) became far more important and effective as opposed to parliamentary bodies of IGOs.[11] Some COP, such as that of the Global Crop Trust, assumed powers and functions typically conferred on intergovernmental organizations.[12]

The greatest advancements typically associated with the operations of COP are in the field of environmental law.[13] These advancements in turn convinced treaty makers to establish similar entities in treaties dealing with international and transnational crimes, such as the ASP to the Rome Statute of the

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implementing and executing agencies . . . in particular legal capacity to enter into contractual agreements and to receive projects, activity and programme proposals directly and to process them . . . as appropriate.").

[10] *See* Ilias Bantekas, *Effective Management of International Aid Through Inter-Governmental Trust Funds*, 17 LOY. U. CHI. INT'L L. REV. 1 (2021).

[11] *See* Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1 (2002). Article 63(1) of the 2003 U.N. Convention Against Corruption (CAC) established a COSP with extensive powers, namely to improve capacity and cooperation between states, as well as promote and review the implementation of the CAC. United Nations Convention Against Corruption, art. 63(1), *adopted* Oct. 31, 2003, 2349 U.N.T.S. 41. To this end, it has established an elaborate review mechanism under the CAC. *See* Conference of the State Parties to the United Nations Convention Against Corruption, *Summary of the State of Implementation of the United Nations Convention Against Corruption: Criminalization, Law Enforcement and International Cooperation*, U.N. Doc. CAC/COSP/2015/5 (Aug. 19, 2015). For an analysis of COSP in the context of the negotiation of Article 40 of the CRPD, see Expert Paper on Existing Monitoring Mechanisms, Possible Relevant Improvements and Possible Innovations in Monitoring Mechanisms, prepared by the Office of the United Nations High Commissioner for Human Rights for the Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on Protection & Promotion of the Rights & Dignity of Persons with Disabilities, 7th Sess., U.N. Doc. A/AC.265/2006/CRP.4, at 65–66 (2006).

[12] It is exactly the expression of this pragmatism in practice that has led commentators to argue that the Meetings of Parties (MOP), or otherwise known as Conferences of Parties (COP) to Multilateral Environmental Agreements (MEP), while lacking Secretariats and permanent seats, operate not as mere treaty bodies but as "international organisations with a distinct legal personality." This perceived intergovernmental organization status is objective and is based, in the opinion of said commentators, on the ability of MOPs to, *inter alia*, establish subsidiary bodies, amend the treaties establishing them, adopt protocols, and interact with other intergovernmental organizations. Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 625–35 (2000).

[13] *See* Nele Matz, *Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements*, 6 MAX PLANCK Y.B. U.N. L. 473 (2002).

International Criminal Court (ICC)[14] and its counterpart in the 2003 U.N. Convention against Corruption.[15] The ASP to the ICC Statute not only gave impetus to a trust fund for victims,[16] which itself was a radical notion in international criminal justice, but it was also responsible for formulating and adopting a subsequent provision on crimes against peace in the ICC Statute.[17] This was something that seemed almost impossible a decade earlier. Moreover, the financing of humanitarian, health, educational, and environmental projects around the globe would have been seriously undermined without ASPs taking control of the process and working alongside IGOs and non-state actors.[18] No doubt, the best-known COP is that administering the Paris Agreement.[19] Its successive COP rounds not only made headlines but have been instrumental in their global inclusiveness and in taking hard actions against climate change.[20] The success of the Paris Agreement COP, which was

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[14] Rome Statute of the International Criminal Court art. 112, *entered into force* July 1, 2022, 2187 U.N.T.S. 3. *See also* Saeid Mirzaee Yengejeh, *Rules of Procedure of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, 25 FORDHAM INT'L L.J. 674 (2002).

[15] United Nations Convention Against Corruption, *supra* note 11, at art. 63.

[16] The ICC Trust Fund is structured like a subsidiary organ to the ASP and, although it can contract in its name (particularly in order to set up an account and receive contributions), it does not have any further international legal personality beyond the personality of the ICC. *See* Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT'L L. 667, 675–76 (2002); Carla Ferstman, *The International Criminal Court's Trust Fund for Victims: Challenges and Opportunities*, 6 Y.B. INT'L HUMANITARIAN L. 424, 426–27, 429 (2003).

[17] Rev. Conf. of the Rome Statute, *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, ICC-RC/Res.6, annex I, arts. 15 *bis* (2–3), 15 *ter* (2–3) (June 11, 2010). For the resolution on the crime of aggression, as well as the other resolutions from the Kampala Conference, see Review Conference of the Rome Statute of International Criminal Court, *Official Records*, ICC-RC/9/11 (2010); *see also* Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair's Perspective*, 23 LEIDEN J. INT'L L. 883 (2010).

[18] *See* Ilias Bantekas, *The Contractual and Transnational Nature of Sovereign Donor-Trustee International Aid Contributions*, 48 SYRACUSE J. INT'L L. & COM. 285 (2021).

[19] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. The Agreement's core concerns encompass national mitigation measures and international cooperation on mitigation, adaptation, and transfer of finance and technology. *Id.* at pmbl. Its key aim is to hold the increase in the global average temperature "well below" the 2 degrees Celsius above pre-industrial levels. *Id.* at art. 2(1)(a); *see also* Lavanya Rajamani & Daniel Bodansky, *The Paris Rulebook: Balancing International Prescriptiveness with National Discretion*, 68 INT'L & COMPAR. L.Q. 1023 (2019).

[20] *See, e.g.*, Conference of Parties Serving as the Meeting of the Parties to the Paris Agreement, *Glasgow Climate Pact*, ¶ 5 (Mar. 8, 2022), U.N. Doc. FCCC/PA/CMA/2021/10/Add.1 ("Stress[ing] the urgency of enhancing ambition and action in relation to mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement.").

achieved outside the U.N. framework, suggests that processes structured under a COP are viewed as flexible enough to garner the type of political consensus that is missing in other intergovernmental fora.

In some instances, a trust entity was set up to operate as both an ASP and as a financing mechanism. Prominent examples of financial mechanisms operating essentially as trust funds are those founded under Article 21 of the Convention on Biological Diversity (CBD) and Article 28 of its affiliated Cartagena Protocol on Biosafety,[21] Article 21 of the International Convention to Combat Desertification (ICCD),[22] and Article 11 of the Framework Convention on Climate Change (FCCC).[23] Exceptionally, in some cases, a trust fund established by a COP to implement the modalities of a particular financial mechanism may be required to work alongside an independent trustee that is responsible for implementing the decisions of the trust fund's board and of keeping and investing its assets. Thus, the Adaptation Fund set up by the COP to the FCCC in accordance with Article 12(8) of the Kyoto Protocol is invested with a trustee, the World Bank, which is to set up an additional mini trust fund in the form of an account in order to carry out the operations mandated by the Adaptation Fund.[24] With the exception of the ICCD (whose financial mechanism is the International Fund for Agricultural Development (IFAD)), the appointment of the Global Environmental Facility (GEF) as a funding mechanism to the aforementioned environmental trust funds was

[21] Convention on Biological Diversity art. 21, June 5, 1992, 1760 U.N.T.S. 79, 39 I.L.M. 1027 [hereinafter CBD]; Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 28, *entered into force* Sept. 11, 2003, 2226 U.N.T.S. 208.

[22] United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa art. 21, *entered into force* Dec. 26, 1996, 1954 U.N.T.S. 3 [hereinafter ICCD].

[23] United Nations Framework Convention on Climate Change art. 11, *entered into force* Mar. 21, 1994, 1771 U.N.T.S. 107.

[24] Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Decisions Adopted by the Conference: Adaptation Fund*, ¶¶ 20–27, FCCC/KP/CMP/2007/9/Add.1, Decision 1/CMP.3 (Mar. 14, 2008) [hereinafter *Adaptation Fund*]; *see also* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 12(8), Dec. 10, 1997, 2303 U.N.T.S. 162.

accomplished through the adoption of a decision by the COP,[25] followed thereafter by the conclusion of a memorandum of understanding (MoU).[26]

This Article is organized as follows: Part II introduces the reader to the idea of international political normativity, which seeks to explain why the decisions of assemblies are generally adhered to by participants, despite the fact that assemblies do not always possess normative powers. Part III goes on to examine some of the functions of assemblies, starting with decision-making powers. Part IV looks at the perennial question of financing, which many assemblies are expected to undertake as part of ensuring the survival of their own mandates. Part V explores an assembly set up by a multilateral human rights treaty, namely the COSP to the U.N. Convention on the Rights of Persons with Disabilities (CRPD). The various subsections highlight the powers of this assembly, as well as its legal nature and personality, and ultimately demonstrate that it is a weak assembly that serves only as a facilitator and does not fall under the international political normativity paradigm.

II. POLITICAL NORMATIVITY IN INTERNATIONAL LAW AS A BASIS OF UNDERSTANDING THE NORMATIVE DIMENSION OF ASSEMBLIES AND CONFERENCES

The notion of international political normativity set forth in this Article requires some clarification and qualification for two reasons: first, because the term has already been coined in the political science domain and its

[25] Conference of the Parties to the Convention on Biological Diversity, *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its First Meeting*, U.N. Doc. UNEP/CBD/COP/DEC/I/2, ¶ 2; Conference of the Parties to the Convention on Biological Diversity, *Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/2/19, annex II, Decision II/6, ¶ 1. It should be noted that the U.N. Legal Counsel has made it clear that the COP to such a treaty possesses the legal capacity, within the limits of its mandate, to enter into agreements and other arrangements with both State and non-State entities. *Arrangements for the Implementation of the Provisions of Article 11 of the United Nations Framework Convention on Climate Change Concerning the Financial Mechanism—Legal Capacity of the Conference of the Parties to the Convention and the Global Environment Facility to Enter into an Agreement or Other Arrangement with Third Parties and the Legal Nature of such Agreement or Arrangement*, 1993 U.N. Jurid. Y.B. 427, at 429, U.N. Doc. ST/LEG/SER.C/31.

[26] Conference of the Parties to the Convention on Biological Diversity, *Report of the Third Meeting of the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/3/38, Decision III/8, annex [hereinafter CBD-GEF MoU]; *see also* Conference of the Parties to the Convention to Combat Desertification, Consideration of, With a View to Adopting, the Revised Draft Memorandum of Understanding between the Conference of the Parties and the International Fund for Agricultural Development Regarding the Modalities and Administrative Operations of the Global Mechanism, U.N. Doc. ICCD/COP(3)/10 (Aug. 30, 1999), annex I [hereinafter CCD-IFAD MoU].

scholarship[27] and second, because it has not before been employed in international legal parlance. It is instructive to provide a brief survey of how the term is employed by political scientists. Moralists contend that the underlying tools as well as the validation of a political process must be predicated on moral arguments and objectives. The outcome of such a process produces "political normativity" among those involved and the wider stakeholders.[28] Realists, on the other hand, argue that political processes must be governed by political principles that are distinct from moral justifications and, hence, distinguish between moral and political normativity.[29] In the middle of these two positions exists a uniting ideological movement, chiefly influenced by moralists, which contends that there is only a single political normativity, whereby morality and politics are inseparable.[30] The politics scholarship, whether moralist or realist, applies the notion of political normativity to inadvertently explain matters pertinent to legal questions, while clearly interested in understanding the validation of political processes. This theory has been developed by political scientists in domestic politics, whereby it is taken for granted that any political process culminates in its ratification by a parliamentary entity and becomes law.[31] Such political processes include parliamentary debates, typically preceded by white, green, or other papers, and political dialogue between political parties, elites, lobby groups, private stakeholders, and many others. In such processes, political scientists are effectively referring to *procedural* political normativity, whether through moralism[32] or realism, as these are clearly contested and largely opposed. If agreement is reached, this gives rise to *substantive* political normativity. In the politics scholarship, procedural political normativity is far more important than its substantive counterpart because the latter is by necessity shaped by the range of moral and realist arguments used by the participants. Hence, if the tools are moralistic in nature so

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[27] *See* BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT (2005); *see also* Robert Jubb & Enzo Rossi, *Political Norms and Moral Values*, 40 J. PHIL. RSCH. 455 (2015).

[28] John Horton, *Realism, Liberal Moralism and a Political Theory of Modus Vivendi*, 9 EUR. J. POL. THEORY 431 (2010).

[29] *See* Enzo Rossi & Matt Sleat, *Realism in Normative Political Theory*, 9 PHIL. COMPASS 689 (2014); *see also* William A Galston, *Realism in Political Theory*, 9 EUR. J. POL. THEORY 385 (2010).

[30] *See* Jonathan Leader Maynard & Alex Worsnip, *Is There a Distinctively Political Normativity?*,128 ETHICS 756 (2018).

[31] *Id.* at 760–62.

[32] *See* Charles Larmore, *What Is Political Philosophy?*, 10 J. MORAL PHIL. 276 (2013). By way of illustration, while endorsing the position that certain principles are politics-specific, many moralists still contend that they qualify as moral principles.

too the outcome will have a moralistic outlook, and this will be reflected in the legislation that embodies it.[33]

In international law, there is no guarantee of normativity for any process, no matter how long the process has endured, unlike in domestic politics where even a negative or stalemate political process ultimately culminates in some sort of normative outcome. One of the greatest challenges in international politics is the inability to rationalize why some inter-state processes effectively produce certain normative outcomes when in fact the participants made it clear from the very outset that the desired outcome was political and not normative.[34] The two paradigmatic examples are the Sustainable Development Goals (SDGs) and the Organization for Economic Cooperation and Development (OECD) Financial Action Task Force (FATF).[35] In both cases, state participants to the SDGs and the OECD clarified that they were under no legal obligation to make financial contributions to the SDGs or adhere to FATF recommendations.[36] The absence of any obligation (i.e., normativity) was in fact the foundation of both the SDGs and FATF.[37] Although until recently there was little debate in international law about the morality of treaty-making or institution-making (such as the SDGs), moralism has become integral to treaty negotiations.[38] This is not surprising, given that it was generally desirable to "water down" a multilateral treaty in order to attract as many participants as possible.

The SDGs' non-binding character very clearly resembles the legal nature of the variety of assemblies of parties encountered in multilateral treaties. In the context of the SDGs and ASP, there was never any intention to render the respective outcomes normative, save for very exceptional circumstances

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[33] *See* Eva Erman & Niklas Möller, *Why Political Realists Should Not Be Afraid of Moral Values*, 40 J. PHIL. RSCH. 459 (2015).

[34] *See* CHRISTINE KORSGAARD ET AL., THE SOURCES OF NORMATIVITY (1996). Political scientists have long argued that there is no normative correctness.

[35] Financial Action Task Force, *Who We Are*, FATF, https://www.fatf-gafi.org/en/the-fatf/who-we-are (last visited Mar. 1, 2023).

[36] Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 MICH. J. INT'L L. 433, 434–35 (2019).

[37] *See* U.N. Off. of the High Comm'r for Hum. Rts., Claiming the Millennium Development Goals: A Human Rights Approach, U.N. Doc. HR/PUB/08/3, at 4 (2008); Sakiko Fukuda-Parr, *Reducing Inequality – The Missing MDG: A Content Review of PRSPs and Bilateral Donor Policy Statements*, 41 IDS BULL. 26 (2010); Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT'L L. 377 (2012); Andrea Ross, *Modern Interpretations of Sustainable Development*, 36 J.L. & SOC'Y 32 (2009); Americo B. Zampetti, *Entrenching Sustainable Human Development in the Design of the Global Agenda After 2015*, 43 DENV. J. INT'L L. & POL'Y, 277, 298 (2015).

[38] *See* Alexander Boldizar & Outi Korhonen, *Ethics, Morals and International Law*, 10 EUR. J. INT'L L. 279 (1999).

required of ASP.[39] Yet, because the purpose underlying the SDGs and ASP was predicated on moralistic grounds, procedural political normativity was imperative in order to convince all participants (industrialized and non-industrialized states) that this was not an indirect attempt to impose neo-colonialism, nor indeed an enterprise that would harm taxpayers without producing any tangible outcomes. The stated intention against any substantive political normativity could only be counter-balanced by a robust procedural political normativity that was predicated wholly on moralistic grounds. Conversely, international treaty-making processes that are intended to produce a substantive normative outcome irrespective of the parties' political differences have no need for moralistic underpinnings at the procedural (negotiating) level because any transparency or moralistic arguments may in fact harm the attainment of outcomes that other stakeholders find abhorrent or immoral. By way of illustration, most people in Europe and North America find it immoral to use Russian gas, even if their cost of living increases significantly.[40] In trying to find alternative sources of energy, European and North American governments will desire to come to agreement with un-democratic governments (e.g., Venezuela) in negotiations where political bargaining is obscure and secretive.[41]

With this in mind, it is apposite to explain why an otherwise political process predicated on moralistic considerations such as the SDGs and the powers/discretion assumed by ASP may claim to lead to sui generis normative outcomes, which phenomenon this Article labels as political normativity.[42] Both the SDGs and the aspirations of ASP make a direct appeal to social justice because the relevant claims are effectively about fair and just relations between individuals and institutions. This is also true in respect of economic

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[39] The intention of all development institutions to coordinate their efforts was expressed in the common report compiled by the IMF, the OECD, the U.N., and the WBG, which was published in 2000. In this document, all four institutions agreed that poverty eradication is the crucial challenge of development and that the most effective way to tackle the issue is by setting quantitative goals against which performance would be measured. As a result, it was tacitly decided that these objectives would be pursued through political, as opposed to normative, institutions. *See* INT'L MONETARY FUND, ORG. FOR ECON. COOP. & DEV., U.N., & WORLD BANK GRP, A BETTER WORLD FOR ALL: PROGRESS TOWARDS THE INTERNATIONAL DEVELOPMENT GOALS (2000), https://www.imf.org/external/pubs/ft/jointpub/world/2000/eng/bwae.pdf.

[40] In one poll conducted in April 2022, 70% of European citizens preferred a boycott of Russian oil and gas. *See Survey: Most Europeans Want Boycott of Russian Oil and Gas*, EUOBSERVER (Apr. 8, 2022), https://euobserver.com/tickers/154700.

[41] Samantha Schmidt et al., *Biden Administration Begins Easing Restrictions on Venezuelan Oil*, WASH. POST (May 17, 2022), https://www.washingtonpost.com/world/2022/05/17/venezuela-oil-sanctions-chevron.

[42] There is no doubt today that international law is understood as a "social conception." *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 187–91 (1989).

and social arrangements that affect peoples' ability to meet those needs. Such fairness is founded on the axiom that humans are fundamentally equal and is manifested in the fair distribution of income and wealth as well as in society's organizational setup that gives all individuals the same opportunity to participate in democratic processes and decision-making.[43] The combination of the two leads to an understanding of human needs *lato sensu* that includes the freedom to achieve dignity and respect of the person through active involvement in society's organizational system in addition to the enjoyment of material goods. Therefore, the objective of development, mitigation of climate change, and capacity building in the developing world—all of which constitute some of the important goals of ASP—concerns current and future societies where people have the opportunity to lead meaningful lives defined by the achievement of adequate standards of living and the empowerment to actively choose and decide upon the full range of factors that determine the quality of their lives. By extension, the responsibility to guarantee this outcome for present and future generations does not merely reflect the just allocation and utilization of specific resources in terms of total stock of natural, physical, and human capital. It should instead be construed as a general duty to afford generations the entitlement of access to the same opportunity to fulfill their legitimate aspirations for a better life and dignity.[44]

International lawyers generally distinguish between claims that give rise to an obligation for one or more entities (normative claims) and those that do not.[45] Normative claims may be found in unilateral acts, treaties, custom, and general principles. Non-normative claims, encompassed chiefly under the broad banner of soft law, although devoid of a hard normative content, are increasingly employed as incubators of hard international law. Experience shows that hard international law is not always desirable, let alone

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[43] This reflects Rawls's two principles of justice, namely: a) equal liberty and b) difference and fair equality of opportunity. *See* JOHN RAWLS, A THEORY OF JUSTICE 266 (1999).

[44] This has been defined as *sustainability* by Anand and Sen. *See* SUDHIR ANAND & AMARTYA SEN, SUSTAINABLE HUMAN DEVELOPMENT: CONCEPTS AND PRIORITIES 19–21, 27–28 (1994). When considered solely as an obligation to maintain resources, a further distinction is made between weak and strong sustainability. *See* Achala Chandani, *Distributive Justice and Sustainability as a Viable Foundation for the Future Climate Regime*, 2 CARBON & CLIMATE L. REV. 152, 160 (2007). However, it is more appropriate to define it from a normative perspective as an exemplification of the commitments to equity inherent in the morals of social justice and universalism which are the normative foundation of the concept of sustainable development.

[45] Alhaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT'L ENV'T L. REV. 21, 52 (2003) (arguing soft law is considered unripe law or law that is being constructed); C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMPAR. L.Q. 850, 856 (1989).

achievable.[46] However, neither normative theories of international law nor their soft law counterparts can sufficiently explain the sort of outcomes derived from processes such as the SDGs and powers assumed by ASP. Specifically, these are outcomes whereby the political commitments of the sovereign participants, while not normative, are effectively transformed into a web of interconnected actions that are not free from normative claims.[47] By way of illustration, let us assume that state A pledges 0.7% of its GDP towards the SDG, and this is earmarked for the reform of the water sector in country X. In doing so, the government of state A will need to seek legitimacy from its electorate (in fact, this might well be a political boost) and then ratify the pledge in parliament through the pertinent constitutional channels and procedures. At the international level, succeeding governments of state A will have negotiated trade-offs for their pledge and in the process committed themselves and others to a diverse range of actions. Once the pledged amount is placed in a trust fund and is applied to the water reform project of country X, other distinct and overlapping pledges will be distributed and applied there. An entire SDG mechanism with several layers of complexity is already set up to receive, administer, and oversee the implementation of the Goals. This level of complexity and interconnectedness between the various participants and their actions and the interconnectedness between them and private stakeholders cannot readily be explained by reference to the otherwise stated political (i.e., non-normative) character of the SDGs. The same level of complexity exists in relation to the solicitation, acceptance, management, investment, and ultimately disbursement of funds administered by ASP and trust funds established under their auspices or by multilateral institutions.[48]

In the traditional conception of soft law, there may well exist extensive mechanisms, such as in the form of assemblies of international organizations, but what is at stake are the decisions or declarations of the participants in these mechanisms. In this sense, the mechanism is a mere facilitator. Whether a claim ultimately gives rise to a multilateral obligation depends on the stance of states with voting power in the mechanism in question. The U.N. General Assembly and the Security Council are paradigmatic of this approach. These entities are facilitators of claims, but the normative character of claims

[46] The paradigm of the International Law Commission's Articles on State Responsibility and the wisdom of then-Rapporteur James Crawford to reject the draft treaty option resulted in their unequivocal recognition as principles of customary international law. *See* James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874 (2002).

[47] *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983) (although there, Weil warned against the dangers stripping international law and institutions of their normative character); *see also* Block-Lieb, *supra* note 36.

[48] Bantekas, *supra* note 10.

entertained therein are distinct from the nature of the mechanism producing them. The mechanism underlying the various types of ASP is of a different nature. They are not facilitators as such. They are outcome producers in and of themselves. The outcome(s) produced by ASP mechanisms and their subsidiary bodies, such as their trust funds, are different from that delivered by an assembly or other entity of an intergovernmental organization in a few ways. First, ASP mechanisms do not make claims as such. Second, normativity is not an essential feature of the outcome produced by the ASP-type mechanism in the sense that the participants can just as well continue to operate in the absence of normativity. This is not possible in the context of other mechanisms such as the U.N. Security Council.[49] Finally, ASP mechanisms are multi-layered, complex, and inter- and intra-connected in such a way that it makes no political and financial sense for powerful participants to abruptly terminate their participation.

As a result of these considerations, while it is wrong to label the SDGs and ASP outcomes as normative, as this goes against the participants' intended will, it is equally wrong to suggest that they constitute non-binding soft law.[50] The thesis made here is that the outcome produced by the SDGs and ASP is best described as a species of *international political normativity*. This type of "normativity" is wholly distinct from claims supporting an international obligation and is in no way justiciable. Moreover, despite the interconnectedness of actions, none of the actions and outcomes in the SDGs or ASP mechanisms give rise to legitimate expectations.[51] Notwithstanding the absence of a true legally binding obligation in the pledges and actions of participants, especially wealthy industrialized states, the outcomes of ASP are not in doubt, even if states may occasionally decrease their contributions because of budgetary or other constraints. Although the thesis is yet untested, it is the belief of this author that the moralistic dimension of the negotiating process renders the substantive outcome politically robust even in the absence of a treaty framework.[52] This high level of mutual trust that was created by the

[49] *See* Efthymios Papastavridis, *Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis*, 56 INT'L & COMPAR. L.Q. 83 (2007) (arguing that even though Security Council resolutions were meant as political instruments, nonetheless they are typically construed by external entities as embodying international legal norms).

[50] *See* Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMPAR. L.Q. 901 (1999); Chinkin, *supra* note 45.

[51] The claim is chiefly raised by investors against host states (where the burden of proof is very high), but it is also a principle in the law of contracts. *See* Jay M. Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525 (2014); Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88 (2013).

[52] It is generally accepted that constant progress or progress along a single particular path is a "false necessity." *See* ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-

moralistic underpinnings of the project in question has led to a *process*, rather than a claim, that is far more effective than any binding treaty mechanism. Readers will come to appreciate that this is generally true of all ASPs.

Political normativity is hence an outcome-based process that is meant to operate under the parties' mutual and enduring trust, which is why it is bereft of a strict normative dimension predicated on international legal obligations. The relative success of the SDGs and ASP demonstrates that absolute normativity is not an essential feature of a successful system of mutual undertakings. What is important is an elevated level of mutual trust among participants, a relatively similar level of domestic laws and human rights, and a common plan by which to implement a morally sound project (e.g., human rights, climate change, sustainable development, and others).[53] These combined elements override the need for obligations as such, albeit international law has a crucial role to play in this system of international political normativity. That is, in order to reach a sufficient level of mutual trust, states must first build capacity and multilateral institutions. This role can only be played by the processes and institutions of international law. The European Union (EU) is an excellent example of an organization seeking to crystallize trust among its member states in order to achieve its stated aims.[54] Even so, there are few institutions in the EU that operate on the basis of political normativity. A good example is offered by the so-called EuroGroup.[55] International law is also important because it sets out the minimum standards as to what is expected of sovereign actors in their international relations. The political normativity of

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NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987). This in turn allows us to reconsider whether normativity is in fact the right process for attaining all types of outcomes, particularly ethical ones.

[53] *See* Sirleaf, *supra* note 8 (arguing that global health epidemics cannot be overcome in the absence of international cooperation and capacity building of poor developed state healthcare infrastructure).

[54] *See* Ling Yin et al., *Economic Convergence in the European Union*, 18 J. ECON. INTEGRATION 188 (2003) (arguing that the EU adopted specific economic policies to ensure economic integration, which subsequently culminated in enhanced political integration).

[55] The Eurogroup is an informal mechanism at ministerial level that discusses the shared responsibilities of EU member states related to the Eurozone. *See Eurogroup,* COUNCIL OF THE EUR. UNION, http://www.consilium.europa.eu/en/council-eu/eurogroup (last visited Mar. 2, 2023). In Joined Cases C-105/15 P to 109/15 P, Konstantinos Mallis and Others v. European Commission and European Central Bank, ELCI:EU:C:2016:702 (Sept. 20, 2016), the CJEU found that the Eurogroup is an informal grouping of the euro area finance ministers and as a result its acts could not be attributed to the Commission or the European Central Bank. But see Joined Cases C-8-10/15P, Ledra Advertising Ltd and Others v. European Commission and European Central Bank, ELCI:EU:C:2016:701 (Sept. 20, 2016), where the CJEU held that where the European Commission is involved in the signing of MoU within the framework of the European Stability Mechanism, it is acting within the sphere of EU law. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

the SDGs and the functions and powers assumed by ASP might today seem common sense, but it is all possible because each and every Goal in the SDGs, as well as the thematic areas encompassed under the mandate of ASP, have been debated and framed multilaterally since the adoption of the U.N. Charter.[56] Of course, it would be naïve to ignore the fact that in the multifaceted web making up the SDGs and the mandates of ASP, there are a plethora of contractual relationships and unilateral undertakings, all of which are underpinned by treaties, custom, and domestic laws. These do not operate on the same political normativity basis as the pledges of the participants and the functioning of the SDGs and ASP mechanisms. Hence, the international political normativity of the SDGs and ASP powers and functions is a phenomenon that is best explained by the rules and processes of public international law with input from political theory, but not by the political science scholarship on so-called political normativity. This Article has attempted to sketch the contours of international political normativity in order to better understand the legal nature of the participants' pledges while hoping that a fuller and perhaps more empirically-based analysis will be offered in the not too distant future.

III. AGREEMENT-MAKING POWERS OF ASSEMBLIES

An important function of ASP is to mobilize funding in order to meet their objectives, at least in the context of environmental, food, and health-related treaties and funds. This function typically also requires that the ASP already possesses or presumes authority to enter into agreements with other entities in order to fulfill its mandate. Such authority resembles the implied powers enjoyed by bodies exercising authority in the context of intergovernmental organizations.[57] This capacity, whether implied or direct, is not straightforward in respect of assemblies not endowed with international legal personality, but which solely exist within the realm of their constitutive treaty. Equally, even if contractual capacity is deemed to exist, it is not clear what form the agreements entered into by the assemblies can or should take or how these agreements can be enforced against the entity of the assembly.[58]

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[56] *See* THE SUSTAINABLE DEVELOPMENT GOALS: A COMMENTARY (Ilias Bantekas, Francesco Seatzu eds., forthcoming June 2023) (demonstrating that the SDGs are not only grounded in broader multilateral discussions that are not exclusive to the narrower SDG framework).

[57] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11); Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47 (July 13); *see also* Dan Sarooshi, *The Legal Framework Governing United Nations Subsidiary Organs*, 67 BRIT. Y.B. INT'L L. 413 (1996).

[58] The underlying principle regarding the liability of international organizations is that where responsibility is in fact incurred by the legal person, it is not shared by those members that set up the organization in the first place. This principle was clearly advocated in

Given that both the U.N. and its specialized agencies do not require a treaty format for concluding trustee (administration agreements) or donor agreements—in fact, the relevant Financial Regulations do not stipulate the two as separate contracts—it is not surprising that several MoU have appeared in this respect. A typical example, albeit not a trustee agreement, is the MoU between the COP of the Convention to Combat Desertification and the IFAD regarding the Modalities and Administrative Operations between the Global Fund.[59] Another example is the MoU between the COP to the Biological Diversity Convention and the GEF regarding the Institutional Structure Operating the Financial Mechanism of the Convention.[60] The GEF and IFAD serve as financing mechanisms for the purposes of these conventions and not as trustees.[61] Their role is to finance part or all of the projects decided by the COP to these conventions, as long as these decisions are consistent with the respective constitutional instruments of IFAD[62] and the GEF. In the case of the COP-GEF MoU, one may obviously argue that the choice of this instrument is necessarily dictated by the fact that neither of the two entities possess sufficient legal personality such that would enable them to conclude a treaty or other binding agreement.[63] In any event, while the parties to such MoU are

the complex *Tin Council* litigations, which concerned the debts of the International Tin Council, a full intergovernmental organization with headquarters in London, against private debtors at a time when the organization itself had financially collapsed and was in the process of liquidation. J H Rayner (Mincing Lane) Ltd. v. Dep't of Trade and Industry [1990] 2 AC 419 (HL) (UK); MacLaine Watson & Co. Ltd. v. Dep't of Trade & Indus., 3 All ER 257 (1988); MacLaine Watson & Co. Ltd. v Int'l Tin Council, 81 I.L.R. 670, 678. *See also* Romana Sadurska & Christine M Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility?*, 30 VA. J. INT'L L. 845 (1990).

[59] CCD-IFAD MoU, *supra* note 26.

[60] CBD-GEF MoU, *supra* note 26.

[61] For the list of treaties for which the GEF serves as a financing mechanism, see *Conventions*, GLOBAL ENV'T FACILITY, https://www.thegef.org/partners/conventions (last visited Mar. 27, 2023).

[62] According to Article 2 of the 1976 Agreement Establishing the IFAD, the objective of the Fund shall be to mobilize additional resources under concessional terms for agricultural development in developing member States. This involves projects designed to introduce, expand or improve food production systems and to strengthen related policies, taking into consideration the need to increase food production in the poorest food-deficit countries, the need to increase food production in other developing countries, and the importance of improving the nutritional level of the poorest populations. IFAD has entered into an agreement with the U.N. under Article 57 of the U.N. Charter and is a specialized agency thereof. Agreement Establishing the International Fund for Agricultural Development art. 2, June 13, 1976, 1059 U.N.T.S. 191 [hereinafter IFAD]; *see* IFAD Lending Policies and Criteria, adopted by IFAD Governing Council on 14 Dec. 1978 (Feb. 12, 1998) (as amended by Res 106/XXI).

[63] Nele Matz, *Financial Institutions Between Effectiveness and Legitimacy: A Legal Analysis of the World Bank, Global Environmental Facility and Prototype Carbon Fund*, 5 INT'L ENV'T AGREEMENTS 265, 285 (2005).

generally presumed to have intended to desist from assuming any binding obligations, the non-binding character of these instruments may nonetheless be questioned on several grounds. First, and with respect to trust agreements established by MoU, the trustee is appointed as the account holder (where applicable) and administrator of the trust fund and its assets. This in itself entails a reciprocal obligation where the trustee owes particular duties to the donors, which can hardly be assumed on a non-binding basis.[64] As most of these duties stem from widespread practice in the field of international law of trust funds, it is not out of the question to posit that they have become part of customary international law between States and trustees, and as such are binding and not merely voluntary. Moreover, the trustee owes some fiduciary duties to the beneficiaries once these have been designated. It would thus be absurd for the trustee and the donors to appoint the trustee without either of these entities owing any obligations to the beneficiaries at any stage of the trust process.

Equally, despite the lack of intergovernmental character in respect of environmental financing to treaty-bodies by the GEF, some obligation must arise for the trustee under the relevant agreements of cooperation. While this may not necessarily involve strict adherence to the policy decisions of the respective COP, it may encompass an obligation, for example, to prepare and submit annual financial reports.[65] Some environmental treaties fully finance their own projects and do not engage the GEF or IFAD as their financial mechanisms. In these cases, the decisions issued by the respective COPs are binding on the GEF in respect of releasing funds owned by the COP for particular projects, despite the non-contractual character of their agreement.[66] In practice, the vast majority of commentators argue that, despite the relevant MoU, "the GEF is not legally bound by decisions of the COPs."[67] Although the intention of the parties entering into such MoU should be respected, the very content of such instruments necessarily entails a plethora of binding obligations, whether implicitly by the very function of the trustee's role or as a result of customary international law. Perhaps, therefore, the best way of approaching the normative character of such agreements is article-by-article. Alternatively, it may be argued that the parties to an MoU establishing a trust

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[64] World Bank Group, 2017 Trust Fund Annual Report (2017), http://documents.worldbank.org/curated/en/428511521809720471/pdf/124547-REVISED-PUBLIC-17045-TF-Annual-Report-web-Apr17.pdf. The Bank's key instrument for managing trusts is its Operational Policy: Trust Funds, OP 14.40 (Feb. 1997).

[65] CBD, *supra* note 21, at arts. 3.1, 4, annex I.

[66] *See, e.g.*, U.N. Framework Convention on Climate Change, Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001, Decision 6/CP.7, U.N. Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002) [hereinafter UNFCCC].

[67] Matz, *supra* note 63, at 285. In fact, the COP to the CBD, in its first review of GEF effectiveness as the CBD's financial mechanism, expressed discontent with the GEF's level of compliance. *See id.* at 285–86.

relationship are aware of, and accept, the binding duties arising from such a relationship, and thus, the role of the MoU is to emphasize the non-binding character of all the other aspects of this relationship. It should be noted, of course, that the parties to the aforementioned MoU are not States in their vast majority but intergovernmental organizations. Moreover, it is true, as this Article has already explained, that the intergovernmental status of others, such as the GEF, may be in doubt. Nonetheless, it is undeniable that they enjoy at least some international legal personality,[68] and even if they are unable to enter into treaties as quasi-intergovernmental organizations, they are competent to conclude contracts under domestic law. The MoU route, therefore, does not have to be the only option. Overall, the problematic nature of MoU serving as administration agreements is limited to a small number of cases that do not generally involve State entities.

IV. FINANCING CAPACITY OF ASSEMBLIES

Financing or budget-related decision-making is not only a crucial but also an integral part of assemblies relied upon by their creators to undertake such functions. A poignant application of the funding of developing states' incremental costs by developed states on the basis of the common but differentiated responsibilities principle[69] is demonstrated in Article 20 of the CBD, which reads as follows:

> (2) The developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention and to benefit from its provisions and which costs are agreed between a developing country Party and the institutional structure referred to in Article 21 [the CBD financial mechanism], in accordance with policy, strategy, programme priorities and eligibility criteria and an indicative list of incremental costs established by the Conference of the Parties. . . .
>
> (3) The developed country Parties may also provide, and developing country Parties avail themselves of, financial resources

[68] Ilias Bantekas, *The Legal Personality of World Bank Funds Under International Law*, 56 TULSA L. REV. 101 (2021).

[69] This is enshrined in Article 3(1) of the 1992 UNFCCC. *See* Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276 (2004); United Nations Framework Convention on Climate Change art. 3(1), *entered into force* Mar. 21, 1994, 1771 U.N.T.S. 107.

> related to the implementation of this Convention through bilateral, regional and other multilateral channels.
>
> (4) The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.
>
> (5) The Parties shall take full account of the specific needs and special situation of least developed countries in their actions with regard to funding and transfer of technology.[70]

It is clear that the funding of developing States' incremental costs has to take into account the particular circumstance of each State. Equally, the funding of incremental costs in the context of the CBD[71] is compulsory for participating developed nations. The next step for the COP of the CBD is to adopt policies and strategies relating to programme priorities, eligibility criteria, and the levels of contributions for each party. It may well be, as is generally the case, that the financial and other resources collected from developed states do not suffice for the fulfilment of the Convention's goals. One option is certainly to decrease the level of expectations and the range of projects funded, but this would defeat the entire rationale of any multilateral environmental treaties (MEA), given that environmental effects and problems are systemic and as such they require a holistic approach.[72] The other option is rather straightforward. It involves engaging an external entity that is willing to fund the remainder. This is the role pertaining to the GEF, as well as other entities with the same purpose, such as IFAD.[73] Theoretically, MEA could provide that the

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[70] CBD, *supra* note 21, at art. 20.

[71] *See* Global Environmental Facility [GEF], Operational Guidelines for the Application of the Incremental Costs Principle, GEF Doc. GEF/C.31/12 (May 14, 2007) [hereinafter GEF].

[72] *See* Anna Kaijser & Annica Kronsell, *Climate Change Through the Lens of Intersectionality*, 23 ENV. POL. 417 (2014) (arguing that "the interconnectedness of climate change with human societies require profound analysis of relations among humans and between humans and nature, and the integration of insights from various academic fields").

[73] IFAD, for example, is the designated financing mechanism in respect of the Convention to Combat Desertification. *See* Conference of the Parties to the Convention to Combat Desertification, Memorandum of Understanding Between the Conference of the Parties and the International Fund for Agricultural Development Regarding the Modalities and Administrative Operations of the Global Mechanism, U.N. Doc. ICCD/COP(2)/L.19 (Dec. 8, 1998).

financial resources contributed by member States be deposited in a distinct trust fund and administered by the COP, whether itself acting as a trustee or by means of an independent entity acting in that capacity. The appointment of external trustees is certainly not the norm.[74] On the other hand, the COP do not generally possess the expertise and the means to undertake the full range of activities required to fulfil the tasks under their respective mandates. An undertaking of this nature would consume their entire energy. Thus, it was decided that the COP would issue general and specific guidance to the entity managing the Convention's financial resources, particularly where this entity itself made a significant financial contribution to the Convention's goals.[75] As a cost-effective strategy, this is certainly ideal for MEA. As a result, the title of Article 21 to the CBD—"Financial Mechanism"—like other similar environmental treaties, should not mislead one into thinking that the entity of the financial mechanism is a trustee. Equally, the *de facto* trustee of these trust mechanisms is the respective COP. There is no requirement that the actual financial mechanism (i.e., the funding entity) be a recognized legal person as such. The financial mechanism can just as well be a mere process under the authority and guidance of the COP through which developing member States receive funding for their incremental costs. In the case of the CBD, the financial mechanism that was initially designated was the GEF, both in respect of its early transitional period,[76] as well as for later purposes.[77]

Despite the many obvious advantages of such collaborations between MEA and the GEF, they are not without their fair share of inter-institutional problems. For one thing, the GEF Instrument, although it does encompass within its ambit projects related to biological diversity, clearly stipulates that availability of funding for incremental costs must only address "agreed global environmental benefits."[78] This imperative contradicts to some degree the

[74] A typical example of this rare structure is the Adaptation Fund established in accordance with Article 12(8) of the Kyoto Protocol, which is composed of a Board of States parties and an independent trustee, the World Bank. The trustee is mandated to set up a trust account wherein to retain the Adaptation Fund's assets and invest them accordingly. *See Adaptation Fund*, *supra* note 24, ¶¶ 20–27. This obligation is contained in ¶ 7 of the Terms and Conditions of Services to be provided by the IBRD as Trustee of the Adaptation Fund. For the relationship between the Adaptation Fund and the GEF, see Global Environmental Facility [GEF], *Note on the Memorandum of Understanding Between the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol and the Council of the Global Environmental Facility Regarding Secretariat Services to the Adaptation Fund Board*, GEF Doc. GEF/C.35/6 (May 21, 2009).

[75] *See* U.N. Framework Convention on Climate Change, *Annual Compilation and Accounting Report for Annex B Parties Under the Kyoto Protocol for 2022*, U.N. Doc. FCCC/KP/CMP/2022/3/Add. 1 (Sept. 15, 2022).

[76] CBD, *supra* note 21, at art. 39.

[77] *Id.* at Decision I/2: Financial Resources and Mechanism.

[78] The Global Environment Facility: Instrument Establishing, Mar. 16, 1994, 33 I.L.M. 1273, 1278 (1994) (reproducing the Restructured GEF Instrument). Paragraph 3 stipulates

strategy of the COP of the CBD, according to which projects "should contribute to the extent possible to build cooperation at the sub-regional, regional and international levels."[79] It equally contradicts the COP's programme priorities, which are aimed to accommodate "national priorities and regional needs within the aims of the Convention."[80] Matters are further complicated by the fact that the MoU adopted between the CBD COP and the GEF is considered non-binding by the signatories. Moreover, despite the existence of specific provisions as to the subordinate status of the funding mechanism vis-à-vis the COP in the Convention on Biological Diversity, the GEF is not a party to the Convention. The GEF defines incremental costs in the following manner:

> The relevant costs are incremental rather than total. The cost of GEF eligible activity should be compared to that of the activity it replaces or makes redundant. The difference between the two costs -- the expenditure on the GEF supported activity and the cost saving on the replaced or redundant activity -- is the incremental cost. It is a measure of the future economic burden on the country that would result from its choosing the GEF supported activity in preference to one that would have been sufficient in the national interest.
>
> . . . .
>
> To estimate incremental cost, the analyst therefore must estimate both the expenditure on the activity in question and the cost saving on activities that, as a result of the GEF activity, will no longer be needed. . . . Cost savings pertain to the projected "baseline" of future activities for sustainable national development that does not explicitly take global considerations into account. . . . Only for more elaborate investment and capacity-building projects would the baseline need to include a number of development activities that would otherwise be needed. . . .
>
> A plausible baseline therefore has several important characteristics.

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also that "[t]he agreed incremental costs of other relevant activities under Agenda 21 that may be agreed by the Council shall also be eligible for funding insofar as they achieve global environmental benefits by protecting the global environment in the four focal areas." *Id.* at 1285, ¶ 3.

[79] CBD, *supra* note 21, at Annex I, ¶ I.

[80] *Id.* at Annex I, ¶ III (3). *See also* SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, HANDBOOK OF THE FINANCIAL MECHANISM UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY ¶ III(3) (2d ed. 2004).

> (a) It addresses national development goals.
> (b) It is technically feasible.
> (c) It is an economically attractive course of action, while remaining broadly consistent with political and social constraints.
> (d) It is environmentally reasonable and therefore does not penalise progressive environmental action in recipient countries.
> (e) It is financially realistic.
>
> . . . .
>
> The incremental cost also depends on the choice of the alternative (GEF) activity.
>
> (a) For the country to regard the activity as a genuine alternative to its baseline activity, the GEF supported activity must deliver domestic benefits that are equivalent to those that the country had planned to achieve in its baseline. In many cases domestic benefits of the baseline and the alternative would be of the same type (e.g., electricity delivered) and physically equivalent. In some cases, domestic benefits may be more broadly defined (e.g., economic income derived from baseline agricultural development equivalent in monetary terms to that derived from a proposed alternative in sustainable forestry for ecotourism).
> (b) The activity must deliver global environmental benefits over and above those achievable in the baseline.[81]

On the face of it, the principle of incremental cost and the financing of the incremental costs incurred by developing countries seems a worthwhile and prudent exercise. The law has little, if any, comment on its effectiveness, given that this is a subject best suited for other disciplines. Some economists have argued, however, that at present, its application fails to protect globally important habitats, and moreover that it skews the bulk of conservation costs from developed to developing countries.[82] Three issues require pointing out at the close of this section. First, the designation of incremental costs that are financed by the GEF are subject to the GEF definition, despite the protestations to the contrary of any given COP. Second, and following from the first observation, the size and nature of incremental costs are "those agreed" upon between the funding mechanism and the respective COP.[83] Finally, on the

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[81] Incremental Costs Policy, GEF Doc GEF/C.7/Inf. 5, ¶¶ 10–12, 16 (Feb. 29, 1996). *See also* Evaluation of Incremental Cost Assessment, GEF Doc. GEF/ME/C.30/2 (Dec. 8, 2006).

[82] Gabriel Labbate, *The Incremental Cost Principle and the Conservation of Globally Important Habitats: A Critical Examination*, 65 ECOLOGICAL ECON. 216 (2008).

[83] CBD, *supra* note 21, ¶ 3.

basis of a number of interpretative declarations appended to the CBD, applicable *mutatis mutandis*, it is clear that the COP can only request developed countries to contribute financial assets up to the "amount of resources needed" and that the Convention does not authorize the COP to take decisions concerning the amount, nature, or frequency of the contributions from States parties.[84] Overall, the differences between the MEA and the GEF should not be over-emphasized, given their successful collaboration up to this date.[85] Also note that the GEF funds or co-finances other individual environmental projects other than its role as a financial mechanism for MEA.[86]

V. THE CRPD COSP[87]

It is within this framework that this Article seeks to examine in more detail the ASP to the Convention on the Rights of Persons with Disabilities (CRPD).[88] The CRPD is of interest because it is the latest U.N. multilateral human rights treaty and the only one setting up a COSP.[89] While it has not necessarily taken the type of far-reaching actions as its Paris Agreement counterpart, it is part of an established tradition whose principal aim is to keep the CRPD alive by stimulating actions, collaborations, enforcement, capacity building, and more. It should be pointed out that the new generation of COSP,

[84] *See* CBD, *supra* note 21, at 79 (exhibiting the signatories and interpretative declarations of Italy, Switzerland, France, and the U.K.).

[85] In fact, disagreements between the COP and the GEF are rare and the GEF emphasizes its adherence to COP Guidance. *See* GEF Council, Strategy for Financing Biosafety, GEF Doc. GEF/C.30/8/Rev.1, at 2 (Dec. 12, 2006).

[86] The GEF is the principal financial mechanism for five major international environmental conventions: the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants, the U.N. Convention on Biological Diversity, the U.N. Convention to Combat Desertification, and the U.N. Framework Convention on Climate Change. The GEF also supports multi-stakeholder alliances to preserve threatened ecosystems on land and in the oceans, build greener cities, boost food security, and promote clean energy. The GEF leverages $5.2 USD in additional financing for every $1 USD invested. For an overview of funding arrangements as compiled by the trustee of the GEF, see *Financial Intermediary Funds*, WORLD BANK, https://fiftrustee.worldbank.org/en/about/unit/dfi/fiftrustee/reports?fundName=GEF&folderName=Summary%20Status%20Reports (last visited Mar. 3, 2023).

[87] Part V of the Article provides an edited, partial reproduction of the author's prior contributions to *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, published by Oxford University Press. Ilias Bantekas, *Article 40: Conference of States Parties*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 1135, 1136–44 (Ilias Bantekas et al. eds., 2018). Reproduced with permission of the Licensor through PLSclear.

[88] Convention on the Rights of Persons with Disabilities, *entered into force* May 3, 2008, 2515 U.N.T.S. 3 [hereinafter CRPD].

[89] *Id.* at art. 40.

represented by the CRPD COSP, broadly exercises parliamentary functions with wide stakeholder participation where members, as well as non-members, may express views and offer insights.[90] Although this parliamentary function of the CRPD COSP has not necessarily produced concrete results at the inter-state or transnational level, it may nonetheless influence pertinent processes at the domestic level.

The creation of a CRPD COSP was discussed at a relatively early stage of the CRPD *travaux*. Although it was not referred to in all the reports of the second preparatory session,[91] elsewhere there was ample reference. In a working paper submitted by Mexico and endorsed by the ad hoc committee during the second session, a draft Article 19 envisaged the establishment of a conference with far greater authority than the current version in Article 40.[92] More specifically, it was to be vested with authority to: a) evaluate the operation and status of the Convention, b) promote international cooperation and assistance, c) consider the recommendations and suggestions of the Committee, and d) elaborate a final report on agreements reached among its members and submit these to the U.N. Secretary-General.[93] More specifically, the Mexican working paper suggested the following actions as far as the conference of states parties was concerned:

1. A Conference or Meeting of States Parties could have an active role in overseeing the implementation of the Convention, by using it as a forum that may review any matter related to the operation of the Convention.[94]

2. As such, the Conference would engage in activities that could include the discussion and review of issues related to the operation and implementation of the Convention, the setting of goals and targets on implementation, and the promotion of international cooperation and assistance.[95]

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[90] See, e.g., the COSP's ninth session in 2016, where in the course of the discussions on the 2030 SDG agenda, statements were made by two signatories and twelve NGO observers, in addition to states parties. U.N. Conference of States Parties to the Convention on the Rights of Persons with Disabilities, *Report of the Ninth Session*, ¶ 9, U.N. Doc. CRPD/CSP/2016/5 (Aug. 16, 2016).

[91] Ad Hoc Comm., Compilation of Proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, U.N. Doc. A/AC.265/2003/CRP/13 (June 16–27, 2003).

[92] *Compare* Ad Hoc Comm., Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities: Working Paper by Mexico, U.N. Doc. A/AC.265/WP.1 (Aug. 9, 2002), *with* CRPD, *supra* note 88, at art. 40.

[93] Ad Hoc Comm., *supra* note 92, at art. 19.

[94] *Id.* at arts. 19(1), 20(e).

[95] *Id.*

3. Aside from this, the Conference would also perform other more frequent functions, such as the consideration of additional norms to the Convention and elections.[96]

4. The Conference could also play a significant role in defining possible reforms of the monitoring mechanism.[97]

5. The Conference of States Parties should meet regularly to discharge its work. Due consideration should be given to the frequency of meetings that will be necessary in this regard.[98]

6. The modalities of work of the Conference should also be considered, including the definition of the convening party and the participation of other stakeholders.[99]

From there until the seventh preparatory session, the idea for a COSP had matured but did not receive much attention. During the seventh session of the ad hoc committee, the facilitator proposed a much more elaborate version of Article 40 (then-draft Article 42).[100] He added at the end of paragraph 1 the following: "including the operation and status of the Convention; matters arising from experience in the implementation of the present Convention; and the facilitation of international cooperation and the exchange of information and best practices for the implementation of the present Convention."[101] While there was general support for the thrust of this provision, it was felt that it spelt out the Conference's powers in very specific terms[102] and was ultimately rejected. Moreover, draft paragraph 2 stipulated that "two years after the first election of the members of the Committee, the Conference shall be convened by the Secretary-General of the United Nations biennially or upon the decision of the Conference of States Parties."[103] This was equally rejected. The facilitator further added two more sub-sections that were also rejected by the ad hoc committee, namely that:

> 3. When fundamental changes have affected the human rights treaty body system, the Conference of States Parties will decide, by a majority of two-thirds of the States present and voting,

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[96] *Id.* at arts. 22(4), 25(a).

[97] *See id.* at art. 20(e).

[98] *Id.* at art. 19(2).

[99] *Id.* at arts. 19, 25.

[100] Facilitator of Seventh Session Ad Hoc Committee, *Draft Provisions for an Implementing Mechanism: Facilitator's Text*, art. 42 (Aug. 11, 2006), https://www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8draftimpmech11aug.doc.

[101] *Id.* at art. 42(1). This was inspired by Article 63(4) of the 2003 U.N. Convention Against Corruption and Article 11(1) of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention). *See id.*

[102] *Id.*

[103] *Id.* at art. 42(2).

> whether it is appropriate to transfer to another body – without excluding any possibility – the functions pertaining to the implementation of the present Convention.
>
> 4. In any event, a Conference of the States parties will take place at the earliest four years and the latest six years following the entry into force of the present Convention to evaluate the functioning of the Committeee.[104]

The current version of Article 40 was cemented in the final preparatory session and was retained in the final text of the Convention.[105] Stein and Lord correctly point out that one of the key aims of the COSP was to bring not only states but also national human rights institutions (NHRIs), NGOs,[106] U.N. agencies, and other actors around the same table with a view to reflecting on how best to operationalize the Convention.[107] Such a forum would avoid the criticism leveled in the past against the U.N. Human Rights Committee—and perhaps, at a future time, the CRPD Committee—of assuming powers (as was the case with its General Comment on reservations)[108] that were never conferred upon it by member states.[109]

An examination of the CRPD COSP is important because it will serve as the model for the next generation of multilateral or regional human rights treaties. As a result, its deficiencies need to be highlighted. The enforcement powers of the CRPD COSP are severely limited, if there truly are any.[110] The powers and functions enjoyed by the CRPD COSP could just as well be exercised even if it had not been established by the CRPD. Nevertheless, on the basis of joint action by CRPD member states, the formal collectivization of member states ensures annual discussions on important and emerging issues affecting

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[104] *Id.* at arts. 42(3)–(4).

[105] *See generally* Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1 (2008).

[106] *See* U.N. Dep't Econ. & Soc. Affs., *List of Non-Governmental Organizations Accredited to the Conference of States Parties*, UNITED NATIONS, https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2/list-of-non-governmental-organization-accredited-to-the-conference-of-states-parties.html (last visited Mar. 10, 2023) (providing a list of NGOs accredited with the COSP).

[107] Michael Ashley Stein & Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 HUM. RTS. Q. 689 (2010).

[108] U.N. Hum. Rts. Comm., General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

[109] Stein & Lord, *supra* note 107, at 700.

[110] *See* CRPD, *supra* note 88, at art. 40.

disability rights and contributes towards a consistency among a group of equal partners undertaking common obligations. This outcome could not be achieved in the absence of a formal entity. Even so, the CRPD COSP has not so far pushed the boundaries of its capacity or its mandate; quite the contrary. Its actions have been largely discussion-based and of a hortatory nature, and it has not assumed the type of supervisory and dynamic actions typically associated with environmental COSP.[111]

Paragraph 1 of Article 40 of the CRPD gives rise to three distinct, but certainly inter-related, issues, namely: a) the Conference's legal personality, if any; b) its internal organization; and c) its competences, or powers, particularly whether besides its express powers it also enjoys implied powers.[112] These matters are not discussed in the text of the CRPD or its *travaux* and hence, the considerations outlined here are predicated on general international law within the context of the COSP and the intention of the state parties to the CRPD.

A. Legal Personality of the CRPD COSP

Neither Article 40(1) of the CRPD nor other provisions therein specifically confer any distinct legal personality on the COSP.[113] Even so, the COSP is expected to "consider any matter"[114] relating to the Convention's implementation. Although the conferral of such a broad express power does not automatically confer legal personality, it does, at the very least, necessitate that when the COSP engages with other actors (intergovernmental or private), it enjoys some legal personality. This is particularly important given that the CRPD itself is not an international organization, which would allow it to contract with third parties under its own legal person.[115] The practice of other COP confirm the existence of this implicit international legal personality, chiefly for practical reasons. COP to environmental treaties regularly, for example, adopt decisions by which they appoint a third entity as a trustee to a financing mechanism stipulated under their founding treaty,[116] followed

[111] *See, e.g.*, Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Report of the Fifteenth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, U.N. Doc. CRPD/CSP/2022/5 (Aug. 2, 2022).

[112] CRPD, *supra* note 88, art. 40(1).

[113] *See id.*

[114] *Id.* at art. 40.

[115] *Cf.* Martin A Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263 (1980).

[116] *See, e.g.*, Conference of the Parties to the Convention on Biological Diversity, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its First Meeting, U.N. Doc. UNEP/CBD/COP/DEC/I/2, 1 ¶ 2 (Feb. 28, 1995);

thereafter by the conclusion of a MoU with the designated trustee.[117] U.N. Legal Counsel has made it clear that COP operating under universal treaties possess the legal capacity, within the limits of their mandate, to enter into agreements and other arrangements with both state and non-state entities.[118] Several commentators have gone as far as to argue that several COP to environmental treaties operate not as mere treaty bodies but as "international organizations with a distinct legal personality," especially where they possess power to establish subsidiary bodies, amend their founding statutes, adopt protocols, or interact with other international organizations, among others.[119]

The COSP's powers and functions under the CRPD are especially broad, although not necessarily invasive or of an enforcement nature.[120] As will be explained in the section dealing with its competences, the term "consider" in Article 40(1) of the CRPD encompasses also the authority to implement and undertake pertinent action.[121] This may include the establishment of a trust fund for purposes of fundraising, employing third parties as advisors for capacity building, entering into agreements which ultimately give rise to *locus standi* before judicial and executive bodies (e.g., procurement), and others. Moreover, given that a decision of the COSP regarding the appointment and functioning of the CRPD Committee under Article 34(5) of the CRPD may give rise to a dispute between itself and a state party, its resolution necessarily confers legal personality on the COSP as a party to the dispute.[122] Finally, in accordance with Article 47(1) of the CRPD, the COSP may decide to amend the Convention by a two-thirds majority.[123] This is an important power that would otherwise have rested with the states parties. It is clear that if the COSP is to undertake all the aforementioned actions, its international legal

Conference of the Parties to the Convention on Biological Diversity, Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, U.N. Doc. UNEP/CBD/COP/2/19, Decision II/6, ¶ 1 (Nov. 30, 1995).

[117] *See* CBD-GEF MoU, *supra* note 26; CCD-IFAD MoU, *supra* note 26.

[118] *Memorandum to the Executive Secretary of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change*, 1993 U.N. Jurid. Y.B. 427, 429.

[119] Robin R Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 625–35 (2000). Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *supra* note 9, ¶ 11 (conferring upon the Adaptation Fund Board "such legal capacity as [is] necessary for the discharge of its functions with regard to direct access by eligible parties and implementing and executing agencies . . . in particular legal capacity to enter into contractual arrangements and to receive projects, activity and programme proposals directly and to process them . . . as appropriate").

[120] *See* CRPD, *supra* note 88, at art. 40.

[121] *See id.* at art. 40(1).

[122] The same is true, *mutatis mutandis*, in respect of possible disputes arising from the voting rights of regional organizations under Article 44(4) of the CRPD. *Id.* at art. 44(4).

[123] *Id.* at art. 47(1).

personality is both express and implicit (particularly as regards the term "consider[]").[124]

Exceptionally, states parties may expressly agree, prior to a treaty coming into force, that several powers of the COP be curtailed on the basis of interpretative declarations.[125] No such interpretative declarations have been entered in respect of the COSP's powers to the CRPD, but this may well occur in the future if the COSP assumes powers and functions at the dismay of one or more parties.

B. Organization of the COSP

Paragraph 1 of Article 40 of the CRPD simply states that the Conference "shall meet regularly," whereas paragraph 2 goes on to say that subsequent meetings shall be convened by the U.N. Secretary-General (in his capacity as depositary) "biennially or upon the decision of the Conference of States Parties."[126] Equally, Article 40 is silent as to the organization and structure of the Conference.[127]

i. Sources

The convening, organizational, and operational aspects of the Conference's meetings are regulated in more detail through three sources other than the CRPD, namely: its own internal rules of procedure;[128] other rules and procedures of the United Nations, to the degree that the matter under consideration is not dealt with in the CRPD or the COSP's own rules of procedure;[129] and the practice of the COSP.

The COSP's rules of procedure are adopted by the parties and are amenable to amendment but may not override the principal treaty, namely the

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[124] *Id.* at art. 47(1).

[125] By way of illustration, on the basis of interpretative declarations to the CBD entered into by Switzerland, Italy, France, and the U.K., the COP may only request developed countries to contribute financial assets to the "amount of resources needed" and that the CBD does not authorize the COP to take decisions concerning the "amount, nature or frequency of the contributions" from states parties. Convention on Biological Diversity, Declarations Made Upon Signature, June 5, 1992, 1760 U.N.T.S. 302.

[126] CRPD, *supra* note 88, at art. 40.

[127] *See id.*

[128] Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Provisional Rules of Procedure for the Conferences of States Parties to the Convention on the Rights of Persons with Disabilities, U.N. Doc. CRPD/CSP/2008/3 (Oct. 14, 2008) [hereinafter CRPD Rules of Procedure].

[129] *Id.* at r. 26.

CRPD.[130] Moreover, such rules may not be invoked as justification for violating undertakings assumed under private or public international law.[131] This is different from any privileges attributed, recognized, contractually agreed, or conferred upon the COSP as a result of its express or implicit legal personality. The rules cannot confer such privileges to the Conference.

Regarding the use of U.N. internal rules as a supplementary means of interpretation of the COSP's powers and organization, Rule 26 of the COSP rules stipulates that: "Any procedural matter arising at meetings which is not covered by these rules, shall be dealt with by the Chairperson in the light of the rules of procedure of the General Assembly which may be applicable to the matter at issue."[132]

The U.N. General Assembly's (UNGA) rules of procedure deal with issues stipulated in the COSP's rules, albeit with far more detail.[133] On the basis of Rule 26 of the COSP, the UNGA's rules of procedure carry the same legal weight as the COSP's own rules.[134] This is known as incorporation by reference; albeit in the case at hand, the UNGA rules of procedure are a supplementary source of law for the Conference and, in the event of conflict, the COSP's rules prevail.[135]

Where the practice of the COSP is consistent and uniform (and without dissent), participating states cannot subsequently disassociate themselves from it as they will have no doubt created legitimate expectations to other parties within the framework of the COSP. This "binding" nature emanating from the internal practice of constituent organs of international organizations[136] and COP,[137] while undeniable, is subject to the obvious limitation that

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[130] *Id.* at r. 27. This is also clearly implicit by the fact that the treaty is the founding instrument of the COP and, hence, the delegated entity cannot possess powers over and above its creator and beyond the ambit of its authority.

[131] Given the COSP's limited legal personality as set out in Article 40 of the CRPD, any liability for breaches committed by the COSP will be incurred by its members, whether individually or jointly under the Articles on State Responsibility. *See* Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, pt. I, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Pt. 2).

[132] CRPD Rules of Procedure, *supra* note 128, at r. 26.

[133] U.N. Gen. Assembly, Rules of Procedure, U.N. Doc. A/520/Rev.17 (2008).

[134] CRPD Rules of Procedure, *supra* note 128, at r. 26.

[135] *Id.*

[136] The internal practice of organs of international organizations is very much recorded and codified as a result. *See, e.g.*, *Repertoire of the Practice of the Security Council*, U.N. SEC. COUNCIL, https://www.un.org/securitycouncil/content/repertoire/structure (last visited Mar. 10, 2023).

[137] The draft rules of procedure of the COP to the UNFCCC, although not formally adopted, have "governed [its] practice." *See* Jutta Brunnée & Ellen Hey, *Transparency and International Environmental Institutions*, *in* 2 TRANSPARENCY IN INTERNATIONAL LAW 23, 32 (Andrea Bianchi & Anne Peters eds., 2013).

it cannot override an existing rule of international law and that, in any event, it does not establish rights and obligations for third parties.

ii. Composition of the COSP

The COSP is composed of a standing organ, its Secretariat, and the participating states through a bureau.[138] The function of the Secretariat is purely administrative[139] and its operation is entrusted to the U.N. Secretary-General,[140] who may in addition participate in meetings by making written or oral statements.[141] In practice, the U.N.'s Department for Economic and Social Affairs (DESA) is tasked with the role of co-Secretariat and it is the DESA that effectively, if not exclusively, services the COSP.[142] Given the volume of work involved and the fact that those engaged with the COSP have other duties, as is the case with similar entities and treaty bodies in the U.N. system, the role of DESA is unsurprising. DESA possesses significant experience with disability-related issues as it serves as secretariat for the 1994 Standard Rules on Equalization of Opportunities for Persons with Disabilities and the 1982 World Programme of Action Concerning Disabled Persons.[143] In addition, DESA prepares publications and acts as a clearinghouse for information on disability issues; promotes national, regional, and international programs and activities; provides support to governments and civil society; and gives substantial support to technical cooperation projects and activities.[144] It also

[138] CRPD Rules of Procedure, *supra* note 128, at r. 1(2), 9.

[139] *See, e.g.*, *id.* at r. 1–3, 5, 22. It does, however, possess authority to draw up the provisional agenda of the Conference's sessions in consultation with the bureau under Rule 5 of the COSP's rules, which is not a purely administrative function. *See id.* at r. 5.

[140] *Id.* at r. 3. The function and powers of the U.N. Secretary-General as depositary should be distinguished from the conferral of secretariat duties. Although both require his consent, the former is conferred by the CRPD (as is the case with Article 34(6) of the CRPD) whereas the latter is conferred by internal rules. In any event, the practice of the U.N. Secretary-General as depositary has given rise to customary powers and functions that are known in advance, whereas his Secretariat role involves further logistic and other considerations.

[141] *Id.* at r. 3.

[142] *See, e.g.*, Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Report of the Fourteenth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, ¶ 4, U.N. Doc. CRPD/CSP/2021/5 (July 27, 2021) [hereinafter Fourteenth Session Report] (exemplifying DESA involvement, although effectively downplaying its role).

[143] *See Disability*, U.N. DEP'T OF ECON. & SOC. AFFS., https://social.desa.un.org/issues/disability (last visited Mar. 10, 2023).

[144] For examples of DESA involvement, see *United National Voluntary Fund on Disability – Activities Supported*, U.N. DEP'T OF ECON. & SOC. AFFS.: DISABILITY, https://www.un.org/development/desa/disabilities/about-us/united-nations-voluntary-fund-on-disability/activities.html (last visited Mar. 10, 2023).

services the work of the U.N. Special Envoy on Disability and Accessibility, the Forum on Disability and Development, and the Expert Group Meetings on disability.[145] This expertise makes DESA an ideal secretariat that, moreover, reduces unnecessary duplication, at least within the U.N. system.[146]

Besides setting the agenda, the Secretariat has progressively made more substantive comments on disability issues, particularly through background papers on the items identified in the Conference's provisional agendas. These are typically short and concise (no more than ten pages) and are prepared on the basis of contributions by non-state actors.[147]

The bureau, on the other hand, is elected by the Conference and consists of one president and four vice-presidents, which serve for a term of two years.[148] For the purpose of the Conference's decision-making powers, a quorum exists when two-thirds of parties are present, in accordance with rule 12.[149] Each state party at the Conference is represented by a single vote,[150] and the same is true of regional integration organizations that are parties, subject to the limitations stipulated in Article 44(4) of the CRPD.[151] Decisions are adopted by a majority of members present and voting,[152] save for the special majority required for the election of CRPD Committee members.[153] States

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[145] For more information on these functions, see *About Us*, U.N. DEP'T OF ECON. & SOC. AFFS.: DISABILITY, https://www.un.org/development/desa/disabilities/about-us.html (last visited Mar. 28, 2023).

[146] The COSP provisions of other treaties expressly mandate the U.N. Secretary-General to provide full Secretariat support and services. *See, e.g.*, United Nations Convention Against Corruption, *supra* note 11, at art. 64.

[147] *See* U.N. Secretariat, Economic Empowerment through Inclusive Social Protection and Poverty Reduction Strategies: Background Paper Prepared by the Secretariat, U.N. Doc. CRPD/CSP/2013/2 (May 7, 2013); U.N. Secretariat, Incorporating the Provisions of the Convention on the Rights of Persons with Disabilities in the Post-2015 Development Agenda: Note by the Secretariat, U.N. Doc. CRPD/CSP/2014/2 (Apr. 1, 2014); U.N. Secretariat, Youth with Disabilities: Note by the Secretariat, U.N. Doc. CRPD/CSP/2014/4 (Apr. 1, 2014); U.N. Secretariat, Improvement of Disability Data and Statistics: Objectives and Challenges: Note by the Secretariat, U.N. Doc. CRPD/CSP/2015/3 (Apr.1, 2015); U.N. Secretariat, Mainstreaming Disability in Reduction of Poverty and Inequality: Note by the Secretariat, U.N. Doc. CRPD/CSP/2015/2 (Apr. 1, 2015); U.N. Secretariat, Eliminating Poverty and Inequality for Persons with Disabilities: Note by the Secretariat, U.N. Doc. CRPD/CSP/2016/2 (Mar. 30, 2016).

[148] CRPD Rules of Procedure, *supra* note 128, at r. 9.

[149] *Id.* at r. 12.

[150] *Id*. at r. 14.

[151] CRPD, *supra* note 88, at art. 44(4) ("Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.").

[152] CRPD Rules of Procedure, *supra* note 128, at r. 15.

[153] *Id.* at art. X.

that abstain from voting are not considered as "present and voting,"[154] and, as a result, it is in the interest (and certainly an incentive) of states to participate in the COSP's sessions. The Conference adopted its first decisions at its seventh session in 2014.[155]

iii. Meetings

Each annual assembly of the Conference is called a session. Each session is composed of meetings. Two types of meetings are envisaged in the COSP's rules; *ordinary*, organized biennially, and *extraordinary* sessions organized "upon the decision of the Conference."[156] Observers, including state non-parties, international organizations non-parties, and NGOs, are allowed to attend meetings under the COSP's rules.[157] From a practical point of view, each meeting is organized around a series of roundtables, with each assuming responsibility for developing a particular agenda item with a view to its inclusion in a plenary discussion. Other forms of discussion include informal panels, as was the case with youth with disabilities at the seventh session in 2014,[158] and interactive dialogues.[159] The role of NGOs and NHRIs is much

[154] *Id.* at r. 16.

[155] *See Seventh Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, 10-12 June 2014*, U.N. DEP'T OF ECON. & SOC. AFFS., https://social.desa.un.org/issues/disability/cosp/seventh-session-of-the-conference-of-states-parties-to-the-convention-on-the (last visited Mar. 28, 2023).

[156] CRPD Rules of Procedure, *supra* note 128, at r. 1(1).

[157] *Id.* at r. 25. For a list of accredited NGOs during the seventh session, see Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Report of the Seventh Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Annex 3, at 15, U.N. Doc. CRPD/CSP/2014/5 (July 37, 2014) [hereinafter Seventh Session Report]. For the list of NGOs accredited to the COSP, see *List of Non-Governmental Organization Accredited to the Conference of States Parties*, U.N. DEP'T OF ECON. & SOC. AFFS., https://social.desa.un.org/issues/disability/cosp/list-of-non-governmental-organization-accredited-to-the-conference-of-states (last visited Mar. 10, 2023).

[158] Seventh Session Report, *supra* note 157, ¶ 14.

[159] *See, e.g.*, Sue Swenson, President, Inclusion Int'l, Remarks at the Interactive Dialogue with the U.N. Entities on the CRPD Implementation (Dec. 3, 2020), https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2020/12/Swenson-COSP-13-Interactive-Dialogue.pdf. The concept of a "meeting," however, is somewhat confusing. In its fifth session, between September 12 and 14, 2012, the COSP stipulated that it held four meetings. These comprised elections for the Committee, two roundtables and an interactive dialogue. An informal meeting on an agenda item was not viewed as a meeting. *See* Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Report of the Fifth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, ¶ 2, U.N. Doc. CRPD/CSP/2012/2 (Oct. 25, 2012). In the previous session, however, an informal meeting on the right to work and employment was classified as a meeting. *See* Conference of States

more important than it appears in the CRPD or the rules.[160] As explained in a previous section, the Secretariat prepares background papers on issues identified in the agenda in advance of each meeting.[161] The bulk of the contribution to these background papers has thus far been made by NGOs.[162] In addition, NGO statements are included in reports.[163]

C. *Competence of the COSP*

It should be made clear from the outset that in respect of certain matters, member states enjoy unilateral competence (e.g., reservations), whereas, in respect of others, exclusive competence rests with the Conference. The latter is true, for example, as regards the election of Committee members[164] and amendment of the Convention.[165] In terms of competence, the Conference is effectively a formal collectivity of member states with a limited degree of legal personality. If the Conference did not exist, member states would have to rely on treaty or customary international law to resolve matters requiring collective action under the CRPD, assuming they decided to undertake collective action in the first place. By way of illustration, in cases of proposals to amend the CRPD, the parties would have been bound to follow the rule laid down in Articles 39 and 40 of the Vienna Convention on the Law of Treaties (VCLT), whereby a collective agreement is required.[166]

The key phrase describing the Conference's competence is that which allows it to "consider any matter with regard to the implementation" of the CRPD.[167] A useful distinction should be highlighted from the outset.

Parties to the Convention on the Rights of Persons with Disabilities, Report of the Fourth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, ¶ 2, U.N. Doc. CRPD/CSP/2011/2 (Dec. 8, 2011).

[160] *See* CRPD, *supra* note 88, at art. 32; CRPD Rules of Procedure, *supra* note 128, at r. 25. The same is also true as concerns the work of the CRPD Committee. CRPD, *supra* note 88, at art. 38(a).

[161] *See supra* note 147 and accompanying text.

[162] *See, e.g.*, U.N. Secretariat, Protecting the Rights of Persons with Disabilities in Armed Conflict and Humanitarian Emergencies: Note by the Secretariat, U.N. Doc. CRPD/CSP/2021/2 (Mar. 30, 2021).

[163] *See id.*

[164] CRPD, *supra* note 88, at art. 34(5).

[165] *Id.* at art. 47(1).

[166] VCLT, *supra* note 1, at arts. 39–40.

[167] CRPD, *supra* note 88, at art. 34(5); *see also* Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Report of the Eighth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, U.N. Doc. CRPD/CSP/2015/5 (July 13, 2015) (discussing the impact of poverty and underdevelopment on disability, as well as implementation of the Convention by the U.N.); Convention on the Rights of Persons with Disabilities, Incorporating the Provisions of the Convention on the Rights of Persons with Disabilities into the Post-2015 Development Agenda,

Depending on its mandate and constitution, an entity may possess *powers*, *functions*, or both. A power refers to an authority, express or implied, involving a binding decision-making capacity that may lawfully be addressed upon its intended addressees. A power may be granted either by law or private agreement (between the powerholder and the assignee) as is the case with the mandate of tribunals to decide a dispute. A function, on the other hand, does not confer decision-making authority to the assignee, but merely the ability to carry out a specific action. This dichotomy is useful also in the context of the COSP.[168] Typical functions of the Conference include the organization of meetings, as well as the setting out of its agenda,[169] whereas powers constitute the election of Committee members and amendment of the Convention.[170] Both of the aforementioned powers and functions are express, because they are stipulated in the CRPD.[171] Besides express powers, however, entities may be endowed with implied powers if these are necessary in order to carry out duties expressly assigned to the entity in question. This principle of implied powers was recognized in one of the first cases decided by the International Court of Justice, the *Reparations for Injuries* case.[172] Given that the Conference's express powers are clearly spelled out in Articles 34(5), 44(4), and 47 of the CRPD, it is necessary to examine whether Article 40(1) gives rise to other express (although not clearly spelled out) powers. In this connection, the Conference's power to "consider any matter with regard to the implementation"[173] of the CRPD necessarily excludes matters unrelated to

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U.N. Doc. CRPD/CSP/2014/2 (Apr. 1, 2014); Ilias Bantekas, *Reservations to the Convention on the Rights of Persons with Disabilities: Peer Engagement and the Value of a Clear Object and Purpose*, 33 N.Y. INT'L L. REV. 61 (2020).

[168] ILIAS BANTEKAS, AN INTRODUCTION TO INTERNATIONAL ARBITRATION 107 (2015).

[169] CRPD Rules of Procedure, *supra* note 128, at r. 5(4). The Conference has also delegated several functions to other entities, namely the U.N. Secretary-General. In its second session, it requested the Secretariat "to (a) continue to update the compilation on legislative measures to implement the Convention; (b) prepare a compilation of good practices on accessibility and reasonable accommodations; and (c) prepare a compilation on good practices on equal recognition before the law, access to justice and support and decision-making." Convention on the Rights of Persons with Disabilities, Report of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, U.N. Doc. CRPD/CSP/2009/2, ¶ 19 (Jan. 11, 2010).

[170] CRPD Rules of Procedure, *supra* note 128, at r. 4(1), 27.

[171] CRPD, *supra* note 88, at arts. 34(5), 47(3).

[172] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11). The instrument upon which implied powers are founded may limit such powers; this is also true of the remit of any claimed powers. *See* Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 3, 53–55; Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 64 (May 28).

[173] CRPD, *supra* note 88, at art. 40.

implementation, but encompasses also the adoption of concrete "measures." Otherwise, the Conference would be reduced to a think-tank.[174] Given our previous observation that the Conference is simply a formal collectivity of what member states would otherwise be entitled to undertake through joint action, the Conference is authorized to undertake any measure as long as it is consistent with general international law and assuming it does not conflict with the CRPD. Hence, if the majority of the parties in the Conference wished to adopt countermeasures against a party that persistently violated its obligations under the Convention, such a power would be encompassed under Article 1.[175] This is because these countermeasures are already available to member states in their individual capacity but would have to be exercised within the limits of Article 49 of the Articles on State Responsibility.[176]

An issue of future contention is the relation between Articles 33 and 40 of the CRPD. This is in the sense that under the Convention member states are solely responsible for implementation at the domestic level, with no pertinent power other than "considering" having been conferred upon the COSP. We have already stated that other treaties, such as the U.N. Convention Against Corruption, authorize conferences to establish elaborate review mechanisms for this purpose.[177] This is not the case with the COSP to the CRPD. The COSP to the CRPD is at present taking a distanced stance to domestic implementation.[178] However, if future domestic implementation weakens, civil society and concerned (powerful) states may assert a greater and more assertive implementation role for the COSP. Such an eventuality will no doubt be resisted by states relying on the express authority and delimitation of powers stipulated in Article 33 of the CRPD but may be admitted as lawful if it is found to be based on practice arising from tacit acquiescence or an

[174] Unlike other COP, such as the ICC's ASP, the COSP to the CRPD has to find these powers through a broad interpretation of its express powers or by way of implied powers. *Compare* Rome Statute of the International Criminal Court, *supra* note 14, at art. 112 (conferring a significant amount of elaborate express powers to the ASP), *with* CRPD, *supra* note 88, at art. 40(1). The CRPD Committee's functions and powers, on the other hand, are extensive and elaborate. *See, e.g.*, CRPD, *supra* note 88, at art. 34; Committee on the Rights of Persons with Disabilities, Rules of Procedure, U.N. Doc. CRPD/C/1/Rev.1 (Oct. 10, 2016) (permitting the creation of subsidiary organs).

[175] *See* CRPD, *supra* note 88, at art. 1.

[176] *See* Int'l L. Comm'n, Rep. of the Int'l L. Comm'n on the Work of Its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 49, U.N. Doc. A/56/10, at 26 (2001).

[177] *See supra* note 101 and accompanying text.

[178] U.N. Secretariat, Community-Based Rehabilitation and Habilitation for Inclusive Society: Background Paper Prepared by the Secretariat, ¶¶ 1–2, U.N. Doc. CRPD/CSP/2013/4 (May 7, 2013).

absence of persistent objection in such a manner that manifests true consent.[179]

In terms of implied powers and given the limited scope of the CRPD (as opposed to the U.N. Charter, for example), the CRPD's scope is limited. Anything that may assist, facilitate, or enhance the implementation of the CRPD qualifies as either an express power under Article 40(1) or, alternatively, as an implied power under customary law. A typical example is the creation of a trust fund for the funding of capacity building, scholarships, or other activities. This task may be delegated to the U.N. Secretary-General given the Secretariat's expertise in setting these up.[180] When the CRPD was adopted, the resources of the U.N. Voluntary Fund on Disability were extended to cover the implementation of the Convention.[181] In practice, the Conference has not shown any desire to pursue, claim, or adopt any implied powers and is content with its current role.

VI. CONCLUSION

This Article has undertaken an analysis of conferences or assemblies of states parties to multilateral treaties with a view of showcasing best practices and models for implementation in the context of multilateral human rights treaties. I have also attempted to sketch an outline of the idea of international political normativity as this idea applies to assemblies, their powers, and the implementation of their decisions by participating states. In the field of multilateral human rights treaties, only the Convention on the Rights of Persons with Disabilities encompasses such a conference and much of the analysis focused on the functions, powers, and effectiveness of this entity.

The CRPD Conference of States Parties as an autonomous entity should (and is) distinguished here from its sessions and meetings.[182] The U.N.

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[179] *See* ROBBIE SABEL, PROCEDURE AT INTERNATIONAL CONFERENCES: A STUDY OF THE RULES OF PROCEDURE OF INTER-GOVERNMENTAL CONFERENCES 34–35 (2d ed. 2006).

[180] We have already stated that under rule 26 of the COSP, in the event of a gap in the rules, the Conference may defer to the rules of the UNGA. Besides its own power and practice in setting up funds, in respect of their practical modalities, all U.N. entities generally rely on the U.N. Secretariat, Secretary-General's Bulletin on the Establishment and Management of Trust Funds, U.N. Doc. ST/SGB/188 ¶ 5 (Mar. 1, 1982). *See generally* Ilias Bantekas, *The Emergence of the Intergovernmental Trust in International Law*, 81 BRITISH Y.B. INT'L L. 224 (2010).

[181] G.A. Res. 63/150, ¶ 6 (December 18, 2008); *see also* Ad Hoc Committee, Use of the United Nations Voluntary Fund on Disability to Support the Participation of Non-Governmental Organizations and Experts, U.N. Doc. A/AC.265/2004/3 (May 17, 2004).

[182] This paragraph of the Article provides an edited, partial reproduction of the author's prior contributions to *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, published by Oxford University Press. Ilias Bantekas, *Article 40: Conference of States Parties*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES:

Secretary-General, not in his depositary function, was entrusted with the task of convening the CRPD COSP no later than six months after the entry into force of the CRPD. The Convention entered into force thirty days after the deposit of the twentieth instrument of ratification in accordance with Article 45(1) of the CRPD. The Convention entered into force on May 3, 2008. The first meeting of the Conference took place on October 31, 2008.[183] As far as its subsequent (post-2008) sessions are concerned, the Conference has been content for the U.N. Secretary-General, through DESA as described above, to set out the agenda for the meetings of its sessions (as well as to service these), to which it has always provided its approval.[184] Up until 2021, no meeting had been arranged by the Conference through a decision adopted by its plenary.[185]

This Article has demonstrated a clear correlation between the prowess and authority of an ASP with its mandate. Assemblies mandated to become funding bodies of their underlying instrument and its aims have entered into partnerships, organize extensive funding conferences, and ultimately innovative ways of contracting, irrespective of their legal personality. In contrast, assemblies like that of the CRPD have been largely unimaginative and have been overshadowed in appeal and authority by other entities. In the case of the CRPD, the ideological, and sometimes even political, mantle has been assumed by the CRPD Committee,[186] as well as the Special Rapporteur on the rights of persons with disabilities.[187] The Committee, despite its relatively short existence, has produced several general comments that have become the

A COMMENTARY 1135, 1144 (Ilias Bantekas et al. eds., 2018). Reproduced with permission of the Licensor through PLSclear.

[183] In convening the Conference and setting out the agenda for its first session, the U.N. Secretary-General prepared a draft set of rules of procedure, nominations for election to Committee, and several other items. *See* Convention on the Rights of the Persons with Disabilities, Conference of State Parties to the Convention on the Rights of Persons with Disabilities: First Session: Provisional Agenda, U.N. Doc. CRPD/CSP/2008/2 (Oct. 7, 2008).

[184] Exceptionally, the Conference has proceeded to make oral amendments to the agenda with the intention of introducing a new sub-item. *See* Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Report of the Fifth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, ¶ 4, U.N. Doc. CRPD/CSP/2012/2 (Oct. 25, 2012).

[185] *See* Fourteenth Session Report, *supra* note 142.

[186] *See* Stein & Lord, *supra* note 107; Anna Bruce, *Negotiating the Monitoring Mechanism for the Convention on the Rights of Persons with Disabilities: Two Steps Forward, One Step Back*, *in* INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 133 (Gudmundur Alfredsson et al. eds., 2009); *see, e.g.*, Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 929 (2009).

[187] *See Purpose of the Mandate*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Nov. 2, 2022, 2:51 PM), https://www.ohchr.org/en/issues/disability/srdisabilities/pages/srdisabilitiesindex.aspx (offering an overview of the work and documents of the mandate).

focal point of discussions,[188] but has yet to reach the level of authority enjoyed by other treaty bodies whose general comments are cited with approval by the International Court of Justice.[189] To some degree, it has done some of the work otherwise expected of COP to environmental treaties.[190]

While it may be argued that there is no real reason for the CRPD COSP to evolve into something more active, there is reason to doubt such an assumption. In this author's opinion, the recommendations of the CRPD Committee to the reports of states parties are infrequently transposed in domestic law and practice. This is unacceptable, given that a bulk of the recommendations concern fundamental aspects of the CRPD, such as the abolition of the medical approach.[191] The Committee can do no more than make recommendations;

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[188] Conference of States Parties to the Convention on the Rights of Persons with Disabilities, General Comment No. 1, Article 12: Equal Recognition Before the Law, U.N. Doc. CRPD/C/GC1 (May 19, 2014); *see also* Anna Arstein-Kerslake & Eilionóir Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law*, 20 INT'L J. HUM. RTS. 471 (2016); Conference of States Parties to the Convention on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, U.N. Doc. CRPD/C/GC2 (May 22, 2014); Conference of States Parties to the Convention on the Rights of Persons with Disabilities, General Comment No. 3, Article 6: Women with Disabilities, U.N. Doc. CRPD/C/G3 (Nov. 25, 2016).

[189] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 136 (July 9) (referring to General Comment 27); Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, ¶¶ 66, 77 (referring to General Comments 15 and 8).

[190] The Committee has recommended increases in the public resources available for representative organizations of persons with disabilities, including those representing children with disabilities. Resources should enable them to fulfill their role under the Convention. *See* Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Gabon, ¶ 9, U.N. Doc. CRPD/C/GAB/CO/1 (Oct. 2, 2015); Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report by Kenya, ¶ 8, U.N. Doc. CRPD/C/KEN/CO/1 (Sept. 30, 2015); Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report by Australia, ¶ 13, U.N. Doc. CRPD/C/AUS/CO/1 (Oct. 21, 2013); Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Periodic Report by Hungary, ¶ 14, U.N. Doc. CRPD/C/HUN/CO/1 (Oct. 22, 2012).

[191] Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Paraguay, ¶ 19, U.N. Doc. CRPD/C/PRY/CO/1 (May 15, 2013). The CRPD Committee has moreover chastised the application of a welfare or charity model in certain states where it has identified it. *See* Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Mexico, ¶ 15, U.N. Doc. CRPD/C/MEX/CO/1 (Oct. 27, 2014); Conference of States Parties to the Convention on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Guatemala, ¶ 23, U.N. Doc. CRPD/C/GTM/CO/1 (Sept. 30, 2016).

thus, it would have been hugely important had the COSP coordinated its efforts with the Committee in order to adopt political mechanisms by which to convince member states to adapt their laws and practices to fundamental tenets of the Convention. In equal measure, the COSP can and should play a more active role in allowing national disability organizations to be heard, at least those silenced in their own countries. At present, while such organizations are vocal, this is only true with respect to those operating from liberal states. Finally, the financing capacity of the COSP is virtually non-existent. An assembly that is content merely that its own expenses and administrative costs be met is not going to go very far with policy and enforcement of its goals. Rather, the COSP should look at the paradigm set out by the ICC ASP as well as the assemblies of environmental entities or intergovernmental trust funds with a view of re-organizing and re-mobilizing itself. A similar paradigm is offered by the mechanism implementing the SDGs which, while clearly set out as a political set of goals, has become a complex institution whose outcomes are adhered to by states as if they have normative value. It is hoped that the next generation of multilateral and regional human rights treaties will not emulate the model of the CRPD, which in all other respects is a truly radical human rights treaty that has gone far beyond its predecessors.[192]

Overall, however, this Article has attempted to show that assemblies, treaty-based or otherwise—such as the SDGs—produce such outcomes that cannot sufficiently or convincingly be explained by reference to the scholarship on soft law, nor indeed the type of normativity arising from classical positivism. As a result, the author has provided a sketch of an alternative approach which he terms "international political normativity." This effectively explains that where state actors have, in a process of mutual trust, afforded non-normative powers to an institution or mechanism for the attainment of moralistic objectives, such mechanism may ultimately produce outcomes that are similar or equivalent to normative outcomes. This is neither a soft law approach nor a hard law approach to international decision-making. Such international political normativity is rare, and the author has identified it in the context of the SDGs and the majority of ASP. I hope that the scholarship on the powers and functions of ASP on the basis of normative outcome theories will expand and that global input to this debate will flourish in the years to come.

[192] *See* Michael A. Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007).