CHALLENGES FACING THE HUMAN RIGHTS TREATY BODY SYSTEM

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The human rights treaty bodies — international organs controlling the implementation of core international human rights treaties by States and forming an interlinked system today — are being confronted by a number of compelling challenges that seriously undermine their effective functioning. The current treaty body strengthening process aims to enhance the work of the treaty body system in a way that these challenges are addressed in most efficiently. In these terms the legal assessment of the system's problems is essential for finding mechanisms of their solution that would ultimately improve human rights protection at the national level.

Key words: human rights, UN, core international human rights treaties, strengthening the human rights treaty body system, challenges facing the human rights treaty body system.

Introduction. The creation of the human rights treaty bodies has become a breakthrough in the development of the control-mechanisms in the field of human rights at the international level. Being established to monitor the implementation of the core international human rights treaties, these bodies today play a «fundamental role in promoting and protecting human rights due to the legal nature of their mandates» [14. Para. 5; 1; 2] The treaty bodies, which now number 10 (1), provide an authoritative guidance on human rights standards, advise on how treaties should be applied in specific cases, inform the States parties on the activities that in a best way would ensure that all people enjoy their human rights as well as «generate advocacy platforms» for national human rights institutions (NHRIs) and civil society actors [8. Para. 2]. Over decades, as different treaties came into force and their monitoring bodies assumed their specific functions, the treaty bodies have developed into an interlinked system. The major function of the treaty bodies is to review periodic reports submitted by States. Most treaty bodies consider individual communications, except for CRC and CMW whose competence to examine individual complaints has not yet entered into force, and issue general comments or recommendations regarding the provisions of the respective treaties [3]. They are also empowered to undertake inquiries, while one treaty body — SPT — is working largely through field missions [8. Para. 3]. The independence of these bodies is their distinctive feature that guarantees objectivity and a non-selective approach to all human rights removes them from political context [23].

It has long been recognised that the treaty body system would benefit from 'institutional and other forms of strengthening in order to render it more efficient and ef-

fective» [20. Para. 4; 3]. A great number of proposals have been developed since 1990-s with the major UN initiatives to strengthen the treaty body system launched by the then Secretary-General Kofi Annan in the early 2000s, the Office of the UN High Commissioner for Human Rights (OHCHR) in 2006. The present stage of the process of strengthening the treaty body system has been marked by the initiative of the UN High Commissioner Navi Pillay in 2009 [24] and the on-going intergovernmental process extended until the first half of February 2014 with a view to finalize the elaboration of an outcome document [25].

Today the treaty bodies are confronted by a number of overriding challenges of a systemic character which impede the positive impact of their work — greater human rights protection at the national level through the implementation of the obligations contained in the core international human rights treaties [17].

The proper assessment and understanding of the nature and causes of these challenges is essential for finding mechanisms of their solution that would render the system more effective.

While the unprecedented growth of the human rights treaty body system constitutes its greatest achievement and demonstrates that treaty bodies have an immense potential, the system has become a victim of its own success as its growth has adversely affected the work of treaty bodies. The fact that the system is, nevertheless, surviving is due to the dedication of the experts, who are unpaid volunteers, the support of staff in OHCHR and States' non-compliance with reporting obligations [24].

Some challenges are associated with the emergence of new treaties and the creation of new treaty bodies as well as the increase in the number of ratifications. The system's expansion has led to the increase in the workload of all treaty bodies and significantly weakened the capacity of the committees. Therefore, the first challenge lies in the lack of capacity of treaty bodies.

The other challenge to the treaty body system is the lack of capacity of States which also constitutes the result of the unprecedented growth of the system since the rise in the ratifications under the treaties and thus the increase in the reporting obligations of States has affected their capacity to implement these obligations.

Whilst the independence of the treaty bodies, namely the independence of their members, constitutes the major asset of the system, today various stakeholders are raising serious concerns on this issue.

Finally, such aspects as the level of awareness and visibility of the treaty body system should be given due account.

1. Lack of capacity of the treaty bodies

1.1. The backlogs in the consideration of States Parties' reports and individual communications

The first and most obvious problem confronting treaty bodies is the significant backlog in the consideration of the reports and the individual communications by the treaty bodies. The backlogs take a form of delay between the date of the submission of the report or communication and the date of its examination.

It was estimated that «the average time lag between submission of a State report to the CRPD and its consideration is currently between six to seven years, three to

four years for the CESCR and the CRC, while the average time-lag for other treaty bodies is two to three years» [21. P. 5]. In 2000 there were 200 reports pending consideration [24. P. 19]. In 2012 treaty bodies were facing backlogs «amounting to cumulative 281 State party reports» [24, p. 23] due under various treaties (as of March 2012). This indicates that the States who invested their time to make a report have to wait for the examination of their report for years after the submission.

For those treaty bodies empowered to consider individual communications the increased number of complaints (2) has lead to a huge time lag in this relation. The average time between the registration and final decision on the case in HRC is three and a half years, in CAT — two and a half years, in CEDAW — two years, on CERD — one and a half years [24. P. 23]. This adversely affects the protection of the rights of petitioners since they are confronted with a long wait before their case will be decided by the respective committee. Moreover, some States contribute to the delays since they refuse to cooperate with the committees notwithstanding the reminders to submit their comments on the petition under the consideration [24. P. 23].

It needs to be noted that these backlogs are taking place at a time of high-level of non-compliance by the States that will be discussed after. Thus, if all the States parties start to report on time the system may be put under the risk of collapse. In this situation it has to be stated with a great regret that «the system, established to oversee the compliance, depends for its continued functioning on a high level of State default» [6].

1.2. Resource constraints

The capacity of the treaty bodies is closely related to the issue of resources to support their work. The expansion of the system leads to the greater need in resources from the side of treaty bodies. The lack of capacity to monitor the compliance resulting in the huge backlogs in processing reports and communications reflects that «resources for the system lag behind the expansion and increasing workload» [24. P. 26].

The increasing requests of the committees' for the additional meeting time clearly show that they lack sufficient time for the consideration of reports and communications and other matters of their work.

Considering financial support provided to the system it should be noted that while the support provided to the system in 2010–2011 amounted to $ 39,3 million, the actual cost of the current system in 2012 amounted to $ 48,36 million. This indicates that there has been a significant growth in the resources to cover conference services, the travel of experts and the staff support. Meanwhile the High Commissioner in her Report stressed that considering the growth in the number of experts the actual costs of the members' travelling and accommodation «have outpaced this increase in the approved budget leading to revised appropriations» [20. P. 26].

There is a significant gap (30%) between the number of professionals needed and the number in place who support the sessions of treaty bodies. The High Commissioner mentions that the reason for this lies in the fact that there is not enough adequate resources received from voluntary contributions [7. P. 27].

Furthermore, there is a view that «States do not fully take into account the actual cost of the system considering the dynamic increase in the number of States parties

and procedures under new Optional protocols to the treaties and that the system is becoming more and more under-resourced, therefore» [12]. At the same time the GA «regularly provides additional resources (approximately $ 6 million in 2012) to the committees upon their requests» [12].

The expansion of the system has had significant financial implications in terms of documentation. The volume of documentation has tripled over the last decade [24. P. 24]. The documentation of treaty bodies, particularly the cost of translating documentation, represents the largest part of conference services costs. The documentation includes mostly the periodic reports submitted by States. In 2011 64% of periodic reports exceeded 40 pages limit and 33% of initial reports exceeded 60 pages limit [7. P. 7]. If these page limits were respected, it would be possible to save an estimated $ 5.5 million [24. P. 54].

2. Capacity of States

2.1. Non-compliance with reporting obligations

While the number of ratifications of the treaties represents a 59% growth in treaty ratification over the last decade, the level of reporting have not raised. The slight increase in the number of reports received by the treaty bodies reveals a relative decrease in the reporting compliance. Thus, in 2000 there were 102 reports submitted (with 927 States parties), in 2008 only 117 reports received while the number of ratifications was 1,325 and in 2011 there were 136 reports submitted (1, 508 States parties) [24. P. 54]. The States that are the parties to multiple treaties are confronted with a challenge of the increase in their implementation and reporting obligations.

It seems appropriate to merit further attention to the reporting periodicity under nine core international human rights treaties and two optional protocols. The initial reports under ICERD, ICCPR, CEDAW, CAT and ICRMW should be submitted within 1 year. The initial reports under ICESCR, CRC, CRC-OPAC, CRC-OPSC, CRPD, CED are to be submitted within 2 years. The periodic reports under ICERD should be submitted within 2 years, under ICCPR — 3, 4, 5 or 6 years, under ICESCR — 5 years, CEDAW — 4 years, CAT — 4 years, CRC — 5 years, CRC-OPAC — integrated in to next CRC report, every five years; every five years for States not party to the CRC, CRC-OPSC — Integrated in to next CRC report, every five years; every five years for States not party to the CRC, ICRMW — 5 years, CRPD — 4 years.

The average reporting periodicity under nine core international human rights treaties is estimated to be between four and five years. If a State becomes a party to all core international treaties two optional protocols establishing reporting procedure, it is obliged to submit approximately 20 reports in a period of 10 years, which means two reports per year and two constructive dialogues with treaty bodies per year [24. P. 21].

Taking into account the flexibility established by the committees with regard to the submission of reports, only 16% of the reports due in 2010 and 2011 were received by treaty bodies in conformity with the due dates for the submission of the reports. When counted with a one-year grace period after the due date, «still only one third of reports were submitted on time» [24. P. 21].

The ad-hoc nature of the schedule for the consideration of reports based on the factual submission of reports by States is a subject of a great critique since it «generates differential treatment among States» [24. P. 22]. States that comply with their reporting obligations on time become a subject of a more frequent review by the relevant treaty body.

The major reason of the non-compliance of States with their reporting obligations is the lack of capacity as the preparation of the report requires substantial resources. The question of resources becomes one of the biggest concerns when States has reporting obligations in other spheres of work of the UN (Universal Periodic Review, environment, disarmament) and at the regional level. This argument becomes particularly valid for «Least Developed Countries, Landlocked Developing Countries, Small Island Developing States and States affected by natural disasters or armed conflicts» [24. P. 25].

States generally establish mechanisms for preparing their reports on an ad-hoc basis. This approach hinders the development of institutional memory among the drafters of the reports. Furthermore, the capacity gaps become more exacerbated due to the huge time lag between the submission of the report and its consideration.

The OHCHR provides support to the Governments for the purpose of strengthening capacity building in the area of treaty reporting and in some cases individual communications procedures. Interestingly, on one or two occasions, some States parties have received technical cooperation to assist with reporting but they have not yet produced a report [13]. This leads to the discussion on the willingness of States to cooperate with treaty bodies.

Despite the lack of capacity to submit a timely report, in some cases the failure to submit a report may denote «a lack of political will on the part of the State to fulfil its reporting obligations» [8]. This issue was identified by the former High Commissioner Louise Arbour who stressed that while States join the human rights treaty body system on a formal level, they superficially engage with it due to insufficient capacity or lack of political will [10].

The level of the submission of initial reports by the States parties reveals that under some treaties (ICESCR, CAT and the ICCPR) is equal to 80%. Therefore, 20% of States did not submit their initial reports. At the same time CRC and CEDAW (the most widely ratified treaties) «have succeeded in receiving almost all initial reports due from their 193 and 187 States parties, respectively» [24. P. 22].

Therefore, it seems that the majority of States are willing to comply with their reporting obligations with a number of States having insufficient capacity to deal with their numerous regional and international reporting duties [12]. However, certain States still do not cooperate in a sufficient way with human rights treaty bodies.

3. Lack of coherence between the treaty bodies

The High Commissioner considers the problem of lack of coherence in the work of treaty bodies as one of the two major challenges confronting the system (the first was related to resources). She stated that «in fact, the impressive growth of the treaty body system, although very positive in absolute terms, has also adversely affected the coherence of the system and its ability to coordinate work. The treaty body end prod-

uct, that is its sets of recommendations, at times can also appear unmanageable for States and other stakeholders» [8]. It seems clear that this may weaken the positive impact of treaty bodies at the country level.

While the nine core international human rights treaties are specific and each has its own scope, these instruments «share similar provisions and cover identical issues from different angles, such as non-discrimination; domestic legislation and domestic application of the treaties, policies, institutions and the national machinery for human rights; and gender equality, to name a few» [24. P. 25].

Meanwhile historical and political developments that motivate the adoption of international human rights treaty may beyond doubt influence the interpretation of certain rights given in the related treaty. Therefore, there might be «discrepancies, explicit or implicit, between related provisions in different instruments adopted at different times» [6. P. 385].

While treaty bodies on the whole adopt a common approach with regard to similar provisions some divergence may still appear. The opinions expressed and the interpretations given to rights or practices vary from one committee to another and at times even contradict each other. The main reason of this divergence arises from «the unavoidable tendency» of treaty bodies «to encompass in their consideration of States' reports all explicit or implicit issues that may arise in the implementation of the relevant treaty» [6. P. 394].

Furthermore, treaty bodies often echo the recommendations given by other committees which results in «an overlap or even duplication of requests.» [19] Some commentators express a critique in this relation, others consider «the cross-cutting nature of the committees' work» [15. P. 510] a great value since this may bring more attention of States to the human rights concerns raised by the committees. Furthermore, «from the perspective of individuals who are victims of human rights violations, having multiple human rights bodies reinforce particular human rights concerns is better, even if it may entail some duplication and overlap» [18. P. 515].

Nevertheless, it seems clear that the discrepancies and duplication in the interpretation of similar provisions by the treaty bodies may have repercussions on the reporting obligations of States parties, especially when they engage in discussions with different treaty bodies with regard to similar issues. Thus, the duplication of reporting obligations of States may arise as well as the confusion on the part of States with regard to the measures that should be introduced to address the divergent recommendations that were pointed out by various committees.

While there are certain tendencies of convergence between treaty bodies in relation to their procedures and harmonization of their working methods is on the committees' agenda, there are surely some aspects of their work that demonstrate divergence. For example, the use of the LOIPR is the new optional procedure which is applied by three treaty bodies and which differs from the procedure that is common to all committees. Although this issue requires deeper consideration and the benefits of this procedure are not yet clear, this process may lead to divergences within «the reporting processes of a committee, as between states that follow the standard reporting

procedure, and states that accept the LOIPR». States will have to adopt different approaches to their reporting obligations in relation to different committees.

Moreover, the follow-up practices adopted by the committees are also inconsistent across them and there is even some duplication [18. P. 511]. The danger of the discrepancies in the procedural matters of the committees is that States may «become too preoccupied with questions of process, and not focus their attention sufficiently on issues of substance» [18. P. 512].

Therefore, the lack of coherence between the committees is the consequence of the significant growth of the human rights treaty body system. There are two aspects that should be emphasised within this challenge. The first one is the divergence in the interpretation given by the committees of certain related issues, which entails the contradiction of jurisprudence and its duplication. The second aspect that deserves attention is some divergence in the working methods of the committees. This situation makes it challenging for States and the rights-holders to benefit from the system [20]. Moreover, it is highly important to bear in mind that new procedures are coming into force for certain committees and the system may continue to grow. Therefore, the tendency towards increasing poses a larger risk for the lack of coordination among treaty bodies. In this relation the unified position of treaty bodies on certain issues and more coordination between them deserves appropriate attention.

4. Independence and expertise of the treaty body members

While the independence of treaty body members is «central to the quality and sound functioning of the treaty body system» [11. P. 17], this issue constitutes one of the main challenges that confront it today.

The High Commissioner Louise Arbour stated that the composition of treaty bodies is «uneven in terms of expertise and independence as well as of geographical distribution, representation of the principal legal systems and gender balance» [10. Para. 22]. Moreover, during the international seminar of experts on the strengthening of the human rights treaty body system it was mentioned that «the means by which candidates for election to treaty bodies are selected at the national level and elected by States parties could be improved greatly» [16. P. 326].

It needs to be stressed that the issue of independence should be addressed from the two major aspects — the election process and the exercise of their respective mandate by the treaty body experts. The process of nomination and election plays a great role in ensuring the expertise, independence and impartiality of the members of treaty bodies.

During the performance of the mandate by the treaty body members the concern on the independence of the expert may arise both from the conduct of the member of the treaty body and certain situations that signalise that the member's independence might be put under the question. These situations ay indicate the conflict of interest. It is necessary to determine the circumstances that typically define the conflict of interest: 1) when the treaty body member has the nationality of a State under review; 2) the member is employed by the State party concerned; 3) a personal interest of the concerned member in the issue under the consideration and any other conflict of interest. It is claimed that the «threshold for determining the existence of a conflict of

interest is very low» since «the mere perception of a potential conflict of interest may be considered sufficient to undermine the independence of the member in question» [18. P. 13].

Interestingly, the rules of procedure of several treaty bodies (HRC, CAT and CRPD) empower the respective committees to decide on the possibility of a conflict of interest. The approach shared by the most committees to the potential conflicts of interest is that the member under the suspicion of conflict of interest is excluded from the examination of relevant periodic reports and all the activities related to it (the meetings with different stakeholders and the adoption of concluding observations) as well as the consideration of the communications by their committee [22. P. 13–15]. The fact that the committees decide on the possible conflict of interest confirms the independence of the committee as a body.

It should be noted that the independence of the member of the treaty body is claimed to be questioned more likely when the member is holding a government position [11. P. 17–18] At present, a sufficient number of experts of treaty bodies are combining their appointment in treaty bodies with serving their Governments.

While there might be a perception that due to the aforementioned factors the independence of a certain member may be undermined, «the personality factor is equally important» [17. P. 376]. The members of the treaty bodies are accountable only to their committee and to «their own conscience» [22. P. 13]. When implementing their mandate the members of the committee may show no sign indicating that their position has been influenced by a third party. In this relation the fact of holding a government position or having another interest in a particular matter may be absolutely irrelevant to the independence and impartiality of a member of the committee.

5. Lack of awareness and visibility of the treaty body system

The problem of awareness and visibility of the treaty body system has been raised by the former High Commissioner Louise Arbur in the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body who indicated the low levels of public awareness of the treaty body system «outside academic circles, Government departments and officials directly interacting with the system, and specialized lawyers and NGOs» [10]. It needs to be mentioned in this relation that the HRC was discussing this issue and the members of the treaty body agreed that «the work of the Committee in promoting respect for human rights is little known outside a small circle of academic and government lawyers, who specialize in human rights law, and the international human rights NGO community. The general public, and especially those in countries most affected by violations of human rights, remain largely in ignorance of the Covenant and of the work of the Committee. This ignorance extends even to the judiciary in a number of countries» [9. Para. 5]. While all the materials related to the activity of treaty bodies are available on the internet (on the website of the OHCHR), many people including people with disabilities are denied from the access to internet [9. Para. 8].

The visibility of the system is linked to the authority of the monitoring bodies, which depends on the quality of the monitoring process, its output and decision-making, as well as the perception of independence and fairness of the procedures em-

ployed. The human rights treaty body system is not always seen as «an accessible and effective mechanism to bring about change» [10. Para. 21]. This situation is associated with the fact that the rights-holders and the civil society are «unfamiliar with the system's complex procedures or are unaware of its potential» [10. Para. 21]. The other aspect is that the system receives less political and media attention in comparison to other UN human rights monitoring mechanisms such as the Universal Periodic Review (UPR). In these terms the human rights treaty body system does not appear to be competitive with regard to the UPR. Therefore, there is a need in a wide dissemination of information on the activities of treaty bodies and their output at the national level.

Conclusion. The increase in the number of international instruments and the addition of new monitoring bodies have put the human rights treaty body system at risk of failing to perform their tasks efficiently and effectively, which, in turn, may adversely affect the human rights protection at domestic level, i.a. the enjoyment of the rights by their holders. The treaty bodies workload has significantly increased which resulted in the huge backlogs in the consideration of reports and individual communications. There are high levels of non-compliance by States with their reporting obligations. These challenges are accompanied by the lack of resources, coherence, awareness and visibility of the system as well as the issue of independence and expertise of the treaty body members. The analysis demonstrated that the systemic challenges confronting all treaty bodies are strongly interlinked.

Therefore, in light of the current process of strengthening the human rights treaty body system, at a moment when the decision-making is on a way, it seems that the comprehensive solution to the challenges should be found so that the measures proposed should correspond to each problem and be capable of addressing them in a most coherent way.

COMMENTS

(1) Committee on the Elimination of Racial Discrimination (CERD) mandated to monitor the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination was established in 1970; Human Rights Committee (HRC) as the monitoring body of the International Covenant on Civil and Political Rights began its activity in 1976; Committee on economic, Social and Cultural Rights (CESCR) mandated to monitor the implementation of the International Covenant on Economic, Social and Cultural Rights was established in 1985 by the resolution of the Economic and Social Council (ECOSOC); Committee on the Elimination of Discrimination against Women (CEDAW) was established in 1982 as the monitoring body of the Convention on the Elimination of All Forms of Discrimination against Women; Committee Against Torture (CAT) was created to monitor the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988; Subcommittee on Prevention of Torture (SPT) established under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and started its activity in 2007; Committee on the Rights of the Child (CRC) is monitoring the implementation of the CRC Convention and began to function in 1990; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) as the body monitoring the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and

Members of Their Families started its activity in 2004; Committee on the Rights of Persons with Disabilities (CRPD) mandated to monitor the implementation of the Convention on the Rights of Persons with Disabilities began to function in 2009; Committee on Enforced Disappearances (CED) entrusted to monitor the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance started its functioning in 2011.

(2) As was estimated, 214 petitions were pending consideration in 2000, 480 — in 2011, 478 in 2012 (as of February 2012) [24. P. 19].

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ВЫЗОВЫ, СТОЯЩИЕ ПЕРЕД СИСТЕМОЙ ДОГОВОРНЫХ ОРГАНОВ ПО ПРАВАМ ЧЕЛОВЕКА

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Договорные органы по правам человека — международные органы, осуществляющие контроль над выполнением государствами основных международных договоров по правам человека и формирующие взаимосвязанную систему — сегодня сталкиваются с рядом проблем, которые серьезным образом подрывают их эффективное функционирование. Текущий процесс укрепления договорных органов направлен на совершенствование деятельности системы путем поиска наиболее оптимальных решений для данных проблем. В этой связи правовая оценка вызовов, стоящих перед системой, имеет ключевое значение для разработки механизмов по их решению, что в конечном счете должно привести к усилению защиты прав человека на национальном уровне.

Ключевые слова: права человека, ООН, основные международные договоры по правам человека, договорные органы по правам человека, укрепление системы договорных органов по правам человека, вызовы, стоящие перед системой договорных органов по правам человека.