

# Oxford Handbooks Online

## The Role and Impact of Treaty Bodies

Nigel S. Rodley

The Oxford Handbook of International Human Rights Law

*Edited by Dinah Shelton*

Print Publication Date: Oct 2013 Subject: Law, Human Rights and Immigration

Online Publication Date: Dec 2013 DOI: 10.1093/law/9780199640133.003.0027

### Abstract and Keywords

This article examines the role of treaty bodies in the development and enforcement of international human rights law. It explains that there are now nine core human rights treaties and each of them provided the establishment of its own monitoring committee which includes the Convention on the Elimination of Discrimination against Women (CEDAW) Committee, the Committee against Torture and the Committee on Enforced Disappearances (CED). This article discusses the composition, functions and the decision-making process of these committees.

Keywords: treaty bodies, human rights law, human rights treaties, monitoring committee, CEDAW, Committee against Torture, CED

---

## 1. Introduction

AT the founding of the United Nations (UN), it was generally understood that the UN could not monitor states' compliance with human rights. The dominant approach was that the Charter of the United Nations (UN Charter) Article 2(7), prohibiting intervention in matters falling 'essentially within the domestic jurisdiction' of states, protected states from human rights scrutiny. This relied on the theory that human rights were, indeed, a matter of domestic jurisdiction and that even discussing critically states' human rights performance was impermissible intervention.

Accordingly, it was believed that states could only be held to any form of account for their human rights behaviour by voluntarily accepting international supervision.<sup>1</sup> It followed that this could only be achieved by virtue of a treaty obligation that each state freely assumed upon becoming a party to a treaty providing for some sort of supervision.

## The Role and Impact of Treaty Bodies

---

It was thus that the International Bill of Human Rights was conceived. The Bill would consist first of the Universal Declaration of Human Rights (UDHR), (p. 622) followed by treaty-based obligations. The UDHR, as a resolution of the General Assembly, could only have the formal status of a recommendation and so would not be binding per se.<sup>2</sup>

Meanwhile, the emergent, legally binding treaties, namely, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), would give further specificity to (most of) the rights in the UDHR and have supervisory machinery. The ICCPR provided for the establishment of the Human Rights Committee, which was expected to become the first human rights treaty body.

There are now nine core human rights treaties. It is usual to speak of the United Nations 'treaty body system' when referring to the committees that have been empowered to monitor states parties' compliance with their obligations under these treaties. In fact, there was no consciousness that any such system was being created when the first two such committees were being contemplated. The first to come into existence was the Committee on the Elimination of Racial Discrimination (CERD Committee) after the adoption in 1965 of the International Convention on the Elimination of All Forms of Discrimination (CERD).<sup>3</sup> The drafting of the CERD was initiated within the context of the seemingly endless process of drafting the two covenants. In fact, it was modelled on the draft of what a year later would become the ICCPR. It is often forgotten that not even the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted contemporaneously with the ICCPR, provided for such a committee. Rather, the function was assigned to the intergovernmental 'principal organ' of the UN, the Economic and Social Council (ECOSOC).

As is often the case, an instance becomes a precedent.<sup>4</sup> So, in 1979, the Convention on the Elimination of Discrimination against Women (CEDAW) was adopted,<sup>5</sup> followed by the Convention against Torture and Other Cruel, Inhuman or Degrading (p. 623) Treatment or Punishment (CAT) in 1984.<sup>6</sup> The UN Convention on the Rights of the Child (CRC) in 1989<sup>7</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) in 1990 followed this.<sup>8</sup> In 2006, two more treaties were added: the Convention on the Rights of Persons with Disabilities (CRPD)<sup>9</sup> and the International Convention for the Protection of All Persons from Enforced Disappearances (CPED).<sup>10</sup>

Each of these conventions provided for the establishment of its own monitoring committee, which will be referred to here, in order of treaty adoption, as the CEDAW Committee, the Committee against Torture (or CAT), the CRC Committee, the CMW Committee (CMW), the CRPD Committee and the Committee on Enforced Disappearances (CED). Meanwhile, ECOSOC, an intergovernmental body, found that it was not able to engage in effective monitoring of the ICESCR, and in 1985 created its own Committee on Economic, Social and Cultural Rights (CESCR), composed of individuals, based on the model of the other committees.<sup>11</sup> Each of the nine so-called 'core' human rights treaties

## The Role and Impact of Treaty Bodies

---

thus has its own treaty body. This chapter touches on some of the reasons for this in Section 7, below.

At this point it should be noted that there is a tenth treaty body, in the form of a Sub-Committee for the Prevention of Torture (SPT), established under a 2002 Optional Protocol to UNCAT (OPCAT).<sup>12</sup> It is a *sui generis* body, whose functions are wholly unlike those of the other treaty bodies and so cannot be considered as a normal part of the 'system'. For the sake of completeness, these functions will be briefly described below, but the SPT will not be the subject of further comment. (p. 624)

## 2. Composition

The salient point about the composition of the treaty bodies, as evidenced by the action of ECOSOC in creating the CESCR, is that individual experts are more apt than government representatives to be able to bring independent judgement to bear on the neuralgic issue of states' respect (or otherwise) for their human rights obligations. Of course, interstate practices are such that the notion of the independent expert, which treaties do not define, may not always be evident in the candidates (which states parties nominate) or the members (which the same states parties elect). While the overwhelming membership of the Human Rights Committee over the years has been of individuals who have no formal connection with the governments that have nominated them, the membership of some committees has had a significant component of officials of their countries' executives, typically in the Foreign Service.

To minimize bias or the perception of it, treaty bodies will generally adopt rules of procedure that prevent members from participating in discussions of, or decision-making on, their own states' behaviour, or will at least limit such involvement.<sup>13</sup> Of course, these states have friends and allies, as well as adversaries, which might mean theoretically that a member holding a national public official function could find it difficult to treat such countries with the same impartiality as he or she would treat other states. That said, it is this author's experience that some holders of national office have been able to evince more evident and rigorous independence, not to mention genuine expertise, than some of those not formally holding any such office. It nevertheless remains desirable that states avoid presenting as candidates persons holding public office in the executive branch of government.<sup>14</sup>

The expertise sought tends to consist of 'high moral standing' and 'recognized competence' in the field covered by the treaty, but typically does not demand specifically legal training, albeit some treaties call for 'consideration being given to the usefulness of the participation of some persons having legal experience'.<sup>15</sup> Given that it falls to the treaty bodies to interpret their respective conventions, that is, solemn legal instruments, and apply them to sometimes complex factual situations, it appears incongruous that more weight is not given to the value of people trained in (p. 625) the discipline that lays

## The Role and Impact of Treaty Bodies

---

down the canons of interpretation of international treaties.<sup>16</sup> In practice, certainly in the case of the Human Rights Committee, there may well be a predominance of members who are trained in or are otherwise familiar with legal work.

The variation in the numerical composition of the committees is incomprehensible. Membership ranges from ten to twenty-three, with the mean being eighteen. Some treaties provide for a base number when the treaty first enters into force and then for expansion after a given number of further ratifications. There can be no inherent reason why the CAT and CRC Committees have ten members each, while the CMW had an initial membership of ten, rising to fourteen, and the CEDAW Committee started with eighteen and expanded to twenty-three. The only explanation is that each decision reflected a tension between states' desire to keep costs down and the strength of their commitment to the subject matter of the convention. The influence of various civil society constituencies for a particular category of victim could also be relevant.

### 3. Decision-Making

The committees aspire to consensus in their decision-making. This started with the Rules of Procedure of the Human Rights Committee. Despite the fact that Article 39(2)(b) of the ICCPR envisages a majority voting for taking decisions, the Committee's Rules of Procedure specifically exhort the Committee to seek to operate by consensus where possible.<sup>17</sup> In practice, this has always been interpreted as requiring consensus decision-making on all substantive outputs except the adoption of 'views' on individual complaints, for which separate or dissenting opinions are common. Whether other treaties provide for majority voting (eg UNCAT Article 18 (2)(b)) or more typically leave the issue to the rules of procedure, the practice tends to follow that of the Human Rights Committee.

The original impulse towards consensus no doubt responded to the demands of Cold War realities. This could be frustrating for human rights advocates, who (p. 626) chafed, for example, under the committees' inability to agree on country-specific evaluations. With the end of the Cold War, the practice changed.<sup>18</sup> Hindsight demonstrates that the consensus approach may have been beneficial. Constant voting on all aspects of the work could have been, and could still be, dysfunctional. More importantly, it invested the product of the committee with the authority that accompanies the corporate expression of a membership reflecting the broad cultural and political geography of the world. On balance, that product more resembles the highest common factor, rather than the lowest common denominator. This is no mean consideration in a world where East-West confrontation has transformed into one of North-South tension.

The periodicity and duration of meetings of treaty bodies vary from treaty to treaty or may be left to the determination of the specific treaty body in its rules of procedure. CERD addresses neither frequency nor duration. In practice, three of the committees

## The Role and Impact of Treaty Bodies

---

meet three times a year for three-week sessions. All the others meet twice a year for sessions of one to four weeks.

### 4. Functions

There are five typical functions that the treaties may contemplate for the committees: first, review of reports that states undertake to submit after becoming party to the treaty; second, at least implicitly, general comments on the nature and scope of the treaties' provisions; third, interstate complaints; fourth, individual complaints; and fifth, inquiries into general practices that violate the respective treaty. Each will be considered separately, as will a small number of atypical functions found in two treaties.

#### 4.1 Review of state reports

Reviewing state reports is generally understood as the core function of each treaty and the 'system' as a whole.<sup>19</sup> This is because it is the one monitoring element that is obligatory under each treaty. Each state party is obliged to submit a report to the (p. 627) particular committee on its compliance with the treaty's provisions; the committee then reviews it. It is customary to refer to this as review of periodic reports, because each treaty provides that, after the submission of an initial report, generally within one or two years of the state's ratification or accession to the treaty, states should submit future reports at intervals either laid down by the treaty or determined by the treaty body. Anomalously, the most recent treaty, the CPED, only contemplates the submission of an initial report, after which the CED has discretion as to whether it will require subsequent reports. No doubt this reflects the expectation that most states parties will not engage in the appalling practice of 'disappearing' people, and it would be vain and wasteful to require them to assume the burden of superfluous reporting and for the CED to engage in superfluous reviews.

There is no uniformity across the treaties and practice as regards the periodicity for submission of reports. It ranges from two to five years. There is no apparent reason for the inconsistency, nor is there any evident explanation as to why the periodicity is laid down in some treaties and, as in the case of the ICCPR, left to the treaty body in others. The Human Rights Committee (HRC) first established a standard period of four years in its Rules of Procedure. It later moved to a flexible one of (in practice) three to five years, and later three to six years, depending on the gravity and extent of its continuing concerns about each state party. The longer the period, the less pressing will be the Committee's concerns and vice versa.

The reporting system typically begins with the submission of the state report, which is sent for translation into the UN's five working languages (English, French, Spanish, Arabic, and Russian). Following a practice that the Human Rights Committee started, an

## The Role and Impact of Treaty Bodies

---

increasing number of treaty bodies then review the report by utilizing a special rapporteur and/or a task force of a few members<sup>20</sup> to prepare an agreed 'list of issues' (LOI) to submit to the state party to alert it to the matters the Committee will wish to pursue as a priority. Indeed, to maximize the use of time during the actual review, the state party will be encouraged to respond to the LOI in writing. This is intended to permit the committee to move straight to an oral 'constructive dialogue', by way of follow-up to the replies to the LOI.

The dialogue usually takes place over a period of two to three half-day public meetings with a delegation sent by the state party. The state delegation will generally consist of officials from the operative ministries of the country, as well as members of the permanent mission in Geneva or New York, wherever the meeting is held. Predictably, delegations vary in size and expertise.

Although states are encouraged to share the difficulties they face in implementing their obligations with the committees,<sup>21</sup> in practice most reports tend to be self-congratulatory, focusing on the provisions of their constitutions and laws that (p. 628) are, in their view, consistent with those obligations. Reports tend to provide little information on how the rights are enjoyed in practice. It follows that committee members are in need of other sources of information to be able to evaluate the reality behind the report. Yet, except for two committees,<sup>22</sup> the (older) conventions failed to mention or grant authority to their committees to access other information. This was no accidental omission, but was part of the design of a procedure undoubtedly chosen as the least intrusive means available that could be considered consistent with any international monitoring. From the beginning, however, non-governmental organizations (NGOs) took the initiative of providing those members willing to receive it<sup>23</sup> with information on their concerns. This permitted those members to ask questions that tested the picture the official report presented. NGOs were also invited to meet informally with committee members.

As the procedures and committees have evolved, especially after the end of the Cold War and the abandonment of the earlier Soviet-camp allergy to unofficial (critical) information, recourse to information other than that contained in state reports has expanded. At present, the Secretariat makes available to all members information that NGOs specifically submit on the reports, as well as other relevant information, notably that from within the UN system itself, such as the reports of the UN Human Rights Council's special procedures and its Universal Periodic Review.<sup>24</sup> The availability of such independent information permits committee members to ask questions that will penetrate the facade that some states party present.

After the conclusion of the oral dialogue, the country rapporteur provisionally approves a draft report, which a confidential meeting of the plenary committee finalizes. The draft text contains what are generally called 'concluding observations', again following the practice of the Human Rights Committee. The power the ICCPR vests in the Committee to adopt 'general comments'<sup>25</sup> was interpreted for the first fifteen years as precluding the making of country-specific evaluations and only permitting comments on states'

## The Role and Impact of Treaty Bodies

---

obligations in general (see below). Once the political will emerged to make such evaluations, the term ‘concluding observations’ was coined to describe them, so as to distinguish them from what had come to be understood as general comments. The concluding observations typically start with recognition of positive elements or advances since the prior report. The core of their content consists of an expression of ‘concern’ about certain issues, as well as (p. 629) recommendations to address the concerns. The concluding observations are made public towards the end of the session.

Within the reporting system, some committees have introduced the practice of asking for special reports from states. This is essentially an emergency procedure, invoked when the above-mentioned independent sources make information available that suggests that a state is experiencing serious problems in complying with its treaty obligations. While it requested such special reports of some notorious regimes in the 1980s,<sup>26</sup> the Human Rights Committee has rarely followed the practice in recent times, because of the difficulty in agreeing from which states to request submissions. It is an area where members’ backgrounds may play a role in their choices or their reaction to their colleagues’ choices. It will be easier to agree on the usual pariahs than on other candidates. So, after seeking special reports from Israel and Yugoslavia (before it became ex-Yugoslavia) in the 1990s, the Human Rights Committee has not expressly availed itself of this option.<sup>27</sup>

There are two major temporal problems that treaty bodies can face. On the one hand, some states fail to submit their initial and/or subsequent reports on time—sometimes for up to two decades. On the other hand, contradictorily, committees themselves often develop a backlog when considering submitted reports. This leads to the anomaly that the more punctual states are in submitting their reports, the longer the backlog will become. As will be seen later, systemic proposals have been made to address this problem, but none has so far borne fruit.

Meanwhile, the committees themselves have taken measures to attenuate both sides of the problem. In 2001, the Human Rights Committee adopted a rule of procedure that allows it to review a country situation even in the absence of a report,<sup>28</sup> a rule adopted with the aim of inciting the state party to submit a report, or at least send a delegation to begin the dialogue (which would take place in closed session). Such a dialogue could be all the more productive after the LOI technique was available to frame a possible dialogue.<sup>29</sup> The aim was realized more frequently than not, because only a few states party failed to report, send a delegation for the hearing, (p. 630) or respond to the LOI.<sup>30</sup> After the hearing, provisional concluding observations are sent to the state party concerned, with a view to making them public after a period of reflection, should the state party not undertake to present its overdue report. Since 2012, the whole exercise has taken place in public.

States parties to several human rights treaties often attribute the delays in submitting their reports to what they call the ‘reporting burden’, despite the fact that it is a burden they have voluntarily assumed, first, by drafting all the treaties to require reports and,

## The Role and Impact of Treaty Bodies

---

second, by ratifying or acceding to them. Treating the concern seriously, two committees adopted a rule that would permit states, after review of their initial report, to dispense with further preparation of a global report<sup>31</sup> and instead to present a response to the LOI. Of course, the LOI itself could no longer be based on the state's report. Rather, the List of Issues prior to Reporting (LOIPR), as it is known, would be drafted on the basis of the concerns that the concluding observations in the previous report expressed, supplemented by more up-to-date information from the independent sources described earlier, as well as from the follow-up procedures (see below). It is too soon to assess how much this focused reporting procedure will lead to a reduction in the number of overdue reports or even to the amount of time they are overdue.

Measures aimed at reducing the backlog are hard won. The original purpose of adopting the LOIs was, it will be recalled, to streamline the reporting process, and perhaps this could have freed some meeting time for considering more reports. It may well be, however, that it merely permitted the use of the same amount of time for more effective consideration and analysis of each report. Another measure the Human Rights Committee tried was reinforcing the country rapporteur by establishing task forces of four or five members to agree on the LOI, with each of the members having primary responsibility for pursuing particular issues from the LOI. This could then relieve all the other Committee members of the sense of responsibility of being fully engaged in various aspects of each dialogue. While this may have achieved some success, it has not made a substantial dent in the backlog.

Another option is for committees to seek extra meeting time on an ad hoc basis, but in times of budgetary constraint (the rule rather than the exception), the General Assembly's Fifth Committee (on finance and budgetary matters) is reluctant to authorize the necessary funds. Even if it were to make the funds available, it is not easy for the committee members who receive no emoluments<sup>32</sup> to take the (p. 631) extra time from their ordinary working lives to donate to performing additional work for their committees.

### 4.2 General comments

ICCPR Article 40(4) authorizes the Human Rights Committee 'study the reports submitted by states parties' and then transmit its own reports 'and such general comments as it may consider appropriate' to the states parties.<sup>33</sup> As already mentioned, there was no agreement during the first decade and a half of the Committee's existence to make country-specific general comments, but the Committee did take seriously the challenge of making comments of a general nature. It saw the power to make general comments as an opportunity to give guidance to states parties on the content of their obligations under the Covenant, and thus as a means of assisting them in preparing their reports by alerting them to the Committee's expectations concerning the behaviour the provisions of the Covenant required.



## The Role and Impact of Treaty Bodies

---

Although some other treaties do not specifically authorize their committees to make general comments, or they make clear that the comments are meant to be country-specific, it is now the general practice of the treaty bodies to issue comments of a general nature because of their proven utility in clarifying expectations of what the conventions demand of states parties. The practice of CAT vividly illustrates the point. Article 19(3) of UNCAT was drafted in light of the Human Rights Committee's experience and empowered UNCAT to make 'general comments on the report'; the use of the singular ('report', not 'reports') was precisely aimed at encouraging the CAT to make comments on each state party's report. Nevertheless, the Committee did not in fact begin to adopt country-specific evaluations until the Human Rights Committee took that step with its first concluding observations, calling them 'conclusions and recommendations', while reserving the term 'general comment' for the same type of document as the same Committee produced.

The contents of the general comments may concern procedural<sup>34</sup> or substantive matters and, in either case, may indicate the sort of information being sought from states' reports, and/or they may simply describe the committees' interpretations of the law. The latter form is the predominant one. It tends to reflect each committee's accrued experience, both from its reviews of states' periodic reports and the 'views' it has issued on its examination of individual complaints. It will effectively amount to something close to a codification of evolving practice. (p. 632)

The drafting process in the Human Rights Committee, which is similar to that in other treaty bodies, involves first deciding what issue or provision seems in most need of elucidation. The choice will not necessarily involve a new topic. It increasingly happens that the lapse of time and evolution of practice since the adoption of an earlier general comment makes it appropriate to revisit the topic. In this respect, at its March 2012 session, the Committee considered factors such as the Committee's frequency in applying a provision in its concluding observations and views on individual cases under the Optional Protocol, as well as the amount of time since the adoption of any previous general comment. Taking these factors into account, the Committee decided to prepare a new general comment on Article 9 (arbitrary arrest and detention) which had been the subject of a general comment in the 1980s.

After choosing the topic, the Committee appoints one of its members as rapporteur to present a draft to the whole committee which posts the draft text on its website, making it available to stakeholders, such as states parties and interested NGOs. A meeting may be held for the Committee to hear the views of such stakeholders. A 'first reading' text is eventually adopted, with stakeholders again being invited to comment. The Committee, taking account of suggestions that have been made, proceeds to a second (final) reading that can involve amendments and additions to, as well as deletions from, the first reading text. Apart from the intrinsic desirability of making the drafting process more transparent and better informed, the invitation to make suggestions at this key stage of the drafting process makes it possible to address and defuse potential problems. It is instructive to compare the negative reactions of three states to aspects of Human Rights Committee

## The Role and Impact of Treaty Bodies

---

General Comment No 24 (on reservations to the ICCPR), adopted without outside consultation, to the absence of such reactions once General Comment No 33 (on states' obligations under the Optional Protocol) was adopted.<sup>35</sup> In the latter case, several states expressed concerns about language in the first reading text. The Committee was then able to take account of these at second reading, thereby avoiding what would certainly have been a similar reaction on adoption of the final text.

Once adopted, a general comment becomes a basic point of reference for the Committee. Like any codification, the Committee will invoke it as authority in its 'constructive dialogue' with states when considering their reports, in its concluding observations emerging from the dialogue, and in its subsequent views in individual complaints. (p. 633)

### 4.3 Interstate complaints

Either the main treaty or an optional protocol related to all but one of the treaty bodies (the CEDAW Committee) provides the possibility of one state party making a complaint against another one. Uniquely, this function appears as an integral part of the CERD.<sup>36</sup> All the others establish it as an optional extra, either by virtue of depositing a declaration with the UN Secretary-General (as depository of the treaty itself) or by means of ratifying or acceding to the relevant protocol. The undertaking is reciprocal, meaning that only a state party that has accepted the jurisdiction of the treaty body with respect to itself can bring a claim against another such state.

No such complaint has been lodged with a treaty body since the inception of the system. One may only speculate on why this is so. It is a commonplace that states do not easily bring international claims against each other before international adjudicatory or quasi-judicial bodies. Their foreign ministries do not have standing institutions and resources for such ad hoc activities. Particularly in the field of human rights, the impugned state is likely to think of the initiation of the activity as unfriendly and thus disruptive of mutual relations. It also may be that a potential initiating state may fear a counter-claim in respect of its own behaviour.

Yet such claims have occasionally been brought before human rights instances outside the UN system, notably before regional mechanisms. This may well be because states feel more comfortable in such contexts of shared history and culture, *en famille* as it were. Even here they are infrequent. As far as the European Convention of Human Rights system is concerned, most interstate cases have involved issues that have already been bilateral irritants, for instance, in *Ireland v United Kingdom*, in respect of the 'troubles' in Northern Ireland, or *Cyprus v Turkey*, in respect of the northern Cyprus occupation. Cases that states with no direct interest in the impugned state bring, are the rarest of the rare.<sup>37</sup> In both cases mentioned, the situations were serious enough that their persistence represented a potentially existential challenge to the central ethos of the parent organization, the Council of Europe.

## The Role and Impact of Treaty Bodies

---

There is evidently room for research on the politics of bringing or, in the case of the UN human rights treaty bodies, failing to bring interstate complaints.<sup>38</sup> (p. 634)

### 4.4 Individual complaints

All nine core treaties and their protocols now provide for the possibility that their committees receive complaints of human rights violations submitted by or on behalf of individuals whose rights are claimed to have been violated. For most of the life of the system, that was the exception rather than the rule.

Dealing with individual complaints is the most court-like function of the treaty bodies, because it leads to a specific decision about claimed violations and can result in indications of appropriate redress. It is probably for that very reason that states have not easily accepted the idea of the individual complaint jurisdiction. They appear to be more comfortable with the state reports system, precisely because it is a mode of reviewing compliance with the treaties' obligations in a minimally intrusive manner. In any event, none of the treaties automatically provides for the treaty bodies to receive individual complaints. It is always a procedure into which states have to opt, either by becoming party to a protocol or by making a declaration with the UN Secretary-General pursuant to a provision of the treaty.

The Human Rights Committee was the first to begin dealing with individual complaints under the (First) Optional Protocol to the ICCPR, both instruments having entered into force at the same time. Although adopted nearly twenty years apart, the CERD (1965) and UNCAT (1984) were the next to acquire the necessary number of declarations of acceptance for their treaty bodies' jurisdiction over individual complaints in 1982 and 1987 respectively. It was not until the 2000s that individual treaties or protocols to other treaties brought the present across-the-board jurisdiction.<sup>39</sup>

The Human Rights Committee's accrued experience remains the most numerous and developed. That of the CERD Committee, under CERD Article 14, is more limited, followed by that of the CAT, under UNCAT Article 22. The much more recent experience of the CEDAW Committee under its 1999 Optional Protocol is also well under way. In general, the treaty provisions and treaty bodies have tended to be modelled on the ICCPR Optional Protocol and to follow the practice of the Human Rights Committee, so what follows is mainly based on that practice.

The proceedings are confidential, in the sense that all the Committee's deliberations under the Protocol take place in closed session. It is a written procedure. Authors of the communications (as the complaints are called) or the alleged victims, acting without representation, send the communication to the UN Secretariat (the Office of the High Commissioner for Human Rights). On receipt of a summary from the Secretariat, the Committee's Special Rapporteur for New Communications and Interim Measures decides

## The Role and Impact of Treaty Bodies

---

whether or not there is the appearance of an arguable violation of the Covenant. If so, he or she will decide that the case should be registered. (p. 635)

The Committee's Rules of Procedure allow it to grant interim measures of protection if there is a danger of irreparable harm to the alleged victim. Usually, such harm will entail the real risk of loss of life, as in the carrying out of a death sentence, or of other grave harm to the person, such as being sent to a country where there is a real risk of treatment in violation of the Article 7 prohibition of torture or cruel, inhuman, or degrading treatment or punishment. Other interim measures have responded to fears that the author or authors of the communications (other than the alleged victim) are at risk of serious harm to themselves. The same Special Rapporteur, acting on behalf of the Committee, makes the decision on interim measures. This is mainly because the urgency of the problem does not permit deferral of action to actual sessions of the Committee. If a state party fails to respect the requested measures, the Committee will consider that to be a grave violation, not of the Covenant itself, but of the Optional Protocol.<sup>40</sup> It considers such action to be incompatible with good faith compliance with the Optional Protocol process. It is the only example of the Committee's considering non-compliance with its decisions as being *ipso jure* a violation of a binding obligation. Interestingly, its practice here foreshadowed similar decisions by the International Court of Justice and the European Court of Human Rights. They, too, decided that, contrary to earlier doubts, their indications of provisional measures were binding.<sup>41</sup> The CAT followed suit in 2005.<sup>42</sup>

Theoretically, as is customary in international judicial or arbitral proceedings, there are two main phases in the Committee's handling of a case: admissibility and merits. The first deals with essentially procedural matters, such as whether domestic remedies have been exhausted; the second concerns the substance of the complained-of violation. To save the time of the Committee, the states parties, and the complainants, the two phases are usually telescoped into one. However, if the Special Rapporteur decides that there are serious admissibility questions to answer, he or she will split the phases, requesting the state party in question to respond first to those questions. Even where the initial decision is to stick with the usual practice of requesting observations on admissibility and merits together, states may request such a split. In that case, it falls to the Special Rapporteur to make the decision on behalf of the Committee.

Sometimes, it appears to the Special Rapporteur that, while there are sufficient grounds to register a case, there are such doubts as to its real admissibility that he or she will decide to prepare a draft inadmissibility decision without even referring the complaint to the state party for its comments. It will be up to the Committee to make the eventual decision. (p. 636)

Except for the latter kind of case, the next stage begins with a case rapporteur being charged with overseeing the treatment of the case. This rapporteur will receive a draft decision from the Secretariat. The rapporteur will then decide whether to follow the line the draft suggests or to request a different approach. He or she then submits a text to a Committee Working Group on Communications, generally consisting of eight to ten of the

## The Role and Impact of Treaty Bodies

---

Committee's eighteen members, which meets in the week preceding each session. This is intended to, and probably does, permit a range of members to examine the issues at stake and reduce the amount of plenary time that has to be devoted to considering individual cases. However, there is no guarantee that other members of the Committee will not wish to discuss any particular case when it arrives at the plenary. The Working Group may deem that the solutions to some cases (or aspects of the cases) are so uncertain that alternative options are put to the plenary. The plenary will then make a decision, and, while consensus will be sought, it is not uncommon for a vote or at least a straw vote to be taken to settle the matter. In such cases, individual members will be free to express separate or, if necessary, dissenting opinions.

### 4.5 Inquiries

The adoption of UNCAT in 1984 brought with it a technique similar to that the inter-American system uses. Article 20 gave the CAT the power, of its own volition, to initiate an inquiry into an apparent systematic practice of torture. It was not, as such, a complaint-based procedure. There were no restrictions on the sources of information. There was only the objective requirement that the information be 'reliable' and the subjective one that the information 'contain well-founded indications' of the practice. This innovation was controversial from the beginning, and no agreement could be reached on it within the UN Commission on Human Rights, which oversaw the drafting process. It was only when the General Assembly was on the verge of adopting the draft instrument that a consensus was found that retained the provision but allowed states parties to make a reservation by which they could opt out of the procedure.<sup>43</sup> This was an improvement on the opt-in processes applicable to individual and most inter-state complaints procedures, as it placed the onus on the state to act if it wished to avoid being subject to the procedure.

Subsequent human rights treaties and optional protocols to earlier treaties also later adopted the power. So far, the only practice available is that of CAT and the CEDAW Committee, with CAT having had a substantial head start.

In fact, the UNCAT procedure has been relatively little used. In over a quarter of a century, the CAT has initiated only seven inquiries—or less than one every three years—that have reached the point of completion and thus publication.<sup>44</sup> This may in some measure be attributable to the original rule of procedure adopted to give effect to UNCAT Article 20. It is couched in terms that seem to require the submission of a complaint alleging the apparent systematic practice, rather than leaving it to the Committee to rely on other sources,<sup>45</sup> as originally contemplated. Other possible reasons, not excluding the quality of some CAT reports under Article 20, may explain the under-utilization of the procedure.<sup>46</sup>

### 4.6 Other functions

---

## The Role and Impact of Treaty Bodies

---

### 4.6.1 Committee on Enforced Disappearances

The CED is broadly modelled on the other treaty bodies, albeit—as noted—there is no automatic reporting requirement beyond that of submitting an initial report. It does, however, have two functions that are novel. The first is the power to refer a serious situation directly to the attention of the General Assembly. This is a reflection of the gravity with which the international community rightly regards the appalling phenomenon.

The second is the power to take an urgent action by intervening with a state party with a view to preventing any enforced disappearance or avoiding its prolongation. The intervention may also include a recommendation for the taking of interim measures.<sup>47</sup> This function is different from the interim measures that other Committees may indicate. The latter are merely designed to preserve the integrity of the individual complaints procedure. Indeed, the CED's urgent action procedure is independent of its power to deal with individual complaints which, as with other treaty bodies, is optional for the state in question.<sup>48</sup> It is also anomalous in another sense. The making of urgent appeals has long been a core function of the thematic 'special procedures' of the Human Rights Council. Indeed, the first special procedure, the Working Group on Enforced or Involuntary Disappearances created in 1980, developed the urgent appeal techniques. It is not clear whether the CED's urgent appeal procedure is meant to act alongside the Working Group's urgent action procedure or will be an alternative to it.<sup>49</sup> (p. 638)

### 4.6.2 Sub-Committee on the Prevention of Torture

As earlier heralded, the Sub-Committee that OPCAT created has functions that are fundamentally different, both in nature and purpose, from those of the other treaty bodies. Intended to be preventive rather than reactive,<sup>50</sup> it is in fact aimed at engaging in and promoting a true monitoring function. Broadly patterned on the work of the Committee for the Prevention of Torture under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, it has the dual task of both visiting places of detention in states parties and cooperating with national preventive mechanisms that the parties are required to establish to engage in such visits at the domestic level. The reports of its visits are, in principle, confidential. The SPT is expected to make regular visits to states without the need for prior authorization. This distinguishes it from the inquiry procedure of several treaty bodies that begin with UNCAT Article 20. The only real element that the SPT has in common with the other treaty bodies is the very limited resources available for it to discharge its worldwide mandate.

## 5. Follow-Up Procedures

## The Role and Impact of Treaty Bodies

---

A number of treaty bodies have adopted follow-up procedures to encourage compliance with recommendations in their concluding observations on periodic reports and views on individual cases. As far as action on concluding observations is concerned, the stimulus is to avoid there being a vacuum between one set of concluding observations and the next report. As regards views, it is to encourage serious consideration of them, rather than letting them be forgotten.

There is nothing in the treaties contemplating follow-up activities, and their initiation would have to be seen as another deployment of what the committees consider their implied powers. States parties do not seem to have made any significant challenge to their implementation. On the contrary, most states seem willing to engage in the dialogue that the procedures entail.

Again drawing on the practice of the Human Rights Committee, the follow-up procedures work as follows. In the case of concluding observations, the observations themselves single out a small number of recommendations (usually three or four) that the Committee requests that the state party implement or begin to (p. 639) implement within a year. These are usually the recommendations arising out of the most serious concerns and which may have some prospect of being addressed (if not resolved) with reasonable rapidity. In the case of views on individual cases, states are given six months to respond on the effect they have given to the measures required to redress the violation.

The Committee appoints two Special Rapporteurs, one on concluding observations and one on views. If the state party has not already provided a response to the issues raised, the rapporteurs will contact them—in writing or, as necessary, in a direct meeting—with a view to eliciting a response or discussing the content of any response. The overall response obtained will then be evaluated on a scale ranging from satisfactory/partly satisfactory to unsatisfactory. At each Committee session, the Rapporteur gives an updated report, and the Committee then decides what further action to take. The process on Concluding Observations ceases once the next report is due, since the latter should be the repository of all information relevant to the state's compliance with its treaty obligations.

## 6. The Legal Nature and Effect of the Committees' Output

The outcomes of the committees' procedures (concluding observations, general comments, and jurisprudence) are not per se legally binding, but they have real legal significance. It should first be pointed out that in certain procedural matters, their decisions are binding. For example, where the treaty obliges a state party to provide a report at a time the Committee will determine, the Committee's decision of the time will

## The Role and Impact of Treaty Bodies

---

*ipso jure* be binding on the state in question. It has already been seen that the Human Rights Committee and CAT consider their interim measures to be obligatory, if only to protect the integrity of the complaint process.

As regards the substantive outcomes, the legal impact must perforce be less direct. While their formal status is that of recommendations, that does not dispose of the matter. Resolutions of the UN General Assembly also only have the formal status of recommendations, yet their ability to affect the content of the law is substantial. Assembly resolutions, of course, can evince state practice. While that is not the case for treaty body determinations, they may contribute to community expectations of appropriate state behaviour under human rights treaty obligations. (p. 640)

This can be especially evident in actual judicial practice. The International Court of Justice (ICJ) has more than once illustrated the point. Famously, in the *Wall* case, it invoked the practice of the Human Rights Committee that considered the jurisdictional reach of Covenant obligations to extend beyond a state party's frontiers.<sup>51</sup> Both Israel, whose acts were at issue in the case, and the United States challenged this interpretation. The Court cited the Committee's 'constant practice', both in earlier Optional Protocol cases and its concluding observations on Israel, to support its own interpretation of the extra-territorial applicability of the Covenant.<sup>52</sup> It also invoked the Committee's General Comment No 27<sup>53</sup> in support of its interpretation of Article 12(3).<sup>54</sup>

In the subsequent *Diallo* case,<sup>55</sup> the Court elaborated on its view of the significance of the Committee's jurisprudence. Interpreting ICCPR Articles 13 and 12(4) (on freedom of movement) the Court invoked both an Optional Protocol case<sup>56</sup> and General Comment No 15.<sup>57</sup> Later in the same decision, the Court addressed issues under ICCPR Article 9 (liberty and security of person/arbitrary arrest and detention). Referring to their scope ('any form of arrest or detention decided upon and carried out by a public authority'), it invoked General Comment No 8.<sup>58</sup>

The Court explained its understanding of the significance of the Committee's work as follows:

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the



## The Role and Impact of Treaty Bodies

---

individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.<sup>59</sup>

(p. 641)

This respectful understanding of the authority of the Committee's jurisprudence may owe something to the Committee's own approach to its activities under the Optional Protocol. In its General Comment No 33, the Committee explained that its views 'are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions'.<sup>60</sup> For the Committee, these were 'important characteristics of a judicial decision', albeit the Committee was 'not, as such...a judicial body'.<sup>61</sup> The Committee exercised its function of adopting its views in the belief that they represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.<sup>62</sup>

The substantial body of Human Rights Committee jurisprudence, accrued over some three decades, is also relevant to the authority with which the ICJ and, for that matter, the European and Inter-American Courts of Human Rights, which will frequently invoke Committee practice with approval, view it.<sup>63</sup> The more limited practices of the CERD Committee, CEDAW Committee, and CAT make it harder to conclude unambiguously that their case law would enjoy similar authority to that of the Human Rights Committee. There is nothing in principle to suggest that it should be treated any differently.<sup>64</sup> However, the output has not been such as to elicit the extent of authoritative judicial approval that that of the Human Rights Committee has acquired.

Meanwhile, the very important role of national courts must be stressed. Occasionally, a state party will even make a Committee decision directly enforceable in its courts or will permit the reopening of cases which have already concluded.<sup>65</sup> Many states' constitutions give various levels of authority to international treaties generally, or human rights treaties in particular. This leads to some invocation of Committee case law, as increasingly noted in comparative law scholarship.<sup>66</sup> (p. 642)

## 7. Problems the Treaty Body System Faces

The long-standing and intensifying central challenge confronting the system is that there is too much work to be done, in too short a time, with inadequate resources. It is not a new problem. On the contrary, the system has undergone three major reviews in as many decades.

## The Role and Impact of Treaty Bodies

---

As regards the reporting system, the most salient manifestations of the problem are that there are substantial delays in states submitting their reports; there are significant backlogs in the treaty bodies' examining the reports; the more the former problem is eased, the more serious the latter one will become; and, as regards the individual complaints system (for the three committees mainly engaged in this activity at present), there is a rough similarity. There is a significant backlog of cases waiting to be dealt with, despite the fact that the potential number of cases that could be brought before the bodies if the procedures were better known could overwhelm the whole system.<sup>67</sup> Meanwhile, there are many criticisms that the quality of the output needs improvement, such as more specific recommendation to government in concluding observations on their reports and better reasoned justifications of the views in individual cases.<sup>68</sup>

Different problems may result from different causes. For example, many states attribute the delays in their submission of reports to the 'reporting burden' (having to report regularly to eight treaty bodies),<sup>69</sup> even though it is a self-inflicted burden. Reasons for the backlog in processing reports may vary from Committee to Committee; some have more states parties than others (and so more reports); some have more meeting time than others (three, six, or nine weeks of plenary meetings annually); or the Secretariat does not have the resources to translate the reports promptly, or to translate at all states' written responses to the list of issues. Many of the issues the Committees deal with are duplicative, if only because much of the subject matter they deal with is relevant to more than one treaty. After all, there is no basic issue of concern to the specific subject or victim-group treaties that is not also of concern to the general treaties: the ICCPR and the ICESCR.<sup>70</sup> (p. 643)

As regards individual complaints, some of the same reasons may apply. It is clear that in the last two or three years, the Secretariat has not been able to process the complaints to the point of being able to present as many draft outcomes as the HRC would have been able to deal with in the amount of time it typically allocates to this aspect of its functions. For a number of years there was a particularly large backlog of, and thus long delays in dealing with, cases from Russian-speaking countries, chiefly because the Secretariat lacked enough Russian-speaking human rights staff. The reasons for the Secretariat's problems are various, and space does not allow inquiry into them. One obvious one, however, is the expansion of the number of bodies dealing with individual cases and the number of cases being submitted to them, without commensurate new resources being put in place to process them.

Before considering the various proposals to resolve the problem(s), it is worth recalling that at the heart of it all is the multiplication of treaty bodies. Without that, there would not have had to be multiple reports, nor extensive duplication of concern. It may be speculated that the problem could have been avoided if the Covenants had taken less time to draft (which led to the adoption of CERD and its own treaty body), or if they had taken less time to enter into force—nearly a decade after their adoption (by which time the drafting of CEDAW had started).<sup>71</sup> An attempt was made to stop proliferation at the time of drafting the UNCAT, the original Swedish draft of which envisaged that the treaty

## The Role and Impact of Treaty Bodies

---

body should be the Human Rights Committee. This attempt at rationality (and, it must be said, at saving money) stopped in its tracks when the UN Legal Counsel of the time advised the UN Commission on Human Rights working group responsible for drafting the Convention that, to give that Committee such functions would require an amendment to the Covenant.<sup>72</sup> Whether or not he was right with respect to the law,<sup>73</sup> the working group had no real choice but to make provision for a further treaty body. The last attempt to come to grips with the problem was during the drafting of the CPED. The Commission on Human Rights considered various options, including (p. 644) making the Human Rights Committee or the CAT the treaty body, as well as a separate one.<sup>74</sup> In the end, pressure from constituencies that focused primarily on the issue persuaded the drafters that this most terrible phenomenon should have its own treaty body. Nevertheless, Article 27 of the CPED envisages the calling of a conference of states parties within between four and six years of the treaty's entry into force, to consider transferring the CED's powers to another body. This was agreed, in the context of the proposal being discussed at the time, to replace the existing panoply of committees with just one unified standing committee (see below). The failure of that proposal may be taken as ensuring that the CED will retain its separate existence.

## 8. Reviews and Proposals

In the 1990s, at the request of the General Assembly, then-CESCR member Philip Alston produced a series of reports.<sup>75</sup> In his 2002 report on strengthening the United Nations, after reviewing the whole UN system, the Secretary-General made suggestions in respect of the treaty bodies. In 2006, the High Commissioner for Human Rights, Louise Arbour, undertook a review of the treaty body system and presented a proposal that her 2005 Plan of Action had heralded. At the time of writing, a dual process is under way. The current High Commissioner, Navanethem Pillay, initiated and collaborated with a wide-ranging series of consultations with various 'stakeholders'—states, treaty body members, national human rights institutions, and civil society/NGOs—with a view to strengthening the system. The collaborative element has been the 'Dublin Process'. This consists of a series of meetings beginning and ending in the Irish capital, supported by the Irish government, at the initiative of the University of Nottingham's Human Rights Law Centre, led by its co-Director and HRC member Professor Michael O'Flaherty. Between the Dublin meetings, consisting predominantly of treaty body members, there were other meetings, including (p. 645) the Marrakesh, Poznan, Seoul, and Pretoria meetings. The product of the Dublin Process is the Dublin Outcome Document on the Strengthening of the United Nations Human Rights Treaty Body System,<sup>76</sup> which has 126 recommendations and which the chairs of all the treaty bodies have signed. The High Commissioner's own report was published in June 2012 offering twenty-three proposals.<sup>77</sup> Meanwhile, parallel to this process, the UN General Assembly initiated its

## The Role and Impact of Treaty Bodies

---

own review.<sup>78</sup> As of the time of writing no substantive proposal had emerged, nor was it expected to until at least late-2013.

The best-known proposal for addressing a number of the problems postulated earlier is the idea of replacing the existing eight part-time treaty bodies (with unpaid members) with one unified, full-time professional treaty body. Alston cautiously mooted it, and then Louise Arbour championed it.<sup>79</sup> The advantages are evident. States would only have to report to one body (probably with one report), thus radically reducing the 'reporting burden', and the body would avoid unnecessary duplication. Given that currently treaty bodies together meet in plenary session for fifty-three weeks per year, involving members travelling to and from the meetings multiple times, it could well be that the proposal would not have major financial implications.

However, High Commissioner Arbour's proposal did not prosper. It is only possible to speculate as to the reasons why. The general perception was that the 'options paper' that contained the proposal only provided one option and in that sense was mis-labelled. Several of the treaty bodies and the constituencies supporting them, especially those whose treaties were victim-specific (racial group (CERD) gender (CEDAW), age (CRC)), also expressed clear opposition. There was a perceptible concern that their specificities would be submerged or at least lose prominence if left in the hands of what would perform be a generalist body like the Human Rights Committee.

Another reason sometimes mooted was that some states feared that a unified body might become a precursor for a world human rights court. Certainly, this was a project that Manfred Nowak and Martin Scheinin (the latter then a Human Rights Committee member) had for some time been advocating. Indeed, the present (p. 646) writer also suggested that the High Commissioner might herself espouse it.<sup>80</sup> That, however, had to be seen as a separate idea. It would have been totally unrealistic to envisage that one treaty body performing all the functions of existing treaty bodies could easily evolve into a judicial body.

The CERD Committee made one original proposal during the Arbour-initiated review that would have hived off the function of adjudicating individual complaints to a single body.<sup>81</sup> Such a body could certainly have been perceived as a potential stalking-horse for a world human rights court. No one took up that proposal, either.

Meanwhile, consultations were proceeding on the idea of a single consolidated report that would serve as the report on each treaty to each Committee. The Secretary-General in his 2002 report *Agenda for Further Change* had advised this.<sup>82</sup> After protracted consultations, the only notable outcome was an expanded 'common core document'.<sup>83</sup> Perhaps it is inevitable that, as long as there is one treaty body per treaty, each will feel more comfortable with a form and style of reporting reflecting the substantive specificities of each treaty and the accumulated experience of each body.

## The Role and Impact of Treaty Bodies

---

One ambitious proposal to emerge from the current review is that of a comprehensive reporting calendar. This would have each state expected to submit, say, two reports annually to each of the treaty bodies, which would then schedule and examine the reports according to a fixed timetable. The report would consist of responses to the LOIPR. Absent such responses, and therefore the report, the consideration of the country situation would proceed anyway. The proposal ignores the legal problem of the different periodicities for which the different treaties provide. Perhaps more challenging would be the states' willingness to accept such a strait-jacket in practice. At the last consultation of states that the High Commissioner convened (p. 647) before finalizing her report, which occurred in New York between 2 and 3 April 2012, however, a substantial number of states expressed interest in the idea.<sup>84</sup>

In reality, most of the changes in treaty body practice have come from the treaty bodies themselves seeking to be more effective, more efficient, and more productive, even with the ever inadequate resources available to them either directly or from the Secretariat. Salient examples in the reporting process include the original development of the list of issues drawn up after the submission of reports, the LOIPR system, and the country situation hearings in the absence of a report. Indeed, ingeniously, the comprehensive reporting calendar idea is predicated on the existence of these.

A constant goal of the treaty bodies in improving their effectiveness has been to seek a certain harmonization of work. This makes the Secretariat's task much easier, as well as making more predictable the experience of state officials who have to prepare and then defend their states' reports. It also permits, through the annual meetings of Committee chairpersons, a certain cross-fertilization and dissemination of new ideas and practices. There have been attempts to give the chairpersons' meeting decision-making power, and these need to be treated with caution. Apart from legal and even political obstacles, rigid harmonization could entail the sort of sclerosis that would prevent the kind of experimentation that has led to improving methodology.

It has been seen that no 'silver bullet' has so far commended itself to what many, especially the governments that created it, consider a dysfunctional system. That may not always be the case. Occasionally, a catalytic event or chain of events occurs that makes radical institutional change, considered unrealistic yesterday, become tomorrow's necessity. The experience in the 1990s that brought us the International Criminal Court, only a decade earlier the hobby-horse of a few visionaries, should remind us that something similar could happen with the world human rights court idea. If that were to materialize, it would probably lead to a root and branch re-appraisal of the current treaty body system.

## Further Reading

## The Role and Impact of Treaty Bodies

---

Alston P and Crawford J (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP 2000)

Bayefsky AF (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International 2000) (p. 648)

— *The UN Human Rights Treaty System: Universality at the Crossroads* (Kluwer Law International 2001)

Conte A and Burchill R, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2nd edn, Ashgate 2009)

Craven M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (OUP 1995)

Ghandhi PR, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Ashgate 1998)

Hanski R and Scheinin M, *Leading Cases of the Human Rights Committee* (2nd rev edn, Åbo Akademi University 2007)

Ingelse C, *The UN Committee against Torture: An Assessment* (Martinus Nijhoff 2001)

Joseph S, Schultz J, and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2004)

Keller H and Ulfstein G (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy: Studies on Human Rights Conventions* (CUP 2012)

McGoldrick D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (OUP 1994)

Möller JT and de Zayas A, *The United Nations Human Rights Committee Case Law 1977-2008: A Handbook* (Engel 2009)

Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005)

Odello M and Seatzu F, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2012)

Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (CUP 2011)

### Notes:

(1) See eg Vratislav Pechota, 'The Development of the Covenant on Civil and Political Rights' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP 1981) 35.

## The Role and Impact of Treaty Bodies

---

(2) Under UN Charter Art 10, the General Assembly only has the power to make recommendations to member states. However, from the time of the UDHR's adoption, there were those who argued that its provisions articulated the human rights and fundamental freedoms to which the UN Charter referred, especially Art 1 (purposes) and Arts 55 and 56, which were said to contain (and have since become accepted as containing) an obligation to comply with human rights. Eg Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 145–54 (arguing for the binding force of the Charter provisions), 408–17 (disagreeing with the 'indirect' legal authority thesis at that time). cf Nigel S Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 ICLQ 321, 324–27 (some forty years after the adoption of the UDHR, suggesting that the UDHR had been found to have legal authority). See also Olivier de Schutter, 'The Status of Human Rights in International Law' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights 2009) 39–41.

(3) See generally Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2nd edn, Sijthoff & Noordhoff 1980).

(4) Another example of this in the UN context was the creation in 1980 of the Working Group on Enforced or Involuntary Disappearances, the first thematic mechanism of the UN Commission on Human Rights. It became, without any prior design, the precedent for a network of thirty-five 'thematic special procedures' (see previous chapter in this *Handbook*).

(5) See generally Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff 1993); Marsha A Freeman, Christine Chinkin, and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (OUP 2012).

(6) See generally J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988); Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999); Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (OUP 2008); Nigel S Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn, OUP 2009).

(7) See generally Alfred Glenn Mower Jr, *The Convention on the Rights of the Child: International Law Support for Children* (Greenwood Press 1997); Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999).

## The Role and Impact of Treaty Bodies

---

(8) Paul de Guchteneire, Antoine Pécoud, and Ryszard Cholewinski (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (CUP 2009).

(9) Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009).

(10) Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 UN Convention* (Martinus Nijhoff 2007).

(11) ECOSOC Res 1985/17 (28 May 1985) UN Doc E/Res/1985/17. Meanwhile, the Optional Protocol to the ICESCR provides for a range of functions for the Committee, thus indirectly endowing it with treaty-based status.

(12) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See generally Nowak and McArthur (n 6) 879–1192; Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (OUP 2011).

(13) UNGA 'Implementation of Human Rights Instruments' (July 2012) UN doc A/67/28442, para 36, Annex 1 (Addis Ababa Guidelines).

(14) As the Human Rights Committee (HRC) pointed out, 'All branches of government (executive, legislative and judicial)...are in a position to engage the responsibility of the State Party'. UNHRC 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 4. Indeed, the courts have been found to have been responsible for ICCPR violations. See Nigel S Rodley, 'The *Singarasa* Case: *Quis Custodiet...?* A Test for the Bangalore Principles of Judicial Conduct' (2008) 41 *Is LR* 500. But it is the executive branch that is most apt to violate human rights.

(15) Eg ICCPR, Art 28(2). See also UNCAT, Art 17(1).

(16) Mainly to be found in the 1969 Vienna Convention on the Law of Treaties, Arts 31, 32.

(17) UNHRC, 'Rules of Procedure of the Human Rights Committee' (11 January 2012) UN Doc CCPR/C/3/Rev.10, rule 51 fn. It should be noted that all the treaties provide for the treaty bodies to adopt rules of procedure that will spell out the modes of their operation—issues not usually extensively dealt with in the body of the treaty. Here, the bodies will often introduce methods of operation that the treaty does not foresee, but which are perceived as pertaining to necessarily implied powers of the body. Examples include the issuance of interim measures in respect of individual complaints and follow-up procedures, as discussed below.

(18) See Section 4.1 in this chapter.



## The Role and Impact of Treaty Bodies

---

(19) See generally Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 *Human Rights LR* 27; Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy: Studies on Human Rights Conventions* (CUP 2012).

(20) The Human Rights Committee is the only one that keeps confidential the identities of its country rapporteurs or, as the case may be, its task force members.

(21) Eg ICCPR, Art 40(2); ICESCR, Art 17(2); CEDAW, Art 18(2).

(22) The CESCR (as a sub-body of the ECOSOC, NGOs in consultative status have certain rights of written and oral intervention) and the CRC Committee (includes NGOs in the notion of 'other competent bodies' which it may consult under CRC Art 45(a)).

(23) Some were not and took the view that the Secretariat was not even permitted to distribute information that had no formal status under the Covenant.

(24) See the previous chapter in this *Handbook*; Nigel S Rodley, 'UN Treaty Bodies and the Human Rights Council' in Keller and Ulfstein (n 20).

(25) Article 40(4).

(26) Eg Iran and El Salvador: see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005) 716.

(27) On 28 July 2005, after twelve months of correspondence relating to the (by now) seven-year overdue report of the United States of America, the Committee informed this State Party that unless the Committee received the report by 17 October 2005, the Committee would proceed to adopt an LOI regarding the human rights issues, domestic and extra-territorial, that arose out of its post-11 September 2001 anti-terrorist measures. (It was submitted on 21 October 2005.) While the Committee refrained from invoking specific rules of procedure, it may be inferred that (1) in the absence of a periodic report, it was seeking a special report; and (2) it was at the point of initiating a country situation review in the absence of a report pursuant to Rule 70 of the Rules of Procedure (n 17) below and text. UNHRC, 'Report of the Human Rights Committee: Vol I' (2005) UN Doc A/60/40, para 75.

(28) UNHRC, 'Rules of Procedure' (n 17) rule 70.

(29) Of course, where there is a hearing in the absence of a report, the LOI has to be compiled on the basis of other sources of information.

(30) Gambia and Equatorial Guinea, each of which was eventually declared 'in non-compliance with its obligations under article 40 of the Covenant', as well as Seychelles, which did then submit comments on the provisional concluding observations (see immediately below) and promised a report. UNHRC, 'Report of the Human Rights

## The Role and Impact of Treaty Bodies

---

Committee: Vol I' (2011) UN Doc A/66/40, paras 69 (Gambia), 71 (Equatorial Guinea), 78 (Seychelles). The most recent was Belize: UN Doc CCPR/C/BLZ/CO/1 (2013).

(31) The Human Rights Committee and CAT.

(32) Under ICCPR, Art 35; CEDAW, Art 17(8); and CRC, Art 43(12), the respective treaty bodies are supposed to receive 'emoluments'; calling them 'honoraria', the General Assembly decided to reduce these to USD 1.00. UNGA Res 56/272 (23 April 2002) UN Doc A/Res/56/272.

(33) See generally Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Keller and Ulfstein (n 19).

(34) Eg UNHRC, 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33. See below.

(35) See, on the reactions of France, the United Kingdom, and the United States of America to General Comment No 24, JP Gardner and Christine Chinkin (eds), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (British Institute of International and Comparative Law 1997).

(36) Article 12.

(37) The *Greek Case*, which Denmark, Norway, Sweden, and The Netherlands brought against the Greece of the post-1967 military junta, took place before the former European Commission of Human Rights. It could not reach the Court, as Greece had not accepted the (then optional) compulsory jurisdiction of the Court. The same applied to the case brought by Denmark, France, Norway, Sweden and The Netherlands against Turkey.

(38) cf the contrary practice the International Labour Organization, with its unique tripartite structure, in Janelle Diller's chapter in this *Handbook*.

(39) PR Gandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Ashgate 1998); Geir Ulfstein, 'Individual Complaints' in Keller and Ulfstein (n 19) 73 and generally.

(40) *Piandiong et al v Philippines*, para 5.2.

(41) *LaGrand Case (Germany v United States of America)*; *Mamatkulov and Askarov v Turkey*, para 129 (having cited *Piandiong* (para 114) and *LaGrand* (para 117)).

(42) In respect of Art 22 (the complaints procedure): *Maftoud Brada v France*.

(43) Article 28.

(44) Turkey (1994), Egypt (1996), Peru (2001), Sri Lanka (2002), Mexico (2003), Serbia and Montenegro (2004), and Brazil (2008).

## The Role and Impact of Treaty Bodies

---

(45) Rule 75(1). Nowak quotes an interview with the Secretariat, according to which the Committee has begun to be more proactive and initiate inquiries without relying on a specially submitted request. Nowak and McArthur (n 6) 675; text accompanying (n 63).

(46) See Rodley and Pollard (n 6) 219. There is clearly room for much more detailed research and analysis into such use as has been made of the procedure and reasons why its use has been so limited.

(47) Article 30.

(48) Article 31.

(49) Article 31(2)(c). See Nigel S Rodley, 'UN Treaty Bodies and the Human Rights Council' in Keller and Ulfstein (n 19) 343.

(50) On the elusive meaning of prevention, see Nigel S Rodley, 'Reflections on Working for the Prevention of Torture' (2009) 6 Essex Human Rights Review 21, 26–29.

(51) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*.

(52) *Wall Case* (n 51) paras 109–111.

(53) UNHRC, 'General Comment No 27: Freedom of Movement (Art 12)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9.

(54) *Wall Case* (n 51) para 136.

(55) *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*; see Sandy Ghandhi, 'Human Rights and the International Court of Justice in the *Ahmadou Sadio Diallo Case* (2011) 11 Human Rights Law Review 536.

(56) *Diallo* (n 55) para 66, referring to *Maroufidou v Sweden*.

(57) *Diallo* (n 55) para 66, citing UNHRC, 'General Comment No 15: The Position of Aliens under the Covenant' (11 April 1986) reprinted in UNHRC, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (12 May 2004) UN Doc HRI/Gen.1/Rev.7.

(58) *Diallo* (n 55) para 77, citing UNHRC, 'General Comment No 8: Right to Liberty and Security of Persons (Art 9)' (30 June 1982) reprinted in UNHRC, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (12 May 2003) UN Doc HRI/GEN/1/Rev.6.

(59) *Diallo* (n 55) para 66.

(60) UNHRC, 'General Comment No 33' (n 34) para 11.

(61) UNHRC, 'General Comment No 33' (n 34) para 11.

## The Role and Impact of Treaty Bodies

---

(62) UNHRC, 'General Comment No 33' (n 34) para 13.

(63) Eg *Mamatkulov* (n 41) para 114; *Case of Caesar v Trinidad and Tobago*, para 63 (corporal punishment).

(64) For instance, in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, the Court had to choose between seemingly contradictory views of the CAT in respect of *ratione temporis* matters in UNCAT; it preferred the approach in which the Committee addressed the matter directly, even though it was an earlier case—indeed the first individual case the Committee decided. *Belgium v Senegal*, paras 100–102.

(65) Eg Colombia (enforceable) and Norway (re-openable). Rosanne Van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Keller and Ulfstein (n 19) 363–67.

(66) See generally, the up-to-date article by Van Alebeek and Nollkaemper (n 65); Christof Heyns and Frans Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International 2002).

(67) cf European Court of Human Rights, which, as of 30 June 2012, had 144,150 pending cases. Council of Europe, 'Pending Applications Allocated to a Judicial Formation' (31 October 2012) <[http://www.echr.coe.int/NR/ronlyres/D552E6AD-4FCF-4A77-BB70-CBA53567AD16/0/CHART\\_30062012.pdf](http://www.echr.coe.int/NR/ronlyres/D552E6AD-4FCF-4A77-BB70-CBA53567AD16/0/CHART_30062012.pdf)> accessed 1 September 2012.

(68) See Henry J Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP 2000) 38–45.

(69) It will be recalled that CED does not require regular reporting after the initial report.

(70) While duplicative activities may well be seriously burdensome for governments, from a human rights perspective, in which moral suasion is the only tool available, duplication may mean reinforced activity.

(71) Note that CEDAW was drafted outside the human rights bodies. The Commission on the Status of Women (CSW) drafted it, whereas the (ex-) Commission on Human Rights drafted most of the other human rights treaties. Both of these bodies would then forward the texts, through ECOSOC, for adoption by the General Assembly (Third Committee). In any event, it would have been unlikely that a body (CSW), established because the Commission on Human Rights was not trusted to take proper account of gender issues, would have been willing to trust the generalist ICCPR treaty body to be appropriate for monitoring CEDAW.

(72) See Burgers and Danelius (n 6) 76.

## The Role and Impact of Treaty Bodies

---

(73) The basic argument of the Legal Counsel was that the functions of the Committee were limited to those for which the ICCPR provided. It may be noted that the same argument, if applied to the President of the International Court of Justice, would prevent that august officeholder, under the Court's Statute, from exercising such traditional functions as appointing arbitrators under international arbitral agreements.

(74) See the report that Mr Manfred Nowak, an independent expert charged with the examination of the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances. Report of Mr Manfred Nowak, 'Civil and Political Rights, Including Questions of: Disappearances and Summary Executions' (8 January 2002) UN Doc E/CN.4/2002/71.

(75) See Final report of the independent expert, Mr Philip Alston, on enhancing the long-term effectiveness of the United Nations human rights treaty system. Report of Philip Alston, 'Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System' (27 March 1997) UN Doc E/CN.4/1997/74.

(76) UN High Commissioner for Human Rights, 'Outcome Document: Strengthening the United Nations Human Rights Treaty Body System' (11 November 2011) <[http://www2.ohchr.org/english/bodies/HRTD/docs/DublinII\\_Outcome\\_Document.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/DublinII_Outcome_Document.pdf)> accessed 31 December 2012.

(77) UNGA, 'Report of the United Nations High Commissioner for Human Rights on the Strengthening of the Human Rights Treaty Bodies Pursuant to Assembly Resolution 66/254' (26 June 2012) UN Doc A/66/860.

(78) UNGA, 'Res 66/254: Intergovernmental Process of the General Assembly on Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System' (15 May 2012) UN Doc A/Res/66/254.

(79) Report by the Secretariat, 'Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (22 March 2006) UN Doc HRI/MC/2006/2.

(80) Recollection of the present writer, during the 4th Inter-Committee Meeting discussion, at which Mme Arbour first broached the unified standing treaty body idea. See UNGA, 'Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights' (19 August 2005) UN Doc A/60/278, Annex, para 34. See Julia Kozma, Manfred Nowak and Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neue Wissenschaftlicher Verlag 2010).

(81) UN International Human Rights Instruments, 'Report of the Working Group on the Harmonization of Working Methods of Treaty Bodies' (9 January 2007) UN Doc HRI/MC/2007/2, para 5.

## The Role and Impact of Treaty Bodies

---

(82) UNGA, 'Report of the Secretary-General: Strengthening the United Nations: An Agenda for Further Change' (9 September 2002) UN Doc A/57/387, para 54.

(83) The common core document is one containing the basic backgrounds and institutional make-ups of states, which has information likely to be of concern to all the treaty bodies and in respect of which changes are unlikely to be frequent. The only substantive element is in relation to the principle of non-discrimination, itself a genuinely common concern of the treaty bodies. Report of the Secretary-General, 'Compilation of Guidelines on the Form and Content of Reports to Be Submitted by States Parties to the International Human Rights Treaties' (3 June 2009) UN Doc HRI/GEN/2/Rev.6, paras 31-59. The Committee unceremoniously dismissed a valiant effort by Australia in its fifth periodic report to the Human Rights Committee to pilot a consolidated report for failure to provide 'sufficient and adequate information'. UNHRC, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (7 May 2009) UN Doc CCPR/C/AUS/CO/5, para 2.

(84) Office of the High Commissioner for Human Rights, 'Consultation for States on Treaty Body Strengthening' (2-3 April 2012) para 17 <[http://www2.ohchr.org/english/bodies/HRTD/docs/ReportConsultation2\\_3April2012.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/ReportConsultation2_3April2012.pdf)> accessed 2 September 2012 (consulted 2 September 2012). The author served as a 'resource person' from the treaty bodies at this consultation.

### **Nigel S. Rodley**

Nigel S. Rodley is an international lawyer that specializes in human rights. He is currently a Professor of Law at the University of Essex and has served as a member of the UN Human Rights Committee since 2001 and as its Vice-Chair since 2003. Since 2003, he has also served on the International Commission of Jurists. He previously worked as an Assistant Professor of law at Dalhousie University and was appointed as a Reader in Law at the University of Essex in 1990. He assumed his current position as a Professor of Law in 1994 and served as Dean of Law from 1992 to 1995. From 1993 to 2001, he also worked as the Special Rapporteur on Torture of the UN Commission on Human Rights. Sir Nigel received an LLB from the University of Leeds, an LLM from Columbia University, an LLM from New York University, and a PhD from the University of Essex. He was knighted in 1998 in the Queen's New Years Honours list for services to Human Rights and International Law and received an honorary LLD from Dalhousie University in 2000. In 2005 he was a joint recipient of the American Society of International Law's 2005 Goler T. Butcher Medal for distinguished work in human rights. In 2008 he was appointed as an Honorary Fellow of the Faculty of Forensic and Legal Medicine of the Royal College of Physicians.

