

Strengthening legitimacy, effectiveness and efficiency of the UN Human Rights Treaty Body system

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The present paper is submitted in preparation of the Lucerne Consultations on Strengthening the United Nations Human Rights Treaty Body System, a meeting with a group of academic experts taking place on 23 and 24 October 2011 in Lucerne, Switzerland. It explains why the reform process should engage simultaneously in strengthening the legitimacy, the effectiveness and the efficiency of the human rights treaty body system and includes suggestions for improvement. Besides further expanding upon existent proposals,¹ I have made an attempt to also add some new ideas to the many valuable suggestions that have been circulating during the reform process.

Address the system’s legitimacy

In thinking about proposals to improve working methods of treaty bodies, I suggest to rely on three distinct but interrelated questions that concern the efficiency, the effectiveness and the legitimacy of the UN human rights treaty body system.

The statements issued over the last two years from States parties, members of human rights treaty bodies and civil society organisations on the treaty body system reform commonly agree on a series of deficiencies that include lack of capacity to deal with country reports on time (concerning both the backlog of treaty monitoring bodies and the burden for States parties to produce reports); lack of compliance to the treaties due to non-reporting or late reporting; reduced quality of reviews and limited follow-up; and insufficient staff resources and meeting time.² The list of deficiencies has largely remained the same since the start of

¹ For a comprehensive overview of ideas and suggestions made over the last twenty years to strengthen the human rights treaty body system, see: The University of Nottingham, Human Rights Law Centre, *Informal Background Paper. Reform of the United Nations Human Rights Treaty Monitoring Bodies: developments 2006-2009*, November 2009; The University of Nottingham, Human Rights Law Centre, *Informal Background Paper*, February 2006. Both papers are available online, see: http://www2.ohchr.org/english/bodies/HRTD/docs/Informal_background_paper_Dublin_meeting.pdf (Retrieved: 10 October 2011). A compilation of suggestions stemming from recent informal consultations in the context of the treaty body strengthening can be found on OHCHR’s webpages, in particular: <http://www2.ohchr.org/english/bodies/HRTD/docs/ProposalsTBStrengtheningProcess.doc> (Retrieved: 10 October 2011).

² The University of Nottingham, Human Rights Law Centre, *Informal Background Paper*, February 2006, p. 55.

the reform process now almost twenty years ago; some challenges have even multiplied due to the system's further expansion.³ The enumerated deficiencies and proposed remedies almost exclusively seek to improve the efficiency and effectiveness of the system: How can the resources put at its disposal be used in the best possible way in order to reach the intended outcome? And in how far have the objectives really been achieved?

These are important matters, that can however not be addressed properly without also taking into account larger issues that deal with how the United Nations treaty body system is embedded in a broader human rights arena, which in turn forms part of an even wider globalising world order. What is or ought to be, within such a globalised context, the particular function of the UN treaty body system? The system, as an institutionalised form of human rights, stands in an ambiguous relation to power, as it simultaneously has the capacity to challenge and constrain various forms of power, but also, because of its entrenchment in relations and structures of power, supports and sustains power.⁴ Power exercised in the field of human rights is thereby not limited to the pivotal position of States and intergovernmental institutions, but includes the way how influential transnational human rights advocacy groups, 'gatekeepers' in the human rights system, interpret and prioritise certain human rights over others.⁵ The legitimacy of the treaty body system should be evaluated in light of its capacity to sustain the emancipatory thrust of human rights and human rights struggles: What are the merit and practical relevance of the treaty body system from the perspective of concrete social actors that frame their struggles for social justice increasingly on human rights language, and thereby rely upon (or do not rely upon) existing human rights institutions to advance their cause?

The importance to address as a central concern the legitimacy of the treaty body system – to ask in how far the system is actually relevant for concrete social actors in particular local settings – builds upon empirical insights from social science research on human rights in the fields of international relations, sociology, socio-legal studies and anthropology.⁶ A common thread in this work that has been undertaken increasingly during the last decade is the

³ Office of the UN High Commissioner for Human Rights (OHCHR), Requirements and implications of the ongoing growth of the treaty body system on the periodic reporting procedures, documentation and meeting time, May 2011. Available online: <http://www2.ohchr.org/english/bodies/HRTD/docs/consultation/Sion/ReportingUndeTreatyBodies.doc> (Retrieved: 10 October 2011).

⁴ Cf. Stammers, N. (2009). *Human Rights and Social Movements*. London: Pluto Press.

⁵ Bob, C. (Ed.) (2009). *The International Struggle for New Human Rights*. Philadelphia: University of Pennsylvania Press; Keck, M.E. and Sikkink, K. (1998). *Activists beyond borders. Advocacy networks in international politics*. Ithaca: Cornell University Press; Hertel, S. (2006). *Unexpected Power. Conflict and Change among Transnational Activists*. Ithaca: Cornell University Press.

⁶ See, *inter alia*, Baxi, U. (2002) *The Future of Human Rights*. Oxford: Oxford University Press; De Feyter, K., Parmentier, S., Timmerman, C. & Ulrich, G. (Eds.) (2011). *The Local Relevance of Human Rights*. Cambridge: University Press; Dembour, M.-B. & Kelly, T. (Eds.) (2007). *Paths to International Justice. Social and Legal Perspectives*. Cambridge: University Press; de Sousa Santos, B. & Rodríguez-Garavito, C.A. (Eds.) (2005). *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge: University press; Liebel, M. with Hanson, K., Saadi, I. & Vandenhoe, W. (2012). *Children's Rights from Below: Cross-cultural Perspectives*. Basingstoke: Palgrave Macmillan. Goodale, M. (2006). Introduction to "Anthropology and Human Rights in a New Key". *American Anthropologist*, 108 (1), 1-8; Goodale, M. (2009). *Surrendering to Utopia. An Anthropology of Human Rights*. Stanford: University Press; Goodale, M. & Merry, S.E. (Eds.) (2007), *The Practice of Human Rights: Tracking Law Between the Global and the Local*. New York: Cambridge University Press; Hanson, K. & Nieuwenhuys, O. (Eds.) (2012). *Living Rights: Theorizing Children's Rights in International Development*. (Manuscript submitted for publication); Merry, S. E. (2006). *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press; Mutua, M. (2002). *Human Rights. A Political and Cultural Critique*. Philadelphia: University of Pennsylvania Press; Wilson, R.A. (2006). Afterword to "Anthropology and Human Rights in a New Key": The social life of human rights, *American Anthropologist*, 108 (1), 77-83.

ambition to address human rights no longer solely as a top down process, but to also include bottom up understandings of human rights in order to attend to 'human rights from below'. Uncertainty and resistance against structural reforms, in particular by civil society organisations and treaty body members that perceive proposed changes as weakening the actual force of the system can be turned into an affirmative, future-oriented project by strengthening the legitimacy of the system, together with improvements of effectiveness and efficiency. In other words, if the treaty body system is to remain legitimate, its relevance for social actors in search for social justice, wherever on the globe, needs to be secured.

Stimulate discussion on competing human rights interpretations

Interpretations and prioritisation of particular human rights over others are more often than not the result of struggles over contrasting understandings of human rights. Rather than silencing down the existence of competing visions, the treaty body system should on the contrary include mechanisms and procedures that acknowledge differences and encourage transparent dialogue over divergent views and priorities.

Actual discussions amongst treaty body members over interpretations of human rights norms are confined to closed meetings with little or no transparency. To encourage discussion, treaty body members could be encouraged to issue separate, dissenting or concurring opinions in individual complaints procedures as well as following the adoption of concluding observations in the country reporting procedure. In a similar vein, treaty bodies should indicate whether a general observation, general comment or recommendation has been adopted unanimously or if a vote has been casted, and explain the majority and minority positions. Furthermore, following the UPR process, States could be asked to take a position on the recommendations issued by the treaty body following the discussion of their country report and indicate their position on each recommendation.

The holding of meetings outside Geneva or New York could help to bring discussions on human rights nearer to particular regions or countries. Other suggestions that have been made elsewhere include making more use of the country visit procedures and the organisation of treaty body sessions at regional level.

Take into account differences between State Parties

The increased number of instruments, ratifications and reporting under international human rights treaties has put to a test the available resources needed to review the submitted country reports on time. Proposed remedies to increase the system's productivity generally leave intact the existent reporting system and include to expand the overall meeting time spent for country report procedures; to work in parallel chambers; to reduce the size of country reports and concluding observations and to limit the number of languages used. These proposals preserve the working principle that each State party receives exactly the same attention and time for its review. There are however huge differences between countries concerning population and size. For instance, under the current procedures, the same time is spent to review the reports by Luxembourg (a country with 500'000

inhabitants), Germany (81 million inhabitants) and India (1,2 billion inhabitants). In order to increase the efficiency of the country reporting procedures, it could be explored to distribute the time allocated to each country in an uneven manner, depending on objective criteria such as the country's population and size. Treaty bodies would be able to spend more time to reviewing reports from State parties with a large population compared to State parties with relatively fewer inhabitants.

Furthermore, in the distribution of time for country reports, treaty monitoring bodies do not take into account the presence or power of national or regional human rights protection and monitoring mechanisms. To strengthen the effectiveness of the country reporting procedures, an asymmetrically review of country reports could be envisaged depending on subjective criteria such as the presence or not of a strong independent national monitoring mechanism or the membership of the State party to a regional human rights system. Countries without a NHRI and/or that are not a member of a regional monitoring mechanism could be reviewed according to the present procedure. Conversely, for countries that have put in place a strong independent national monitoring mechanism, and/or that participate in a monitoring process on the regional level, the UN treaty body review could be limited to assess the quality and performance of the national and/or regional monitoring systems in place.

Include non-State actors

The treaty monitoring bodies supervise the human rights record of State parties that are traditionally the only signatories of international human rights treaties. As a consequence, non-State actors whose activities often have great impact on the level of respect for human rights (including UN entities, intergovernmental institutions, regional governmental organizations, large NGOs and transnational corporations) have no reporting duty under the actual treaty body system. Particular procedures should be developed in order to also review the impact on human rights of the activities of powerful non-State actors. The Convention on the Rights of Persons with Disabilities (CRPD) provides an exception and foresees the possibility that also 'regional integration organizations' sign the convention and have to regularly submit their reports to the treaty monitoring body. This could be generalised and further expanded for all human rights treaties, in order to also make powerful international and transnational entities subject to the human rights reporting mechanisms.

Take steps towards the integration of treaty monitoring bodies

If experts would be asked to design a new UN human rights treaty monitoring system, it is very likely that they would elaborate a system that resembles more to the rejected proposal for a unified standing treaty body than to the actual system with a separate body for each separate treaty. In order to convince oppositions against an incorporated treaty body system, which most often refer to the perceived risk that a unified system would insufficiently be able to take into account the degree of specificity present in the existing system, I suggest adopting an inductive process in order to integrate, rather than to unify, the actual treaty bodies. By doing so, the specialist treaty bodies would not merge into one

generalist human rights treaty body, but the emphasis would be on the specialised entities (or 'chambers') of an integrated system. The generalist chambers would thereby operate on a second level and only intervene after the review performed by the specialist chambers. Such an approach would provide guarantees to preserve specialisation by giving a generalist chamber (based on the suggested merging of CCPR and CESCR) the task to overview and eventually complement the issues raised by the specialist chambers.

To guarantee a strong human rights monitoring system, the establishment of an integrated treaty monitoring body should continue to be considered as a medium-term goal. In order to reach that objective, shorter term goals which have met with much less resistances can be pursued immediately, such as the creation of a unified individual complaints mechanism and the establishment of an integrated management structure. Such a management structure, for example a standing Inter-Committee management committee, should overview the quality of the work by the individual treaty bodies. It could in particular be empowered to ratify all new guidelines, procedures, general comments and recommendations issued by each treaty bodies.

Another step towards integration of the treaty monitoring bodies is the simultaneous consideration of country reports. Besides merging two or more Committees, one country report could be considered by two or more treaty bodies at the same time, based on a decision by the management structure. For instance, depending on the issues at stake in a particular State party, CEDAW and CESCR might review the State party report together, while for another State party the review would be undertaken conjointly by CERD and CCPR.