

Treaty Body Reform, comments from Germany

Germany greatly values the UN Treaty Body (TB) System and firmly believes that the TBs represent an important pillar of the United Nations human rights protection system. With appreciation for the progress already made on implementing resolution 68/268, Germany hereby offers comments for the TB system reform debate regarding its effectiveness and efficiency. These comments present the findings of relevant German Ministries, with contributions from current and former German members on the TBs. The German government assumes that OHCHR will itself also seek comprehensive comments from all experts on the TBs.

On the outset, we would like to emphasize that any measures taken to reform the TBs must under all circumstances avoid to weaken the TB system.

The central strength of the TB system lies in the regular and comprehensive review of all human rights obligations, insofar as they have been ratified by the UN Member States. The review of the state reports requested by the TBs presents the only comprehensive assessment by independent experts of Member States' implementation of their human rights obligations in the UN system. The Universal Periodic Review (UPR) has various strengths, such as the involvement of various actors and civil society. Ultimately, however, the UPR presents a "peer-to-peer" review that often cannot be viewed independent of Member States' respective political position vis-a-vis the Member State under review.

The demand to potentially reform the TB system is in the view of the German government a result of the following developments:

- Due to the continuing growth of the system (more TBs, more ratifications, more individual complaints) the system is overburdened. This is also true for the Member States and their reporting obligations towards up to ten different TBs, as well as their obligations under individual complaints procedures. Many committees face a backlog of state reports and/or of the handling of individual complaints.
- There is a lack of coherence and oftentimes an overlap between the work of the TBs, some of which have established different working methods.
- A uniform calendar for reporting does not yet exist. Many Member States submit their reports late or have not even submitted an initial report. There is a grave problem with non-reporting of Member States; according to an "update report" by the Secretary General on Res. 68/268 (2008), only 17 percent of all Member States had fully fulfilled their reporting obligations (A/73/309, 06.08.2018).
- The Secretariat's resources devoted to TBs are not commensurate to the tasks and as a result the TBs cannot tap their full potential.
- The experts sitting on the TBs work "pro bono", yet their tasks are very time-consuming. This raises the question of how to ensure that in the future the TBs can be equipped with independent and qualified experts. The Res. 68/268 proposes new selection procedures (for all TBs) and a limitation of the membership period for experts.

1. Potential risks of a TB reform

We see a potential risk that the process could be used to weaken the independent review procedures of the TBs as a whole. Given the current pushback regarding human rights worldwide we worry that the TB reform process could be mis-used to further weaken the UN human rights system.

One line of argument is that the TBs allegedly have become less significant given the increase of Special Procedures (such as country or thematic rapporteurs). The number of Special Procedures has now risen to about 60. It must be avoided that the TB system is seen as competing with the Special Procedures, also not over financial resources.

Germany will therefore carefully observe the reform process and will continuously assess whether the foreseeable reform results will help to improve the system or not.

2. Assessment of efficiency measures already introduced

According to our knowledge, the TBs are at different stages in their application of possible efficiency measures. Some TBs have already started using the so-called LOIPR procedure ("list of issues prior to reporting"). From a State perspective, to report on a LOIPR only – instead of reporting once in general and overall on the implementation and then on issues of particular interest to a Committee, is a huge increase in efficiency. However, if in practice a particular LOIPR includes specific questions on all but one article of a given treaty, the efficiency gain is very limited. Also, the questions should be drafted as clear as possible. The LOIPR should substantially differ from what a general report would require and encompass.

We have been told that all TBs have begun to address the lack of coherence or duplication of questions. The Concluding Observations of the Committees are available to all Committees and it is thus increasingly possible to avoid a duplication of questions that have been raised by other Committees over the last year or two. Nevertheless, there seems to be substantial overlap between questions in some Committees that could be avoided without putting into question the Committees' task to monitor compliance with all the rights contained in their respective human rights treaty.

The Human Rights Committee has introduced Dual Chambers for the review of state reports and has thus completely cleared the backlog of state reports by 2017. Hence, this was a very successful measure that other Committees should consider.

Another efficiency measure is to organize State examinations "back to back", i.e. two or more Committees conduct an examination at the same time and, if necessary, even agree on a common list of questions. The Human Rights Committee and the ESC-Rights Committee are currently applying this approach in a pilot project with Finland. If successful, back-to-back examinations should be made a rule in the future.

TBs should be encouraged to streamline follow-up procedures. Whereas in principle follow-up mechanisms are a valuable and indispensable tool of compliance control, the increasingly complex procedures place an additional burden on States and may lead to delays in complying with reporting obligations.

3. Assessment of the Geneva Academy's reform proposals

The proposals of the Academic Platform, organized by the Geneva Academy, which presented its final report in May 2018, initially included the introduction of a consolidated state report for all TBs, either all bodies or divided into two sections ("clusters"): a combined report to the ICCPR and the ICESCR and alternating a combined report to all other TBs. Together with the UPR procedure every four years, this led to the proposal of a consolidated calendar with an eight-year reporting cycle for each TB. This would give the States fixed dates for the reporting procedures. Thus it would also allow examining States even if they had not presented their reports. Under the title "developing synergies", they also highlighted various possibilities for harmonizing the work of the TBs, such as the harmonization of working methods, joint meetings, etc.

So far, there seems to be no uniform evaluation by the different TBs of these proposals. From the German government's perspective, it is in principle worthwhile to further consider the idea of reporting in clusters, albeit that the success of such a method depends very strongly on its exact design. Two challenges in particular would have to be taken into account: At present, the state reporting procedures in Germany are accompanied by a particularly interested civil society (e.g. in the case of the Child Rights Committee or in the Committee for People with Disabilities). Clustered reporting would have to be organized in a way that would not limit the attention that the issues can receive in the national public discourse. In addition, it would be necessary to address the problem that, given the wide range of topics covered by the TBs, a unified report risks being either very long or lead to insufficient answers due to page restrictions. There might also be a risk of losing the focus provided by the specialized TBs.

The handling of individual complaints leads to a particular burden for the Committees. The Geneva Academy recommends access to "comparative jurisprudence" and "information sharing" between the Committees as well as periodic meetings with regional human rights institutions. Both activities are already taking place in the Committees, but could be considerably systematized. It is also important that Committees are aware of the fact that views on communications may need to take into account issues outside their specific competence (e.g. weighing of freedom of expression against combatting discrimination). Individual communications have to be considered on a legal rather than a political basis. The Committees therefore need sufficient legal competence among their members if their views are to carry the appropriate weight.

5. Role of the TB Chairs

Germany holds the view that the Chairs of the TBs should better use their role to increase the coordination between TBs. However, the meetings of the chairpersons of the TBs should not become a decision-making body for far-reaching decisions. They have no mandate and no independent function for this purpose. Decisions of the meetings of the chairpersons must subsequently be confirmed by the individual TBs. At their annual meetings, the chairpersons of the TBs can and should deal more intensively with questions of harmonizing working methods. They can also play an important role in strengthening the exchange of best practices between Committees. Another positive development in this regard is the nomination of one

member of each TB as “focal points” for TB reform. This should allow for better streamlining of the working methods of the different TBs.

6. Individual complaints

It seems difficult to consider filters or preconditions for individual complaints beyond what is laid down in the respective human rights treaties, yet this approach should not be ruled out a priori. It might be worth considering to more clearly set out the respective responsibilities of the Secretariat and the Member States in the process of handling a complaint, with the aim of making this process more efficient. It is the responsibility of the Committees to take the limitations on admissibility seriously and to avoid any incentives for forum shopping with regard to other international and regional mechanisms. It seems useful to increase the capacity of the TBs to deal with individual complaints by (1) increasing the Secretariat's support, (2) using innovative elements in the handling of particular cases (such as "repetitive cases"), (3) organizational improvements, i.e. creating chambers which prepare the views for the Committees and (4) by encouraging TBs to make use of the possibility to examine the admissibility of complaints separately in order to reach quick decisions on manifestly inadmissible applications. If the number of cases continues to rise, which cannot be ruled out, further measures could be considered. One such idea would be to task a permanent chamber for the treatment of individual complaints.

4. Support personnel and financial resources

While Germany welcomes the commitment and expertise of the OHCHR employees working with the Committees, the capacity of the Committee secretariats is being seen as potentially insufficient. According to the renewed formula for the financial resources of the TBs, there is sufficient time for meetings only for some Committees. In the case of other committees, meeting times are too short – especially for working on individual complaints. While a more focused, problem-oriented survey of the state review – which is the essence of the LOIPR procedure – offers the opportunity to discuss the most important national problems, it will require at the same time more and improved secretarial work.

We suggest making the current allocation of funds to the TBs, i.e. the distribution key of funds by the OHCHR more transparent. Also, a recalculation of the required financial resources appears to be required. The previous calculation factor meant that the Human Rights Committee, for example, was sometimes unable to make use of the additional meeting times because the capacities of the Secretariat/ Petitions Unit for preparing individual complaints were insufficient. At the same time it was unclear whether OHCHR possibly used available resources for other purposes.

7. TB reform in Geneva and in New York

In our view, most of the challenges relating to working methods can be addressed within the existing normative framework by improving the actual modalities of the TBs. Many practical steps towards harmonization or standardization of procedures can be taken in the day-to-day work of the Committees in Geneva. Reform steps such as a unified calendar, which would advance an eight-year reporting cycle in two clusters, would [most likely] have to be adopted by the GA, as this would both change the way in which non-reporting states are dealt with and extend the reporting periods, i.e. provisions of treaties would be altered or changed.