5 The UN human rights treaty system

CONTENTS

5.1 INTRODUCTION

UN treaty bodies constitute the main institutional vehicle for the application of international human rights law. Bodies such as the UN HRCtee are by no means the only international mechanisms that address issues of human rights protection. Indeed, bodies as diverse as the ILO[1] and the World Bank[2] employ special procedures dealing with human rights questions. International tribunals and courts, particularly the ICJ, are increasingly adjudicating cases that have a bearing on international human rights law.[3] Yet, human rights treaty

[1] www.ilo.org. See for a good overview and nuanced assessment of the ILO's contribution to the promotion of social justice and human rights, particularly labour rights, and its supervisory system, G. Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Cambridge: Polity, 2007, reprinted 2008), 106–12.

[2] See on the World Bank 1993 Inspection Panels, ibid., 129–35; S. Skogly, *Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish, 2001), 35–6 and 180–5; and, more generally, M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford: Hart, 2003).

[3] The ICJ has increasingly addressed human rights questions, both in its contentious and advisory jurisdiction. See S. Sivakumaran, 'The International Court of Justice and Human Rights', in S. Joseph and A. McBeth, *Research Handbook on International Human Rights Law* (Cheltenham, Northampton, MA: Edward Elgar, 2010), 299–325; B. Simma, 'Mainstreaming Human Rights: the Contribution of the International Court of Justice', *JIDS* 3(1) (2012), 7–29.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

bodies fulfil a special role in that they are the only entities within the UN system that states have explicitly mandated to monitor compliance with their human rights treaty obligations.

Treaty bodies fulfil a range of functions, from promotional activities to monitoring and adjudicating complaints. These tasks, which are taken for granted today, are the result of states' willingness to vest treaty bodies with the mandate of monitoring compliance. This constituted a remarkable shift away from earlier notions of sovereignty in a system where states were, essentially, the sole authors, interpreters and enforcers of rights and obligations. What accounts for this change and why do states agree to be part of such regimes? This question, which has attracted considerable attention in recent years, poses a particular challenge because it does not seem to conform to the realist views that used to hold considerable sway in international relations, according to which states use institutions as a means to exercise power. Alternative theories emphasise states' interests (enhancing reputation and avoiding sanctions) or point to 'acculturation'.[4] This denotes a process of interaction of various actors which generates a pull to build and join credible human rights mechanisms as part of an international order. Indeed, these mechanisms form part of broader international institution-building, particularly at the UN level. The development of UN treaty bodies has witnessed a steady growth after a slow beginning in which it took over twenty years and numerous debates to set up the first two, the Committee on the Elimination of Racial Discrimination (CERD) and the HRCtee.

The proliferation of treaties, treaty bodies and increased ratification does not automatically equate to a coherent and effective international system that is well placed to achieve its objectives, particularly strengthening protection at the international and national level. On the contrary, this development may strain the capacity of the parties and institutions involved and lead to duplication as well as system fatigue. The discussions surrounding states' reporting obligations before UN treaty bodies illustrates these capacity challenges. Treaty bodies have struggled with state compliance, both procedurally (reporting) and substantively (implementing human rights obligations), and this continues to be an area of major concern. These factors have contributed to the perceived weakness of UN treaty bodies and triggered a series of reform proposals. Paradoxically, this process is taking place at the same time as a growing number of national and international actors seek to use these very bodies to advance human rights promotion and protection, which inadvertently deepens existing institutional and systemic challenges.

This development raises serious questions about the ability of these bodies to respond adequately to human rights concerns. Beyond these operational

[4] See for a good overview of the various theories O. C. Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge University Press, 2007), 12–62; Oberleitner, above note 1, 6–22.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

difficulties lurk more fundamental issues concerning the very nature of a system that depends on states and in which treaty bodies 'oscillate between the desire to supervise and the need to cooperate'.[5] The search for gradual improvement takes place in an institutional framework whose dynamics may make it incapable of addressing 'larger issues of power, domination, and legitimacy'.[6] Mandate constraints, bureaucracy and the still largely state-centric nature of the process, all contribute to a situation where the bodies may not respond effectively to serious violations and/or fashion effective remedies. Nevertheless, their work provides an important forum for developing international human rights law and engaging with states; this very engagement allows domestic actors, NGOs, other states and international institutions to seek changes that may over time result in an improved human rights situation. However, the task of strengthening the role of treaty bodies in the protection of human rights will continue to pose a considerable challenge in a system that is ultimately based on the 'goodwill' of states, which it constantly has to test in order to be effective.

5.2 COMMON FEATURES OF INTERNATIONAL HUMAN RIGHTS TREATY BODIES

Debates surrounding the drafting of international human rights treaties centred not only on the substance of the instruments but also on what, if any, type of body should be mandated to exercise particular functions. The idea of setting up bodies composed of independent experts to monitor state conduct in the domestic sphere constituted a departure from the then prevailing notion of state sovereignty; it was not entirely unprecedented, though, as the Permanent Mandates Commission established under article 22 of the Covenant of the League of Nations had earlier operated a petitions procedure against the mandatory that also dealt with human rights-related matters.[7] Subsequently, proposals made by states in the formative years of the UN human rights system show the breadth of options pondered, ranging from calls for an International Court of Human Rights (Australia)[8] to a rejection of special monitoring bodies on the ground that they would represent an unwarranted interference with state sovereignty (Romania).[9] The model of treaty bodies

[5] B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003), 66–7.

[6] Ibid., 67.

[7] Ibid., 67–71, and A. Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations', *N.Y.U.J. Int'l L. & Pol.* 34 (2002), 513–633, at 523–8.

[8] A. Devereux, 'Australia and the International Scrutiny of Civil and Political Rights: an Analysis of Australia's Negotiating Policies, 1946–1966', *AYIL* 22 (2003), 47–75, at 54–60.

[9] See for references to debates in the General Assembly in 1952, Y. Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge University Press, 2011), 58–60.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

that eventually emerged inevitably reflects a compromise that has resulted in the dynamics and challenges evident today.

Beginning with CERD[10] in 1969, followed in 1976 by the most prominent body, the HRCtee,[11] the total number had risen to ten treaty bodies in 2012. This includes the CEDAW (hereinafter CtEDAW) (1982),[12] the CAT (hereinafter CtAT) (1987),[13] the CRC (hereinafter CtRC) (1991),[14] the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) (2003),[15] the CRPD (hereinafter CtRPD) (2008),[16] and the Committee on Enforced Disappearances (CED) (2011).[17] In addition, the Subcommittee on Prevention of Torture (SPT) was set up under the OPCAT in 2006.[18] With the exception of the CESCR, all international human rights treaty bodies are established by states parties and based on the founding treaty that sets out their respective mandate and functions.[19] Their close institutional links, including reporting to the UNGA and being serviced by the OHCHR and financed out of the UN budget, means that human rights treaty bodies effectively form part of the UN human rights architecture.[20]

Human rights treaty bodies fulfil their monitoring function primarily by means of considering states parties' reports and adjudicating on complaints. In addition, several treaty bodies, such as the CtAT,[21] the CtEDAW,[22] the CED,[23]

[10] Articles 8–16 ICERD, www2.ohchr.org/english/bodies/cerd/index.htm.

[11] Articles 28–45 ICCPR; www2.ohchr.org/english/bodies/hrc/index.htm.

[12] Articles 17–22 CEDAW; www2.ohchr.org/english/bodies/cedaw/index.htm.

[13] Articles 17–24 CAT; www2.ohchr.org/english/bodies/cat/index.htm.

[14] Articles 43–5 CRC; www2.ohchr.org/english/bodies/crc/index.htm.

[15] Articles 72–8 ICRMW; www2.ohchr.org/english/bodies/cmw/index.htm.

[16] Articles 34–9 CRPD; www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

[17] Articles 26–36 CPED; www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx.

[18] Articles 5–16 OPCAT; www2.ohchr.org/english/bodies/cat/opcat/index.htm.

[19] ECOSOC resolution 1985/17 (28 May 1985). See on steps taken to correct this anomaly, HRC resolution 4/7 (30 March 2007): Rectification of the legal status of the Committee on Economic, Social and Cultural Rights. For an analysis of the CESCR's work, see also Chapter 9.

[20] See for a brief overview, including facts and figures, *Strengthening the United Nations Human Rights Treaty Body System*, A report by the United Nations High Commissioner for Human Rights, N. Pillay (United Nations, June 2012), 16–19, online, at www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf.

[21] Article 20 CAT. The Committee has to date made eight confidential inquiries: Turkey, Egypt, Peru, Sri Lanka, Mexico, Serbia and Montenegro (Former Yugoslavia), Brazil, and Nepal. See www2.ohchr.org/english/bodies/cat/confidential_art20.htm.

[22] Articles 8, 9 Optional Protocol CEDAW. The Committee has to date made one inquiry relating to Mexico, see Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico, UN Doc. CEDAW/C/2005/OP.8/MEXICO (27 January 2005).

[23] Article 33 CPED. See also article 34 ibid.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

the CtRPD,[24] the CtRC[25] and the CESCR[26] are, or will be, mandated to conduct confidential inquiries upon receipt of reliable information of systematic or serious violations or, in the case of the CERD, through early warning and urgent action procedures.[27] The SPT differs from other bodies; it neither considers states parties reports nor complaints. Instead, in line with its preventive function it focuses on visiting mechanisms, providing advice to national preventative mechanisms and offering cooperation.[28]

It is tempting to measure the strength of a treaty body by reference to its power to adjudicate complaints because this is still frequently seen as the function that really matters, drawing on analogies with national law. Complaints procedures are undoubtedly important, especially those providing individuals with access to international justice.[29] However, these procedures do not automatically result in enhanced respect for rights and implementation of states parties' obligations. What must therefore be considered crucial is the ability of treaty bodies to utilise all means at their disposal to contribute to the development of an international 'culture' in which human rights are recognised and translated into actual promotion and protection at the national level.

Human rights treaty bodies are composed of between ten to twenty-five members who are elected by states parties and commonly serve for four years and up to eight years if re-elected.[30] The 'ideal' body has a group of individuals of high repute, outstanding expertise, dedication and independence who represent various regions of the world. This ideal has been met to varying degrees by the various bodies; the HRCtee, in particular, has been credited for the capacity of its members, which reflects its prominent role and status. However, the lack of equitable geographical representation and gender balance in human rights treaty bodies has been a cause for concern and steps have been taken to address these shortcomings.[31]

[24] Articles 6, 7 Optional Protocol CRPD.

[25] Articles 13, 14 Optional Protocol CRC on a Communications Procedure.

[26] Articles 11, 12 Optional Protocol ICESCR.

[27] See Guidelines for the Early Warning and Urgent Action Procedures, Annual Report, UN Doc. A/62/18, Annexes, Chapter III, adopted at the CERD's 71st session in August 2007. See for the practice of using these procedures, www2.ohchr.org/english/bodies/cerd/early-warning.htm

[28] Article 11 OPCAT.

[29] See in particular A. A. Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press, 2011), and Chapter 7 on complaints procedures.

[30] Articles 8 ICERD; 28–34 ICCPR; 17 CEDAW; 17 CAT; 43 CRC; 72 ICRMW; 34 CRPD; 26 CPED; 5–10 OPCAT.

[31] See Promotion of equitable geographical distribution in the membership of the human rights treaty bodies, UNGA resolution 64/173 (18 December 2009), and Composition of the staff of the Office of the United Nations High Commissioner for Human Rights, UNGA resolution 16/10 (26 March 2011); Pillay, above note 20, 74–7, and, on gender representation, H. Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', *Harv. Hum. Rts. J.* 18 (2005), 1–18.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

The committees work on a part-time basis and meet at least twice a year in Geneva or New York for brief sessions to review state party reports and, depending on the body, to consider individual communications and/or adopt general comments. The working methods of the committees are set out in their respective rules of procedure, which detail the role of committee members, decision-making, publicity of meetings and so on.[32] The periodic sessions become an intense focus of committee work and an important forum for interaction with states parties, UN agencies, NGOs and others. However, the geographic focus of the committee work in Geneva and New York, while having logistical advantages, can contribute to a sense of remoteness, especially for actors from Asia and Africa. Webcasting of Committee sessions and having more regional meetings are some of the initiatives taken to make the committee work more accessible.[33]

The growing number of states parties' reports and communications, together with the need for enhanced coordination between the various bodies, increasingly strains the capacity of the committees. They are served throughout the year by their respective secretariats through the OHCHR, but there are consistent complaints that the time allocated and the resources available are inadequate to undertake the work effectively without overstretching the personal capacity of those involved.[34] In practice a lot depends on the initiative of individual committee members and the dynamics of the bodies concerned, and their level of engagement and output can differ markedly. The lack of remuneration (expenses only) may underscore the integrity of the committee members but is prone to limit the additional time such individual experts are able to spend on committee work.

Problems of capacity, coordination and limited visibility in the broader public have contributed to calls for the strengthening, if not the wholesale reform, of the treaty body system. This includes revived calls for a human rights World Court, which will be considered in more detail following an examination of how the committees fulfil their functions in practice.

[32] The text of the rules of procedures can be found on the websites of the treaty bodies, see www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

[33] See Inter-Committee Meeting of the human rights treaty bodies, The structure of the dialogue between treaty bodies and States parties, the structure and length of concluding observations, and the mode of interaction of treaty bodies with stakeholders, in particular national human rights institutions and civil society actors, UN Doc. HRI/ICM/2011/2 (18 May 2011), para. 66, and Report of the Chairs of the human rights treaty bodies on their twenty-third meeting, Implementation of Human Rights Instruments, UN Doc. A/66/175 (22 July 2011), para. 8.

[34] See Pillay, above note 20, 27–8, 32–4.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

5.3 REPORTING PROCEDURE

5.3.1 Overview

Periodic reporting, the only generally accepted procedural obligation of states, has a special place in the work of human rights treaty bodies.[35] The reporting procedure serves multiple goals. Its overall objective is to ensure that states parties comply with their treaty obligations or, as article 2(2) of the ICCPR puts it, 'to give effect to the rights recognised'. It provides an opportunity for states to review their law and practice, to develop a better understanding of the nature of problems identified, including by developing adequate policies, and to evaluate progress made in respect of implementation. The reporting procedure also offers an occasion for civil society and other national and international actors, including UN agencies, to provide input and scrutinise state conduct. Viewed from this perspective, reporting is essentially an enabling process engaging a number of actors, with the committees concerned acting as focal points that guide, helping them to evaluate and assist states on how best to implement their obligations.[36] This understanding is based on the implicit instrumental assumption that states are more likely to comply if engaged in a 'constructive dialogue (also called constructive discussion)', which is the approach pursued by the treaty bodies.[37]

Reporting procedures were first mooted in 1956[38] and later incorporated as a general obligation of states parties in subsequent treaties.[39] However, treaty bodies grappled with framing this obligation and developing a suitable format for reports. This was largely due to the vague wording of relevant provisions and resistance by some committee members to subjecting states' records to a critical examination, including the adoption of concluding observations. This prompted treaty bodies to adopt a series of general comments to clarify states parties' reporting obligations.[40] Since then, the reporting practice has

[35] See generally OHCHR, *Manual on Human Rights Reporting under six major international human rights instruments* (Geneva: United Nations, 1997); A. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st century* (The Hague: Kluwer Law International, 2000).

[36] See for example article 40 ICCPR and OHCHR, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet no. 30 (Geneva: UN, 2005), 27; P. Alston, 'The Purposes of Reporting', in OHCHR *Manual*, above note 35, 19–24.

[37] See Harmonized Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Common Core Document and Treaty-specific Documents, UN Doc. HRI/MC/2006/3 (10 May 2006), para. 11.

[38] ECOSOC resolution, E/Res/624 B (XXII) (1 August 1956).

[39] See Alston, above note 36, 19–20.

[40] See for example HRCtee General Comments 1, 2 (both 1981) and 30 (2002), online, at www2.ohchr.org/english/bodies/hrc/comments.htm.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

developed, resulting in the adoption of harmonised guidelines on reporting.[41] Treaty bodies generally follow a similar format. An initial report is to be submitted within one or two years of a state becoming a party, depending on the treaty in question.[42] It is expected to set out the legislative, institutional and administrative framework in relation to the rights concerned and the report effectively serves as a baseline for later reports. The committee concerned considers the report based on information received from a variety of sources, including other UN agencies, national human rights institutions and NGOs. A list of issues, which is put to the state party before the session and allows NGOs and others to submit further information, subsequently forms the basis of discussions with the state delegates.

At the end of this process the committee deliberates and adopts concluding observations that set out positive developments, areas of concern and recommendations.[43] This includes requesting the state party to inform the committee concerned of measures taken to implement its recommendations within a certain time period. For example, the HRCtee identifies a number of important recommendations that states should implement within one year and which are supervised by a follow up rapporteur who draws up follow-up reports.[44] The state party may respond to the concluding observations, an option that is often used by states, primarily to object to some findings or recommendations made.[45] Next, the state party is obliged to submit further (periodic) reports (the period varies under the various rules of procedures, from two years (CERD) to five years (most treaty bodies)).[46] Periodic reports are more targeted in nature. States are expected to report on relevant developments in the reporting period and to set out what measures they

[41] See UN Doc. HRI/MC/2006/3. See also Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/66/GUI/Rev.2 (26 February 2001).

[42] Articles 9 ICERD, 40 ICCPR, 18 CEDAW, 19 CAT, 44 CRC, 73 ICRMW, 35 CRPD, 29 CPED. See for an overview, Pillay, above note 20, 20.

[43] The concluding observations are available on the OHCHR website, www.ohchr.org, both by treaty body (see sessions), and by country (see name of the country). The Universal Human Rights Index, http://uhri.ohchr.org, provides a search function according to treaty body, state and specific rights.

[44] See, for example, Concluding Observations on Colombia, UN Doc. CCPR/C/COL/CO/6 (4 August 2010), para. 27: 'In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the state party should provide, within one year, relevant information on its implementation of the recommendations made by the Committee in paragraphs 9, 14 and 16' (relating to impunity, extrajudicial killings and forced disappearances).

[45] See, for example, Comments by the Government of the People's Democratic Republic of Algeria, UN Doc. CCPR/C/DZA/CO/3/Add.1 (19 November 2007), contesting the accuracy of the Committee's findings and several of the concerns it raised, such as in relation to amnesties, secret detention, enforced disappearances, torture and pre-trial detention in the counter-terrorism context, freedom of expression, assembly and association and the status of women.

[46] Pillay, above note 20, 20.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

have taken to comply with the recommendations made in the preceding concluding observations of the treaty body concerned. Following the initiative of the CtAT in 2007, the HRCtee and the CMW introduced a new optional reporting procedure 'whereby [the HRCtee] would send States parties a list of issues ... and consider their written replies in lieu of a periodic report'.[47] This measure was introduced to make reporting more targeted and efficient, and initial responses by states parties were favourable, resulting in an increase of reports submitted.[48] Upon receipt of the report the reporting cycle continues as set out above.

The increased participation of civil society actors has considerably changed the nature of the reporting procedure. NGOs and others can play an important role in the review of law and practice during the preparation of reports. Ideally, this already constitutes part of a broader domestic dialogue about a state's human rights performance.[49] Indeed, some states involve NGOs, national human rights institutions and others at the drafting stage, but the practice is far from uniform. Where it is based on a genuine dialogue rather than consultation for the sake of it this practice has the potential to result in a contextualised report reflecting existing challenges and shortcomings. This stands in contrast to reports that simply restate the law or use selective and often irrelevant information, or otherwise do not present an accurate picture of affairs. The treaty bodies have responded to such shortcomings through the adoption of detailed guidelines and by pursuing dialogue with state delegates, as well as, on occasion, by requesting supplementary reports. However, states frequently appear either unable or unwilling to provide a sufficiently detailed and/or accurate report.[50] The information provided by UN agencies, NGOs and others provides an important counterweight and alternative source of information.[51] Drawing on a rich pool of information enables treaty bodies to identify a list of issues that are relevant in light of the actual practice and to ask probing questions

[47] See HRCtee, Focused Reports Based on Replies to Lists of Issues prior to Reporting (LOIPR): Implementation of the New Optional Reporting Procedure (LOIPR procedure), UN Doc. CCPR/C/99/4 (29 September 2010), para. 1.

[48] Pillay, above note 20, 48.

[49] UN Doc. HRI/MC/2006/3, para. 10.

[50] This may take the form of a clearly inadequate report, such as the one-page initial report submitted by Nepal to the CAT, UN Doc. CAT/C/16/Add.3 (16 December 1993), or rather sophisticated but highly 'selective' reports, such as Uzbekistan's report to the CAT, UN Doc. CAT/C/UZB/3 (28 July 2006).

[51] 'Alternative' or 'shadow' reports can be found on the respective treaty bodies websites under 'The Committee and its Work', 'Sessions', 'Information provided to the Committee (or NGO Information/Information provided by other sources). See A. Clapham, 'The UN Human Rights Reporting Procedures: an NGO Perspective', in J. Crawford and P. Alston (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), 175–98, and OHCHR, *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (New York and Geneva: United Nations, 2008), Chapter IV, at www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook4.pdf.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

during the constructive dialogue.[52] This includes highlighting specific cases or incidents that have been taken up by treaty bodies to illustrate systemic problems, enhance engagement and make follow-up more targeted.[53]

The increased level of engagement is frequently reflected in the concluding observations of treaty bodies. Concluding observations, that is the 'verdict' of the treaty body, are often the most contentious part of the reporting process. Inevitably, such observations raise issues and include recommendations that are objected to by states. Irrespective of what one considers to be the legal nature of concluding observations – positions range from an 'authoritative pronouncement on whether a state has or has not complied with its obligations'[54] to mere opinions or recommendations[55] – they will have to be sufficiently specific, practical and persuasive to command the authority needed to enhance the prospect for implementation.[56] This includes the soundness of the legal arguments made, which have at times been the subject of controversy. A prominent example is the USA's disagreement over the interpretation of the law by the HRCtee. The latter's concluding observation had challenged several of the states parties' interpretations of its obligations in the context of counter-terrorism operations, including the definition of torture and the applicability of the Covenant on Civil and Political Rights to the Guantánamo Bay detention regime.[57] This was a highly politicised and exceptional incident that directly challenged the foundations of the extraordinary legal regime that the then US government had sought to erect. More generally, however, it is clear that concluding observations can be highly authoritative and are increasingly referred to in legal arguments made and in jurisprudence on human rights issues, such as by the ICJ in the *Wall* case.[58]

[52] However, see the critical account of the frustrating reality of treaty body proceedings, T. Kelly, 'The Cause of Human Rights: Doubts about Torture, Law, and Ethics at the United Nations', *JRAI* 17 (2011), 728–44.

[53] See for example List of Issues, Sri Lanka, UN Doc. CAT/C/LKA/3-4 (24 June 2011); and South Africa, UN Doc. CEDAW/C/ZAF/Q/4 (2 September 2010).

[54] T. Buergenthal, 'The UN Human Rights Committee', *MPYBUNL* 5 (2001), 341–98, at 351.

[55] See e.g. *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, on the CtAT's comments on article 14 CAT in relation to Canada's state party report; Lord Bingham of Cornhill, para. 23, 'no more than a recommendation'; Lord Hoffmann, para. 57, 'no value'.

[56] See C. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002), 26–7, and Tyagi, above note 9, 252–9, on the nature of concluding observations.

[57] Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (12 February 2008).

[58] The ICJ referred to the HRCtee's concluding observations on Israel's second period report when discussing the applicability of the ICCPR to the occupied territories in *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory opinion, ICJ Reports 2004, 136, para. 110.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

INTERVIEW 5.1

Using shadow reports to promote gender equality and combat sexual violence: South Africa

(Lesley Ann Foster)

Gender discrimination, sexual violence and other *de jure* or *de facto* violations of women's rights constitute major problems in South Africa. In 2011 South Africa was due for review before CtEDAW. Several NGOs used the opportunity to submit alternative reports, including a joint shadow report submitted by over twenty NGOs.[1] CtEDAW issued its concluding observations on the report on 5 April 2011.[2] The following is an interview with Lesley Ann Foster, executive director of the Masimanyane Women's Support Centre,[3] which took the lead in preparing the joint shadow report.

What did you hope to achieve by submitting the shadow report?

The then UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, had visited South Africa saying that it had the highest levels of violence against women in the world for a country not at war. This remark, together with the group's own knowledge and experience, provided sufficient motivation for us to focus on this issue. Another thing that counted in the group's favour was that violence against women had been raised high on the political agenda and it had been acknowledged as one of the most critical issues facing the country. We adopted a broad understanding of violence against women. It encompassed many other facets of women's rights, such as education, employment, literacy, health, welfare and similar issues, all with links to violence against women. Our main objective was to see a strengthening of the state's response to violence against women. We had identified various challenges in the implementation of state policies and called for a better legislative framework as well as improved institutional arrangements.

How did you succeed in having so many NGOs join the endeavour?

We started off with a strong network of partner organisations. Next we purposefully identified the groups we knew should be included. Anyone else could join so when groups expressed an interest we let them be a part of it. We asked various organisations to conduct the focus group discussions or participate in the field work. This included marginalised

[1] *South African Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women*, submitted to the CEDAW Committee's 48th Session (17 January–4 February 2011), online, at: www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint_NGO_Report_for_the_session_SouthAfrica.pdf.

[2] UN Doc. CEDAW/C/ZAF/CO/4.

[3] www.masimanyane.org.za.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

groups, including people working on LGBT issues, a transgender group and a sex workers group. We did not contact the group of disabled women whom we work with and this was a gap in our recent report. We made sure that everyone was given the opportunity to input into the process. We went into communities and trained women's groups on the principles of the CEDAW and then invited them to participate in the process. All of this made it possible to draw people into developing the shadow report and participating in different ways in the process.

What was the division of labour between NGOs in preparing the report?

The approach of how to write a report on violence against women generated much discussion. An audit of the available skills was done. The group had medical expertise, legal expertise, media, education, financial and advocacy and lobbying skills. Most of the group had strong links to various networks. It was also helpful that they came from different provinces within the country so were able to provide information on violence against women in different geographical, social, cultural and political settings.

How did you ensure the accuracy of information used?

We recorded the focus group discussions using electronic tools (video and recording devices). We also used published research and official state documents. All those involved in the process were briefed on the CEDAW and provided training on research, which helped in selecting and verifying relevant information.

How was the report received and used by the committee?

The final report was distributed to all the participating organisations throughout the country and every government minister and department was sent a copy. This was done after the report was sent to the CEDAW committee members. There were very audible grumblings in government circles about the report and some attempts were made to discredit the information contained in it. A harsh attack by the head of the government delegation was made to one of our representatives whom she knew well. The attack centred on her view that we were out of order in providing alternative information and that we should have been supportive of the government as it was a government of the people for the people. She did not accept our view that we had an important monitoring role to play.

The report was read by the CEDAW committee members. We then had a lunch briefing with the committee prior to our state reporting. They asked for clarifications on issues raised in the report and asked us to elaborate our concerns. They asked us what questions should be put to our state. This was very useful and extremely powerful. Eighteen out of the final

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

twenty-six recommendations made by the CtEDAW focused on aspects of violence against women as highlighted in the NGO shadow report. Perhaps one of the most significant concluding comments was the suggestion that the South African government develop specific equality legislation. All of the concluding comments were sound suggestions which the group welcomed.

Some members of the group travelled back to South Africa with the government delegation. During the trip some discussion took place and the delegation acknowledged that the presence of the NGO delegation was a good thing. The representatives said that the concluding comments gave the delegation bargaining tools for greater political commitment and resource allocation for addressing women's rights in the country. They realised that if the report had been accepted without an honest critique and recommendations it would have led to complacency within government. This was an important shift.

Are you using the concluding observation in domestic advocacy, if so, how and with what impact?

We are currently disseminating the concluding observations. We have a national advocacy strategy in place to take up some of the issues on an ongoing basis. We are exploring further use of the convention, such as by applying the optional protocol to the CEDAW. We are also considering requesting an inquiry into some forms of discrimination in the country. The government has taken some action. It used the report to develop a strategy for addressing violence against women in the country, including research on lived realities of women. Extensive legislative reform took place and more than 4,000 laws were reviewed to ensure non discrimination against women and girls. Equality legislation was developed but has not as yet been passed. Extensive programmes have been established in the country to support women and girls who are victims of gender-based violence. Research has been commissioned by the national government to develop the data systems related to violence against women.

What are the lessons you learned from the process?

Shadow reporting is a vital strategy for getting international attention on the plight of women in your country. We learned that you have to be prepared and you need to understand how the system works. We also learned that the work after the reporting session is as important as the development of the shadow report. One needs to use every opportunity to teach women about discrimination and inequality. Finally, we have learned that the state and women themselves do not have a strong enough understanding on discrimination.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

5.3.2 Strengthening the reporting procedure

Non-compliance with treaty reporting is one of the notorious, systemic challenges confronting the UN human rights treaty system. Many states have failed to submit any reports or submitted them several years after they were due.[59] The reasons for this are both state specific and systemic. States may lack the political incentive or have limited capacity, including lack of adequate data, to submit reports in time. The treaty bodies have limited 'enforcement' powers and there is no apparent political cost for late submissions, unlike with the UPR which is a much more state-driven political process.[60] One major problem facing the system is the growing number of reporting obligations that states find it increasingly difficult to meet.[61] The treaty bodies and the OHCHR have taken a series of measures to address non-reporting and delays.[62] This includes supporting states in building their capacity to prepare and submit reports, encouraging states to submit core documents[63] and offering states the possibility to report on a list of issues rather than submitting a full periodic report.[64] Treaty bodies may name and shame late or non-reporting states; they also increasingly decide to consider the situation in a state even in the absence of a report on the basis of other information received.[65] In practice, the threat of doing so has often been sufficient to prompt a state to engage and ultimately submit a report.[66] This demonstrates a degree of effectiveness which ironically may generate the reverse problem. The treaty bodies themselves may not have the capacity to

[59] According to Pillay, above note 20, 21, only 16 per cent of reports 'were submitted in strict accordance with the due dates established in the treaties or by the treaty bodies'. As of April 2012, a total of 626 reports – 315 initial reports and 311 periodic reports – were overdue; see ibid., 23.

[60] See section 4.3.1 for a discussion of the UPR.

[61] See Report by the Secretariat, Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2 (22 March 2006), para. 16; Pillay, above note 20, 25.

[62] See W. Kälin, 'Examination of State Reports', in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies* (Cambridge University Press, 2012), 16–72, at 32, and Tyagi, above note 9, 188–210, for the HRCtee.

[63] The core document should contain general information about the state, the general framework for the promotion and protection of human rights, information on non-discrimination and equality and effective remedies; see UN Doc. HRI/MC/2006/3, paras. 31–59.

[64] See UN Doc. CCPR/C/99/4.

[65] For example, in relation to Gambia, in 2008 the HRCtee considered the situation in the absence of a report in 2002, 'declared the state party to be in breach of its obligation to cooperate with the Committee in the performance of its functions under Part IV of the Covenant', and, in 2009, 'referred [the matter] to the High Commissioner for Human Rights, Report of the Special Rapporteur for follow-up on concluding observations', UN Doc. CCPR/C/95/2/rev.1 (26 May 2009), 2, 3.

[66] See for example Concluding Observations of the Human Rights Committee: Rwanda, UN Doc. CCPR/C/RWA/CO/3 (7 May 2009), para. 2.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

hear reports within a reasonable time if reporting were to increase, which would in all likelihood considerably add to the already existing backlog.[67]

This challenge, together with concerns about adequate coordination and lack of impact of treaty bodies, led to a concerted review process in the 2000s.[68] In the course of this process the OHCHR proposed the establishment of a unified standing treaty body. It argued that the creation of such a body would

> provide…a framework for a comprehensive, cross-cutting and holistic approach to implementation…a consistent approach to interpretation of provisions in the treaties…extend…the period of the dialogue…members…be available on a permanent basis…be more visible…[provide a] unified monitoring structure.[69]
>
> In addition, a comprehensive, overall assessment of the implementation of international legal obligations under human rights treaties for countries in one single document…would be more likely to attract heightened attention from political bodies such as…[the] Human Rights Council or the Security Council.[70]

In spite of these apparent advantages the proposal did not garner much support. This was due to concerns that it might undermine protection for specific rights and that the attempt to integrate all treaties would be fraught with difficulties. In 2009 the High Commissioner for Human Rights initiated a treaty body strengthening process involving a range of relevant stakeholders, with a major focus on measures aimed at harmonising the working methods of treaty bodies, as expressed in the Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System.[71] NGOs welcomed this process and submitted a number of proposals to make the system more visible and accessible for NGOs to contribute.[72] The process

[67] See UN Doc. A/66/344, para.11: 'As of May 2011, 263 reports were pending consideration under the nine treaty bodies with a reporting procedure.' See ibid., p. 12, Table 2 for an overview of the backlog, and para. 21: 'The observation, made by an independent expert reporting on the same issue to the United Nations in 1997, that the treaty system "can function only because of the large-scale delinquency of states" remains true today (see UN Doc. E/CN.4/1997/74, para. 48).'

[68] Reform efforts date back to the 1980s, see UNGA resolution 43/115 (8 December 1988), para. 15. See for the important role played by the UN Secretary-General, Strengthening of the United Nations: An Agenda for Further Change, UN Doc. A/57/387 (9 September 2002), paras. 52–4, and In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005 (21 March 2005), para. 147.

[69] UN Doc. HRI/MC/2006/2, paras. 27–35.

[70] Ibid., para. 36.

[71] See www2.ohchr.org/english/bodies/HRTD/docs/DublinStatement.pdf. See for further documents generated as part of the review process, OHCHR, 'The Treaty Body Strengthening Process', online, at www2.ohchr.org/english/bodies/HRTD/index.htm.

[72] Dublin Statement on the Process of Strengthening the United Nations Human Rights Treaty Body System: Response by non-governmental organizations, November 2010 (recommendations include holding occasional meeting outside of Geneva, advance notice for NGOs, communications, protection against reprisals for NGOs, enhanced membership of treaty bodies, better coordination), online, at www.apt.ch/region/unlegal/DublinStatementNGO_JointResponse1110en.pdf.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

culminated in a major report by the UN High Commissioner for Human Rights in 2012, which compiled a series of recommendations. These included:

> establishing a comprehensive reporting calendar…enhancing independence and impartiality of members and strengthening the election process; establishing a structured and sustained approach to capacity-building for States parties for their reporting duties…increasing accessibility and visibility of the treaty body system, through webcasting of public meetings and use of other new technologies; a simplified focused reporting procedure…alignment of other working methods to the maximum extent without contradicting the normative specificities of the treaties; limitation of the length of documentation.[73]

There is a clear understanding of the problems and needs as reflected in the measures suggested. This includes availability of greater resources to respond to the increased workload resulting from the expansion of treaty bodies and states parties, improved communications, more targeted reporting and follow up and better coordination between the treaty bodies.[74] These measures, if implemented, would contribute to enhanced efficiency. However, it is questionable whether they will be sufficient to satisfactorily address the underlying factors, particularly fragmented mandates, limited powers and the low visibility of UN treaty bodies. This raises the more fundamental question of whether the current system is based on structures and processes that can be successfully strengthened or whether it suffers from systemic shortcomings that require a radical rethink and reforms. The risks to the human rights treaty body architecture inherent in such drastic changes have acted as a bulwark that has kept the current system in place. However, ongoing concerns, if not frustration, with a system seen as dysfunctional may give renewed impetus to the idea of a unified standing treaty body, or even a World Court of Human Rights,[75] which several observers believe would be the authority needed to give human rights the standing it warrants at UN level.

It would seem tempting to dismiss the reporting procedure as an onerous and futile 'soft' mechanism that generates the illusion of progress but in reality produces a dialogue that allows states and other actors in the system to be seen as doing something while largely maintaining the status quo. However, for all its apparent and supposed weaknesses the reporting procedure has become an integral part of the system that has contributed, at least to some degree, to the promotion and protection of human rights. It has within its confines: (1) produced an impressive source of information

[73] Pillay, above note 20, 10–11.

[74] Ibid., and Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System, UN Doc. A/66/344 (7 September 2011).

[75] See M. Nowak and J. Kozma, *A World Court of Human Rights* (June 2009), online, at www.udhr60.ch/report/hrCourt-Nowak0609.pdf, and T. Buergenthal, 'A Court and Two Consolidated Treaty Bodies', in Bayefsky, above note 35, 299–302.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

and record in respect of states' implementation of their human rights obligations; (2) advanced to varying degrees the interpretation and understanding of rights and obligations under the various treaties; (3) provided a forum and instrument for human rights advocacy; and (4) contributed to some changes in law and practice, although the state record of implementing recommendations is patchy.[76] In addition to strengthening the technical aspects of reporting in order to increase efficiency the main task for treaty bodies is to enhance implementation. This includes better visibility and most importantly fostering practices that enable domestic actors, particularly civil society, to use the process as an advocacy tool to improve the human rights situation in the country concerned.

QUESTIONS

1 **Is the reporting system fundamentally flawed or simply in the process of becoming an effective means of monitoring of and engagement on states' human rights record?**
2 **What is the evidence that the model of 'constructive dialogue' adopted by the treaty bodies has really been constructive?**
3 **Would the establishment of a unified standing body proposed by the OHCHR or a World Human Rights Court constitute the breakthrough needed to substantially strengthen the reporting procedure or would it weaken the more targeted protection existing human rights treaty bodies are mandated to provide?**
4 **What are the strategic openings and challenges for NGOs in the reporting process?**

5.4 GENERAL COMMENTS/RECOMMENDATIONS

General comments (also referred to as general recommendations by the CtEDAW and CERD) are written instruments that treaty bodies adopt, with varying frequency, to set out their views as to the rights and obligations under the treaty concerned.[77] These comments are an integral aspect of the treaty body practice and a vital tool for the interpretation of the respective treaties. The practice of adopting general comments was pioneered by the CERD in 1972, based on the power of treaty bodies to make general

[76] The most thorough study on implementation is that of Heyns and Viljoen, above note 56. See also UN Doc. HRI/MC/2006/2, paras. 11–14.

[77] The General Comments can be found in UN Doc. HRI/GEN/1/Rev.9 (vols. I and II) (27 May 2008), and on the websites of the respective treaty bodies.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

recommendations in relation to their function of examining states parties' reports.[78] This direct link was particularly evident in the first generation of general comments that specified states parties' reporting obligations. Subsequently, general comments have become instruments that enable treaty bodies to interpret treaty provisions with a view to promoting effective rights protection and the implementation of treaties. They can serve a number of purposes, combining legal analysis with important policy and practice direction functions.[79]

The adoption of a general comment typically involves a number of stages that are followed with some variation by all treaty bodies. A member or members of a treaty body propose(s) the drafting of a general comment. If this proposal is supported a member or a group composed of several members is tasked with preparing a draft or drafts for consideration by the committee. The draft is then further revised and formally adopted after a detailed discussion of its contents.[80] In this process the committee consults with a range of actors from within the UN system, such as specialised agencies, and from without, such as NGOs. In practice, general comments are the outcome of particular dynamics within the treaty body. Is there a readiness to use general comments generally or in relation to a particular issue? Who is taking the lead? How well informed and capable are the drafters? And how successfully does the body overcome internal and external differences to produce an authoritative draft?

The practice of adopting general comments differs markedly between committees. Whereas many bodies adopt one general comment every two years on average, others, notably CtAT, have only adopted two in over twenty years. The HRCtee had adopted an impressive number of thirty-four general comments by 2011, and these constitute an important guide to its understanding of the ICCPR.[81] These comments broach the obligation of states parties under the Covenant and the Optional Protocol, reporting obligations, general questions such as reservations and the majority of substantive rights (including revised comments in relation to several important articles). Compared to the initial, rather cursory general comments of treaty bodies, the more recent ones are greatly substantive. They include at times detailed analysis of the treaty bodies' jurisprudence and relevant international law as well as consideration of topical themes, such as

[78] See Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process, UN Doc. HRI/ICM/2010/2 (10 May 2010), para. 120, based on article 9(2) ICERD.

[79] See the study by H. Keller and L. Grover, 'General Comments of the Human Rights Committee and their Legitimacy', in Keller and Ulfstein, above note 62, 116–98, at 143.

[80] See Buergenthal, above note 54, 388, and UN Doc. HRI/ICM/2010/2, paras. 122–4.

[81] Available at www2.ohchr.org/english/bodies/hrc/comments.htm. See on the role of General Comments in the Committee's practice, Keller and Grover, above note 79, 116–98, and Tyagi, above note 9, 277–307.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

sanctions,[82] non-citizens,[83] children and HIV/AIDS.[84] General comments have served to clarify the fundamental norms of a treaty, such as the application of non-discrimination to violence against women,[85] and the relationship between torture and other forms of cruel, inhuman or degrading treatment or punishment.[86] They can also act as key reference points for states parties, such as on the nature of their obligations, and others where they articulate important principles of international law.[87] General comments have been particularly valuable for bodies that do not have the competence to hear complaints. The CESCR in particular has used its general comments to develop a sophisticated understanding of states parties' obligations necessitated by the controversies surrounding the nature of ESC rights and of corresponding obligations,[88] which in turn has been referred to in national jurisprudence.[89]

General comments are not binding or vested with any formal legal status. Instead, they are widely seen as interpretations of the respective treaties by an authoritative body, which may also serve to restate and clarify its jurisprudence.[90] As such, general comments have become influential not only for the practice of treaty bodies but also because they are cited as authoritative in the jurisprudence of other national and international bodies.[91] It is therefore apt to refer to general comments as 'important instruments in the lawmaking process of the [Human Rights] Committee'[92] and compare them to advisory opinions.[93] Indeed, the ICJ believes that 'it should ascribe great

[82] CESCR, General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8 (12 December 1997).

[83] CERD, General Comment 30: Discrimination against Non-Citizens, UN Doc. HRI/GEN/1/Rev.7/Add.1 (4 May 2005).

[84] CtRC, General Comment 3: HIV/AIDs and the Rights of the Children, UN Doc. CRC/GC/2003/3 (17 March 2003).

[85] CtEDAW, Violence against Women, General Recommendation 12 (1989) and General Recommendation 19 (1992).

[86] CtAT, General Comment 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 (24 January 2008).

[87] HRCtee, General Comment 31: The Nature of the General Legal Obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

[88] This practice started with its General Comment 3 on general obligations, which was followed by comments concerning the states parties obligations in relation to substantive rights.

[89] See for example *Government of the Republic of South Africa and Others* v. *Grootboom and Others*, 2000 (11) BCLR 1169 (CC), (4 October 2000), paras. 29–31, 45.

[90] See Tyagi, above note 9, 301–7, with further references. However, see Keller and Grover, above note 79, 133, who refer to the US and UK position rejecting 'the idea that the Committee is "the" authoritative interpreter of the Covenant'.

[91] See for example the ICJ in the *Wall* Advisory opinion, para. 136 (reference to General Comment 27); *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), Judgment of 30 November 2010, para. 66 (General Comment 15); para. 77 (General Comment 8).

[92] Buergenthal, above note 54, 387.

[93] Ibid., 386.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

weight to the interpretation adopted by this independent body [the HRCtee] that was established specifically to supervise the application of that treaty'.[94]

The legitimacy of General Comments has been attributed to a number of factors, which a recent study based on a series of interviews with committee members identified as determinacy, symbolic validation, coherence, adherence and democratic decision-making.[95] While many General Comments have been favourably received their authority has been challenged in some notable instances. The HRCtee's General Comment 24 is an example that elicited considerable controversy. Several states, namely the UK, USA and France, took exception to the HRCtee's position that it rather than the states parties themselves has the competence to decide on the validity of reservations, as has been the traditional understanding in international law.[96] The General Comment was the subject of close scrutiny and questions were raised about the Committee's reasoning and limited legal analysis.[97] Such reactions generate moments of tension that can damage the relationship between states and treaty bodies and serve to undermine the latter's authority. However, the committees, being the guardians of the treaty in question, also have a responsibility to strengthen the effectiveness of human rights treaties. Using general comments to break new ground to this effect can be a risky undertaking but may over time be vindicated if a sufficient number of relevant actors subscribe to the treaty bodies' position, which in turn generates momentum for others to follow.

5.5 COMPLAINTS PROCEDURES AND JURISPRUDENCE OF TREATY BODIES

5.5.1 Overview

Treaty-based complaints procedures (individual and inter-state communications) are an important means to monitor compliance of states parties with their obligations and to develop the law under the respective treaty. Importantly, and exceptionally as compared to other areas of international law, individual complaints procedures provide victims of human rights violations with a remedy at the international level.[98] This is in contrast to related areas, such as international refugee law and international humanitarian law, where no

[94] *Ahmadou Sadio Diallo*, para. 66. [95] Keller and Grover, above note 79.

[96] See observations by the USA, the UK and France on General Comment 24, in *Report of the HRCtee*, UN Doc. A/50/40 (3 October 1995), Annex IV (USA and UK), and UN Doc. A/51/40 (13 April 1997), Annex VI (France).

[97] See K. Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', *EJIL* 13(2) (2002), 437–77, at 446–68; E. A. Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties', *Berkeley J. Int'l L.* 17 (1999), 277–329.

[98] See Chapter 7.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

comparable treaty bodies and procedures exist. However, human rights treaty bodies are, with few exceptions, not vested with the automatic competence to consider communications. They can only deal with individual cases where states parties make a declaration to this effect or become parties to an optional protocol.[99] The lack of a compulsory complaints procedure historically reflected the reluctance of states to expose themselves to any scrutiny other than the reporting procedure. This has slowly changed as many states (with some significant exceptions, see below) have now recognised the competence of treaty bodies to consider complaints of alleged human rights violations.[100]

Procedures for inter-state cases before the various treaty bodies differ. Communications may be heard by the committee concerned (CAT, ICRMW and CPED)[101] or dealt with by *ad hoc* conciliation commissions (ICERD and ICCPR).[102] Disputes regarding the interpretation and application of the respective treaty may be settled through negotiation, arbitration, or, ultimately referral to the ICJ (ICERD, CEDAW, CAT, ICRMW and CPED).[103] The rather elaborate UN treaty system for inter-state complaints has not been used. This may appear odd at first sight because states included the relevant provisions in the first place and a number of states parties have made declarations accepting the complaints procedures concerned. States' reluctance to use formal inter-state procedures before treaty bodies to resolve disputes may be attributed to a preference for political bodies, such as the UN HRC, to address human rights concerns and a desire to avoid adverse diplomatic repercussions. However, there have been a growing number of inter-state cases over the breach of human rights obligations before other courts, namely the ECtHR and the ICJ.[104] Notably, in several judgments, the ICJ adjudicated cases with reference to the ICCPR, among other applicable sources.[105] This suggests that states prepared to use formal proceedings prefer to resort to courts, where possible. The reason for this may be the prospect of obtaining a binding judgment that

[99] Optional protocols become necessary where the primary treaty, as is the case with the ICCPR, does not provide for a complaints procedure. See, more recently, the OPICESCR and OPCRC (Complaints Procedures).

[100] See http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.

[101] Articles 21 CAT, 74 ICRMW and 32 CPED.

[102] Articles 11–13 ICERD (automatic/compulsory) and 41–43 ICCPR (upon declaration).

[103] Articles 22 ICERD, 29 CEDAW, 30 CAT, 92 ICRMW and 42 CPED. See for an interpretation of article 22 ICERD (dispute settlement between ICERD states parties and referral to the ICJ), case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), Preliminary Objections, Judgment of 1 April 2011, paras. 115–84; on article 29 CEDAW, *Armed Activities on the Territory of the Congo* (*New Application:2002*) (*Democratic Republic of the Congo* v. *Rwanda*), Jurisdiction and admissibility, Judgment, ICJ Reports 2006, p. 6, paras. 87–93; and, on article 30 CAT, *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), ICJ Judgment of 20 July 2012, paras. 42–55.

[104] See section 6.2.4 on the ECtHR.

[105] See in particular the *Wall* advisory opinion and *Ahmadou Sadio Diallo* case.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

carries greater weight than quasi-judicial or other dispute settlement procedures for inter-state cases provided for in the UN human rights treaty system.

By July 2012 six treaty bodies had the competence to receive individual communications. Individual complaints mechanisms are either provided for in the respective treaty, such as the ICERD, the CAT, the ICRMW (procedure not in force as of July 2012) and the CPED,[106] or in an optional protocol, as is the case with the ICCPR, the CEDAW and the CRPD. The optional protocol to the CEDAW (1999), the ICESCR (2008, not in force as of July 2012) and the CRC (on complaints procedure) (2011, not in force as of July 2012) were adopted twenty years, forty-two years and thirty-two years respectively after the adoption of the treaty setting out the substantive rights. This time lag shows that the acceptance of individual complaints procedures is often the outcome of protracted processes. These processes are usually driven by a range of actors comprising civil society organisations, like-minded states parties, UN bodies and individual experts who frequently encounter considerable obstacles when advocating changes to the system. This includes objections based on the supposed lack of justiciability of rights (ICESCR)[107] and the reluctance to vest bodies such as the CtEDAW with the power to consider complaints in what are seen as sensitive areas. The challenges surrounding the recognition of an individual complaints procedure were also evident in recent debates in the HRC concerning an optional protocol to the CRC.[108]

The level of state acceptance as regards the competence of the various treaty bodies to consider communications varies considerably.[109] There is a significant regional imbalance which undermines the universal reach of procedures. The USA, India, China and Middle Eastern states in particular have not accepted the competence of treaty bodies to receive complaints against them. Even where states have recognised such competence, there are sizeable differences in the number of communications that reach the various committees. The HRCtee has dealt with by far the most complaints, followed by the CtAT, the CERD, the CtEDAW and the CtRPD.[110]

[106] Articles 14 ICERD, 22 CAT, 77 ICRMW and 31 CPED.

[107] See section 9.6.

[108] See Optional Protocol CRC on a communications procedure, A/HRC/RES/17/18 (14 July 2011), and documents of the Open-ended Working Group on an Optional Protocol to the CRC to provide a communications procedure, online, at www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm.

[109] The status of ratifications and acceptance of treaty bodies' competence to consider complaints is available online at www2.ohchr.org/english/bodies/petitions/index.htm.

[110] The relevant statistics are provided in the overview for each treaty body following in this chapter, with the exception of CtRPD due to its limited jurisprudence to date. CtRPD decided its first case on 19 April 2012, *H. M.* v. *Sweden*, UN Doc. CRPD/C/7/D/3. The case concerned the 'refusal to grant building permission for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability on grounds of incompatibility of the extension in question with the city development plan', with the Committee finding a violation of articles 5(1), 5(3), 19(b), 25 and 26, read alone and in conjunction with articles 3(b), (d) and (e), and 4(1) (d) CRPD.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

The respective committee(s) often plays a valuable role for some countries or in some regions while it may be of marginal interest in others. In this context, it is important not to see the number of communications brought against a particular state as a reliable indicator of the seriousness of the human rights situation in a country, though this may constitute one factor influencing whether or not cases are brought. Other factors include awareness, the presence of activist lawyers and NGOs taking up cases, the availability of effective domestic remedies that make recourse to the treaty bodies unnecessary, a preference for regional procedures where available and the degree of belief in the utility of the procedure.[111] Finally, state acceptance of complaints procedures has not automatically translated into compliance with decisions made.[112]

5.5.2 Human Rights Committee

The optional protocol had been accepted by 114 of the 167 states parties to the ICCPR as of 27 July 2012. The HRCtee had found 764 violations in the 1,815 concluded cases out of a total of 2,034 communications with respect to eighty-four countries as of 23 April 2012.[113] It has developed an impressive body of jurisprudence that has been marked by its response to systemic and/or serious violations in several countries and regions and by the development of its case law on particular rights. The 1970s and 1980s were characterised by a large number of decisions against Uruguay in cases involving torture and disappearances.[114] Colombia and Zaire featured prominently in the 1980s in respect of serious violations committed in the course of conflict and dictatorship.[115] Jamaica in the late 1980s and throughout the 1990s and Trinidad and Tobago in the 1990s and 2000s were the subject of dozens of decisions, particularly in respect of the death penalty regime in place in both countries. This included findings that the mandatory death penalty was incompatible with the right to life, an emphasis on compliance with the right to a fair trial as prerequisite for the imposition of the death penalty and

[111] Heyns and Viljoen, above note 56, 28–30.

[112] See section 7.5.

[113] See statistical survey of complaints considered, www2.ohchr.org/english/bodies/hrc/procedure.htm.

[114] Beginning with the case of *Massera* v. *Uruguay*, Communication no. R.1/5 (15 August 1979), the first HRC decision on the merits that found violations of articles 7, 9(1–4), 10(1), 14(1, 2, 3), 25. All of the Committee's first twelve views concerned Uruguay, with a total of forty-seven views as of 7 March 2012.

[115] See for example *Herrera* v. *Colombia*, Communication no. 161/1983 (2 November 1987), paras. 10.1–11 (violation of articles 6, 7, 10(1)); *Muteba* v. *Zaire*, Communication no. 124/1982 (24 July 1984), paras. 10.1–12 (violation of articles 7, 9 (3, 4), 10(1), 14(3 (b),(c),(d)), 19); *Mpandanjila et al.* v. *Zaire*, Communication no. 138/1983 (26 March 1986), paras. 8.1–9 (violation of articles (9(1), 10(1), 12(1), 14(1), 19 and 25).

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

holding that the so-called death row phenomenon may constitute inhuman and degrading treatment.[116]

In the 2000s the geographic focus broadened. It included Algeria and Libya (particularly enforced disappearances);[117] Belarus (denial of various rights resulting from political repression);[118] Central Asian states, particularly Tajikistan, Kyrgyzstan and Uzbekistan (mainly torture and imposition of the death penalty following an unfair trial);[119] Russia (multiple violations);[120] and several Asian states, particularly the Philippines and Sri Lanka (mainly in relation to the death penalty before its abolition in the Philippines, as well as torture, arbitrary arrests and detention and unfair trials).[121] The HRCtee has over the years also heard a number of complaints in relation to particular states for which it constitutes the only available international complaints procedure. This included Spain in respect of the right to an appeal as part of the right to a fair trial, primarily because Spain had until recently not been a party to protocol no. 7 to the ECHR which recognises such a right.[122]

[116] See *Kennedy* v. *Trinidad and Tobago*, UN Doc. CCPR/C/67/D/845/1999 (2 November 1999), para. 7.3 (mandatory death penalty); *Price* v. *Jamaica*, UN Doc. CCPR/C/58/D/572/1994 (6 November 1996), paras. 9.2–9.3 (death penalty following an unfair trial); *Pratt and Morgan* v. *Jamaica*, Communication nos. 210/1986 and 225/1987 (6 April 1989), para. 15 (commutation as appropriate remedy); *Johnson* v. *Jamaica*, UN Doc. CCPR/C/56/D/592/1994 (25 November 1998), para. 10.4 (death row).

[117] See *Benaziza* v. *Algeria*, UN Doc. CCPR/C/99/D/1588/2007 (26 July 2010), paras. 9.1–10 (violation of articles 6(1), 7, 9, and 2(3)); *El-Abani* v. *Libyan Arab Jamahiriya*, UN Doc. CCPR/C/99/D/1640/2007 (26 July 2010), paras. 7.1–8 (violation of articles 6(1), 7, 9, 10(1), 14(1, 3 (a–d)), 16 and 2(3)).

[118] See *Korneenko and Milinkevich* v. *Belarus*, UN Doc. CCPR/C/95/D/1553/2007 (20 March 2009), paras. 8.1–9 (violation of articles 19(2), 25, 26); *Lukyanchik* v. *Belarus*, UN Doc. CCPR/C/97/D/1392/2005 (21 October 2009), paras. 8.1–9 (violation of article 25(b) in conjunction with article 2); *Tulzhenkova* v. *Belarus*, UN Doc. CCPR/C/103/D/1838/2008 (26 October 2011), paras. 9.1–10 (violation of article 19(2)).

[119] See *Iskandarov* v. *Tajikistan*, UN Doc. CCPR/C/101/D/1499/2006 (30 March 2011), paras. 6.1–7 (violation of articles 7, 9(1, 3), 14(1), 3(b),(d),(e),(g)); *Akhadov* v. *Kyrgyzstan*, UN Doc. CCPR/C/101/D/1503/2006 (25 March 2011), paras. 7.1–8 (violation of articles 6, 7, 9, 14(1), (3)(g)); *Kasimov* v. *Uzbekistan*, UN Doc. CCPR/C/96/D/1378/2005 (30 July 2009), paras. 9.1–10 (violation of articles 7, 14(3)(b), (g)).

[120] See *Lantsova* v. *Russia*, UN Doc. CCPR/C/74/D/763/1997 (26 March 2002), paras. 8.1–10 (violation of articles 6, 10(1)), and *Andrei Khoroshenko* v. *Russia*, UN Doc. CCPR/C/101/D/1304/2004 (29 March 2011), paras. 9.1–10 (violation of articles 6, 7, 9(1–4), 14(1), (3)(a), (b), (d), (g)).

[121] See *Wilson* v. *Philippines*, UN CCPR/C/79/D/868/1999 (30 October 2003), paras. 7.1–8 (violation of articles 7, 9(1–3), 10(1, 2)); *Singarasa* v. *Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (21 July 2004), paras. 7.1–7.5 (violation of articles 14(1), (2), (3)(c), (f), (g), 5, 2(3) and 7); *Rajapakse* v. *Sri Lanka*, UN Doc. CCPR/C/83/D/1250/2004 (14 July 2006), paras. 9.1–10 (violation of articles 7, 9(1–3), 10 as well as 2(3)).

[122] See *Gayoso Martínez* v. *Spain*, UN Doc. CCPR/C/97/D/1363/2005 (19 October 2009), paras. 9.1–10 (violation of article 14(5)).

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

A large number of cases before the HRCtee concern articles 2, 6, 7, 9, 10 and 14, which reflects the prevalence and close nexus of arbitrary detention, torture, ill-treatment and enforced disappearance, or unfair trials and the death penalty, as well as the lack of effective remedies. The HRCtee has made an important contribution to the international jurisprudence in this respect.[123] It has also adopted a number of influential views in respect of other articles, including on freedom of expression,[124] discrimination[125] and minority rights.[126]

The HRCtee's jurisprudence constitutes an authoritative record of violations in the cases brought before it. While the value of its views as a remedy for individuals has been undermined by limited state compliance,[127] it has vindicated claims, set precedents and served as an advocacy tool for tackling systemic violations.[128] In conjunction with the reporting system its jurisprudence has eroded the acceptability of certain practices. This has contributed to changes in the practice of states parties, such as the suspension or abolition of the death penalty.[129]

The views of the HRCtee have been referred to by other courts, including the ICJ, human rights treaty bodies, other UN bodies, national courts and

[123] *Bleier* v. *Uruguay*, Communication no. 30/1978 (R.7/30) (29 March 1982), paras. 13.1–14 (violation of articles 6, 7, 9, 10(1)); *Sharma* v. *Nepal*, UN Doc. CCPR/C/94/D/1469/2006 (28 October 2008), paras. 7.1–10 (violation of articles 6, 7, 9, 10 and 2(3)); *Alzery* v. *Sweden*, UN Doc. CCPR/C/88/D/1416/2005 (25 October 2006), paras. 11.1–12 (violation of article 7, 2 and article 1 of the optional protocol). See also HRCtee, General Comment 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR/C/GC/32 (23 August 2007).

[124] See HRCtee, General Comment 34: Article 19: Freedoms of Opinion and Expression, UN Doc. CCPR/C/GC/34 (12 September 2011) and, for example, *Yong-Joo Kang* v. *Republic of Korea*, UN Doc. CCPR/C/78/D/878/1999 (15 July 2003), paras. 7.1–8 (political opinion), (violation of articles 10 (1, 3), 18, 19, 26).

[125] See on article 26 *Zwaan-de Vries* v. *The Netherlands*, Communication no. 182/1984, (9 April 1987), paras. 10–16, and *Albareda et al.* v. *Uruguay*, UN Doc. CCPR/C/103/D/1637/2007, 1757 and 1765/2008 (24 October 2011), paras. 9.1–10.

[126] On article 27, see *Lovelace* v. *Canada*, Communication no. R.6/24 (30 July 1981), paras. 13.2–19 (violation); *Lubicon Lake Band* v. *Canada*, UN Doc. CCPR/C38/D/167/1984 (26 March 1990), paras. 32.1–33 (violation); *Länsman et al.* v. *Finland*, UN Doc. CCPR/C/52/D/511/1992 (26 October 1994), paras. 9.1–10 (no breach); *Diergaardt et al.* v. *Namibia*, UN Doc. CCPR/C/69/D/760/1996 (25 July 2000), paras. 10.1–11 (violation of article 26, not 27); *Mahuika et al.* v. *New Zealand*, UN Doc. CCPR/C/70/D/547/1993 (27 October 2000), paras. 9.1–9.9 (no breach); *Mavlonov and Sa'di* v. *Uzbekistan*, UN Doc. CCPR/C/95/D/1334/2004 (19 March 2009), paras. 8.6–9 (violation); *Poma* v. *Peru*, UN Doc. CCPR/C/95/D/1457/2006 (27 March 2009), paras. 7.1–8 (violation); *Georgopoulos et al.* v. *Greece*, UN Doc. CCPR/C/99/D/1799/2008 (29 July 2010), paras. 7.1–8 (violation).

[127] See section 7.5.

[128] See for an assessment of its impact, Heyns and Viljoen, above note 56, 15–19.

[129] Reference to this development is made in *Lumanog and Santos* v. *Philippines*, UN Doc. CCPR/C/92/D/1466/2006 (20 March 2008), para. 8.2.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

others.[130] The importance of the ICCPR as part of the International Bill of Rights, the nature of issues raised before the Committee and the standing of individual committee members have all contributed to the authority that the HRCtee's jurisprudence generally commands. However, there are several grounds on which the HRCtee's jurisprudence can be, and has been criticised, including by its own members. These include its handling of facts and evidentiary problems – the HRCtee has no fact-finding capacity and relies on written submissions rather than hearings – and the paucity of its reasoning, generally attributed to the limited time and resources available and the search for consensus. Critics also mention taking positions that have far-reaching consequences with limited explanation and reference to the jurisprudence of other bodies.[131]

5.5.3 Breadwinners, social security and discrimination: *Zwaan-de Vries* v. *The Netherlands*

The author, Mrs F. H. Zwaan-de Vries, was denied benefits under the Dutch Unemployment Benefits Act in 1979/1980, which excluded married women 'who were neither breadwinners nor permanently separated from their husbands', but not married men.[132] The legislation had been based on the view that 'all married men who had jobs could be regarded as their family's breadwinner'. In 1985, in implementing an EC Council directive, the Netherlands amended its legislation in order to provide for equal treatment. The author argued that she had been a victim of discrimination (article 26 ICCPR) in relation to social benefits. In response, the state party posed the question of whether the way it had fulfilled its obligations under article 9 (right to social security) in conjunction with articles 2 and 3 ICESCR could become, by way of article 26 ICCPR, the object of an examination by the HRCtee. It further argued that if the Committee were to find article 26 ICCPR applicable, the article would need to be interpreted so as to impose simply an obligation of periodic review to ensure that a state took measures to progressively eliminate discrimination in its national legislation. In addition, the state party claimed that the notion of breadwinner was not discriminatory as the provisions of the Act were 'based on reasonable social and economic considerations which are not discriminatory in origin'.

On the merits, the Committee held that:

[130] A. Nollkaemper and R. van Alebeek, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, ACIL Research Paper no. 2011-02 (11 April 2011), 18–19.

[131] See for example controversy surrounding the case of *Kennedy* v. *Trinidad and Tobago*, in which the HRCtee denied the validity of Trinidad and Tobago's reservation to the Optional Protocol, including individual, dissenting, opinions of Committee members Nisuke Ando, Prafulachandra N. Bhagwati, Eckart Klein and David Kretzmer, ibid.

[132] *Zwaan-de Vries* v. *the Netherlands*, paras. 10–16.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 [UDHR], which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof…what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 [ICCPR] and the guarantee given therein to all persons regarding equal and effective protection against discrimination. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26…Under [the Act] a married woman, in order to receive WWV benefits, had to prove that she was a 'breadwinner' – a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable…

The case sets an important precedent for the interpretation of article 26 ICCPR, giving it a broad scope of application in relation to any legislation, even where the latter purports to regulate social rights. The finding of discrimination was the inevitable consequence of this interpretation given the outdated terms of the law. It was facilitated by the fact that the Netherlands had already changed the very legislation to provide for equal treatment, which constituted an implicit acknowledgement. The Netherlands reacted strongly to the decision and even threatened to withdraw from the Optional Protocol.[133]

While the Netherlands ultimately refrained from denouncing the Optional Protocol, other states such as Jamaica, Guyana and Trinidad and Tobago have done so. It is clear that the HRCtee has to tread a fine balance. The acceptance of its views in a given case, and of the legitimacy of the HRCtee as a quasi-judicial body, depends to a considerable degree on the persuasiveness of its views, which require careful reasoning where they seemingly depart from widely held understandings. *Zwaan-de Vries* v. *The Netherlands* broke important ground in this regard.

5.5.4 Committee on the Elimination of Racial Discrimination

Fifty-four of the 174 states parties had made a declaration under article 14 of the ICERD (recognising CERD's competence to hear individual complaints) as of 2 September 2011.[134] The CERD has considered a much lower number

[133] See C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd edn (Oxford University Press, 2008), 51–2.

[134] Report of the Committee on the Elimination of Racial Discrimination, UN Doc. A/66/18 (2011), para. 2 and Annex I.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

of complaints than the HRCtee (forty-eight as of 2011), which shows that its complaints procedure remains underutilised.[135] The majority of communications have concerned a few states parties only (Australia, Denmark, the Netherlands, Norway, Sweden, Slovakia). As a result, its jurisprudence has to date not fully captured the manifold forms of violations and problems arising in the context of racial discrimination, which has limited its overall impact. Nevertheless, the CERD's decisions have highlighted inadequate responses to racial discrimination and racial hatred, such as the lack of effective investigations of racist incidents in Denmark[136] and the tolerance of hate speech in Norway.[137] The CERD also dealt with cases such as the removal of the word 'Nigger' from a sign put up in an Australian town in 'honour of a well-known sporting and civic personality' (the word 'Nigger' had been the latter's nickname), which reflected that changed perceptions can make the public display of certain words racially offensive.[138] Within the given limitations the CERD's jurisprudence has contributed to the clarification of the notion of racial discrimination, the difference between direct and indirect discrimination and the positive obligations of states in response to (allegations of) racial discrimination, particularly the nature of effective remedies.

5.5.5 Still facing discrimination: *Durmic* v. *Serbia and Montenegro*

In *Koptova* v. *The Slovak Republic* the Committee found that two municipal resolutions banning Romani families from entering the towns concerned constituted a violation of article 5(d)(i) of the Convention (prohibition of discrimination in the enjoyment of civil rights, in particular 'the right to freedom of movement and residence within the border of the State'). In *Ms L. R. et al.* v. *Slovak Republic* (*Dobsina*), the cancellation of a low-cost housing project for Romas following a hostile local petition was found to constitute discrimination in relation to housing in violation of article 5(d)(iii). In both cases there was a lack of effective remedy.[139]

[135] Ibid., para. 74.

[136] *Ahmad* v. *Denmark*, UN Doc. CERD/C/56/D/16/1999 (13 March 2000), paras. 6.1–8 (violation of article 6); *Gelle* v. *Denmark*, UN Doc. CERD/C/68/D/34/2004 (6 March 2006) and *Adan* v. *Denmark*, UN Doc. CERD/C/77/D/43/2008 (14 August 2010), both paras. 7.1–8 (both violations of articles 2(1)(d), 4, 6); *Dawas and Yousef Shava* v. *Denmark*, UN Doc. CERD/C/80/D/46/2009 (6 March 2012), paras. 7.1–8 (violation of articles 6 and 2(1)(d)). See also *L. K.* v. *Netherlands*, Communication no. 4/1991 (16 March 1993), paras. 6–6.8 (lack of diligent investigation into threats of racial violence – violation of articles 6, 4).

[137] *The Jewish Community of Oslo* v. *Norway*, UN Doc. CERD/C/67/D/30/2003 (15 August 2005), paras. 10.1–11 (violation of articles 4, 6).

[138] *Hagan* v. *Australia*, UN Doc. CERD/C/62/D/26/2002 (20 March 2003), paras. 7.1–7.4 (articles 2(1)(c), 5, 6, 7 – violation).

[139] *Koptova* v. *Slovak Republic*, UN Doc. CERD/C/57/D/13/1998 (8 August 2000), and *Ms L. R. et al.* v. *Slovak Republic (Dobsina)*, UN Doc. CERD/C/66/D/31/2003 (7 March 2005).

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

In *Durmic* v. *Serbia and Montenegro*

in 2000 the Humanitarian Law Center (HLC) carried out a series of 'tests' across Serbia, to establish whether members of the Roma minority were being discriminated against while attempting to access public places. It was prompted to such action by numerous complaints alleging that the Roma were denied access to clubs, discotheques, restaurants, cafes and/or swimming pools, on the basis of their ethnic origin ... two Roma individuals ... and three non-Roma individuals, attempted to gain access to a discotheque in Belgrade. All were neatly dressed, well behaved and were not under the influence of alcohol. Thus, the only apparent difference between them was the colour of their skin. There was no notice displayed to the effect that a private party was being held and that they could not enter without showing an invitation. The two individuals of Roma origin were denied entry to the club on the basis that it was a private party and they did not have invitations. When the petitioner asked the security guard how he could obtain an invitation there and then, he was told that it was not possible and that the invitations were not for sale ... The three non-Roma individuals were all allowed to enter, despite having no invitations for the so called private party and making this clear to the security personnel at the time.

A criminal complaint submitted to the Public Prosecutor to investigate a case of racial discrimination did not result in any prosecution and a case brought before the Constitutional Court remained pending for over fifteen months without any response. Following a detailed discussion of challenges to admissibility the Committee found a violation of articles 5(f) and 6 of the Convention, holding, *inter alia*, that:

The State party has ... failed to establish whether the petitioner had been refused access to a public place, on grounds of his national or ethnic origin in violation of article 5(f) of the Convention. Owing to the police's failure to carry out any thorough investigation into the matter, the failure of the public prosecutor to reach any conclusion and the failure of the Court of Serbia and Montenegro even to set a date for the consideration of the case some six years after the incident, the petitioner has been denied any opportunity to establish whether his rights under the Convention had been violated.

The decisions cast an important spotlight on racial discrimination against the Roma, demonstrating a pattern in which discriminatory acts are followed by wholly inadequate responses of the authorities and judicial systems, effectively denying legal protection. They added to the growing evidence of the systemic nature of this group-specific discrimination in the region and form an important part of broader efforts to combat discrimination and the 'rightlessness' of the Roma.[140]

[140] See in this regard in particular the work of the European Roma Rights Centre, www.errc.org.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

5.5.6 Committee against Torture

The competence of the CtAT to hear individual complaints pursuant to article 22 CAT has been recognised by 64 of the 147 states parties as of 3 June 2011.[141] The CtAT had dealt with 462 individual communications as of 6 June 2011, finding 60 violations in the 324 concluded cases concerning twenty-nine states.[142] The majority of complaints have concerned alleged violations of article 3 (*refoulement*) brought mainly against Australia, Canada, France, the Netherlands, Sweden and Switzerland. The CtAT's jurisprudence on article 3 includes several important decisions, including in the context of renditions[143] and in relation to situations where the risk of torture or ill treatment emanates from non-state actors (Somalia).[144] The Committee has also specified states parties' obligation to investigate allegations of torture effectively and to provide reparation, including in several cases against Serbia and Montenegro, Spain and Tunisia, which highlighted systemic shortcomings.[145] It also considered the issue of acquiescence in respect of a state's failure to protect individuals against violence by non-state actors, namely mob violence against a Roma settlement in Montenegro.[146] In addition the CtAT has ruled on the scope of universal jurisdiction as part of the ramifications of the *Habré* case, the former Chadian president, accused of being responsible for international crimes, who had fled to Senegal, which has engaged several treaty bodies and courts.[147] These cases show the potential of CtAT to contribute to the jurisprudence on the prohibition of torture, particularly if

[141] Report of the CtAT, UN Doc. A/66/44 (2011), paras. 1, 2 and Annexes I and III.

[142] Statistical survey of individual complaints considered, www2.ohchr.org/english/bodies/cat/procedure.htm.

[143] Return to Egypt was considered a violation of article 3 in *Agiza* v. *Sweden*, UN Doc. CAT/C/34/D/233/2003 (20 May 2005), paras. 13.1–14 (see case study below), but not in *Attia* v. *Sweden*, UN Doc. CAT/C/31/D/199/2002 (17 November 2003), para 12.1–13.

[144] *Elmi* v. *Australia*, UN Doc. CAT/C/22/D/120/1998 (14 May 1999), paras. 6.4–7 (violation of article 3).

[145] *Nikolic* v. *Serbia and Montenegro*, UN Doc. CAT/C/35/D/174/2000 (24 November 2005), paras. 6.2–7 (violation of articles 12, 13); *Dimitrijevic* v. *Serbia and Montenegro*, UN Doc. CAT/C/33/D/207/2002 (24 November 2004), paras. 5.3–6 (violations of articles 2(1), 1, 12, 13, 14); *Guridi* v. *Spain*, UN Doc. CAT/C/34/D/212/2002 (17 May 2005), paras. 6.4–7 (violation of articles 2, 4, 14); *Bouabdallah Latief* v. *Tunisia*, UN Doc. CAT/C/31/D/189/2001 (14 November 2003), paras. 10.3–11 (violation of articles 12, 13); *Keremedchiev* v. *Bulgaria*, UN Doc. CAT/C/41/D/257/2004 (11 November 2008), paras. 9.2–10 (violation of articles 12, 16); *Hanafi* v. *Algeria*, UN Doc. CAT/C/46/D/341/2008 (3 June 2011), paras. 9.1–10 (violation of articles 1, 2(1), 11, 12, 13, 14); *Sonko* v. *Spain*, UN Doc. CAT/C/47/D/368/2008 (25 November 2011), paras. 10.1–10.8 (violation of articles 12 and 16).

[146] *Hajrizi Dzemajil et al.* v. *Serbia and Montenegro*, UN Doc. CAT/C/29/D/161/2000 (21 November 2002), paras. 9.1–10 (violation of articles 16, 12, 13). See also *Osmani* v. *Serbia*, UN Doc. CAT/C/42/D/261/2005 (8 May 2009), paras. 10.3–11 (violation of articles 16, 12, 13).

[147] *Guengueng* v. *Senegal*, UN Doc. CAT/C/36/D/181/2001 (17 May 2006), paras. 9.1–9.12 (violation of article 7 and 5(2)). See also section 7.7.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

it engages in more in-depth considerations of the normative questions posed in a given case rather than their cursory treatment that is characteristic of some of its decisions.

5.5.7 Rendered defenceless: *Agiza* v. *Sweden*

In 1998 Ahmed Hussein Mustafa Kamil Agiza, an Egyptian national, was tried *in absentia*, convicted and sentenced to twenty-five years' imprisonment for belonging to a terrorist group. In 2000 he claimed asylum in Sweden. Following the views of the Swedish security police the government denied him asylum. According to an investigation by the Parliamentary Ombudsman he was deported to Egypt in 2001 on an aircraft provided by the American Central Intelligence Agency. The complainant alleged that he was tortured by the Egyptian state security officers upon his return. After finding the complaint admissible, on the merits, the Committee considered in detail whether there was a substantial risk of torture upon the complainant's return, finding that:

> it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons ... It follows that the state party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.

Importantly, in its assessment of the procedural dimension of article 3, the Committee found that

> in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof ... The nature of refoulement is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.

On the facts, the Committee found that the lack of judicial or independent administrative review of the government's decision to expel the complainant constituted a breach of article 3 CAT and that the state party had also violated its duty under article 22 CAT to cooperate with the Committee.

Agiza v. *Sweden* set an important precedent in the jurisprudence on renditions, showing how states' security cooperation undermines the prohibition of

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

refoulement and exposes individuals to the risk of torture.[148] It proved to be influential in cases before other human rights treaty bodies, particularly the largely similar *Alzery* case decided by the HRCtee.[149] Most importantly for the interpretation of CAT, the Committee read a general procedural obligation to provide an effective remedy into article 3 and the Convention as a whole, thereby strengthening legal protection, particularly against future violations.

5.5.8 The Committee on the Elimination of Discrimination against Women

A hundred of 186 states parties had recognised the competence of the CtEDAW to hear complaints under the optional protocol as of 4 February 2011.[150] The CtEDAW assumed its function of considering individual complaints in 2001. It had decided relatively few cases (twenty-three) by March 2012 and these concerned a limited number of states parties, with Hungary, Austria, the Philippines, Bulgaria, Belarus, Brazil, Peru, Canada and Turkey found to have violated their obligations under the treaty. The CtEDAW's jurisprudence has primarily addressed positive obligations, particularly the duty to take effective action to provide protection against domestic violence.[151] The Committee dealt with a case on involuntary sterilisation of a Roma woman, which highlighted the intersection between racial and gender-based discrimination.[152] It has also recognised intersectional discrimination in access to health care as a violation,[153] and in the case of an aboriginal woman who did not have effective legal protection when seeking to regain her property.[154] The CtEDAW has strengthened reproductive rights in a case where a girl who had become pregnant as a result of sexual abuse was denied surgery.[155] In addition, it has addressed stereotyping in employment matters and criminal proceedings (*Vertido* v. *Philippines*, see below).[156]

[148] See section 15.8.

[149] *Alzery* v. *Sweden*.

[150] Report of the Committee on the Elimination of Discrimination against Women, UN Doc. A/66/38 (2011), 145, paras. 1–2.

[151] *Yildrim* v. *Austria*, UN Doc. CEDAW/C/39/D/6/2005 (6 August 2007) and *Goekce* v. *Austria*, UN Doc. CEDAW/C/39/D/5/2005 (6 August 2007), both paras. 12.1–12.2 (violation of article 2(a), (c)–(f), 3, 1); *V. K.* v. *Bulgaria*, UN Doc. CEDAW/C/49/D/20/2008 (25 July 2011), paras. 9.1–9.15 (violation of article 2(c), (d), (e) and (f), article 1, and article 5(a), 16(1)).

[152] *A. T.* v. *Hungary*, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005), paras. 9.1–9.6 (violation of articles 2(a), (b), (e), 5(a), 16).

[153] *Teixeira* v. *Brazil*, UN Doc. CEDAW/C/49/D/17/2008 (25 July 2011), paras. 7.1–8 (violation of articles 12, 2(c), (e), 1).

[154] *Kell* v. *Canada*, UN Doc. CEDAW/C/51/D/19/2008 (28 February 2012), paras. 10.1–11 (violation of articles 2(d) and (e), 16(1) and 1).

[155] *L. C.* v. *Peru*, UN Doc. CEDAW/C/50/D/22/2009 (17 October 2011), paras. 8.6–9 (violation of articles 2(c), (f), 3, 5, 12, 1).

[156] *R. K. B.* v. *Turkey*, UN Doc. CEDAW/C/51/D/28/2010 (24 February 2012), paras. 8.1–8.10 (violation of articles 2(a), (c) and 1, 5(a), 11(1)(a) and (d)).

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

The importance of the Convention in the custodial context was underscored in a case concerning humiliating treatment of women and conditions in detention facilities.[157] The nature of these cases and the approach taken by the Committee hint at the important role that it can play in strengthening the rights of women in international human rights law.

5.5.9 'We don't believe you': *Vertido* v. *The Philippines*

Karen Tayag Vertido alleged that she had been raped by the former president of the Davao City Chamber of Commerce and Industry in March 1996. She underwent a medical examination and complained to the police. The case eventually reached a trial court where it remained pending from 1997 to 2005.[158] Two experts testified that the author suffered from post-traumatic stress disorder due to the rape. There were no further witnesses and the accused claimed 'that the sexual intercourse was consensual'. In April 2005 the Regional Court of Davao City acquitted the accused, relying on several criteria established in a previous Supreme Court ruling.

After finding the case admissible the CtEDAW considered

> the author's allegations that gender-based myths and misconceptions about rape and rape victims were relied on by Judge Hofileña-Europa in the Regional Court of Davao City in its decision ... leading to the acquittal of the alleged perpetrator, and will determine whether this amounted to a violation of the rights of the author and a breach of the corresponding state party's obligations to end discrimination in the legal process under articles 2(c), 2(f) and 5(a) of the Convention.

It found that the length of the trial breached the author's right to a remedy in relation to article 2(c), stating 'while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, [it] considers that such a right is implied in the Convention'. Further, '[t]he Committee finds that one of [the guiding principles applied in the case], in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias...' Moreover,

> [i]t is clear from the judgement that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the rational and ideal response of a woman in a rape situation ... [the author had reacted 'both with resistance at one time and submission at another time', which the judge saw as contradictory]. Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and

[157] *Abramova* v. *Belarus*, UN Doc. CEDAW/C/49/23/2009 (25 July 2011), paras. 7.1–8 (violation of articles 2, 5(a)).

[158] *Vertido* v. *The Philippines*, UN Doc. CEDAW/C/46/D/18/2008 (16 July 2010), paras. 8.1–8.9 (violation of article 2(c), (f), 5(a),1).

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim.

Moreover, '[w]ith regard to the definition of rape, the Committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code ... [emphasising] that rape constitutes a violation of women's right to personal security and bodily integrity and that its essential element was lack of consent'. The Committee then recommended that the state party pay compensation to the author and undertake far-reaching reforms in its legislation on rape and procedures in rape cases, including

> training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.

The views of the Committee provide an anatomy of how a legal system fails rape victims. Given the prevalence of gender stereotypes worldwide the decision reaffirms the Committee's understanding of rape and clarifies states parties' obligation to treat rape cases in an expeditious and non-discriminatory manner. While not explicitly referring to it, the case can be viewed in light of judgments by other bodies, such as the ECtHR in *M. C.* v. *Bulgaria*, in which states failed in their positive obligation to adequately respond to rape allegations. It therefore forms part of a growing jurisprudence that both exposes domestic failings in rape cases and helps in developing best practices.

5.5.10 Achievements and challenges

The individual complaints procedure before international treaty bodies has contributed to the development of international human rights law. It has also provided some form of remedy for individuals and brought about changes as a result of subsequent implementation.[159] However, several treaty bodies, such as the CERD, the CtAT and the CtEDAW, remain underutilised. Ironically, this development also shields them to some degree from the opposite problem, namely an increasing caseload that would adversely affect the effectiveness of complaints procedures.

Several crucial areas remain unaddressed in the current system of complaints procedures. This applies in particular to ECSR, which is bound to change with the (eventual) coming into force of the Optional Protocol to the ICESCR.[160] An individual complaints procedure for children's rights will also constitute an important contribution to the system, not least because it

[159] See section 7.5.

[160] As of May 2012, eight states had become parties to the Optional Protocol. For a discussion of this procedure, see section 9.6.1.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

has the potential to let children themselves more clearly articulate their best interests.[161] However, an increase in existing complaints procedures will pose a challenge in its own right, particularly for the coherence and capacity of the system to ensure effective rights protection.

The recourse to individual complaints procedures has increased to 478 communications pending examination as of 1 February 2012 compared to 214 in 2000. In response, the OHCHR proposed a series of measures, particularly aligning working approaches by means of common practices to strengthen the system of individual complaints procedures, inquiries and country visits.[162] The challenges facing the system run deeper than operational matters. Their function as expert bodies that examine complaints on a part-time basis without having public hearings or undertaking fact-finding, and which issue decisions that often do not attract great visibility and are repeatedly not complied with, limits their effectiveness. This is particularly evident in the lack of implementation. Treaty bodies have sought to address this problem by strengthening follow-up procedures, including by means of follow-up rapporteurs, though with limited success to date.[163] While important, these top-down measures may on their own be insufficient to enhance implementation. As highlighted by observers, making the complaints procedure an effective and meaningful remedy for victims and an advocacy tool will require broader changes to the system, focusing particularly on its relevance in the domestic context.[164]

INTERVIEW 5.2
Working for the CESCR
(Eibe Riedel)

Dr Eibe Riedel is Professor Emeritus and Visiting Professor at the Geneva Academy of International Humanitarian Law and Human Rights, previously having taught public law and international law at several universities in Germany, Britain, Switzerland and Australia. Among a number of other positions held, he has been a member of the UN Committee on Economic,

[161] 'On 19 December 2011, the UN General Assembly approved a third optional protocol on a Communications Procedure which will allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. The Protocol opens for signature in 2012 and will enter into force upon ratification by 10 UN Member States.' See www2.ohchr.org/english/bodies/crc.

[162] Pillay, above note 20, 68–74.

[163] See Open Society Justice Initiative, *From Judgment to Justice, Implementing International and Regional Human Rights Decisions* (New York: Open Society Foundations, 2010), 117–36.

[164] See section 7.5.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

Social and Cultural Rights since 1997, with his term due to expire on 31 December 2012.

How would you describe your experience as a member of the Committee on Economic, Social and Cultural Rights – rewarding, frustrating, or a bit of both?

A bit of both, but mainly rewarding. And a lot of work.

The reporting procedure has been much maligned; how do you assess its effectiveness and prospects for its strengthening or more fundamental reforms?

This is a very broad question that cannot be answered easily. With permanent cuts in financial resources for all the treaty bodies, any method of strengthening the system seems flawed. What is needed in the medium term is a proper reform of the entire system towards a unified treaty body monitoring. After initial failure in 2004, this real reform drive has to start soon – with ten treaty bodies making the whole process cumbersome, unwieldy, and at times repetitious and unfocused – both in the state reporting and during the committee questionings. If work started on reforms now, I reckon it would take about ten years to achieve it.

Do General Comments sometimes play the role of a Trojan horse for fundamental reinterpretations of treaty provisions or general rules of international law. If so, where are the limits?

Sometimes they may indeed give the appearance of Trojan horses – but the process is really quite transparent. The issue remains how far interpretation can go. Views differ considerably as to how far interpretation (legitimate) and acting like a legislator (illegitimate) can go. My own view is that General Comments should only interpret the Committee's approach in dialogues with states parties, explaining the meaning of terms used in the ICESCR. But sometimes, newer developments have to be taken on board, like the issue of the right to water, deduced from articles 11 and 12 ICESCR. By way of example, maybe have a look at the CESCR statement on resource allocation and the standard of reasonableness and proportionality in the Committee's work, adopted a little while ago when the Optional Protocol was discussed[1] to explain how far the Committee can go and what the 'margin of appreciation/discretion' of states parties really entails.

Considering the procedure under the Optional Protocol to the ICESCR, the question of justiciability, and the experience of other UN treaty bodies with individual complaints procedures, what do you see as the

[1] See www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

main challenges and prospects for the Committee once the optional protocol comes into force?

Again a very big question.[2] In a nutshell: the Committee should take great care not to overstep its role once the Optional Protocol is in force (we need two more ratifications) with forty signatures at the moment. It would be wise to choose micro-level issues first and to keep away from macro-issues like the extraterritorial application of ICESCR rights, or poverty generally, or environment protection issues on a large scale. This would definitely frighten off many states from ratifying. The fact that a reference to article 1 of both Covenants – which never played a role in the practice of the HRCtee – was kept in the Optional Protocol, despite no treaty body practice on it, will frighten off many countries that have large minorities and self-determination problems. In 2008 about fifty states voiced clear objections to that issue in an individual communications procedure. Those macro-questions should be left to the HRC, the General Assembly, ECOSOC or even to the Security Council. In fact, the CESCR only refers to self-determination occasionally in the state reporting procedure and then usually in conjunction with a particular Part III article.

Once the Optional Protocol is in force and in operation (first cases to come about two years after the exhaustion of local remedies, optimistically in 2014, if the Optional Protocol enters into force in 2012) I expect that interpretation of the broadly and vaguely formulated Covenant provisions will be easier and help to focus discussions, as happened with the Optional Protocol to the ICCPR. To be successful the cases dealt with have to be really convincing individual – or groups of individuals – cases, showing clear violations in order to attract proper worldwide attention. I would warn against overambitiousness, at least at the beginning, because that would scare off many potential ratifiers.

What role do NGOs play as users of the system and as critical supporters of the Committee on Economic, Social and Cultural Rights?

NGOs continue to play a crucial role in the whole procedure(s). But sometimes, they overdo it; for example, by raising budget issues in a very broad manner or by negating discretionary powers of states in making policy choices. When NGOs provide carefully drafted alternative or parallel reports Committee members find them really helpful. Sometimes, though, they are one-issue overstatements, or even alternative government positions, of the opposition that may just have lost a general election. But the information is crucial, anyway, for the Committee to do its work

[2] See E. Riedel, 'New Bearings to Social Rights: the Communications Procedure under the ICESCR', in U. Fastenrath *et al.*, *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma* (Oxford University Press, 2011), 574–89.

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press

properly. Civil society has been excellent in propagating Henry Shue's triple obligations, as popularised by Asbjoern Eide, 'respect, protect, fulfil', which by now most states know of and accept almost without opposition, even though the Covenant is silent on that issue.

POINTS TO CONSIDER

- **Have UN treaty bodies played a leading role in the development of international human rights law?**
- **Is the proliferation of individual complaints procedures the way forward or is it time for a radical rethink? What are the issues that a more effective system should address?**
- **How do the practical challenges facing treaty bodies affect their legitimacy?**

FURTHER READING

Alen, A. *et al.* (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden, Boston: Martinus Nijhoff, 2005).

Baderin, M. and McCorquodale, R., 'The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development', in Baderin and McCorquodale (eds.), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007), pp. 3–24.

Keller, H. and Ulfstein, G., *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012).

Langford, M. (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) (various contributions on the role of several committees).

McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 2nd edn. (Oxford: Clarendon Press, 1994).

Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edn (Kehl am Rhein: Engels, 2005).

Nowak, M. and McArthur, E., *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008).

Schöpp-Schilling, H. B. and Flinterman, C. (eds.), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination Against Women* (New York: The Feminist Press, 2007).

Sohn, L. B. and Buergenthal, T., *International Protection of Human Rights* (Indianapolis: Bobbs-Merrill, 1973).

Wolfrum, R., 'The Committee on the Elimination of Racial Discrimination', *MPYBUNL* 3 (1999), 489–519.

Websites

UN: www.un.org (main UN organs).

OHCHR: www.ohchr.org (providing links to all human rights treaty and charter bodies, i.e. HRC and Special Procedures, country specific documents; text of international treaties and status of ratification).

Universal Human Rights Index Database: www.ohchr.org/EN/HRBodies/Pages/UniversalHumanRightsIndexDatabase.aspx (provides easy access to country-specific human rights information emanating from international human rights mechanisms in the United Nations system: the treaty bodies, the special procedures and the UPR).

https://doi.org/10.1017/CBO9781139048088.006 Published online by Cambridge University Press