The other is that, although economic and social rights are regarded by the treaty bodies at times as having features that differentiate them from civil and political rights, both sets of rights are treated as having much in common.

2 The practice of the ICESCR Committee

In this section we examine the approach and practice of the ICESCR Committee in relation to the three characteristics of economic and social rights that have often traditionally been regarded as distinguishing such rights from civil and political rights: the typically broad formulation of economic and social rights, the progressive nature of such rights, and consequently their alleged non-justiciability.

2.1 The broad formulation of economic and social rights

It is undeniable that many of the rights in the ICESCR, especially social rights, are broadly formulated. For example, on the right to social security, article 9 says no more than: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'; while article 11(1), on the right to an adequate standard of living, states simply: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.' But not all rights in the ICESCR, especially economic rights, are so broadly formulated. For example, article 7 provides, *inter alia*, for 'equal remuneration for work of equal value without distinction of any kind'; article 8 provides for a right to join a trade union, in language that is similar to, but slightly less restrictive than, that of article 22 of the ICCPR; while article 13(2) provides that 'primary education shall be compulsory and available free to all'. The ICESCR Committee considers this latter group of rights, and some other rights of the ICESCR that are also precisely worded, to be 'self-executing'.[15]

Rights such as those in articles 9 and 11(1) of the ICESCR are too broadly and vaguely worded to be operational as they stand. Guidance as

[15] ICESCR Committee, General Comment No. 3, 14 December 1990, UN Doc. E/1991/23, Annex III, UN ESCOR, Supp. (No. 3), para. 5; and General Comment No. 9, 3 December 1998, UN Doc. E/C.12/1998/24, para. 10.

to the more precise content of such rights is therefore desirable if states parties to the ICESCR are to know what their obligations are and what steps they need to take to comply with them. Such guidance is also essential if the ICESCR Committee is to be able to determine a state party's compliance with the ICESCR when examining state party reports or eventually when considering individual Communications under the Optional Protocol. The main means of providing such guidance are the General Comments adopted by the ICESCR Committee. The purpose, nature and legal status of the ICESCR Committee's General Comments are similar to those of other UN treaty bodies.[16] The ICESCR Committee describes the purpose of its General Comments as being to:

> make the experience gained through the examination of States' reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures; and to stimulate the activities of the States parties, international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant.[17]

The ICESCR Committee's General Comments are not legally binding, because neither the ICESCR nor any other instrument so provides, and the ICESCR Committee, like other UN treaty bodies, lacks the power to take legally binding decisions. Nevertheless, the ICESCR Committee's General Comments are not without legal significance. Some of them, at least, may be considered to be interpretations of the ICESCR. Such interpretations would seem to carry considerable weight, given the role

[16] The purpose, nature and legal status of the General Comments adopted by UN treaty bodies have been widely discussed, both in this book (see Keller and Grover, 'General Comments', this volume, section 2) and elsewhere: see for example C. Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, Center for Human Rights and Global Justice, Working Paper No. 17 (2008), 2–38; and K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', *Vanderbilt Journal of Transnational Law* 42:3 (2009) 905–47, 926–31, and literature cited therein.

[17] ICESCR Committee, *Report on Fortieth and Forty-First Sessions*, 28 April–16 May 2008, 3–21 November 2008, ESCOR 2009 Supplement No. 2 (New York and Geneva: United Nations, 2009) UN Doc. E/2009/22, para. 56. On the complexities of drafting General Comments relating to the ICESCR, see Steiner, Alston and Goodman, *International Human Rights* (n. 2), 359, quoting P. Hunt, *Ten Years after the World Conference on Human Rights*, presentation for panel on evening of Thursday 16 October 2003, FIAN Conference on Ten Years After the Vienna Conference on Human Rights, available at www.essex.ac.uk/human_rights_centre/research/rth/presentations.aspx, accessed 5 January 2011.

of the ICESCR Committee as the supervisory organ of the ICESCR, although they are probably less authoritative than an interpretation by an international court.[18] Some General Comments seem to go beyond interpretation and appear to be quasi-legislative in nature. For example, General Comment No. 4 (1991) on the right to adequate housing, spells out the elements of adequacy contained in the bald right in article 11(1) of the ICESCR to 'an adequate standard of living . . . including . . . housing', by setting out in some detail the ICESCR Committee's views on: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.[19] Even more obviously legislative in nature, perhaps, is General Comment No. 15 (2002)[20] which spells out a right to water, a right which is not explicitly referred to in the ICESCR and whose inclusion therein was deliberately rejected when drafting the ICESCR.[21] The ICESCR Committee derives the right to water from the right to 'an adequate standard of living . . . including adequate food' in article 11(1) and the right in article 12(1) to the highest attainable standard of health. The ICESCR Committee's elaboration in this General Comment of the 'normative content of the right to water' runs to more than three sides of A4.[22] The Committee's quasi-legislative approach, especially in General Comment No. 15, has given rise to considerable debate and some criticism.[23] Nevertheless, whether the Committee's General Comments are interpretative or quasi-legislative in character, they are undoubtedly a form of soft law.

As with the General Comments adopted by other UN treaty bodies, issues arise as to the legality and legitimacy of the General Comments of the ICESCR Committee. As far as legality is concerned, the ICESCR Committee is perhaps on rather firmer legal ground than other UN treaty bodies, as its

[18] See further M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press, 1995), 91–2.

[19] ICESCR Committee, General Comment No. 4, 13 December 1991, UN Doc. ESCOR, Supp. (No. 3) Annex III, 115, para. 8. See also General Comment No. 7, 20 May 1997, UN Doc. E/1998/22, Annex IV, which details the obligations of states parties in relation to security of tenure where such security is threatened by forced evictions.

[20] ICESCR Committee, General Comment No. 15, 20 January 2003, UN Doc. E/C.12/2002/11, paras. 10–16 inclusive.

[21] Blake, *Normative Instruments* (n. 16), 24, quoting P.H. Gleik, 'The Human Right to Water', *Water Policy* 1:5 (1999) 487–503, 87.

[22] ICESCR Committee, General Comment No. 15 (n. 20), paras. 10–16.

[23] See for example Blake, *Normative Instruments* (n. 16), 24–5 and literature cited therein; and the debate on General Comment No. 15 between S. Tully and M. Langford in *Netherlands Quarterly of Human Rights* 23 (2005) 35–63; and 26 (2006) 433–59, 461–72 and 473–9.

authority to issue General Comments derives from an explicit invitation to do so from the Economic and Social Council (which established the Committee),[24] rather than fairly vague provisions in the constituent treaties of the other treaty bodies. It is also noteworthy that the invitation from ECOSOC does not ask the ICESCR Committee to confine its General Comments to interpretation. However, some questions may be asked about the legitimacy of the ICESCR Committee's General Comments. First, there is a lack of coherence in some of the General Comments that undermines their legitimacy. For example, in several General Comments the ICESCR Committee discusses the scope of the 'other status' ground of discrimination in article 2(2) of the ICESCR in ways that are neither consistent nor coherent;[25] and the concept of a 'minimum core obligation' elaborated by the Committee (discussed in section 2.2 below) is not very clear.[26] More fundamentally, there is some question as to the legitimacy of the ICESCR Committee itself, given that its members are elected by the Economic and Social Council, not by states parties to the ICESCR, even though not all members of the Council are parties to the ICESCR and those that are represent only about a third of all parties.[27] On the other hand, the way in which General Comments are drawn up is more open and democratic than with some other treaty bodies because of the way in which NGOs are involved in the process. Notwithstanding the fact that there may be some question as to the legitimacy of the practice of the ICESCR Committee in adopting General Comments, no state party to the ICESCR has formally raised any objection to the practice.[28]

[24] ECOSOC, Resolution 1987/5, 26 May 1987, UN Doc. E/C.12/1989/4, 27, para. 9. See further Craven, *The International Covenant* (n. 18), 89–90.

[25] See M. Langford and J. A. King, 'Committee on Economic, Social and Cultural Rights: Past, Present and Future' in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008), 477–516, 484. Although the ICESCR Committee adopted a General Comment on discrimination subsequent to the publication of this book (General Comment No. 20, 10 June 2009, UN Doc. E/C.12/GC/20), that General Comment does not address the criticisms made by Langford and King.

[26] See Langford and King, *ibid.* 492–4.

[27] But note that in 2007 the HR Council adopted a resolution to 'repatriate' the ICESCR Committee to the states parties to the ICESCR: see HR Council, Resolution 4/7. Rectification of the Legal Status of the Committee on Economic, Social and Cultural Rights, 30 April 2007, UN Doc. A/HRC/RES/4/7.

[28] Langford and King, 'Committee on Economic, Social and Cultural Rights' (n. 25), 481; and Ssenyonjo, *Economic, Social and Cultural Rights* (n. 2), 29–30. However, Dennis and Stewart assert that some states parties do not accept some General Comments: see Dennis and Stewart, 'Justiciability' (n. 5), 495.

While the General Comment is the main vehicle for providing guidance on the broadly formulated provisions of the ICESCR, there are two other vehicles, one actual, the other at present only potential. The former is the Statement. The purpose of Statements, according to the ICESCR Committee, is to assist states parties by 'clarify[ing] and confirm[ing] its position with respect to major international developments and issues bearing upon implementation of the Covenant'.[29] The ICESCR Committee is the only UN treaty body apart from the CRPD Committee using Statements for this purpose. By no means do all of the sixteen Statements that the ICESCR Committee has so far issued provide guidance as to the meaning of ICESCR provisions. But some do, notably the Statement on 'An Evaluation of the Obligation to take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' (discussed extensively below),[30] and the Statement on the 'Convention to draft a Charter of Fundamental Rights of the European Union'.[31] Like General Comments, Statements are not legally binding but are a species of rather soft law, and some may constitute (authoritative) interpretations of the ICESCR. In the future, if and when the Optional Protocol to the ICESCR enters into force, the ICESCR Committee's 'Views' in response to individual Communications will also provide guidance as to the meaning of the provisions of the ICESCR. Indeed, the experience of other treaty bodies, such as the HRC, suggests that 'Views' in response to individual complaints tend to provide a more authoritative and precise interpretation of the treaty provision concerned.

2.2 *The progressive nature of economic and social rights*

As is well known, the ICESCR provides that its rights are to be progressively realised. This principle is stated in article 2(1) as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[29] *Report on Fortieth and Forty-First sessions* (n. 17), para. 58.
[30] 10 May 2007, UN Doc. E/C.12/2007/1 (referred to hereafter as 'the OP Statement').
[31] 31 December 2000, UN Doc. E/2001/22-E/C.12/2000/21, Annex VIII, see especially para. 4.

Article 2(1) and its implications for both states parties and the work of the ICESCR Committee have given rise to much discussion in the academic literature.[32] Here we focus solely on the Committee's views and practice. Conceptually, its initial approach was to see the obligations in the ICESCR as including both obligations of conduct and obligations of result.[33] It later abandoned that approach and from General Comment No. 12 (1999) onwards adopted a three-fold typology of obligations: respect, protect and fulfil. The obligation to respect requires a state party 'to refrain from interfering directly or indirectly with the enjoyment of Covenant rights' and will often be an obligation of immediate effect.[34] The obligation to protect requires a state party to 'prevent third parties from interfering with the rights recognized in the Covenant': sometimes the obligation is of immediate effect, at other times it is one requiring 'positive budgetary measures', i.e. progressive.[35] The obligation to fulfil is subdivided into two imperatives: first, to facilitate, meaning that a state party must 'pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure' enjoyment of a right; and secondly, to provide a right directly.[36] The obligation to fulfil will always be progressive. Langford and King have suggested that this typology was developed in part 'to affirm that in certain key respects, [economic and social rights] are similar to civil and political rights because both types of rights involve' the three kinds of obligation.[37] They argue, however, that this three-fold typology is 'ripe for a more critical conceptual review.'[38]

Thus, in spite of the principle enunciated in article 2(1), not every right in the ICESCR, or not every aspect of a particular right, is progressive. The ICESCR Committee has declared certain rights to be of immediate effect.[39] They include the obligation to guarantee that the rights

[32] See for example Alston and Quinn, 'The Nature and Scope' (n. 8); Craven, *The International Covenant* (n. 18), ch. 3; and Ssenyonjo, *Economic, Social and Cultural Rights* (n. 2), 50–84.
[33] ICESCR Committee, General Comment No. 3 (n. 15), para. 1.
[34] OP Statement (n. 30), para. 7. See also ICESCR Committee, General Comment No. 12, 12 May 1999, UN Doc. E/C.12/1995/5, para. 15.
[35] *Ibid.*
[36] *Ibid.* para. 15. In General Comment No. 15 the ICESCR Committee disaggregates the obligation to fulfil into the obligations to facilitate, promote and provide: see para. 25.
[37] Langford and King, 'Committee on Economic, Social and Cultural Rights' (n. 25), 484. See also ICESCR Committee, General Comment No. 3 (n. 15), para. 1.
[38] Langford and King, *ibid.* 485. See also O. De Schutter, *International Human Rights Law* (Cambridge University Press, 2010), 248–56.
[39] ICESCR Committee, General Comment No. 3 (n. 15), para. 1.

in the ICESCR will be exercised without discrimination of any kind (article 2(2)) and the right to equal pay for equal work (article 7).[40] Even where a right is, in general terms, progressive, there may be elements of it that are of immediate effect. Thus, in relation to the right to housing in article 11, which in general is clearly of a progressive nature, the ICESCR Committee has nevertheless found that there are some immediate obligations contained within that right, such as the obligation of states parties to refrain from engaging in or permitting forced evictions and to monitor effectively the housing situation on its territory.[41] Furthermore, in the case of rights or aspects of rights that are progressive, it has declared that the obligation on a state party under article 2(1) to 'take steps' to realise that right means that they 'must be taken within a reasonably short time after the Covenant's entry into force for the State concerned'.[42] This means moving 'as expeditiously and effectively as possible' towards such realisation, although the ICESCR Committee acknowledges that the principle of progressivity is a 'necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring the full realization of economic, social and cultural rights'.[43] It follows from the obligation to take progressive steps towards the realisation of rights that any deliberate regression would be likely to contravene the ICESCR. As the Committee puts it: 'any deliberately retrogressive measures ... would need to be fully justified by reference to the totality of rights provided for in the Covenant and in the context of the full use of the maximum available resources.'[44] Related to the idea of immediately taking, or at least not delaying in taking, the necessary steps towards realising ICESCR rights, is its notion of there being a 'minimum core obligation' to each right.[45] This concept is not very precisely articulated. According to the ICESCR Committee, a state would *prima facie* be failing to discharge its obligations under the Covenant if, for example, 'any significant number of individuals is deprived of essential

[40] *Ibid.* paras. 1 and 2. See also ICESCR Committee, General Comment No. 9 (n. 15), para. 10.

[41] ICESCR Committee, General Comment No. 4 (n. 19), paras. 8(a) and 10–14; and ICESCR Committee, General Comment No. 7 (n. 19). For examples of other rights where the ICESCR Committee has found various elements to be of immediate effect, see Langford and King, 'Committee on Economic, Social and Cultural Rights' (n. 25), 487–9.

[42] ICESCR Committee, General Comment No. 3 (n. 15), para. 2.

[43] *Ibid.* para. 9.

[44] *Ibid.* See also the OP Statement (n. 30), paras. 9 and 10.

[45] ICESCR Committee, General Comment No. 3 (n. 15), para. 10. See further Ssenyonjo, *Economic, Social and Cultural Rights* (n. 2), 65–9.

foodstuffs, of essential primary care, [and] of basic shelter and housing', although account must also be taken 'of resource constraints applying within the country concerned'. But this requires a state to show that it has made every effort 'to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[46]

There has been discussion in the academic literature about the implications of the progressive nature of some ICESCR rights for the reporting system, with suggestions that the ICESCR Committee should employ a system of indicators or benchmarking.[47] The Committee has to some degree endorsed the principle of benchmarking. In General Comment No. 1 it observed that, in order to provide a basis on which it and a state party 'can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant[,] ... it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health-care provider, etc.'[48] The Committee added that, to this end, states parties should include in their reports information (including both qualitative and quantitative data)

[46] ICESCR Committee, General Comment No. 3 (n. 15), para. 10. Cf. para. 11, where the ICESCR Committee states that 'even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'. This proposition is repeated in the OP Statement (n. 30), para. 4. For a critique of the concept of 'minimum core obligation' and the way in which it has been applied by the ICESCR Committee in practice, see Langford and King, 'Committee on Economic, Social and Cultural Rights' (n. 25), 492–5; and Mechlem, 'Treaty Bodies' (n. 16), 940–5.

[47] See for example P. Alston, 'International Governance in the Normative Areas', *UN Background Papers: Human Development Report* (1999) 15–18, as quoted in Steiner, Alston and Goodman, *International Human Rights* (n. 2), 317–18; A. Chapman, 'A New Approach to Monitoring the International Covenant on Economic, Social and Cultural Rights', *Review of the International Commission of Jurists* 55 (1995) 23–8, 23; S. Russell and A. Chapman (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002); K. Tomaševski, 'Indicators' and A. Eide, 'The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights' in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights*, 2nd edn (Leiden: Martinus Nijhoff, 2001), 531–43 and 545–51, respectively.

[48] ICESCR Committee, General Comment No. 1, 24 February 1989, UN Doc. E/1989/22, para. 6.

that 'shows the progress over time, with respect to the effective realization of the relevant rights.'[49] In practice, however, there appears to be little evidence of the use of benchmarking in relation to specific ICESCR rights by the Committee, at least if one goes by its Concluding Observations. More common is for the ICESCR Committee to call on the state party concerned to inform the Committee in its next periodic report of all the steps that it has taken to 'implement' the suggestions and recommendations made by it in its Concluding Observations.[50] While this is in a sense a form of benchmarking, the Committee's suggestions and recommendations are often wide-ranging and discursive and not specifically related to a particular right. From them one cannot easily glean the progress that a state is making towards the realisation of a particular ICESCR right. There are, in any case, some practical obstacles towards a more rigorous system of benchmarking. The ICESCR Committee in practice examines reports from only about ten of its 160 parties each year. Presumably in order to prevent too great a backlog developing, it will often examine two or more successive periodic reports for the same state at the same session: for example, at its forty-third session, in November 2009, the ICESCR Committee examined the second to fourth reports of the Democratic Republic of Congo. Examining a succession of reports in this way clearly militates against any systematic benchmarking. So too do the long delays between some states parties' reports. For example, the reports of the Democratic Republic of Congo just referred to were examined twenty-one years after its initial report, while at the same session Madagascar's second report was examined twenty-three years after its initial report.

Apart from the particular issues arising from the progressive nature of some ICESCR rights, the reporting system of the ICESCR operates in much the same way as with other UN human rights treaties and therefore nothing further needs to be said here.[51] One comment that may be made, however, is that, at times, the ICESCR Committee seems to rove quite a long way beyond the ICESCR and comments on matters that would appear to be more appropriately dealt with by other UN treaty bodies, and in some cases are not connected to economic and social rights. For example, it has commented on inadequacies in the judicial system of some states parties and on the death penalty, matters that fall

[49] *Ibid.* para. 7.

[50] See for example ICESCR Committee, Concluding Observations: France, May 2008, UN Doc. E/C.12/FRA/CO/3, para. 55.

[51] See further Kälin, 'State Reports', this volume, section 2.

within the competence of the HRC;[52] condemned domestic violence (including marital rape) and female genital mutilation, matters which it would seem are better dealt with by the CEDAW Committee;[53] and called for an end to the sexual exploitation of children and child soldiers, matters within the purview of the CRC Committee.[54] It has also commended or recommended the ratification by states parties of treaties that are at best only marginally concerned with economic and social rights, for example the Rome Statute of the International Criminal Court, the Optional Protocol to the CAT, and ECHR Protocol 12.[55] Questions may be asked about the legitimacy – and indeed the legality – of the ICESCR Committee straying into territory that is (arguably) beyond its province.[56]

The question of how the principle of progressivity would operate in relation to a system of complaints of alleged violations of the rights in the ICESCR was a concern of a number of states in the negotiation of what became the Optional Protocol to the ICESCR.[57] To help address those concerns, the ICESCR Committee issued a statement on the matter in May 2007.[58] In it, the ICESCR Committee suggests that, when

[52] See for example ICESCR Committee, Concluding Observations: Cambodia, 12 June 2009, UN Doc. E/C.12/KHM/CO/1, para. 14; ICESCR Committee, Concluding Observations: Democratic Republic of Congo, 20 November 2009, UN Doc. E/C.12/COD/CO/4, para. 10; ICESCR Committee, Concluding Observations: Kazakhstan, 7 June 2010, UN Doc. E/C.12/KAZ/CO/1, para. 11; and ICESCR Committee, Concluding Observations: Mauritius, 8 June 2010, UN Doc. E/C.12/MOS/CO/4, para. 28.

[53] See for example ICESCR Committee, Concluding Observations: Australia, 12 June 2009, UN Doc. E/C.12/AUS/CO/4, para. 22; ICESCR Committee, Concluding Observations: Benin, 9 June 2008, UN Doc. E/C.12/BEN/CO/2, paras. 17 and 26; ICESCR Committee, Concluding Observations: Democratic Republic of Congo (n. 52), paras. 20 and 25; ICESCR Committee, Concluding Observations: Kazakhstan (n. 52), para. 25; and ICESCR Committee, Concluding Observations: Mauritius (n. 52), para. 22.

[54] See for example ICESCR Committee, Concluding Observations: Mauritius (n. 52), para. 24; and ICESCR Committee, Concluding Observations: Democratic Republic of Congo (n. 52), paras. 26–8.

[55] See ICESCR Committee, Concluding Observations: Colombia, 21 May 2010, UN Doc. E/C.12/COL/CO/5, para. 3; ICESCR Committee, Concluding Observations: Mauritius (n. 52), para. 5; ICESCR Committee, Concluding Observations: France (n. 50), para. 53, respectively.

[56] Cf. Kälin, 'State Reports', this volume, who makes a similar comment in respect of the HRC.

[57] For example, Australia, Canada, India and the United Kingdom: see C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review* 8:4 (2008) 617–46, 636; and Dennis and Stewart, 'Justiciability' (n. 5), 490.

[58] OP Statement (n. 30).

considering an alleged failure of a state party to take steps to the maximum of its available resources, it would assess whether the measures that that state had taken were 'adequate' or 'reasonable' by taking into account various considerations, including: (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights; (b) whether the state party had exercised its discretion in a non-discriminatory manner; (c) whether that state's decision (not) to allocate available resources was in accordance with international human rights standards; (d) where several policy options were available, whether that state had adopted the option that least restricted Covenant rights; (e) the time frame in which the steps had been taken; (f) whether such steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups; and (g) whether the state party prioritised grave situations or situations of risk.[59] Where a state party had taken no steps to realise ICESCR rights, or had taken retrogressive steps, the burden of proof would rest on that state to show that its course of action was 'based on the most careful consideration and [could] be justified by reference to the totality of the rights provided for in the Covenant and by the fact that full use was made of available resources.'[60] The ICESCR Committee emphasises, however, that, in assessing whether a state party had taken 'reasonable steps to the maximum of its available resources to achieve progressively the realization of the provisions of the Covenant', it would at all times:

> bear in mind its own role as an international treaty body and the role of the state in formulating or adopting, funding and implementing laws and policies concerning economic, social and cultural rights. To this end, and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the ICESCR Committee always respects the margin of appreciation afforded to states to take steps and adopt measures most suited to their specific circumstances.[61]

The Optional Protocol to the ICESCR itself seems to reflect something of the idea of a margin of appreciation, although it does not use that

[59] *Ibid.* para. 8.

[60] *Ibid.* para. 9. In para. 10 the ICESCR Committee sets out the criteria that it would consider in assessing whether retrogressive steps could be justified by resource constraints.

[61] *Ibid.* para. 11. A similar point is made in para. 12. The Committee's advocacy of a margin of appreciation has been questioned by Langford and King, 'Committee on Economic, Social and Cultural Rights' (n. 25), 500.

term. Article 8(4) of this Protocol provides that, when the ICESCR Committee examines a Communication, it 'shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.'[62] As pointed out below, the Optional Protocol is some way from entering into force, so it may be a considerable period of time before it will be possible to see how the concept of progressivity is applied in practice by the ICESCR Committee when considering alleged violations of the ICESCR.

2.3 *The non-justiciability of economic and social rights*

Not long after its establishment, the ICESCR Committee began to assert, at first rather cautiously but then with increasing force, that the rights contained in the ICESCR, or at least some of them, were justiciable. Initially it was concerned with the justiciability of economic and social rights at the national level. Its early statements were restrained. Thus, for example, in General Comment No. 3 (1990) on the nature of states parties' obligations, it stated that, among the measures that 'might be considered appropriate' for giving effect to the rights in the ICESCR, was 'the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable.'[63] Eight years later, in General Comment No. 9, the Committee was much bolder in its pronouncements. It began by observing that:

> [a state party to the ICESCR] seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' . . . or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be ineffective if they are not reinforced or complemented by judicial remedies.[64]

[62] For a discussion of art. 8(4) of the Optional Protocol to the ICESCR, see Mahon, 'Progress at the Front' (n. 57), 635–8; B. Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins', *Nordisk Tidsskrift for Menneskerettigheter* 27:1 (2009) 39–53; and A. Vandenbogaerde and W. Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex-Ante Assessment of its Effectiveness in Light of the Drafting Process', *Human Rights Law Review* 10:2 (2010) 207–37, 223–6.

[63] ICESCR Committee, General Comment No. 3 (n. 15), para. 5.

[64] ICESCR Committee, General Comment No. 9 (n. 15), para. 3.

It went on to argue that, 'whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.'[65] The ICESCR Committee then made a bold and important pronouncement on the justifications for the justiciability of economic and social rights, the possible arguments against justiciability, and comparisons with civil and political rights, a pronouncement that is worth quoting almost in full:

> In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made it clear [for example, in General Comment No.3] that it considers many of the provisions of the Covenant to be capable of immediate implementation ... It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[66]

The ICESCR Committee has asserted the justiciability of rights in the ICESCR not only in its General Comments but also in some of its Statements[67] and in its Concluding Observations on states parties' reports, especially of those states parties that question the justiciability

[65] *Ibid.* para. 9.
[66] *Ibid.* para. 10. See also paras. 12–14 on the practices of national courts.
[67] See for example Statement to the Convention to Draft a Charter of Fundamental Rights of the European Union (n. 31), especially paras. 5 and 8.

of economic and social rights.[68] The Optional Protocol to the ICESCR assumes a degree of justiciability of economic and social rights at the national level. Article 3(1) provides that the ICESCR Committee shall not consider a communication from an individual unless 'all available domestic remedies have been exhausted.' Such remedies will often, although not invariably, be judicial in nature.

In the 1990s the ICESCR Committee became increasingly concerned with promoting the justiciability of the rights in the ICESCR on the international plane, i.e., that there should be a mechanism whereby individuals could bring complaints of alleged violations of the ICESCR by states parties before an international body. From 1990 it worked on elaborating an Optional Protocol to the ICESCR to provide for such a mechanism. It presented its proposals to the then UN Commission on Human Rights in 1996.[69] Following an eight-year hiatus, the Commission established a working group to elaborate options for a draft protocol, and in 2006 the new UN Human Rights Council (HR Council) directed the working group to negotiate a draft protocol.[70] Following those negotiations, the HR Council adopted the Optional Protocol in June 2008[71] and forwarded it to the UN General Assembly, which adopted it unanimously on 10 December 2008.[72] The Optional Protocol provides for the ICESCR Committee to receive Communications from individuals or groups of individuals claiming to be victims of 'any' of the rights in the ICESCR,[73] thus indicating that all such rights are justiciable.

While the General Assembly may have adopted the Optional Protocol unanimously, there was a considerable divergence of views expressed between states parties during its negotiation. States were divided into three

[68] See for example ICESCR Committee, Concluding Observations: Poland (n. 6), para. 8 and ICESCR Committee, Concluding Observations: United Kingdom, 12 June 2009, UN Doc. E/C.12/GBR/CO/5, para. 13.
[69] Langford and King, 'Committee on Economic, Social and Cultural Rights' (n. 25), 514.
[70] HR Council, Resolution 1/3. Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 13 November 2006, UN Doc. A/HRC/RES/1/3.
[71] HR Council, Resolution 8/2. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 18 June 2008, UN Doc. A/HRC/RES/8/2.
[72] UN GA, Resolution on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on the Report of the Third Committee (A/63/435), 10 December 2008, UN Doc. A/Res/63/117. For a detailed discussion of the drafting of the Optional Protocol, see Mahon, 'Progress at the Front' (n. 57), 621–8; and Vandenbogaerde and Vandenhole, 'The Optional Protocol' (n. 62), 207–18.
[73] Optional Protocol to the ICESCR, art. 2.

broad camps. The first was what were known as supporters or friends of the Protocol and included some European states (Belgium, Croatia, Finland, Portugal and Spain) and many Latin American and Caribbean states. A second group, which included Australia, Canada, China, Japan, Netherlands, New Zealand, Norway, Poland, Sweden, the United Kingdom and the USA, were, in varying degrees, sceptical of the desirability of an optional protocol and expressed such scepticism (or even opposition) during the debate on the adoption of the Optional Protocol in the General Assembly. The third group had no very strong views on the matter.[74] Two years after its adoption, the Optional Protocol has yet to gain widespread support from states parties to the ICESCR. As of 3 October 2010, thirty-five states (just over 20 per cent of the states parties to the ICESCR) had signed the Optional Protocol, and it had obtained only three ratifications (Ecuador, Mongolia and Spain) of the ten necessary for its entry into force.

It has been a long march to obtain acceptance for the idea that the economic and social rights of the ICESCR are justiciable on the international plane, especially when compared with the experience of other UN treaty bodies concerned with economic and social rights as part of their remit. The ICCPR, CERD, CMW and CRPD have all had a system of individual Communications since their inception, while CEDAW has had such a system since 1999. Only the CRC has yet to provide for individual complaints. It remains to be seen whether the ICESCR Optional Protocol will come into force and an international complaints mechanism become a reality. Even if it does, it may not be very effective, because of weaknesses with some of the Optional Protocol's provisions.[75]

3 The 'cross-cutting' committees: the CRC and CEDAW Committees

Notwithstanding the legacy of distinct treaty regimes at the global level for civil and political rights, on the one hand, and economic and social rights, on the other, the later drafting of 'issue-specific' human rights treaties again highlighted that much of the purported distinction between these rights is artificial. This became particularly clear in the negotiation and drafting of the CRC and CEDAW.

[74] Vandenbogaerde and Vandenhole, 'The Optional Protocol' (n. 62), 210–17.

[75] See *ibid.* 230–7. For a more positive view of the Optional Protocol see B.A. Simmons, 'Should States Ratify? – Process and Consequences of the Optional Protocol to the ICESCR', *Nordisk Tidsskrift for Menneskerettigheter* 27:1 (2009) 64–81.

By and large, these two treaties do not add a great deal in substantive legal terms to the ICESCR and ICCPR: a state which is party to them will either expressly or implicitly already owe many of the obligations contained in the CRC and CEDAW. With regard to gender, for example, article 2(2) of the ICESCR and article 2(1) of the ICCPR oblige states to extend rights without discrimination on various grounds including sex. With regard to children, they both extend all protected rights to 'everyone', and there are specific provisions that make express reference to children and their rights, for example article 24 of the ICCPR. Although the CRC and CEDAW do contain some novel legal obligations, for example article 3(1) of the CRC, which requires states parties to ensure that in all matters the best interests of a child shall be 'a primary consideration', the two treaties are more important in their allocation of attention, resources and expertise to the issues they tackle, rather than the development of new human rights standards.

The primary importance of the CRC and CEDAW for our purposes lies in the fact that both treaties contain different types of rights and that the enforcement of those various rights is entrusted to specialist committees which must interpret and apply all of them. With regard to enforcement mechanisms, Alston has argued that both the CRC and CEDAW were perceived as economic and social rights treaties and thus with non-justiciable content.[76] As a consequence, at the time of their adoption, they did not include a petition mechanism. That is still the case with the CRC but not with CEDAW, since its Optional Protocol came into force in 2000.[77] The Protocol also creates an inquiry procedure enabling the CEDAW Committee to initiate inquiries into situations of grave or systematic violation of women's rights.[78] With these powers in mind, the discussion in this section will initially examine the approach of the CRC Committee and then move on to the CEDAW Committee.

3.1 The CRC Committee

As mentioned, the CRC contains civil and political as well as economic and social rights, although it does not seek to identify which provisions

[76] P. Alston, 'Establishing a Right to Petition Under the Covenant on Economic, Social and Cultural Rights', *Collected Courses of the Academy of European Law* 4:2 (1993) 107–52, 116.

[77] Optional Protocol to the CEDAW, 2131 UNTS 83, entered into force 22 December 2000. As of 1 September 2010, there were 99 parties to this Protocol.

[78] This Protocol includes an 'opt-out clause', allowing states upon ratification or accession to declare that they do not accept the inquiry procedure. To date four states, Bangladesh, Belize, Colombia and Cuba, have opted out.

7

UN treaty bodies and the Human Rights Council

NIGEL S. RODLEY

1 Introduction

For historical reasons, the United Nations is presently endowed with two sets of human rights monitoring procedures: those established under human rights treaties[1] and those under the UN Human Rights Council (HR Council), variously called 'non-treaty procedures', 'extra-conventional mechanisms', or 'Charter-based mechanisms'. The latter may be divided into procedures at the level of the HR Council itself (whether operating in open, public sessions or in closed, private proceedings) and the 'special procedures', that is, those the HR Council has established to be discharged by appointed experts acting in their individual capacities. These, in turn, may be divided into country-specific and thematic procedures. In practice, the country-specific special procedures are generated directly by the HR

This is an updated and expanded version of my chapter 'United Nations Human Rights Council, Its Special Procedures and Their Relationship with the Treaty Bodies: Complementarity or Competition?' in K. Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009), 49–73, which in turn developed my 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights – Complementarity or Competition', *Human Rights Quarterly* 25 (2003) 882–908; reprinted in N. Ando (ed.), *Towards Implementing Universal Human Rights – Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (Leiden/Boston: Martinus Nijhoff, 2004), 3–24. I gratefully acknowledge the research assistance of Laura Callaghan-Pace, LLM in International Human Rights Law (University of Essex), who pulled together the material on the operation of UPR in practice and provided important insights based on her own experience of working with the system as a member of the United Kingdom Mission to the UN in Geneva.

[1] The nine core treaties and treaty bodies are: the CERD (CERD Committee); the ICESCR (ICESCR Committee); the ICCPR (HRC); the CEDAW (CEDAW Committee); the CAT (CAT Committee); the CRC (CRC Committee); the CMW (CMW Committee); the CRPD (CRPD Committee); and the CPED (CPED Committee). The following works deal with the treaty system as a whole: P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000); A. F. Bayefsky (ed.), *The UN Human Rights System in the 21st Century* (The Hague: Kluwer Law International, 2000); A. F. Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (The Hague: Kluwer Law International, 2001).

Council's own country discussions and only last as long as the Council considers (for whatever reason) that it should continue to scrutinise the human rights situation in the state in question. The thematic special procedures have more of a standing status, being renewed for three-year periods and rarely discontinued.[2]

The Charter-based procedures as a whole only began to develop after the first human rights treaties were adopted. The International Convention

[2] The following thematic mandates are in existence at the time of writing: the Working Group on Enforced or Involuntary Disappearances; the Working Group on Arbitrary Detention; the Working Group on People of African Descent; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the question of torture; the Special Rapporteur on internally displaced persons; the Special Rapporteur on religious intolerance; the Special Rapporteur on the question of the use of mercenaries; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on violence against women, its causes and consequences; the Special Representative of the Secretary-General on the situation of human rights defenders; the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes; the Special Rapporteur on the human rights of migrants; the Independent Expert on the effects of foreign debt on the full enjoyment of human rights; the Special Rapporteur on the right to education; the Special Rapporteur on the right to adequate housing; the Special Rapporteur on the right to food; the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people; the Independent Expert on the Question of Human Rights and Extreme Poverty; the Special Rapporteur on the right to health; the Independent Expert on minority issues; the Special Rapporteur on human rights and terrorism; the Special Rapporteur on trafficking in persons; and the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises; the Special Rapporteur on contemporary forms of slavery; the Independent Expert on human rights and access to water; and the Independent Expert on cultural rights. The following works deal with the special procedures system: T.J.M. Zuijdwijk, *Petitioning the United Nations: A Study in Human Rights* (Hampshire: Gower Publishing; New York: St. Martin's Press, 1982); M.E. Tardu, *Human Rights: the International Petition System* (New York: Oceana, 1979); A. Dormenval, *Procédures onusiennes de mise en oeuvre des droits de l'homme* (Paris: Presses Universitaires de France, 1991); O. de Frouville, *Les Procédures Thématiques: une contibution efficace des Nations Unies à la Protection des droits de l'homme* (Paris: Pedone, 1996); M. Lempinen, *Challenges Facing the System of Special Procedures of the United National Commission on Human Rights* (Turku, Åbo: Institute for Human Rights, Abo Akademi University, 2001) ch. 8 of which also addresses the relationship between the special procedures and the treaty bodies; I. Nifosi, *The UN Special Procedures in the Field of Human Rights* (Antwerp: Intersentia, 2005); E. Domínguez Redondo, *Los Procedimientos Públicos Especiales de la Comisión de Derechos Humanos de Naciones Unidas* (Valencia: Tirant Io Blanch, 2005); J. Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law* (Antwerp: Intersentia, 2006).

on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted in 1965, and the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966. The first country-specific engagement of the HR Council's predecessor, the Commission on Human Rights, came with the adoption in 1967 of Economic and Social Council (ECOSOC) resolution 1235 (XLII). This permitted the Commission to consider consistent patterns of human rights violations and investigate gross human rights violations. In 1970, the well-known 1503 procedure (named after ECOSOC resolution 1503(XLVIII) establishing it) was adopted to permit the Commission to deal, in closed session, with complaints from non-governmental sources of consistent patterns of gross human rights violations. It was not until 1980 – some thirty-five years after the founding of the UN – that the Commission established its first thematic mechanism, the Working Group on Enforced or Involuntary Disappearances.

This delay reflected a belief by many UN members in its early days that scrutiny of any individual state's human rights practices constituted improper intervention in matters essentially within the domestic jurisdiction of states, as excluded by article 2(7) of the Charter of the United Nations. Even though the bold and pioneering commentator Sir Hersch Lauterpacht argued as early as 1950 that mere discussion of a state's human rights performance was not precluded under the Charter's non-intervention rule,[3] this view was not to prevail for some two decades.

On the other hand, no such problem existed if a state voluntarily agreed to the monitoring activity by means of adherence to a treaty that provided for it. In the words of one of the most renowned framers of the Universal Declaration of Human Rights:

> il aurait été difficile de contester que les Etats pouvaient par la voie d'instruments juridiques particuliers prendre des engagements qui faisaient ressortir les obligations qu'ils assumaient ainsi en matière des droits de l'homme du domaine de leur compétence interne.[4]

Thus, supervisory procedures were envisaged as a necessary part of the two treaties that, with the UDHR, were to complete the International

[3] H. Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons, 1950), 168–73.

[4] R. Cassin, *Hague Recueil Des Cours* 79:2 (1951) 237–364, 310. 'It would have been difficult to disagree that States could, by way of particular juridical instruments, take on commitments that entail assuming obligations, including in the field of human rights within their domestic jurisdiction.'

Bill of Human Rights: the ICESCR[5] and ICCPR.[6] As it happened, the protracted process of agreeing on these covenants made it possible for the specialised CERD[7] to be adopted a year earlier, with its own supervisory body. The drafting of three of the four other specialised conventions now in force – the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[8] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[9] and the Convention on the Rights of the Child (CRC)[10] – began before the thematic special procedures commenced.

This history permits speculation as to whether the treaty bodies would have been created had extra-conventional mechanisms with a comprehensive mandate been achievable at the birth of the UN.

Similarly, the existence of the treaty bodies, once on the horizon, led to early concerns that special procedures should not duplicate their work and, indeed, that the very existence of the special procedures should be reviewed once the treaty bodies were in operation.[11]

[5] See generally M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Clarendon Press, 1995).

[6] See generally D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1990); I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights* (Antwerp: Intersentia, 1999); S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary*, 2nd edn (Oxford University Press, 2004); M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, 2nd edn (Kehl, Germany: N. P. Engel Verlag, 2005).

[7] See generally N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 2nd edn (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980).

[8] CEDAW; see generally L. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Dordrecht: Martinus Nijhoff, 1993).

[9] CAT; see generally J.H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988); A. Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (The Hague: Martinus Nijhoff, 1999); M. Nowak and E. McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008); N. Podley and M. Pollard, *The Treatment of Prisoners under International Law*, 3rd edn (Oxford University Press, 2009).

[10] CRC; see generally A.G. Mower, Jr., *The Convention on the Rights of the Child: International Law Support for Children* (New York: Greenwood Press, 1997); S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff, 1999).

[11] See ECOSOC Res. 1235 (XLII), *Communications Concerning Human Rights*, 6 June 1967, UN Doc. E/4393, para. 4; ECOSOC Res. 1503 (XLVIII), *Procedure for dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms*, 27 May 1970, UN Doc. E/4832, para. 10.

In fact, we seem now to be at the stage where, despite occasional reviews of each of the two systems – treaty bodies[12] and non-treaty procedures[13] – there is no serious proposal to roll back one system in favour of the other. Rather, the chapter will first look at the country-specific work of the HR Council, comparing and contrasting it with the relevant working methods of the treaty bodies. Here the potential for overlap between, on the one hand, the new HR Council procedure of Universal Periodic Review (UPR) and, on the other, the treaty body review of periodic reports will be identified and its significance assessed. Subsequently, the work of the treaty bodies and that of the thematic special procedures will be compared and contrasted, in respect of which there is surprisingly little duplication and overlap.

2 Country work of the HR Council and review of periodic reports by treaty bodies

The country work of the Commission on Human Rights traditionally raised no problems of duplication or overlap with that of the treaty bodies. First, the decision to consider a country situation under either the 1235 or 1503 procedures was one taken by a group of government representatives, whereas the treaty bodies are composed of individual experts.[14] Second,

[12] See for example P. Alston, Independent Expert, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments (Final Report)*, 27 March 1997, UN Doc. E/CN.4/1997/74; Secretariat, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, 22 March 2006, UN Doc. HRI/MC/2006/2.

[13] See Commission on Human Rights, *Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, 27 April 2000, UN Doc. E/CN.4/DEC/2000/109; *Report of the Inter-sessional Open-Ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, 16 February 2000, UN Doc. E/CN.4/2000/112; HR Council, *Institution-Building of the United Nations Human Rights Council*, Res. 5/1 (2007), 18 June 2007, UN Doc. A/62/53.

[14] Of course, when the Commission or HR Council appoints a body, such as (rarely) a working group or (typically) a special rapporteur to undertake country-specific scrutiny, the mandate-holders serve as individual experts. Note, however, that there was a substantial role for the now dissolved Sub-Commission on Prevention of Discrimination and Protection of Minorities (later Sub-Commission on the Promotion and Protection of Human Rights) in the early phases of the 1503 procedure. By 2000, the Sub-Commission's function had been reduced to providing a Working Group on Communications that reviewed and forwarded directly to the Commission communications (from NGOs) appearing 'to reveal a consistent pattern of gross and reliably attested violations of human rights' (ECOSOC Res. 200/3, *Procedure for dealing with Communications Concerning Human Rights*, 16 June 2000, UN Doc. E/RES/2000/3). The HR Council Advisory Committee that replaced the Sub-Commission now appoints a similar Working Group for the Complaints Procedure that effectively continues the 1503 procedure (HR Council Res. 5/1, Annex (2007), *ibid.* paras. 65–108). The Sub-Commission's role in adopting country-specific resolutions in public session was terminated by the Commission in 2000 (December 109/2000, Annex, para. 52).

the treaty bodies are not normally looking at an overall situation; rather they are focusing on specific issues. This is evidently the case for the specialised treaty bodies, but it is also largely true for the treaty bodies with a more general mandate: the Human Rights Committee (HRC) under the ICCPR and the Committee on Economic, Social and Cultural Rights (ICESCR Committee) under the ICESCR. Typically, they look at states from an article-by-article perspective, not a global one, albeit the ICCPR and ICESCR each cover a very broad range of issues. Third, and of special importance, the treaty bodies do not usually take up states on an *ad hoc* basis; they pursue a standard agenda, applying their procedures as state reports come up for consideration, apart from the rarely used option retained by some treaty bodies of asking for special reports. What it boils down to is that the traditional country work of the Commission or HR Council has involved unmistakably political decision-making, while that of the treaty bodies is impartially selected and institutionally determined.

Indeed, it was the very politically selective nature of the Commission's work that was asserted to be a central reason for seeking to replace it with another body – the HR Council. Others have begun to assess how successfully in general this objective appears to have been achieved.[15] Here, we are concerned only with one dimension of the HR Council's processes, the UPR. However, it was precisely the UPR process that was seen as a key innovation in addressing the political selectivity charge. Since the UPR was something that would apply to all UN member states, it would be impossible to argue that the HR Council was applying double standards in the selection process. Universality is the opposite of selectivity.

The relevance of this to the treaty bodies lies in the fact that the one procedure common to all the treaty bodies and obligatory for all states parties to the treaties is the periodic review process, involving states parties submitting reports that are then considered and assessed by the treaty body in question on the basis of a 'constructive dialogue'. This sounds suspiciously close to the UPR which, according to General

[15] See K. Boyle, 'The United Nations Human Rights Council: Origins, Antecedents and Prospects' in K. Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009), 11–47; P. Sen (ed.), *Universal Periodic Review of Human Rights: Towards Best Practice* (London: Commonwealth Secretariat, 2009).

Assembly resolution 60/251,[16] was to be 'a cooperative mechanism, based on an interactive dialogue'. The General Assembly was evidently alert to the issue, since it provided that 'such a mechanism shall complement and not duplicate the work of treaty bodies'.[17]

What it did not do was lay down how this was to be achieved. This was left to the HR Council which, after a year of deliberations, adopted resolution 5/1 (2007), its 'institution-building package'. The first thirty-eight paragraphs of the package are devoted to the UPR mechanism.[18]

The salient elements are that, every four years, states are expected to submit a twenty-page information document which 'can take the form of a report' on the fulfilment of its human rights obligations and commitments, and the Office of the High Commissioner for Human Rights (OHCHR) prepares two reports of up to ten pages each, one on the findings of UN treaty bodies and special procedures and one that summarises information from 'stakeholders' (read 'NGOs and national human rights institutions'). On the basis of these reports, a Working Group of the whole HR Council conducts the main interactive dialogue with the state concerned, lasting some three hours. A further hour of plenary discussion, in which NGOs are able to participate, concludes the discussion. A 'troika' of rapporteurs from HR Council members, chosen by lot, helps prepare the dialogue and the Working Group report that is the main component of the outcome document for discussion in the Plenary.

The outcome was to consist *inter alia* of 'conclusions and/or recommendations' and 'may include ... [an] assessment ... of the human rights situation in the country under review'. This again sounds uncomfortably like the conclusions and recommendations typically found in the Concluding Observations of treaty bodies adopted after their dialogue with states parties.

Any reader familiar with human rights work will know that since, in most cases, the only international sanction for human rights violations is the verdict of the court of public opinion, duplication of work can be helpful in getting a hearing before that court. Accordingly, more is better.

[16] UN GA, Resolution without reference to a Main Committee (A/60/L.48) 60/251. HR Council, 3 April 2006, UN Doc. A/RES/60/251, para. 5(e).

[17] *Ibid.* See generally N. Bernaz, 'Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism' in K. Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009), 75–92; for a thorough background analysis of the issue, see F.D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System', *Human Rights Law Review* 7 (2007) 109–39.

[18] The mechanism is explored in detail by Bernaz, *ibid.*

It may therefore be asked what problem there is with the UPR in fact duplicating treaty body periodic reviews, at least with respect to states parties to each treaty. Might not their submission of information under the UPR process make it somewhat harder for states to claim a 'reporting burden' that leaves them overdue in their reporting to the treaty bodies? Might it even, as anticipated by the HR Council, encourage states to adhere to treaties they are not yet party to, as a means of eliciting the appreciation of their peers in the UPR, and encourage the fulfilment of treaty body recommendations?[19] While we may need to await detailed assessment of these matters, informal discussions with close observers indicate that affirmative answers may be indicated, not least pursuant to commitments that states are encouraged to make in advance of their consideration under the UPR.

The potential problem lies in how the results of the two processes compare. For if there were a real basis for comparison, then comparisons will be made. It is surely not too cynical to suggest for example that, if the outcome of the UPR were to be less critical of a state than the Concluding Observations of treaty bodies in respect of the same state, then the state will invoke the gentler diagnosis of the UPR to discredit the harsher diagnosis of the treaty bodies. Nor would it be inconsistent with experience to expect that a process led by governments with an outcome elaborated and adopted by government representatives, on the basis effectively of a three-hour dialogue, is likely to yield a gentler evaluation than one arrived at by individual experts on the basis of a (typically) six-to-nine hour dialogue on a more limited range of issues.

Various suggestions were made aimed at avoiding this situation. One, considered but not retained during the discussions leading to the institution-building package, would have focused the UPR on the extent to which states had actually implemented recommendations of the treaty bodies and special procedures.[20] Another suggestion, a variation on the previous idea, would have been for the UPR to avoid reviewing an issue covered by a treaty obligation with regard to which the state is up to

[19] HR Council, Res. 9/8 (2008), *Effective Implementation of International Human Rights Instruments*, 24 September 2008, UN Doc. A/HRC/9/28, para. 7 welcoming 'the potential of this mechanism to contribute to the ratification and to promote the implementation of the human rights treaties, including follow-up to the recommendations of the treaty bodies'.

[20] M. Scheinin, 'Elements of the Universal Periodic Review', presentation made at *The New Human Rights Council: The First Two Years, Workshop*, European University Institute, Florence, 7–8 November 2007.

date with its treaty reporting obligations, limiting such a consideration to the activities of the state to give effect to the recommendations.[21] Another variation, offered by the present author during informal gatherings of relevant actors, was that the outcome should avoid arriving at 'conclusions' in respect of the treaty obligations just mentioned, restricting the outcome to recommendations. This is based on the probability that competing assessments of human rights performance as could be expected to be reflected in 'conclusions' could be more harmful to the promotion of human rights than would non-identical recommendations on how to address a specific human rights problem.[22]

As it turned out, the product of the UPR bears no resemblance to the standard conclusions and recommendations style of UN human rights monitoring processes. Indeed, there is no corporate evaluation of facts or proposal for improvement whatsoever. Rather, the operative component of the 'outcome' is a list of recommendations made by individual states (members of the HR Council and others choosing to participate in the process) together with the response, if any, of the state being reviewed. That response may consist of an acceptance or rejection of each recommendation, or a more ambiguous formulation.

On this basis, it could be thought that there was no longer any risk to the status of treaty body Concluding Observations. However, a more subtle concern began to be felt: insofar as states might feel free to reject a recommendation made by another state, what would be the effect if that rejected recommendation was in fact, explicitly or implicitly, the same as one made by a treaty body in its Concluding Observations on the state under review? Might the freedom of state A to reject without adverse consequences a recommendation made by state B embolden state A to reject or ignore the same or a similar recommendation made by a treaty body?

In an (evidently unscientific) attempt to assess the validity of the concern, the UPR outcomes of nineteen of the ninety-six states that had been reviewed by the end of 2009 were examined. The nineteen were chosen on the basis of permanent membership of the Security Council (by the end of 2009, only the United States remained to be reviewed) and then a cross-section of states from the five UN regions: Africa (Algeria, Senegal, Zambia), Asia (Sri Lanka, Philippines, Japan), Latin America and Caribbean

[21] P.J. Hampson, 'An Overview of the Reform of the UN Human Rights Machinery', *Human Rights Law Review* 7 (2007) 7–27, 17.

[22] For example at Wilton Park Conference, 'Building on 60 Years of the Universal Declaration of Human Rights: The Way Forward', 17–19 January 2008.

(Mexico, Chile, Colombia), Western European and other (Canada, Norway, Switzerland), and Eastern Europe (Slovakia, Azerbaijan, Poland).

The Concluding Observations of the HRC, the CAT Committee and the ICESCR Committee were considered. Of the 110 relevant HR Council recommendations, ninety-nine were implicit (i.e. not referring directly to the treaty body as the source, but evidently inspired by the treaty body's Concluding Observations), while eleven were explicit treaty body recommendations. Of the CAT Committee's seventy-six recommendations, sixty-seven were implicit and nine were explicit. The ICESCR Committee had eighty-one implicit and six explicit relevant recommendations.

Many state responses are ambiguous, but a rough attempt to assign them to the accepted or rejected category (where at all possible) suggested the following:

- HRC implicit recommendations (ninety-nine): seventy-one accepted and seventeen rejected;
- HRC explicit recommendations (eleven): five accepted and four rejected;
- CAT Committee implicit recommendations (sixty-seven): forty-eight accepted and fourteen rejected;
- CAT Committee explicit recommendations (nine): four accepted and five rejected;
- ICESCR Committee implicit recommendations (eighty-one): sixty-nine accepted and eleven rejected; and
- ICESCR Committee explicit recommendations (six): five accepted and one rejected.

Three general observations may be made. First, even though there is substantial reliance on treaty body recommendations, only a small proportion of the recommendations mention this provenance. This could be attributable to several factors, including that the recommending state prefers to present the concern as its own, that time and word limits require brevity and that there is a desire not to overexpose the treaty bodies.

The second general observation is that the ICESCR Committee's recommendations are more likely to be accepted than those of the HRC and CAT Committee, and that HRC recommendations are more likely to be accepted than CAT Committee recommendations. This may be due to the political or legal sensitivity of the issue and the relative generality or specificity of the recommendation.

The third general observation is that, unlike those of the ICESCR Committee, the explicit recommendations of the HRC and CAT Committee are more prone to rejection than the implicit ones. The same possible explanatory factors could be relevant here, too.

To plumb these issues further would demand analysis of these and contingent factors that are beyond the scope of this study. It would also require an analysis of states' reactions in the follow-up procedures of the treaty bodies to see if things were being said in the UPR that were different from what was being said directly to the treaty body.

Overall, there is little evidence that the UPR is providing an opportunity to undermine the authority of treaty body recommendations. Indeed, perhaps the more salient conclusion is that it allows the concerns of the treaty bodies to be taken up at the inter-governmental level. Moreover, the outcome will doubtless prove helpful to the treaty bodies in subsequent reviews of periodic reports. It may be that explicit reference in the UPR to the recommendations of the HRC and CAT Committee may be supportive of the work of the treaty bodies.

3 Treaty bodies and thematic special procedures

The main common element of the work of the treaty bodies and the thematic special procedures is that both are in the hands of individual experts. As such, both may reasonably be expected to deliver more impartial assessments of compliance with human rights obligations than states.[23] Indeed, many special procedures experts have also been treaty body members, either concurrently or consecutively. For example, several HRC members have been special procedure mandate-holders, including Amos Wako of Kenya, who was the first Special Rapporteur on summary and arbitrary executions (1982–92; HRC 1984–92); Abdelfattah Amor of Tunisia was Special Rapporteur on religious intolerance (1993–2004; HRC 1999–present); Maurice Glèlè of Benin was Special Rapporteur on racial intolerance (1993–2002; HRC 2001–8); and Martin Scheinin is Special Rapporteur on human rights and terrorism (2005–11; HRC 1997–2004). Paul Hunt (New Zealand) was a member of the ICESCR Committee (1999–2002) before becoming first Special Rapporteur on the

[23] The election or appointment processes differ. Treaty body members are elected by states parties to the treaty, while special procedures mandate-holders are appointed by the HR Council on the recommendation of its President. The latter is presented with possible candidates by a consultative group of five, composed of individuals nominated to serve in their individual capacities by each UN regional group.

right to health (2002–8). Similarly, Phillip Alston was a member of the ICESCR Committee (1987–90) and later became Special Rapporteur on extrajudicial, summary and arbitrary executions (2004–10). Finally, CERD Committee member Theo van Boven was Special Rapporteur on Torture (2001–4; CERD Committee 1992–9).

The above are all examples of thematic special procedures mandate-holders being or becoming members of treaty bodies. There are also examples of treaty body members undertaking country-specific mandates, such as HRC members Rajsoomer Lallah of Mauritius serving as Special Rapporteur on Myanmar (1996–2000; HRC 1977–82, 1985–present); Christian Tomuschat of Germany being Special Representative on Guatemala (1990–3; HRC 1977–86); and Christine Chanet of France serving as Special Rapporteur on Cuba (2002–7; HRC 1987–present). Similarly, former CRC Committee member Thomas Hammarberg became Special Rapporteur on Cambodia (1996–2000; CRC Committee 1991–9).

Presumably, the selections reflect an understanding that the expertise brought to and acquired in one function would be relevant to the effective discharge of the other. However, no such benefits were sufficient to prevent the HR Council from deciding that duplication of UN functions was to be stopped as far as the appointment of its special procedures mandate-holders was concerned, applying what it called '[t]he principle of non-accumulation of human rights functions at a time'.[24] In a particularly abrupt application of the new rule, Walter Kälin of Switzerland had to choose between renewal of his mandate as Special Representative on internally displaced persons, and continuing his term as a member of the HRC. He opted for the former and resigned his HRC membership.

It is not clear how the effective promotion of the UN's human rights work is advanced – or was intended to be advanced – by the new rule. Nevertheless, it remains the case that those who serve in either category of function do so as individual experts, and they can generally be expected to perform their functions independently and impartially, in a way that could never plausibly be anticipated from government representatives.

3.1 Purpose of activities

While there might be extensive or potential overlap in the mandate of treaty bodies on the one hand, and special procedures on the other, there is little, if any, in their purpose.

[24] HR Council Resolution 5/1 (2007), Annex (n. 13), para. 44.

The treaties are silent as to the purpose of the functions attributed to the treaty bodies, as are the resolutions establishing or continuing the mandates of the special procedures. Nevertheless, there are differences in context that clearly elucidate their respective purposes. Essentially, it is suggested that the treaty bodies should be conceived of as functioning on a bilateral plane, while the special procedures operate on the multilateral plane. While mainly a matter of formality, the distinction has substantive implications.

In formal terms, members of treaty bodies are typically elected by one multilateral cluster and report to another. That is to say, they are elected by a meeting of states parties and report to the General Assembly.[25] Since the reports of the treaty bodies are not before the meetings of states parties (substantive items on their agendas are usually confined to electing the treaty bodies' members), it is understandable that those meetings will not be concerned with the treaty bodies' conclusions and views of compliance, or otherwise with the respective treaties.[26] Meanwhile, the General Assembly similarly ignores the country-specific substance of the reports. Arguably, it may be thought inappropriate, unless the treaty were to provide otherwise,[27] for a body like the Assembly, composed of members not confined to states parties, to take positions on the behaviour of those states that have assumed the respective treaty obligations.

Accordingly, it may be inferred that the essential relationship as regards the treaties is between the treaty bodies and each individual state party. This view is underlined by the current core function of all of them, namely the consideration in dialogue with each state party, of the reports submitted to them by the states parties.

By contrast, the special procedures are typically elected by and report to the same multilateral body, the HR Council. Their reports frequently provide the subject matter of discussion, not least in respect of their country-specific reporting, which may even be invoked in debates on whether or not to adopt country-specific resolutions.

[25] The ICESCR Committee is anomalous in this respect, as it is established by the ECOSOC, the original body designated to receive and consider states' periodic reports (ICESCR, art. 16–17). Accordingly, it is elected by and reports to the ECOSOC.

[26] The author recalls that some members of the HRC have hinted that a more country-specific substantive role for the meetings could be appropriate.

[27] As the formally constituted treaty body for the ICESCR is the ECOSOC, it evidently could have members that are not states parties' nationals reviewing reports of states parties.

In addition, as far as the thematic procedures are concerned, they are expected to make recommendations aimed at states generally[28] (these are often reflected in resolutions on the subject matter of the mandates) and, through the HR Council, to other parts of the UN and the international community, including non-governmental organisations.

Of course, in response to the political impossibility in their early days of the treaty bodies adopting country-specific observations, they developed the technique of the 'general comment'.[29] General Comments are expositions of the treaty body's understanding of the scope and nature of states' obligations under the treaty in question. They have proved to be important, authoritative guides to states, especially when preparing their periodic reports. As such, they may cover territory similar to that covered by the special procedures in the recommendations that may be found in their annual reports.

Space does not allow for a detailed comparison of the two types of contribution. Any interested reader is invited to compare the HRC's General Comment on article 7 of the ICCPR with the compilation of recommendations made by the Special Rapporteur on torture,[30] to perceive the different nature of both exercises. In brief, the General Comment adopts an expository style, identifying key obligations perceived to be explicit or implicit in the prohibition of torture or cruel, inhuman or degrading treatment or punishment.

The compilation of recommendations uses more lapidary language and goes into greater detail with respect to desirable measures. Indeed, the very fact that the Special Rapporteur's functions include not just identifying the specifics of legal obligation, but also proposing the measures that might be considered good practice with a view to prevention, inevitably affects the content and nature of the two approaches.

So, while much of the work of the special procedures is carried out by means of bilateral communication between each special procedure and individual UN member or observer state, it is done with a view to informing the action of a multilateral body. That action may be country-specific,

[28] See for example *Report of the Special Rapporteur on Torture*, 27 December 2001, UN Doc. E/CN.4/2002/76, Annex I; ECOSOC, Commission on Human Rights, Res. 2002/38, *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 22 April 2002, UN Doc. E/CN.4/2002/200, paras. 1–15.

[29] See Keller and Grover, 'General Comments', this volume, section 2.1.

[30] *Report of the UN Special Rapporteur on Torture* (n. 28); *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Note by the Secretariat*, 26 April 2001, UN Doc. HRI/GEN/1/Rev. 5/(2001), 139.

but need not be. The procedures' function of permitting the HR Council to understand certain phenomena on a comparative and global basis is at least as important, for then it is able to address further the phenomena on the same basis.

In this context – the essentially bilateral focus of the treaty bodies and the essentially multilateral focus of the special procedures – an examination of working methods of both types of mechanism needs to be situated.

3.2 *Working methods*

An examination of the working methods of each type of mechanism shows that there is little in the way of overlap and duplication of function.

The treaty bodies currently in existence have up to four types of activity. First, as has been seen, all have a core function in common: they examine reports to be submitted periodically by states parties. Second, three may consider interstate complaints: the CERD Committee on an obligatory basis (articles 11–13, CERD),[31] and the HRC (articles 41–3, ICCPR)[32] and CAT Committee (article 21, CAT)[33] on an optional basis. Third, on an optional basis, four committees may consider complaints of violations of the rights of individuals: the CERD Committee (article 14, CERD),[34] the HRC (ICCPR Optional Protocol),[35] the CAT Committee (article 22, CAT)[36] and CEDAW Committee (CEDAW Optional Protocol).[37] Fourth, two committees, the CAT Committee (article 20, CAT)[38] and the CEDAW Committee (CEDAW Optional Protocol)[39] may investigate of their own motion apparent systematic torture practices or violations of CAT and CEDAW respectively. These investigations may include on-the-spot visits to particular states parties, with the parties' permission.[40]

The special procedures that engage in systematic actions on alleged violations within their mandates typically undertake the following actions: first, transmittal to governments for their comments of allegations of violations and legislative or institutional aspects conducive

[31] Arts. 11–13, CERD. [32] Arts. 41–43, ICCPR. [33] Art. 21, CAT.
[34] Art. 14, CERD.
[35] First Optional Protocol to the ICCPR, 999 UNTS 302, entered into force 23 March 1976.
[36] Art. 22, CAT.
[37] Optional Protocol to the CEDAW, 2131 UNTS 83, entered into force 22 December 2000.
[38] Art. 20, CAT. [39] Optional Protocol to the CEDAW (n. 37).
[40] While the CAT art. 20 procedure is automatically applicable in principle, it may be excluded by a reservation made under art. 28. Similarly, the CEDAW procedure may be excluded by means of a reservation made under art. 10 of its Optional Protocol (n. 37).

to them; second, sending of urgent appeals (usually in individual cases)[41] to prevent possible imminent violations; and, third, undertaking on-the-spot visits to countries with an apparent extensive problem, with the permission of the state in question.

The interrelatedness or otherwise of the activities of both sets of bodies may best be understood by approaching them from two perspectives: general country work and case-specific work.

General country work may itself be divided between routine work, investigation work – usually involving on-the-spot fact-finding missions – and, occasionally, urgent appeals. Beginning with routine general country work, it is evident that the styles of work between the two types of bodies are markedly dissimilar. The typical core work of the treaty bodies involves an examination of reports, article-by-article, submitted periodically by states parties. The reports, whose quality assuredly varies, are usually dealt with according to a standard formula. The committee in question or a designated sub-group will approve written questions to the government of the state party which then sends a delegation to a session of the committee to present the report and respond to the questions, as well as to oral questions members may choose to pose by way of follow-up. Thus, the report is the basis of the exercise and the main formal source of information.

Except for the ICESCR and the CRC Committees, NGOs are not formally assigned any status under the constitutional instruments and so the information they provide has only informal status. In practice, the Secretariat makes arrangements to facilitate the transmission of NGO information to individual committee members and to permit NGOs to brief interested committee members.[42] It is evident that the NGO information looms large in the ability of the committees and their members to pose the kinds of questions necessary to elicit from the state party's delegation a fuller sense of the actual practice in that state than typically is apparent from the state party's report. The questions, particularly written ones, normally will be formulated in general terms, although they may well be based on individual cases. Of course, individual cases

[41] The technique may also be used for more general urgent matters: see *infra* n. 73 and accompanying text.
[42] This of itself represents an evolution: in the early days of the HRC, for example, NGOs had to post or distribute personally to individual members willing to receive it, any material they wished to be considered; the argument was that, since the material had no official status, the Secretariat should not be involved in processing or disseminating it. See Boerefijn, *The Reporting Procedure* (n. 6), 216–20. Some, like the HRC now, may even allow meeting time to briefings of the Committee as a whole by NGOs.

taken up by the committees that have dealt with such cases in their optional procedures may well figure in the questions. Despite having no formal status, NGO information effectively provides a sort of continuing education or refresher course to enhance the expertise of committee members for the purposes of the exercise at hand. As will be seen below, treaty bodies, or at least their members, increasingly have access to other independent sources of information, such as the findings of other treaty bodies and of the special procedures themselves.

The centrepiece of the exercise is the dialogue with the government delegation.[43] In response to the written and oral questions, the delegation is able to clarify legal and factual questions and give important contextual orientation. Follow-up oral questions can elicit direct responses, prevarication, or no response, all of which permit the committee in question to assess the reality sought by the questions.

Even in the days before the committees began formulating Concluding Observations on the basis of the exchange, there were (and there remain) at least three important outcomes of the exercise. First, there is the learning process for the state party preparing the report, which examines its own legal system through the lens of obligations in a seriously undertaken international instrument. The second outcome is having to submit to and absorb critical reactions by members from all parts of the world, to whose election they had been a party. The third outcome, which is perhaps the most important despite its intangibility and immeasurable nature, is the dialogue itself. A delegation, typically consisting of senior officials responsible for law enforcement and the administration of justice and diplomats, flanks the committee chairperson and faces the committee in a formally arranged chamber; it has come for the purposes of undergoing an act of formal and public accountability regarding the extent to which the state party it represents has given effect to a set of obligations that it has solemnly assumed by ratifying or acceding to the treaty in question. No individual special rapporteur, special representative or advisory services expert under the special procedures system has anything comparable. Certainly, the few special procedures working groups may, like their one-person counterparts, have meetings with

[43] There has been a tentative trend towards conducting a review where the state party fails over a long period to submit a due report or where it constantly delays sending a delegation. The main purpose here is to prod the state into submitting the report or appearing, not to have a hearing *in absentia*: see HRC, Rules of Procedure, 24 April 2001, UN Doc. CCPR/C/3/Rev. 6.

representatives of states, in respect of which they are seeking to elucidate facts or arrange possible missions. But these meetings are *ad hoc*, informal, and private. They have nothing of the ceremonial nature of the reviews by treaty bodies of state reports.

For the last twenty or so years, there has been a much more concrete outcome of the review process carried out by the treaty bodies, namely, the Concluding Observations.[44] The crucial parts are their findings under the notion of 'subjects of concern' and the recommendations made to the state party to address the concerns. Where the concerns relate to factually contested matters, they will usually refer to 'allegations' of violations, rather than to 'violations' *tout court*. Nevertheless, the very inclusion of the allegations will at least signify that the state party has failed effectively to refute their credibility. Moreover, in a practice developed by the HRC, the seriousness of the concerns will be reflected in the follow-up information or action requested of the state party in the Concluding Observations. The actual follow-up may also affect the timing of the subsequent periodic report.[45]

The approach of the action-oriented special procedures is very different. Most of the material they transmit to governments is in the form of individual case allegations, to which the governments may or may not respond. The main source, which is authorised as a source by the resolutions establishing their mandates,[46] will be NGOs. Where the allegations they receive include general material, for instance, assessing the scope of the practice or describing legal impediments to the prevention of the phenomenon, states will also be invited to comment on these. In the early years of their mandates, the country entries in their reports to the Commission on Human Rights tended to restrict themselves to a summary of allegations transmitted and any replies received. To the extent that this represented a dialogue, it was primarily a written one. Many subsequently formulated observations on the correspondence were in the way of provisional judgment and rather general recommendations.

[44] Until 1992, the HRC was not prepared to interpret its power to make 'general comments' under art. 40(4) of the ICCPR as empowering it to make country-specific comments, as opposed to comments of a general nature. See Boerefijn, *The Reporting Procedure* (n. 6), 303–6.

[45] See HRC, Rules of Procedure (n. 43), rule 70(A).

[46] See for example ECOSOC, *Summary or Arbitrary Executions*, 7 May 1982, UN Doc. E/RES/1982/35 which, on the recommendation of the Commission, established the mandate of the Special Rapporteur on summary or arbitrary executions and determined that the Special Rapporteur would seek and receive information from governments as well as international governmental and non-governmental organisations.

These would generally consist of a few sentences. They were also inevitably limited by the fluctuating information they may receive in any given year, and the limited nature of the information on the political and legal context in which the allegations of individual violations are said to occur. Accordingly, while their reporting is annual, they have little of the sustained consideration of the issues that the treaty bodies' reviews of periodic reports evince. On the other hand, the wealth of case-specific material can give a sense of the scope and gravity of a problem that is missing from the process of periodic reporting to the treaty bodies.

Only two of the existing treaty bodies are expressly empowered to engage in investigative country work, including the use of on-the-spot visits. So any area of potential overlap with the special procedures only applies to the CAT Committee (article 20, CAT)[47] and the CEDAW Committee (Optional Protocol).[48] The CAT Committee's power applies to all states parties to the CAT, except the few which have availed themselves of the option in article 28 of CAT to exclude this power.[49] Yet, here too the experience is limited. It is understood that there have been seven inquiries into suspected systematic practices of torture, the reports of which are in the public domain: Turkey,[50] Egypt,[51] Peru,[52] Sri Lanka,[53] Mexico,[54] Serbia and Montenegro[55] and Brazil.[56] The reports on all except Egypt are based on on-the-spot fact-finding visits. Egypt availed itself of the right to refuse to receive a committee delegation.

Most of the published reports tend to show the value of sustained study. They deal with a broad range of allegations and consider in detail the legal and institutional framework in which the problem is manifested. They suggest that the in-country experience permits a committee to make less tentative conclusions (the Egypt report makes greater use of 'allegations' to qualify its assessment), more detailed analysis of the legal

[47] Art. 20, CAT. [48] Optional Protocol to the CEDAW (n. 37). [49] Art. 28, CAT.
[50] UN GA, *Report of the Committee Against Torture*, 15 November 1993, UN Doc. A/48/44/Add.1.
[51] UN GA, *Report of the Committee Against Torture*, 1 January 1996, UN Doc. A/51/44 (SUPP), paras. 180–222.
[52] UN GA, *Report of the Committee Against Torture*, 12 October 2001, UN Doc.A/56/44 (SUPP), paras. 144–93.
[53] UN GA, *Report of the Committee Against Torture*, 17 October 2002, UN Doc. A/57/44, paras. 117–95.
[54] CAT Committee, Report on Mexico, 25 May 2003, UN Doc. CAT/C/75.
[55] UN GA, *Report of the Committee Against Torture*, 1 October 2004, UN Doc. A/59/44.
[56] CAT Committee, Report on Brazil, 3 March 2009, UN Doc. CAT/C/39/2.

issues and more specific recommendations reflecting greater understanding of the local scene. Indeed, the CEDAW Committee's only public report of a country visit focusing on the murder and disappearance of women in Ciudad Juarez, Mexico, is a fine example of comprehensive human rights reporting.[57] In sum, they demonstrate the undoubted value of an on-the-spot visit to come to grips with the legal and practical realities of the human rights situation.

The country visit has become routine for most special procedures. Of course, states remain free to refuse access, but a substantial number set a more positive example. Indeed, there is now a practice of states giving blanket prior agreement to visits by any special procedure, some sixty having done so as of October 2007.[58] The interest of the special procedures in country visits is assuredly because of the benefits described above. Direct access to civil society and most relevant levels of officialdom permits an 'immersion course' in the historical, constitutional, legal and operational framework of the problems being studied. Insistence on the conditions of access contained in the standard terms of reference for fact-finding visits make possible, in this writer's experience, substantial uncovering of those aspects of the reality that governments prefer to conceal and which, indeed, may be unknown to important higher-level decision-makers, whether by preference or inadvertence.

So far the potential for overlap applies only to the CAT Committee acting under article 20 of the CAT and the Special Rapporteur on torture, and to the CEDAW Committee and the Special Rapporteur on violence against women. Any such overlap or duplication on the torture issue has been avoided by the Special Rapporteur's policy of not seeking to visit a country in respect of which the CAT Committee has initiated an article 20 inquiry. On the other hand, there is evidently room for complementary action. Thus, in 1997, five years after the CAT Committee visited Turkey, the Special Rapporteur also sought a visit, which took place in 1998.[59] Since

[57] CEDAW Committee, Report on Mexico, 27 January 2005, UN Doc. CEDAW/C/2005/OP.8 (2005). Unlike the CAT Committee, the CEDAW Committee is not restricted to publishing only a summary report (see art. 20(5), CAT). In fact, Mexico consented to publication of the CAT Committee's full report.
[58] See the website of the OHCHR: www.ohchr.org, go to 'special procedures': www2.ohchr.org/english/bodies/chr/special/index.htm (accessed 24 December 2010).
[59] *Report of the Special Rapporteur*, 27 January 1999, UN Doc. E/CN.4/1999/61/Add.1. The Special Rapporteur sought the invitation in 1995: *Report of the Special Rapporteur*, 9 January 1996, UN Doc. E/CN.4/1996/35, para. 178. The Committee's visit had taken place in 1992.

neither mechanism has the resources that would make follow-up visits practicable, the Special Rapporteur's visit was able to serve as a *de facto* follow-up to the CAT Committee's visit. Similarly, the CAT Committee's visits to Mexico and Brazil were able to build on earlier ones of the Special Rapporteur.[60] In addition, in the light of Egypt's refusal of access to the CAT Committee, the Special Rapporteur on torture did not hesitate to seek an invitation to visit that country,[61] albeit no such invitation was forthcoming. On the other hand, a visit to Mexico by the Special Rapporteur on violence against women, only seven months after that of the CEDAW Committee, half of whose report deals with the Ciudad Juarez situation,[62] should perhaps be seen as testifying to Mexico's particular openness to international attention being given to this notorious problem.

One final aspect of special procedure activity relevant to general country work, for which there is no counterpart in the methods of the treaty bodies, is the urgent appeal. As will be noted below, urgent appeals are normally used by special procedures in individual cases, by way of seeking to avert harm to individuals feared to be at risk. However, the technique may occasionally be resorted to for a more general purpose. For instance, four procedures jointly appealed to Peru to refrain from adopting a constitutional amendment aimed at permitting an amnesty for crimes committed by security forces in counter-emergency operations.[63] The only analogous treaty body measure available is the request for a special report from the state party.[64]

To the extent that some treaty bodies and several special procedures are engaged in *case-specific work*, this at first sight could be a source of overlap and duplication. A closer look reveals that the perception is so far largely illusory. The area of potential overlap is, in any event, limited. It covers only individual cases that could be the subject of Communications to the HRC in respect of

[60] CAT Committee, Report on Mexico (n. 54), para. 7; CAT Committee, Report on Brazil (n. 56), paras. 45–6.

[61] The Committee reported in 1996 (see *supra* n. 37) and the Special Rapporteur sought the invitation in 1997; *Report of the Special Rapporteur*, 24 December 1997, UN Doc. E/CN.4/1998/38 (1998), para. 4.

[62] *Report of the Special Rapporteur on Violence against Women*, 13 January 2006, UN Doc. E/CN.4/2006/61/Add.4.

[63] The four procedures were the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteurs on extrajudicial, summary or arbitrary executions, on torture, and on the independence of judges and lawyers. See *Report of the Special Rapporteur*, 9 January 1996 (n. 59), paras. 133–6.

[64] For example, the CAT Committee sought a special report from Israel in 1996, which was submitted in 1997; CAT Committee, Special Report: Israel, 18 February 1997, UN Doc. CAT/C/33/Add.2/Rev.1.

states parties to the First Optional Protocol to the ICCPR;[65] to the CAT Committee in respect of states parties that have made the requisite declaration under article 22 of the CAT;[66] to the CERD Committee in respect of states parties that have made the requisite declaration under article 14 of the CERD;[67] and to the CEDAW Committee in respect of states parties to the CEDAW Optional Protocol.[68] Moreover, the nature of the activities of the two types of mechanism is generally different. The treaty bodies, when considering individual cases, do so for the purpose of formulating 'Views' as to whether or not there has been a violation. This is the practice of only one of the special procedures. While, as noted earlier, they seek information from states in respect of allegations of individual violations, they do so in the framework of reporting the dialogue and perhaps making observations on the problem in general in the state. Except for the Working Group on Arbitrary Detention (WGAD), they do not systematically engage in formulating judgemental conclusions on each case. The HRC, tellingly, does not generally consider the activities of the special procedures as 'procedures of international investigation or settlement', as precluded by article 5(2)(a) of the First Optical Protocol to the ICCPR.[69]

The WGAD, on the other hand, has from the beginning had a specific mandate of 'investigating' cases of arbitrary detention.[70] In the light of this wording, it makes reasoned findings (currently called 'opinions')[71] on whether the case involves a violation of the right not to be subjected to arbitrary detention. This could evidently involve overlap with a case coming before the HRC, especially under article 9 of the ICCPR. Indeed, in respect of one case submitted to both bodies, the WGAD transmitted the case to the HRC once it became aware of the situation.[72] It is also

[65] First Optional Protocol to the ICCPR (n. 35). [66] Art. 22, CAT.

[67] Art. 14, CERD. [68] Optional Protocol to the CEDAW (n. 37).

[69] For example, the HRC was not precluded from dealing with a case also under study by the Special Rapporteur on summary or arbitrary executions. See HRC, *Baboeram et al.* v. *Suriname*, Communication Nos. 146/1983 and 148–54/1983, Annex X, 1 January 1985, UN Doc. A/40/40, para. 9.1.

[70] ECOSOC, Commission on Human Rights, Res. 1991/42, *Question of Arbitrary Detention*, 5 March 1991.

[71] ECOSOC, Commission on Human Rights Resolution 1997/50, *Question of Arbitrary Detention*, 15 April 1997, UN Doc. E/CN.4/1887/50, para. 7, required the Group to give 'views', rather than 'decisions'. In response, it has chosen the word 'opinions'.

[72] Working Group on Arbitrary Detention, *Arredondo Guevara* v. *Peru*, Opinion 4/2000, UN Doc. E/CN.4/2001/14/Add.1, paras. 61–2. The HRC considered that the case remained admissible in light of the group's referral of the case to the HRC without any expression of its views. See *Arredondo* v. *Peru*, Communication No. 688/1996, HRC, Report, 1 February 2001, UN Doc. A/55/40, vol. II Annex IX E, para. 10.2.

understood that attempts are made in the Secretariat to steer cases in the right direction. For example, in a case where domestic remedies have been exhausted, the Secretariat may process it under the First Optional Protocol to the ICCPR, while in one where they have not, it may be processed for the attention of the WGAD. Here, however, much will depend on the familiarity of staff members with the different procedures, a task rendered more difficult by the fact that the relevant staff work in separate branches.

As far as the treaty bodies and special procedures are concerned, the duplication is not of function, but of potential inconvenience to a state receiving multiple requests. This can be a problem *within* the cluster of special procedures, as well as between them and the treaty bodies. Ideally, systems in the Secretariat would ensure that, in such cases, states are invited to make their responses to each of the mechanisms involved.

As noted earlier, the special procedures have developed the method of issuing urgent appeals to states in circumstances where a violation within their mandates is feared to be imminent or occurring. They constitute routine preventive work for several of the procedures that use them, especially the Working Group on Enforced or Involuntary Disappearances (WGEID), the Special Rapporteurs on extrajudicial, arbitrary or summary executions, and on torture, and the Special Representative on human rights defenders.[73]

The only comparable measure currently used by the treaty bodies is the interim measure, whereby the body seeks suspension of a formal measure believed to be imminent in a state party, pending its consideration of the substance of the complaint. For example, the HRC, through its Special Rapporteur on New Communications, is empowered under rule 86 of its Rules of Procedure to request interim measures by a state party to avoid irreparable damage, for instance, an execution taking place before the HRC is able to assess the compatibility of the penalty with the state party's obligations under the ICCPR.[74]

[73] OHCHR, 'Seventeen Frequently Asked Questions about United Nations Special Rapporteurs', Fact Sheet No. 27 (2001), 9; N. Rodley, 'Urgent Action' in G. Alfredsson *et al.* (eds.), *International Human Rights Monitoring Mechanisms – Essays in Honour of Jakob Th. Möller*, 2nd edn (Leiden: Martinus Nijhoff, 2009), 191–6; Van Boven, 'Urgent Appeals on Behalf of Torture Victims', *Mélanges en homage au Doyen Gérard Cohen-Jonathan* [Essays in Honour of Dean Gérard Cohen-Jonathan] (Brussels: Bruylant, 2004), 1651.

[74] E. Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Antwerp: Intersentia, 2010).

The HRC and CAT Committee act similarly in the case of threatened expulsions from states parties to states where the alleged potential victim would be at risk of torture.[75]

It is not impossible to conceive that the treaty bodies, resources permitting, might adopt an urgent appeals system similar to that of the special procedures. However, it is unlikely that they would do so outside the formal framework of action on individual cases pursuant to the optional individual complaints procedures. Since the latter approach involves compliance with the rule of exhaustion of domestic remedies and the maintenance of confidentiality until the case is either declared inadmissible or is the subject of final views, any urgent action would presumably be constrained by the domestic remedies rule and the same confidentiality. For the special procedures, there are no similar constraints. They can take up a case, regardless of the stage it may be at in the domestic legal system. They usually may not, following a mandated requirement to use 'discretion' in their work,[76] report publicly on the actions until they issue their annual reports, but there is no rule of confidentiality and some have also used press releases to draw public attention to the appeal.[77] Indeed, if the work of the treaty bodies can be, as has been seen, characterised by its formality, that of the special procedures is more notable for its flexibility. However, article 30 of the CPED provides that its Committee will have the power to issue urgent appeals in a manner indistinguishable from the practice of the WGEID. This is bound to lead to measures aimed at avoiding repetitive or duplicative action.

4 Extent of direct cooperation

One factor representing a pull towards common endeavour is the very existence of the relevant treaties. These establish the mandates of the treaty bodies, but they are also essential sources of legitimacy for the activities of the special procedures. Thus, the CAT will frequently be invoked by the Special Rapporteurs on torture and on violence against women, as will the CERD by the Special Rapporteur on racial

[75] See HRC, Rules of Procedure (n. 43), rule 108(9); see HRC, *S. H.* v. *Norway*, Communication No. 121/1998, 1 January 2000, UN Doc. A/55/44, Annex VIII.B.4, para. 1.2.

[76] See for example ECOSOC, Commission on Human Rights, Res. 1985/33, 29 May 1985, UN Doc. E/CN.4/RES/1985/33, para. 6 (establishing the mandate of the Special Rapporteur on Torture). See now HR Council Res. 5/1 (2007) (n. 13), Annex.

[77] As part of its 'institution-building package', the HR Council adopted a Draft Code of Conduct for Special Procedures Mandate-Holders: HR Council Res. 5/1 (2007), *ibid.*

discrimination and the CRC by the Special Rapporteur on the sale of children.[78] Of course, it is essential that the special procedures should not seem to arrogate the role of guardians of the treaties, a role that belongs to the treaty bodies. Rather, they base themselves on general international law or normative standards. These may be reflected in various sources, such as declarations, resolutions and other manifestations of acceptable state practice. For example, the Special Rapporteur on torture will frequently invoke the 1975 General Assembly Declaration against Torture,[79] especially vis-à-vis states not party to the CAT, as well as other 'soft law' instruments.[80] Yet, where a particular rule or type of recommended behaviour promoted by the Special Rapporteur is covered by the CAT, it would be perverse of him to refrain from invoking the relevant CAT provision in communication with states that are, in fact, parties to it. Certainly, a special procedure should be careful in adopting a controversial interpretation of a human rights treaty monitored by a treaty body, especially if that interpretation is at odds with that of the treaty body. Yet, the silence of the treaty body need not necessarily preclude the special procedure from staking out a position. For instance, the Special Rapporteur on torture, where constrained to address the appropriateness of including corporal punishment within his mandate,

[78] ECOSOC, Commission on Human Rights, 57th Session. *Report of the Special Rapporteur on Torture: Visit to Brazil*, 30 March 2001, UN Doc. E/CN.4/2001/66/Add.2, paras. 149–51; ECOSOC, Commission on Human Rights, 56th Session. *Report of the Special Rapporteur on Violence against Women*, 27 January 2000, UN Doc. E/CN.4/2000/68/Add.3, para. 76; ECOSOC, Commission on Human Rights 50th Session. *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 2 February 1994, UN Doc. E/CN.4/1994/66, para.10, describing CERD as 'the basic international legal instrument' relevant to his mandate; ECOSOC, Commission on Human Rights, 58th Session. *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, 4 February 2002, UN Doc. E/CN.4/2002/88, para. 13, describing the CRC and its Optional Protocol on the sale of children, child prostitution, and child pornography as 'the foundation for determining and developing the scope of the mandate'.

[79] These references will be in letters transmitting allegations to governments, but do not appear in the heavily summarised versions found in the annual reports; they also figured in his analysis of the relevance of his mandate to the problem of corporal punishment. See ECOSOC, Commission on Human Rights, 53rd Session. *Report of the Special Rapporteur [on torture]*, 15 October 1996, UN Doc. E/CN.4/1997/7, para. 3.

[80] See for example ECOSOC, Commission on Human Rights, 50th Session. *Report of the Special Rapporteur*, 6 January 1994, UN Doc. E/CN.4/1994/31, para. 135, referring to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN GA, Resolution on a Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, UN Doc. A/RES/43/173.

could not but explore the relevance of the CAT in support of his contention that the practice did fall within the mandate.[81] The CAT Committee appears subsequently to have taken the same view.[82]

The special procedures also typically promote ratification of the treaties of most concern to their mandates, with some also advocating acceptance of their optional complaints procedures.[83] This is a role that would be minimally appropriate for the treaty bodies themselves. In doing so, they are inevitably promoting the importance of the work of the treaty bodies. After one visit (to Sierra Leone), the Special Rapporteur on violence against women even recommended that the authorities submit a report to the CEDAW Committee.[84]

While they may not formally invoke the country-specific findings of the special procedure, the treaty bodies routinely have access to and cite in the oral dialogue the findings of special procedures. This is especially the case where the findings are those of a country-specific special procedure or of a thematic one which has recently reported on a country visit. For example, the report of the Special Rapporteur on torture on his visit to Brazil in 2000 was referred to in the CAT Committee's dialogue with that country in 2001.[85] While the point cannot be documented, in

[81] ECOSOC, *Report of the Special Rapporteur* (n. 79), paras. 6–8.

[82] See CAT Committee, Conclusions and Recommendations: Saudi Arabia, 12 June 2002, UN Doc. CAT/C/CR/28/5, para. 3(e).

[83] See for example ECOSOC, Commission on Human Rights, 53rd Session. *Report of the Special Rapporteur on Torture: Visit to Pakistan*, 15 October 1996, UN Doc. E/CN.4/1997/7/Add.2, para. 102; ECOSOC, Commission on Human Rights, 55th Session. *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Mission to South Africa*, 27 January 1999, UN Doc. E/CN.4/1999/15/Add.1, para. 90(6); Report of the Special Rapporteur on Violence against Women: Mission to Haiti (n. 78); ECOSOC, Commission on Human Rights, 53rd Session. *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Mission of the Special Rapporteur to the United States of America on the Issue of Commercial Sexual Exploitation of Children*, 7 February 1997, UN Doc. E/CN.4/1997/95/Add.2, chapter VII; inexplicably, the former Special Rapporteur on the sale of children omitted to recommend that the Russian Federation ratify the Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography, adopted by UN GA Res. 263, 25 May 2000, after her visit to that country in October 2000 (ECOSOC, Commission on Human Rights, 57th Session. *Report of the Special Rapporteur: Mission to the Russian Federation*, 6 February 2001, UN Doc. E/CN.4/2001/78/Add.2).

[84] See ECOSOC, Commission on Human Rights, 58th Session. *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, 11 February 2002, UN Doc. E/CN.4/2002/83/Add.2, para. 115.

[85] In its Concluding Observations, the CAT Committee requested 'information concerning measures taken by the public authorities to implement throughout the country, the recommendations ... of the Special Rapporteur on torture to which the state party

view of the confidentiality of Committee discussions of the list of issues to be presented to a state party in advance of the review and of their Concluding Observations, it is this writer's experience with the HRC that the findings and recommendations of these special procedures reports will also influence the issues identified in the list of issues and recommendations in the Concluding Observations. It is also understood that the same is true for other treaty bodies, notably the CAT Committee.

The work of the treaty bodies may also inform that of the special procedures. Thus, the findings of the CAT Committee's mission to Turkey and its Concluding Observations on Mexico loomed large in the discussions with the authorities during the visit of the Special Rapporteur on torture to those countries.[86] The same Special Rapporteur routinely included at the end of country visits entries in his annual report that referred to the findings of the HRC and the CAT Committee in their Concluding Observations.[87] While this may not be standard practice for the special procedures, the work of the treaty bodies may inform their recommendations in other ways. For instance, in the report of her visit to Colombia, the Special Rapporteur on violence against women urged the government to comply with the CEDAW Committee recommendations after its review of Colombia's fourth periodic report.[88] On the other hand, the CERD Committee in 1999 took the

delegation referred during the dialogue with the Committee'. See CAT Committee, Concluding Observations: Brazil, 21 May 2001, UN Doc. A/56/44; see UN GA, *Report of the Committee against Torture* (n. 52), para. 120(i); for the discussion in the Committee, see CAT Committee, *Summary Records*, 9 May 2001, UN Doc. CAT/C/SR. 471, para. 39 (Ms Gaer).

[86] See ECOSOC, *Report of the Special Rapporteur: Visit to Turkey* (n. 59), para. 104; the report of the visit to Mexico is, regrettably, silent on the point, which is a matter of the author's personal recollection; see ECOSOC, Commission on Human Rights, 54th Session. *Report of the Special Rapporteur: Visit to Mexico*, 14 January 1998, UN Doc. E/CN.4/1998/38/Add.2.

[87] See for example ECOSOC, Commission on Human Rights, 57th Session. *Report of the Special Rapporteur*, 25 January 2001, UN Doc. E/ CN.4/2001/66 (2001), paras. 50 (Argentina), 63 (Armenia), 68 (Australia), 167 (Belarus), 231 (Cameroon), 235–6 (Chile), 330–1 (China), 349 (Congo), 475–6 (Egypt), 688 (Kyrgyzstan), 843 (Peru), 857 (Portugal), 1223 (United States). The present Special Rapporteur seems no longer to be including country observations in his reports of transmittal of allegations and state responses: UN GA, HR Council, 7th Session. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 15 January 2008, UN Doc.A/HRC/7/3 and Add.1 (19 February 2008).

[88] See ECOSOC, Commission on Human Rights. *Report of the Special Rapporteur*, 11 March 2002, UN Doc. E/CN.4/2002/83/Add. 2, para. 120.

unusual step of publicly lamenting that the Special Rapporteur on racism 'appears to completely overlook the relevance' of the CERD.[89] While it is unfortunately true that he had apparently overlooked the CERD Committee's Concluding Observations in the reports on several country visits,[90] in that very year he did refer to them in his annual report in respect of the scheduled tribes and castes of India.[91] It may be speculated whether this reflected an awareness of the concern within the CERD Committee. Certainly by 2001, the report of his visit to Australia made reference to the CERD Committee's Concluding Observations.[92]

As far as direct contact between the special procedures and the treaty bodies is concerned, the Special Rapporteur on torture and the CAT Committee have consistently held joint meetings.[93] The main topic of these is to ensure precisely that the two mechanisms maximise the complementarities of their work and minimise duplication. On one occasion, responding to a CAT Committee member's question, the Special Rapporteur gave reasons why he thought there would be difficulties for the Special Rapporteur to submit situations that the CAT Committee might study under article 20 of the CAT.[94] At a later meeting, cooperation in respect of article 20 was further explored.[95] Another topic

[89] K. Boyle and A. Baldaccini, 'A Critical Evaluation of International Human Rights Approaches to Racism' in S. Fredman (ed.), *Discrimination and Human Rights – The Case of Racism* (Oxford University Press, 2001), 135–91, 183–4; see Report of the Committee on the Elimination of Racial Discrimination, 18 August 1997, UN Doc. A/52/18 (1997), para. 666.

[90] See T. Van Boven, 'United Nations Strategies to Combat Racism and Racial Discrimination: A Sobering but not Hopeless Balance Sheet' in M. Castermans-Holleman *et al.* (eds.), *The Role of the Nation-State in the 21st Century* (The Hague: Kluwer Law International, 1998), 251–64, fn. 261.

[91] See ECOSOC, Commission on Human Rights, 55th Session. *Report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 15 January 1999, UN Doc. E/CN.4/1999/15, paras. 88–100.

[92] See ECOSOC, Commission on Human Rights, 58th Session. *Racism, Racial Discrimination, Xenophobia and all forms of Discrimination*, 26 February 2002, UN Doc. E/CN.4/2002/24/Add.1, para. 1.

[93] See for example ECOSOC, Commission on Human Rights, 50th Session. *Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 12 January 1995, UN Docs. E/CN.4/1995/34, para. 6; UN GA, Promotion and Protection of Human Rights: Implementation of Human Rights Instruments, *Note by the Secretary-General*, 14 August 2006, UN Doc. A/61/259, para. 29.

[94] See CAT Committee, *Summary Record of the First Part (Public) of the 187th Meeting*, 3 May 1994, UN Doc. CAT/C/SR. 187, paras. 19–21.

[95] CAT Committee, Committee against Torture Holds Dialogue with Special Rapporteur on Torture, 28th session, 25 May 2002, Press Release.

of the meetings has become agreeing on a joint text, together with the Voluntary Fund for Victims of Torture and the High Commissioner for Human Rights, to commemorate the International Day in Support of Victims of Torture (26 June).[96] The second Special Rapporteur on the Sale of Children recently had a meeting with the CRC Committee with a view to seeking closer cooperation with the Committee and attended a thematic meeting convened by it.[97] His predecessor had attended similar thematic meetings.[98]

In general, a study considered the cooperation between Special Rapporteurs and both committees to be an exception.[99] It found that the same does not apply to the relationship between the CEDAW Committee and the Special Rapporteur on violence against women or between the CERD Committee and the Special Rapporteur on racism.[100] The same source indicated dissatisfaction by these treaty bodies with the absence of contact,[101] although this writer understands that the Special Rapporteur on violence against women had sought such contact with the CEDAW Committee.[102] By 2004, a meeting had taken place.[103] Except for an initial, apparently positive, exploratory meeting in 1995,[104] the first meeting between the CERD Committee and the Special Rapporteur on racism that the author has been able to identify took place in 2006.[105] On the other hand, the Special Rapporteur apparently had a meeting in

[96] See for example CAT Committee, *Report of the CAT Committee* (n. 75), Annex V, paras.17–18.

[97] See ECOSOC, *Report of the Special Rapporteur* (n. 78), para. 34.

[98] She attended the CRC Committee's day of discussion on state violence against children; see ECOSOC, *Report of the Special Rapporteur* (n. 83), para. 6; so did the Special Rapporteur on torture: see ECOSOC, Commission on Human Rights, 57th Session. *Civil and Political Rights Including the Questions of Torture and Detention*, 25 January 2001, UN Doc. E/CN.4/ 2001/66 (2001), para. 15.

[99] See A.F. Bayefsky, *The UN Human Rights Treaty System* (n. 1), 56.

[100] *Ibid.*

[101] *Ibid.*

[102] Information kindly provided by the human rights officer who services the mandate of the Special Rapporteur, on file with the author.

[103] See ECOSOC, Commission on Human Rights, 61st Session. *Integration of the Human Rights of Women and the Gender Perspective*, 17 January 2005, UN Doc. E/CN.4/2005/72, para. 4.

[104] See UN GA, *Elimination of Racism and Racial Discrimination. Note by the Secretary-General*, 25 September 1995, UN Doc. A/50/476 (1995), paras. 26–32; see also Boyle and Baldaccini, 'A Critical Evaluation' (n. 89).

[105] See UN GA, HR Council, 4th Session. *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council': Report submitted by Mr. Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 12 January 2007, UN Doc. A/HRC/4/19, para. 20.

2001 with the Secretary of the CERD Committee, which considered ways and means of enhancing cooperation between them.[106] In the light of the positive relationship between the torture-related and child-related mechanisms, it is difficult to comprehend why other such relationships should not be similar. It cannot be excluded that a (misplaced) perception of potential competition may have been a factor.

Undoubtedly, the HRC has not sought systematic contacts with the special procedures to its work, respectful as it may be of their contribution through their reports. Since most of them are relevant to its work, a practice of holding meetings with them would be an added burden on an already overcharged agenda. Presumably, juridical considerations do not loom large. It is true that there is nothing in the ICCPR envisaging such contacts, but a similar absence in the CERD, CAT and the CRC has not prevented the contacts being made. Certainly, the ICESCR Committee as a sub-organ of ECOSOC has no formal inhibitions, nor does it apparently have practical ones. In 2001 it had an exchange of views with the Special Rapporteur on adequate housing 'with a view to exploring the scope of appropriate cooperation between the Committee and the Special Rapporteur.'[107] In the same year, evidencing that this was no isolated incident, the ICESCR Committee announced that it would look into ways of further strengthening its cooperation with the relevant Special Rapporteurs of the Commission on Human Rights (including the Special Rapporteurs on adequate housing, on the right to education, on the right to food, on violence against women, its causes and consequences, on the sale of children, child prostitution and child pornography and on the human rights of migrants) and with its independent experts (on the right to development, on the question of human rights and extreme poverty and on structural adjustment and foreign debt).[108]

What is clear is that, at the group level, both sets of procedures have been keen to develop an annual consultation. Starting with the attendance in 1996 of the chair of the third annual meeting of special procedures at the seventh session of the meeting of persons chairing human

[106] Information kindly provided by the human rights officer who services the mandate of the Special Rapporteur, on file with the author.

[107] UN GA, Committee on Economic, Social and Cultural Rights: *Report on The 25th, 26th and 27th Sessions*, 21 May 2002, UN Docs. E/2002/22, E/C.12/2001/17, para. 1066.

[108] *Ibid.* para. 1050. The author is grateful to University of Essex colleague Professor Paul Hunt, who at the time was Rapporteur of the ICESCR Committee, for providing him with this information.

rights treaty bodies,[109] the chair of that session of the treaty body meeting attended the fourth special procedures meeting in 1997, as did the chair of the ICESCR Committee.[110] The following year the chair of the CAT Committee attended.[111] By 1999, the scheduling of both meetings was such as to permit the first joint session of the chairs of treaty bodies and the special procedures, which is now an annual event.[112]

It is beyond the scope of this chapter to examine the details of this evolving cross-system dialogue. Perhaps the most significant aspect of it is that it manifestly corresponds to a shared perceived need. One facet of the 'need' is that of improving mutual knowledge and understanding of each group of mechanisms. Inevitably, the meetings can only help partially: each of the treaty bodies can convey what it wishes to the assembled special procedures, but not all the special procedures can do the same in a brief meeting, nor can the treaty body chairs reasonably be expected to be an effective conduit to the whole membership of the committee they represent. Moreover, the regular turnover of special procedures mandate holders and treaty body chairs limits the possibility of entrenching the information and ideas exchanged.

[109] See UN GA, Human Rights Questions: Implementation of Human Rights Instruments. *Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights: Note by the Secretary-General*, 11 October 1996, UN Doc. A/51/482, paras. 8 and 53.

[110] See ECOSOC, Commission on Human Rights, 54th Session. *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Follow-Up to the World Conference on Human Rights*, 20 November 1997, UN Doc. E/CN.4/1998/45, paras. 9 and 34–43.

[111] See ECOSOC, Commission on Human Rights, 55th Session. *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Follow-Up to the World Conference on Human Rights*, 27 July 1998, UN Doc. E/CN.4/1999/3, paras. 10 and 33–42.

[112] See for example ECOSOC, Commission on Human Rights, 56th Session. *Report of the UN High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, 6 August 1999, UN Doc. E/CN.4/2000/5, paras. 30–1; ECOSOC, Commission on Human Rights, 57th Session. *Report of the UN High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, 11 July 2000, UN Doc. E/CN.4/2001/6, paras. 71–6; ECOSOC, Commission on Human Rights, 58th Session. *Report of the UN High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, 11 September 2001, UN Doc. E/CN.4/2002/14, paras. 69–75. The latest report is to be found in UN GA, *Promotion and Protection of all Human Rights* (n. 87), paras. 80–5.

A recurrent theme in the reports of their first three joint meetings was the intense focus on the importance of promoting full awareness by mechanisms of each group of the activities and output of the mechanisms of the other group. The key role of the Secretariat in making that happen was evidenced by increasingly insistent demands for feedback on the recommendations, notably those requesting the Secretariat to put in place systems that would facilitate the desired information exchange.[113]

The joint meetings have, with some nuance that doubtless reflects a certain diffidence by some treaty bodies, given their blessing in principle to the notion of bilateral meetings between treaty bodies and relevant special procedures. In the words of the recommendation from the first meeting: 'The joint meeting encouraged the treaty bodies to call, as they felt necessary, for the cooperation of the special procedures, including the possibility of a direct exchange of information during their respective sessions.'[114]

By the third joint meeting, the tone, albeit in the passive voice, seemed somewhat less doubtful: 'Increased emphasis should be placed on organizing meetings between special procedures mandate holders and the treaty bodies.'[115]

In terms of the overall theme of this chapter, the will towards cooperation rather than competition was best stated in the first sentence of the first recommendation of the first joint meeting: 'The joint meeting emphasized that the work of each group of mechanisms is equally and mutually important.'[116]

Subsequent meetings have permitted exchanges on the shared concerns about the impact of anti-terrorism measures on human rights and more internal issues, notably the transition from the Commission on Human Rights to the HR Council and proposals for reform of the treaty body system.[117]

[113] *Ibid.*

[114] See ECOSOC, Report of the UN High Commissioner for Human Rights (n. 112), para. 31(b). The present author chaired that year's meeting of Special Rapporteurs and co-chaired the joint meeting.

[115] See ECOSOC, *Report of the UN High Commissioner for Human Rights* (n. 112).

[116] *Ibid.* para. 31(a).

[117] See for example ECOSOC, Commission on Human Rights, 61st Session. *Report of the UN High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, 5 July 2004, UN Doc. E/CN.4/2005/5 (2004), paras. 64–8 (anti-terrorism and human rights); *Report of the 13th Meeting of Special Rapporteurs*, 26 October 2006, UN Doc. A/HRC/4/43 (2006), paras. 56–9.

5 Conclusion

It may be that, had the UN from the beginning been ready to establish a human rights monitoring system analogous to that found in the current Charter-based system, it would not have then gone on to create the system of treaty bodies. Certainly, there would have been little likelihood that any treaty body system would have been endowed with the core function of reviewing states' periodic reports alongside the UPR. The current challenge will be to find ways of indeed making the two processes complementary and productive, rather than competitive and injurious to promoting the better enjoyment of human rights.

It is also necessary to be aware that, as the main political organ dealing with human rights, the HR Council is in a position to affect the atmosphere in which the treaty bodies carry out their functions. Traditionally, the Commission on Human Rights, and then the HR Council, have been wholly supportive of the work of the treaty bodies, as evidenced by a recent HR Council resolution on the topic.[118] Nevertheless, a troubling signal from the General Assembly could, if it were to inspire the HR Council, lead to questioning of treaty body work. The incident in question involved a challenge to traditional language of welcoming General Comments of treaty bodies. In this case, draft language that would merely have taken note of the HRC's General Comment No. 33 on the obligations of states parties under the First Optional Protocol to the ICCPR was deleted from the adopted text.[119] It is to be hoped that this was more a flash in the pan than a straw in the wind.

Apart from this, the existence of the two systems cannot be properly understood as creating substantial duplication and overlap. The treaty bodies have nothing resembling the HR Council's public discussion procedures or confidential procedures for looking at situations of

[118] HR Council, Res. 9/8 (2008): Effective Implementation of Human Rights Instruments, 24 September 2008, UN Doc.A/HRC/9/28.

[119] Cf. UN GA, Res. 64/152. International Covenants on Human Rights, 18 December 2009, UN Doc. A/RES/64/152, para. 9; UN GA, *Promotion and Protection of Human Rights: Implementation of Human Rights Instruments. Note by the Secretary-General*, 20 October 2009, UN Doc. A/C.3/64/L.22, para. 9. This was the outcome of a debate, in which the main targets were General Comments of the ICESCR Committee, but they ended up being welcomed by a close vote in para. 10 of the same resolution, while the HRC General Comment lost also by a close vote: see International Service for Human Rights, *Overview of the 64th Session of the General Assembly* (2010), 5–6, available at www.ishr.ch/archive-general-assembly/701-work-of-the-general-assembly-at-its-64th-session-october-december-2009 (last accessed 25 December 2010).

consistent patterns of gross violations of human rights. It is the systems of thematic special procedures mandates and those of the treaty bodies, both expert-driven, that bear comparison. The implicit purpose of each system is substantially different. The structural features of the elective and reporting constituencies for each mechanism places them on essentially separate planes: bilateral for the treaty bodies, multilateral for the special procedures. This is connected with a different style of communication – characterised by dialogue, in the case of the treaty bodies, and fact-elucidation, in the case of the special procedures. The main focus of the treaty bodies, particularly through their core function of reviewing states' reports, is to promote enhanced respect for the human rights enshrined in the treaty obligations, with General Comments being merely an attendant product aiming to give states guidance on the nature and scope of other obligations for their reports. A main focus, if not the only one, of the thematic special procedures is to provide the whole UN membership with comparative and global understanding of the human rights problem in question, as well as with guidance on how to deal with it.

As far as case work is concerned, the special procedures, with one exception (the Working Group on Arbitrary Detention) do not pursue individual cases to a formal conclusion on whether or not there has been a violation, whereas the treaty bodies do just that. In the case of the exception, the problem has been solved in the one case it has arisen, by the Working Group on Arbitrary Detention deferring the case to the HRC. If that had not happened, it cannot be excluded that such an incident could lead to the HRC considering the case to be inadmissible by reason of having been submitted to an alternative procedure of international investigation or settlement. That no such thing happens in respect of cases submitted to the other special procedures, testifies to the difference in function between the two types of procedure. Also, improved information management systems within the Secretariat can contribute substantially to the avoidance of duplicative case work.

By contrast, the special procedures' use of urgent appeals has no real counterpart in the current treaty bodies' methods. In the rare cases where an apparent similar practice exists, it is used by the treaty bodies to preserve the possibility of determining whether or not a violation could occur. The purpose of the special procedures' urgent appeals is to prevent, inhibit or stop any feared violations. However, the clearly overlapping urgent appeal system under the CPED will require policy decisions to be taken between its Committee and the WGEID, preferably by agreement.

In general, the activities of the treaty bodies reflect the formality of the solemn legal instruments that gave birth to them; those of the special procedures have the flexibility appropriate to their genesis in a UN political body. This does not mean that the special procedures should consider themselves free to act inconsistently, without an established (common or procedure-specific) methodology. Rather, a key aspect for the special procedures is to seek to have some effect and give some guidance in a short timeframe, whereas for the treaty bodies the very nature of periodic reports and the necessarily protracted process of reaching Views on individual cases require a longer-term perspective.

This analysis suggests that any area of potential overlap and duplication of work between the two types of mechanisms is largely illusory. Where occasionally it is real, it is avoidable by the application of the treaties' rules on admissibility, by improved information management systems in the Secretariat, by an effective management of resources and by a spirit of cooperation, whereby the special procedures defer to the activities of the treaty bodies.

Underlying any legitimate concern of potential cross-system duplication and overlap is the assumption that the state whose activity in question is a party to the relevant treaty and that, where optional, it has accepted the treaty bodies' scrutinising or complaints functions. It is, therefore, axiomatic that there can be no such duplication or overlap in respect of states that have not ratified the treaty or accepted the optional procedures. Where a state has accepted the relevant treaty regime, that acceptance would also have to be – unlike the present case – irrevocable.[120] Pursuing the same logic, it would also be necessary for the treaty bodies that do not at present engage in on-the-spot fact-finding visits to do so. This would raise the question as to whether they have the implied power to do so or would need a treaty amendment or optional protocol to give them that power (the CEDAW Optional Protocol may be invoked to suggest, *a contrario*, that there is no such implied power). The treaty bodies would also have to be able to engage in urgent appeals beyond those merely aimed at preserving their adjudicative functions.

It will be evident that this sort of evolution would in fact involve a transformation in the nature of the treaty body system to approximate that of the special procedures system. Any transformation of this sort cannot reasonably be expected in the near future. Universal ratification

[120] For example, Guyana, Jamaica, Trinidad and Tobago have denounced the First Optional Protocol to the ICCPR.

of the treaties is still a depressingly distant goal, despite sustained attempts at promoting it.[121] Presumably universal acceptance of the optional procedures is yet further off.

It would appear that, for the foreseeable future, the two systems will remain what they have been so far, highly complementary means of promoting accountability for compliance with human rights norms. The complementarity is increased by the ability of each system to build on the work of the other. Of course, from the perspective of the state, interest from more than one body, however different the basis of that interest, represents probably unwanted, increased pressure to address the problem. The human rights perspective must, however, particularly in view of the non-coercive nature of the actions, be that of the potential victim. From that perspective, multiple activities can only be supportive of the broader human rights project.

[121] See Roadmap towards the implementation of the United Nations Millennium Declaration: *Report of the Secretary-General*, 6 September 2001, UN Doc. A/56/326, para. 204.

9

Conclusions

HELEN KELLER AND GEIR ULFSTEIN

The international protection of human rights is a success in terms of the increasing number and ratifications of global human rights conventions over the last fifty years. Ratifications of the six core international human rights treaties (ICCPR, ICESCR, CERD, CEDAW, CAT and CRC) increased by over 50 per cent, to 1,536, between 2000 and 2011.[1] These six conventions have in recent years been supplemented by three more conventions (CMW, CRPD and CPED) and a number of optional protocols. Further, new legal instruments with international supervision are expected in the future, for example on the protection of the human rights of older persons.

It is difficult to explain why states were willing to negotiate and ratify an increasing number of human rights conventions in the first decade of the new millennium. But this is consonant with both global and regional trends to strengthen human rights protection, for example by establishing the UN Human Rights Council. The dissolution of the Soviet Union and the end of the Cold War were followed by increased attention being paid to democracy and human rights around the world. In addition, the Universal Periodic Review (UPR) procedure of the Human Rights Council might have influenced the accelerated ratification of the major human rights treaties, as such ratifications are recommended on a regular basis.

The human rights treaty body system has grown correspondingly. The current number of such monitoring bodies is ten (the ICESCR Committee, HRC, CERD Committee, CEDAW Committee, CAT Committee, Subcommittee on Prevention of Torture, CMW Committee, CRPD Committee, CRC Committee and CPED Committee). This system confirms that treaty ratifications do not suffice to ensure the protection of human rights. States are generally reluctant to interfere with the human

[1] Material on the informal technical consultation with states parties to international human rights treaties in Sion, Switzerland from 12–13 May 2011 is available at www2.ohchr.org/english/bodies/HRTD/SionConsultation.htm (last visited on 7 June 2011).

rights obligations of other states. International organs are therefore necessary to supervise respect for treaty obligations and settle disputes.

The treaty bodies perform important functions by examining state reports, expressing their Views in cases of individual complaints, adopting General Comments on the interpretation of human rights obligations, and, under some conventions, conducting inquiries. They are dedicated, creative and have established procedures that could not easily have been foreseen in their early years. They clearly raise awareness about human rights and influence the conduct of states, providing relief to individuals and developing important jurisprudence concerning the scope and content of international human rights obligations. They comprise part of the international institutional machinery that holds states to account.

But increasing attention is paid to how the treaty bodies work. First of all: do they achieve their objectives in protecting human rights? How can all of these organs be managed in an efficient way without placing too much burden on the UN system and requiring too much reporting from states? Is there a danger of fragmentation within international human rights law? Are the treaty bodies too creative in their practices, at the expense of legal principles? Do they live up to international standards in their composition, procedures and accountability? Is there too much interference with domestic democratic control? Several of these concerns are reflected in current efforts of the UN High Commissioner for Human Rights to strengthen the treaty bodies. The chapters of this book deal with different aspects of the effectiveness of these bodies, as well as pertinent legal issues and the legitimacy of their activities.

Legal aspects

Over the years, it is striking to note the evolution of the mandates as interpreted and applied by the treaty bodies. The Human Rights Committee only started to adopt Concluding Observations after the end of the Cold War (Kälin). While the meaning and nature of General Comments were controversial in the 1970s, a compromise was reached, and from the 1990s the Committee began to adopt General Comments that provide more significant substantive guidance concerning the obligations of states parties (Keller and Grover). Furthermore, the treaty bodies introduced interim measures and follow-up procedures in respect of individual complaints (Ulfstein).

To some degree these developments have a political background, especially the end of the East-West divide, but they can also partly be ascribed to the increased maturity of the system. Treaty bodies find their legal basis either in the express wording of the relevant conventions, or the concept of institutions having 'implied powers' that are necessary for them to fulfil their mandates. The latter evidences the perceived international 'public' character of the work of the treaty bodies. The public character of the treaty bodies is also fundamental to their relationship with the Meeting of the States Parties of the different conventions (ECOSOC, in the case of the ICESCR), as well as their connection to the Secretariat of the UN Office of the High Commissioner for Human Rights, the Human Rights Council and the UN General Assembly. The challenge is to adapt concepts such as 'implied powers', developed for assessing the competences of intergovernmental organisations, to the work of the treaty bodies. The expanded functions of the treaty bodies seem to have been accepted by states parties.

When it comes to the substantive obligations of states parties, it has long been debated whether human rights treaties should be interpreted in a manner that differs from the rules contained in the Vienna Convention on the Law of Treaties (1969) and other canons of treaty interpretation in customary international law. Special treatment of human rights obligations could be based on the fundamental importance of human rights values within the international community, as well as the evolutive character of these standards. On the other hand, international supervision of human rights interferes with the relationship between a state and its citizens, which may call for a certain measure of restraint, reflected in the principle of subsidiarity. It is also a question to what extent the diversity between regions and countries should be recognised. Finally, it has been asked whether the review of economic and social rights should be treated differently from monitoring states' implementation of civil and political rights.

The chapters in this book have revealed that interpretation by the treaty bodies is at times controversial. Examples include the scope of the prohibition against discrimination and the extraterritorial effects of the ICCPR. Furthermore, the HRC at times in its examination of state reports raises concerns and gives recommendations relating to policy choices, and not necessarily violations of the ICCPR (Kälin). Additionally, the right to life as interpreted by the HRC to encompass, *inter alia*, housing, health and nutrition, has been characterised as 'extremely expansive' (Khaliq and Churchill). These authors also claim that some General Comments by the ICESCR Committee seem to be

quasi-legislative in nature, such as General Comment No. 4 on the right to adequate housing.

On the other hand, the examination of Views adopted by the HRC, the CAT Committee and the CERD Committee as a response to individual complaints indicates that the legality of interpretations adopted by treaty bodies in these cases is a less controversial issue than it appears at first blush. Hence, it is argued on the basis of this analysis that the special character of human rights interpretation is over-emphasised. The guidance provided by the rules of interpretation in the Vienna Convention on the Law of Treaties is so broad that it can accommodate methods of interpretation associated with the interpretation of human rights (e.g. contextual, dynamic, effective, systemic), and it would be almost impossible to contemplate an interpretive finding that could be considered 'illegal' pursuant to these rules (Schlütter).

As for the controversial distinction drawn between the interpretation of civil and political rights, and economic and social rights, this too might seem to be overstated. In the practice of several treaty bodies, both sets of rights are considered justiciable, interdependent and sometimes analysed in a holistic manner. Distinctions between negative and positive rights, or rights that entail judicial as opposed to legislative measures, are also artificial. And although some allowance must be made for the progressive realisation of economic and social rights, this may also be the case for certain civil and political rights, thereby rendering the distinction less clear than might be thought (Khaliq and Churchill).

In conclusion, the treaty bodies have to balance the need for effective and evolutive protection of human rights as expressed in the respective conventions, while taking due account of diversity in regions and countries and the subsidiary role of international supervision. It should, however, be added that controversies have arisen on issues not addressed in this book, especially the extent to which states may make reservations to human rights treaties, terminate such treaties, and continue to be bound by them in cases of succession.[2]

The legal status of the findings of the treaty bodies is also disputed (Kälin; Ulfstein; Keller and Grover; Alebeek and Nollkaemper). This controversy most recently found expression in states' disapproval of General Comment No. 33 of the HRC (on the obligations of states parties) through a vote in the General Assembly (Keller and Grover; Rodley).

[2] See M.T. Kamminga and M. Scheinin, *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009).

On the question of legal status, the point of departure should be that treaty bodies are delegated important functions in upholding human rights treaty obligations while not being judicial organs. An important clarification on the legal status of their work product at the international level can be found in the recent judgment of the International Court of Justice in the *Diallo* case (2010), where the Court stated that it accorded 'great weight' to the interpretations of the ICCPR by the HRC. Its practice is important, said the Court, because that Committee 'was established specifically to supervise the application of [the ICCPR]'.[3] Thus, there is no need to construe such practice as subsequent state practice under article 31(3)(b) of the Vienna Convention on the Law of Treaties (1969). It has also been argued in this book that interim measures should be regarded as legally binding to the extent necessary to prevent irreparable harm to the individuals concerned (Ulfstein; Alebeek and Nollkaemper). Despite increasing acknowledgement of the legal authority of treaty bodies' output at the international level, however, there continues to exist a 'significant gap' between this and the weight that national laws and courts attribute to this output (Alebeek and Nollkaemper).

Effectiveness

The treaty bodies face fundamental challenges regarding their effectiveness in protecting human rights. While the growth in the number of conventions as well as their ratification has been more than impressive, the human rights system is a victim of its own success. The flipside of this success is the overburdening of both states and the treaty bodies.

The expansion of the human rights monitoring system is a challenge in budgetary terms. The membership of the treaty bodies increased from 97 states in 2000 to 172 states in 2011.[4] Their meeting time increased as a consequence from 51 weeks in 2000 to 72 weeks in 2010 and 2011 (as of 3 May 2011). Since 2000, the regular budget supporting the travel of experts increased from $4,323.9 million per biennium in 2000–1 to $10,746.5 million per biennium in 2010–11.

The increasing number of legal instruments and ratifications is also reflected in the number of reports submitted by states parties: from

[3] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (30 November 2010, unreported).

[4] See n. 1 *supra*. The following data is collected from the various documents presented at the Sion meeting.

102 reports in 2000 to 139 in 2010. That year, ninety-two states submitted a total of 11,294 pages reporting on their laws and activities, each of which had to be translated into the three working languages of the human rights treaty body concerned at a cost of some $17.5 million. These translation needs and costs should be viewed in light of the fact that the Human Rights Council is entitled to meet on an 'as required' basis. In fact, any document coming from a human rights treaty body will compete – in terms of human and financial resources – with documents produced by the Human Rights Council. This partially explains the poor working conditions of the treaty bodies in which translations are delayed or simply not delivered. This, in turn, considerably hampers these bodies' ability to work effectively.

The treaty bodies reviewed in 2010 a total of over 120 individual complaints and over 120 state reports – almost three times the number of states reviewed under the Human Rights Council's UPR procedure. At the same time, over 250 states parties' reports were due and waiting to be reviewed and over 500 individual complaints were pending for consideration. This workload does not reflect the group of states parties that do not hand in their reports at all or only with considerable delay. As of 3 May 2011, 623 state party reports were overdue. However, if all states parties were to report on time, the treaty bodies would need to be in session for a total of some 220 weeks per year (compared to the 73 weeks of session in 2011). To put it bluntly, the delay in reporting protects the human rights system from collapsing.

The growing reporting burden on states is reflected by the fact that a state which is party to eight or nine treaties is bound to submit approximately twenty reports in a ten-year period, i.e. two reports annually. It is accordingly also expected to participate in an average of two treaty body sessions per year. Particularly (but not only) for small countries, this reporting obligation is a heavy burden. Developing countries with small governments are overwhelmed.

Even though this growth in human rights conventions is certainly a success for the promotion of human rights in general, it leads to institutional and potentially substantive fragmentation. The willingness of treaty bodies to take into account obligations and practices arising from other conventions varies (Khaliq and Churchill). But so far, the danger of fragmentation does not seem to present insurmountable legal problems. The existence of specialised conventions and treaty bodies means that many different human rights interests are protected, and that the treaty bodies may build up a nuanced case law.

At present, treaty bodies consult with one another at least annually on procedural matters, and increasingly on substantive issues (Keller and Grover). As for the relationship between treaty bodies and the Human Rights Council, especially in respect of its Universal Periodic Review (UPR) procedure, all of these organs are to be commended for working to complement rather than compete with the activities of the others, thereby avoiding undue overlap (Rodley). This synchronicity has increased the pressure on states parties to comply with their human rights obligations (Rodley).

It is inherently difficult to measure the effects of treaty bodies' findings on states' laws and policies. While some progress may be identified on the basis of Concluding Observations, many recommendations are not implemented by states parties (Kälin). Furthermore, it seems that only a minority of Views in response to individual complaints are implemented by the relevant states (Ulfstein; Alebeek and Nollkaemper). The treaty bodies have engaged in follow-up procedures in order to improve the compliance rate. But a broad range of measures are needed, from monitoring and capacity-building to the use of different kinds of pressure on states (Ulfstein). The obstacles in national law are also examined in this book (Alebeek and Nollkaemper).

Stepping back, the output of the treaty bodies should be assessed on a broader basis. For example, Concluding Observations, Views and General Comments all increase awareness about the content of human rights obligations and the extent to which they have and have not been implemented at the national level (Kälin; Ulfstein; Keller and Grover). This may serve as a basis for mobilisation among national governments as well as political groups and NGOs. General Comments have acquired a powerful role within the HRC in consolidating the past practice of this body, highlighting its interpretive reasoning, filling legal gaps, harmonising substantive outcomes across treaty bodies, fleshing out the content of the ICCPR and embedding this content into international law as well as state party practice (Keller and Grover). As for Views, the limited resources of the treaty bodies may mean that they are more effective in terms of offering sound interpretive findings and developing the general jurisprudence on rather vague treaty obligations than in dispensing individual justice (Alebeek and Nollkaemper). Finally, a number of commentators link effectiveness, however defined, to visibility, arguing that the work of treaty bodies needs to be better known in the wider public if it is to make a difference (Alebeek and Nollkaemper; Kälin; Keller and Grover). Even within national legal

circles, there is a disturbing lack of understanding surrounding the work of these bodies (Alebeek and Nollkaemper). The paradox is, however, that the treaty body system, in its current form, would be unable to handle a greater workload.

Legitimacy

Human rights treaty bodies have been delegated public power at the international level, and should as such fulfil relevant criteria of legitimacy in exercising it. This is of importance from a normative perspective. But it is also essential that states perceive the treaty bodies' activities as legitimate in order to promote the effective implementation of their findings. The treaty bodies should first of all respect legal requirements on the interpretation of human rights conventions. But this is not enough. The findings of treaty bodies may be perfectly legal, but not fulfil relevant legitimacy criteria in terms of the composition of treaty organs, procedural requirements, the substantive properties of the findings, or their democratic basis. Deficiencies in the treaty bodies' efficiency in protecting treaty rights may also undercut their legitimacy.

The UN High Commissioner for Human Rights has expressed concern over the composition of treaty bodies in terms of members' expertise, independence and their representativeness, as well as the procedure for electing such members. It is essential that these bodies possess the highest expertise and are irrefutably independent. The criteria for membership are, however, vague. The nomination and election of members suffers from the opaque and politicised character of comparable procedures within the United Nations. It is suggested that both the criteria for membership and the procedures for nomination and election be improved, possibly by decisions of the Meetings of States Parties of the respective conventions (Alebeek and Nollkaemper; Ulfstein). That being said, there is currently no reason to distrust the overall competence of the treaty bodies.

The procedural aspects of decision-making by the treaty bodies could also be revisited (Alebeek and Nollkaemper; Kälin; Keller and Grover; Ulfstein). The state reporting procedure has been improved by permitting states parties in certain situations to respond to a list of issues, rather than produce a full report (Kälin). Oral proceedings have been proposed in cases of individual complaints. However, this could unfairly privilege the stronger party, which is usually the respondent state, and would call for the active involvement of the UN Secretariat and the

relevant treaty body (Ulfstein). In terms of General Comments, concrete proposals have been made to formalise what are currently *ad hoc* procedures for their design, selection of topics, drafting and adoption within the HRC (Keller and Grover). More generally, treaty bodies have yet to resolve what relationship they are to have with NGOs, and what resulting procedural powers the latter should or should not acquire (Kälin; Keller and Grover; Schlütter).

In addition to procedural improvements, the legitimacy of treaty bodies' findings can be greatly enhanced by strengthening the reasoning underlying them (Alebeek and Nollkaemper; Keller and Grover; Schlütter). For example, General Comments of the HRC define the content of ICCPR rights and obligations in a variety of ways and offer past practice in support of the interpretations contained therein, but these techniques are not consistently invoked (Keller and Grover). Moreover, it is not always clear whether the concerns of treaty bodies arise from a treaty violation or policies to improve human rights protection (Kälin; Keller and Grover). Similarly, the determinacy and clarity of interpretive reasoning in the Views of treaty bodies could be improved (Schlütter). In particular, treaty bodies such as the HRC need to settle on a uniform approach in their Views to the matter of subsidiarity, when and how to defer to states in their interpretation of treaty rights (Schlütter).

States are clearly concerned about the need for treaty bodies to respect the scope of treaty obligations as ratified. Therefore, states are likely to criticise dynamic treaty interpretation by these bodies (Schlütter). They may argue that such interpretation goes beyond their consent and represents an unjustified restriction of state sovereignty and democratic control. Perhaps for this reason, some states parties have expressed their disapproval in respect of certain draft General Comments (Keller and Grover; Rodley). Human rights concern the relationship between a state and individuals on its territory, traditionally considered part of the internal affairs of the state. International human rights may also involve sensitive cultural and religious issues and ways of life pertaining to states and regions. A constant challenge is how the treaty bodies can demonstrate respect for diversity while upholding effective human rights protection.

As treaty bodies continue to work on enhancing the legitimacy of their work output, it should be kept in mind that this output is not legally binding, but that, according to the International Court of Justice, it is to be accorded 'great weight'. The non-binding status of treaty bodies' findings gives states some flexibility in their implementation of international human rights obligations. This flexibility would seem to respect state sovereignty and democratic ideals (Ulfstein). The non-binding character of treaty bodies' findings and the absence of a powerful enforcement body means, however, that these bodies' composition, procedures and reasoning – their legitimacy – become even more essential if states are to be convinced to obey them.

Future challenges

Going forward, it is expected that all treaty bodies will be scrutinised more critically. States parties, civil society, the treaty bodies themselves, and the UN Office of the High Commissioner for Human Rights will, in light of current and future challenges, have to address innovative proposals for improving the international human rights monitoring system. In preparing such proposals, consideration should be given to the following issues.

The selection procedure for members of the human rights bodies could be improved. In particular, the selection or nomination procedure on the national level is not transparent enough. As long as governments can nominate candidates without the involvement of civil society, the professional background, impartiality and independence of the individual members are not guaranteed. The nomination process on the international level does not focus primarily on the personal capacities of the various candidates, but is rather a political bargaining process on the basis of give-and-take.

Further, the high frequency of state reports due in a short time period calls for an improvement of the reporting obligations. The schedule for reporting obligations should be predictable for the states parties and coordinated among the different treaty bodies in order to avoid an accumulation of several reports due almost at the same time. Also, it is essential that the reports submitted to the treaty bodies are well synchronised with the UPR in order to make best use of the two procedures. This would lead to a better-coordinated timetable. Treaty bodies could delegate the power to coordinate the reporting deadlines to another organ.

Treaty bodies may also wish to rethink the examination of those states that have never submitted a report, or over decades have submitted very few of them. In the current system, calendars for the treaty bodies are based on reports received rather than due. Therefore states parties are not treated equally. Those who report regularly are under the most

scrutiny of the treaty bodies. However, states not reporting, or only with long periods of delay (more than ten years) are rarely examined. Ironically, these states are often the countries in which the human rights situation requires the most thorough scrutiny and input from international experts.

The conduct of individual treaty body members could perhaps also be improved. Members could demonstrate greater self-discipline in the conduct of meetings, stronger control and leadership when chairing meetings, and strict time management, including self-restraint in respect of unnecessary interventions and controlling the filibustering of state delegates during the examination of state reports.

As for working documents, these could be shorter and more focused. Strict page limits could be introduced, both for documents submitted by the states parties (e.g. core document, individual reports), and for the documents that treaty bodies issue (e.g. Concluding Observations, Views, General Comments). Further, in order to make better use of the human resources available in the translation services, treaty bodies may consider reducing their internal working languages from three to two.

The state report examination procedure could also be refined. A more focused dialogue with state delegations based on an individualised list of issues relating to a particular state's human rights situation is one possibility. This would require more intense preparation of the dialogue based on professional support from the Secretariat and civil society. Ultimately, however, the treaty bodies and their members bear the responsibility for the quality of their work.

Further thought may also be given to harmonising the procedures of the different treaty bodies. This aim has to be balanced against the wish of preserving the autonomy and uniqueness of each treaty body, which is an especially sensitive issue. As long as each treaty body insists on its absolute particularity, any attempt at unification or harmonisation of procedures will be vetoed.

Better coordination between the different human rights treaty bodies both on substantive and procedural issues, would require the assistance of a meta-organ with defined competences. So far, the Meetings of Chairpersons and the Inter-committee Meetings are purely informal, as these conferences do not possess any decision-making powers. However, this should be reconsidered. Another possibility would be to delegate some powers to the UN High Commissioner for Human Rights. In terms of (democratic) legitimacy though, the latter would certainly not be the best approach.

Additionally, a core problem is the limited financial resources of the treaty bodies. The UN High Commissioner for Human Rights clearly needs more staff to support their work. Some states have voiced their support for adequate funding of the treaty bodies from the regular budget, but there seems to be little support from the majority of states for the assignment of substantial new resources to these bodies. Paradoxically, the system does not have the capacity to deal with its current caseload, yet its members still hope to receive reports from overdue states, and to be able to handle an increasing number of individual complaints. The answer is to realistically prioritise situations and issues. In respect of individual complaints, this means emphasising not only individual relief but also providing more general guidance on the interpretation of treaty obligations.

Since the treaty bodies have no enforcement powers and their findings are not legally binding, it is all the more important that the latter are based on sound reasoning. Treaty bodies have to strike an appropriate balance between the principle of subsidiarity and respect for diverse conditions of life in different parts of the world on the one hand, and effective human rights protection on the other. It is also important that national legal systems are designed to accommodate the findings of human rights treaty bodies.

In the years to come, human rights protection will become an even more prominent aim of the international community. Undoubtedly, both the ratification of existing conventions and the adoption of new human rights instruments will continue. Therefore, the jurisprudence of the international human rights system will continue to increase. The diversification of this jurisprudence will be a challenge in terms of legitimacy. The stakeholders – states, NGOs and individuals – will only accept the international system for the protection of human rights as legitimate if the system appears to be consolidated and coherent. This requires not only coordination between the various bodies but also each treaty body functioning well in the performance of its core mandate (e.g. effective compliance control of human rights obligations at the national level). The uncoordinated growth of this system in the last decades, increased expectations about its output and its continued under-resourcing, have rendered the effective fulfilment of treaty bodies' mandates increasingly difficult. The credibility of the system as it stands is seriously threatened. There is much to be done in order to preserve and build upon what the international human rights system has achieved during the past half-century. It is hoped that the chapters in this book can help to constructively inform this effort.