
14. The influence of politics on the work of the UN human rights treaty bodies

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INTRODUCTION

This chapter presents a practitioner's view on the influence of political dynamics on the work of the United Nations (UN) human rights treaty bodies (UNTBs or treaty bodies). These human rights monitoring mechanisms have gone through a process of expansion and transformation, since the establishment of the first UN human rights treaty body, namely the Committee on the Elimination of Racial Discrimination (CERD Committee) in 1970. UNTBs have had to keep up with developments through a dynamic collective interpretation of human rights law, relying on their expertise and shielded by their independence and collegial nature. These are the three main assets of the UN treaty body system when navigating their mandate in an essentially political environment resulting from States, competing interests and views. While the current ten UNTBs are functioning as collaboratively as possible, they still act in separate legal tracks under nine core international human rights treaties that created groups of independent experts mandated to monitor State parties' compliance with their treaty obligations. Between the unity of purpose and a variety of approaches, there is a need for a balancing act of harmonization. With ten UN treaty bodies, monitoring a broad range of human rights, through different procedures, including State reporting, individual communications, inter-State complaints, and in situ visits, the possibility for disagreements among the treaty bodies themselves and their occasionally tense relations with States parties are permanent features of a treaty body system which was not initially conceived as such. The reflections in this chapter are based on legal and policy document analysis, the practice of the UNTBs, scholarly work, and some personal empirical observations.

Unsurprisingly, the work of the UNTBs has provoked pushback by some States and, at times, controversy. International human rights law is a legal system that operates in the moving sands of national and international political environments. Most contentious seem to be individual communications where States could be found in violation of a specific treaty norm, or general comments which develop the understanding of State parties' legal obligations based on a treaty body's practice and new developments. Other contentious issues, albeit to varying degrees, include the scope of authority of the UNTBs concerning interim measures, urgent actions, and follow-up procedures on concluding observations or individual communications, which some States contend have no basis in the respective treaties. Such disagreements that often reach the level of controversy also extend to the interpretative weight of the general comments or general recommendations issued by UNTBs.

¹ The views expressed here are those of the authors and do not represent any institution. We would like to thank Kristine Røisland Hernes for her research assistance, the two anonymous reviewers for their feedback, and the OHCHR Secretariat for information on various matters. Any mistakes remain our own.

The Office of the High Commissioner for Human Rights (OHCHR) supports the different human rights monitoring mechanisms in the United Nations system, both the UN treaty bodies and the UN Charter-based bodies, including the Human Rights Council.² The Special Procedures of the Human Rights Council are independent human rights expert mechanisms with mandates to report and advice on human rights from a thematic or country-specific perspective. While important and partially overlapping, this chapter will not address the work of the Human Rights Council and its Special Procedures.³

The chapter is structured in four main parts, besides the introduction and the concluding remarks. The first part (section 1) shall focus on the politics affecting international human rights law more generally and what that means for the implementation of international human rights norms. The second part (section 2) shall analyse the political dynamics of the work of the treaty bodies. In this part, our analysis first addresses the treaty body strengthening process, which started in 1988 and is ongoing through the UNTBs 2020 Review Process.⁴ Since 1988, four major initiatives have been taken by the UN to enhance the effectiveness of the treaty body system.⁵ After addressing their institutional aspects, our focus turns to the political dynamics around the main activities of the UNTBs, including State reporting, individual communications, general comments or general recommendations that have attracted controversy by the State parties, and inter-State complaints.

1. THE POLITICS AFFECTING INTERNATIONAL HUMAN RIGHTS LAW

This section will discuss the politics affecting international human rights law and the general impact this has on its effectiveness and legitimacy.⁶ First, it must be noted that human rights have often been used by States as instruments of foreign policy. That said, the notion of politics affecting human rights law is hard to define because it covers two distinct yet related phenomena. On one hand, the implementation of human rights law can be challenged by perfectly legitimate conceptual differences or competing legal interpretations of either the substance of

² Most of these bodies receive secretariat support from the Human Rights Council and Treaty Mechanism Division of the OHCHR. For more information, see United Nations Human Rights Office of the High Commissioner, 'Instruments and Mechanisms' (OHCHR, 2022) <https://www.ohchr.org/en/instruments-and-mechanisms> accessed 15 September 2022.

³ See among others, Eric Tistoune, *The UN Human Rights Council: A Practical Anatomy* (Edward Elgar Publishing 2020); Elvira Domínguez-Redondo, *In Defense of Politicization of Human Rights: The UN Special Procedures* (Oxford University Press 2020). See also United Nations Human Rights Officer of the High Commissioner, 'Special Procedures of the Human Rights Council' (OHCHR, 2022) <https://www.ohchr.org/en/special-procedures-human-rights-council> accessed 15 September 2022.

⁴ For more details see United Nations Human Rights Officer of the High Commissioner, 'Treaty Body Strengthening' (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/treaty-body-strengthening> accessed 15 September 2022.

⁵ Ibid.

⁶ See generally, Andrew Vincent, *The Politics of Human Rights* (Oxford University Press 2010); Anat Biletzki, 'Politicizing Human Rights (Using International Law)', in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (Cambridge University Press 2009) 180-197. For a critical appraisal, see Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (Hurst & Company 2014).

norms or the scope of authority of their monitoring treaty bodies. On the other hand, at times the divergent States' positions are predominantly serving political interests in a manner that attempts to bypass their human rights obligations or weaken the authority of their monitoring treaty bodies. The 'politicization' of human rights results from the overlapping between legitimate disagreements and manipulative interferences that obstruct the implementation of human rights law or weaken its mechanisms. Such obstruction occurs in practice through different stages of interaction among the various stakeholders, especially the States concerned and the UNTBs. Such politicization results in severe conflict between irreconcilable approaches to specific human rights issues, 'where human rights organizations must, while defending human rights, place themselves on one side of the conflict. The neutrality and impartiality that were to accompany universalism then become naturally suspect'.⁷ Some examples of where this has come to the fore are condemnation of specific religious or customary law practices which concern women or children rights, religious clothing in public spaces or institutions, and so on.

To analyse the politics affecting international human rights law, one must bear in mind how international law and politics interact in contemporary international relations.⁸ While that interaction has different facets and occurs in various fora, this chapter addresses it from a perspective of State compliance with binding international legal obligations. International human rights law has several legal sources,⁹ but our focus rests on the main international human rights treaties and the practice of the UNTBs. These international treaties place specific legal obligations on States and create a monitoring system by their respective treaty bodies. The idea of the State parties subjecting their own practices to scrutiny by a body of independent experts is a huge advancement that has led to improvement in many human rights areas. However, States' engagement with these expert bodies has not always been smooth on a range of sensitive matters.

It must be noted up front that the term 'politicization' usually carries a negative connotation in international law circles. This is mainly due to the inherent preference for a normative explanation for State compliance with international law, embedded in the maxim of *pacta sunt servanda* that is codified in the law of treaties.¹⁰ That said, international law and politics at the international institutional level are in constant interaction. International law itself is conceived through a political process of negotiations and its monitoring and implementation necessarily involves political aspects and triggers responses of a political nature. The question therefore is not how to negate politics, but rather how to avoid or at least mitigate its negative impact on the law and law's implementation. The same holds for international human rights law, as a branch of public international law. The paradox is that while politics are part and parcel of law-making and its implementation, there seems to be a widely shared presumption

⁷ Biletzki, *ibid.*, 184.

⁸ See among others, Martti Koskenniemi, 'The Politics of International Law' (1990) 1(1) *European Journal of International Law* 4; Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20(1) *European Journal of International Law* 7; Nicole Scicluna, *The Politics of International Law* (Oxford University Press 2021).

⁹ See among others, Hugh Thirlway, *The Sources of International Law*, second edition (Oxford University Press 2019); William A. Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021).

¹⁰ See respectively Article 26 of the 1969 Vienna Convention on the Law of Treaties and Article 26 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

that politics are detrimental for human rights. The main question, in our view, is not whether politics are part of these broad processes of international human rights law-making and implementation, but which methodologies and approaches should inform the interaction among the different stakeholders to reduce the negative consequences of inevitable politics on the implementation of human rights.

Understanding the politics of human rights is essential for countering their undue instrumentalization. By politics of human rights, we mean the socio-cultural features and the competing interests of various actors in the environment where human rights norms are to be implemented. Understanding this context improves the implementation process of international human rights law. A positive dimension of human rights politics occurs when modes of engagement widen the scope of civic society participation and involve non-traditional actors. Politics are unavoidable and their effect can be either positive or negative. The positive or negative nature of such politics depends on the intention of stakeholders, their content and their effect on human rights implementation. The progressive development of any set of norms, whether at the national or international level, inevitably requires advocacy that seeks to widen public adherence to the need for specific change through debate. This is essentially a positive political process in the service of law. Addressing different constituencies effectively necessitates adequately tailored narratives and cultural sensitivity. While this exercise has a dual legal and political nature, it is positive not only for the implementation of human rights law, but also for its progressive development in a manner that strengthens human rights universality.

Interdisciplinary research and creative institutional approaches to the implementation of international human rights law, informed among others by political sciences and enlightened multi-culturalism, have become more prominent in recent years,¹¹ with more attention paid to legitimacy and effectiveness aspects of the work of the UN human rights mechanisms, including their impact at the domestic level.¹² This shift towards interdisciplinarity coincides with an increased focus on empiricism and experimentalism, the quantification of human rights and the proliferation of different indexes and measurements.¹³ The main theories of change concerning the impact of international human rights are the *domestic mobilization thesis* and the *boomerang thesis* (and the spiral model).¹⁴ However, in this context, namely that of engagement at the international level, these theories can partially explain the reasons

¹¹ See among others Beth Simmons, *Mobilizing for Human Rights in Domestic Politics* (Cambridge University Press 2009); Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013); Gráinne De Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021).

¹² See Christof Heyns and Frans Viljoen (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International/Brill 2002); Gráinne De Búrca, 'Human Rights Experimentalism' (2017) 111 *The American Journal of International Law* 277. For a critical perspective see among others, Jasper Krommendijk, 'The (In)effectiveness of UN Human Rights Treaty Body Recommendations' (2014) 33(2) *Netherlands Quarterly of Human Rights* 194; Aslan Abashidze and Aleksandra Koneva, 'The Process of Strengthening the Human Rights Treaty Body System: The Road towards Effectiveness or Inefficiency?' (2019) 66 *Netherlands International Law Review* 357. For the effect of human rights on other fields see also Simon Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Intersentia 2009).

¹³ See among others, Samuel Moyn, 'Beyond the Human Rights Measurement Controversy' (2018) 81 *Law and Contemporary Problems* 121.

¹⁴ See de Búrca (n 11) 17–20. See also more generally Beth Simmons (n 11); Risse, Ropp and Sikkink (n 11).

behind the positions taken by States and UNTBs or other mechanisms. This multi-stakeholder engagement happens broadly along the lines of alignment (implicit or explicit) or confrontation and it is the latter which is of interest for this chapter. Such confrontation can happen in various forms. Most of it could be tempered through the quality, harmony and transparency of working methods of the UNTBs and their constant assessment and refinement to achieve optimal impact through constructive engagement. Establishing synergies between the work of the UNTBs and that of the Special Procedures of the UN Human Rights Council would also increase the impact on the ground of the whole human rights architecture and facilitate States' engagement. The establishment or strengthening of national permanent mechanisms for reporting and follow-up is another necessary element in favour of constructive engagement rather than political confrontation.¹⁵ To sum up, while politics can affect international human rights law implementation in positive or negative ways, the interaction of treaty bodies with all States and non-State actors provides opportunities for constructive engagement among various stakeholders and eventually for strengthening the human rights monitoring system.

2. THE INFLUENCE OF POLITICIZATION ON THE UN HUMAN RIGHTS TREATY BODIES

Human rights treaties cover a large array of rights under the two Covenants, including civil and political rights, as well as economic social and cultural rights. The other seven core human rights treaties provide for protection against racial discrimination (CERD) and discrimination against women (CEDAW), protection of children (CRC), migrant workers and their families (CMW) and persons with disabilities (CRPD), and the prohibition of torture (CAT and Optional Protocol to CAT) and enforced disappearances (CED). The ten UNTBs established under their respective treaties monitor the implementation of these rights in practice by the State parties.¹⁶ Of them, eight can receive individual communications.¹⁷ The expansion of substantive, procedural and institutional legal frameworks in the field of human rights has been quite significant.

In her in-depth study of the work of UNTBs, Carraro argues that their politicization is not absent, but appears in a different form predominantly in the context of the selection and election process of committee members, since elections take place on the basis of bargaining and exchange of votes between States and that, consequently, the expertise of candidates is not the main criterion that is taken into account.¹⁸ Despite the structural problems around the election of individual experts to these treaty bodies, Carraro concludes that States are keen to nominate experts who will heighten the State's prestige in the UN human rights framework, but also,

¹⁵ See the studies prepared by OHCHR, including United Nations Human Rights Officer of the High Commissioner, 'National Mechanisms for Reporting and Follow-up: A Study of State Engagement with International Human Rights Mechanisms' (OHCHR 2016); and United Nations Human Rights Officer of the High Commissioner, 'National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms' (OHCHR 2016).

¹⁶ For more information see United Nations Human Rights Officer of the High Commissioner, 'Treaty bodies' (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies> accessed 15 September 2022.

¹⁷ These Committees are CCPR, CERD, CAT, CESC, CEDAW, CRPD, CRC and CED.

¹⁸ Valentina Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?' (2017) 39 *Human Rights Quarterly* 968.

and more importantly, in the fact that the working methods of committees, where decisions are taken by consensus, are effective in filtering out the non-objective, biased and irrelevant comments or recommendations delivered by some of the experts.¹⁹ She has developed three indicators to measure the politicization of human rights reviews: country bias, issue bias, and instrumental use of cultural relativism.²⁰ It is important to note some recent attempts by civil society actors in collaboration with the OHCHR to enhance the objectivity of the selection and election process of treaty body experts. This has taken the form of informal public events where candidates for treaty body elections engage in a kind of ‘public hearing’ and answer questions from States parties and different stakeholders about their respective views and priorities regarding the mandates they aspire to uphold.²¹ Social need stimulates innovation and institutional change does not always require legal amendments of existing structures. For certain changes, political will and creativity are sufficient.

In the following subsections, we will first address the treaty body strengthening process, given its inherent political nature and important implications for the well-functioning of the treaty bodies. Then, attention will shift to the political elements impacting on the work of the UNTBs, in the context of the State reporting process, individual communications, general comments and inter-State cases.

2.1 The Treaty Bodies Strengthening Process

The strengthening process of treaty bodies is important for two equally important and inter-related reasons. Decisions adopted through this process can help shield UNTBs from the negative impact of politics on their independence and integrity. At the same time, these decisions can enhance UNTBs’ efficiency and effectiveness through injecting synergy and complementarity in their work, given that the interdependence and interrelatedness of all human rights is the mantra of the Vienna Declaration and Program of Action of 1993.²² A lot of scholarly research and political negotiations have focused on the issue of effectiveness of the UNTBs and their strengthening.²³ The notion of ‘reform’, in general, has a negative record and even a bad reputation at the UN, both in terms of perceived political intentions behind various reform initiatives and their often mediocre results. This is probably why it was safer to conceive the current review of the treaty body system as a strengthening process and to conduct it bottom-up in an inclusive manner that also involves civil society actors.

¹⁹ Valentina Carraro, ‘Electing the Experts: Expertise and Independence in the UN Human Rights Treaty Bodies’ (2019) 25(3) *European Journal of International Relations* 845.

²⁰ Carraro (n 18), 948. Country bias takes place when certain countries receive differential treatment than others with a virtually comparable human rights performance. Issue bias refers to the possibility of the review being biased towards certain issues for political reasons, regardless of the equal status of these issues in the goals of the review. Instrumental use of cultural relativism is conceptualized as a phenomenon in which cultural differences are employed instrumentally in the review process.

²¹ See Association for the Prevention of Torture, ‘First meet and greet with UN treaty body candidates on 9 October 2020’ (*APT*, 09 October 2020) https://www.apr.ch/en/news_on_prevention/first-meet-and-greet-un-treaty-body-candidates accessed 15 September 2022.

²² World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ (25 June 1993) UN Doc. A/CONF.157/23, para. 5.

²³ See among others, Surya P. Subedi, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (Routledge 2017), especially 71–99.

The need for such process is embedded in the legal history and political context of the UNTBs. These monitoring mechanisms were not initially conceived as an integrated coherent system. They are separate legal entities, negotiated at different points in time over five decades. The ten UNTBs have no legal nor institutional horizontal links, with the exception of some linkages between the CAT Committee and the Subcommittee on Prevention of Torture (SPT). This represents a weakness for a system that is expected to function as a coherent whole. The UNTBs are not accountable to each other or to any other body, though they report annually to the UN General Assembly. They act independently in parallel tracks under the theoretical auspices of the conference of States parties to each individual treaty, which is the only authority that can amend their respective treaties or formulate remarks on their functioning. This has not been the case so far. Meetings of States parties to the treaties are only used by States to elect members of the UNTBs, rather than to discuss any substantive matters related to the implementation of the treaty in question.

The political dynamics behind this rather odd fact is simply the difficulty of ensuring convergence among States on substantive treaty law matters that would often amount to modification or at least formal interpretation of treaties' provisions. Such a missing substantive role of the conferences of States parties creates a potential gap in terms of jurisprudential coherence that can only be filled through coordination among UNTBs. This is an immediate result of the intrinsic nature of the individual legal instruments, and the politics of rights as they emanate from States' conflicting political interests and even those of various advocacy constituencies. Interestingly, the main result of this situation is that the UNTBs enjoy a very large latitude to exercise their functions in full independence. This good side of the coin has another less fortunate consequence, which is the organic development of diverging working methods by UNTBs and the difficulty of aligning their legal approaches to similar issues. This results in a potential risk of conflicting jurisprudence and a fragmentation of human rights law.²⁴ For the treaty body system to act as a coherent system an 'institutional backbone' is necessary. One way to provide such a critical missing function, without States' intervention that risks introducing political interference, is to strengthen the role of the treaty bodies' chairpersons' meeting and the institutional support and coordination function provided by the OHCHR. The two subsections below will provide a brief overview of the process and the steps needed to address the problems faced by the UNTBs.

2.1.1 The process of strengthening of UNTBs

Attempts to strengthen treaty bodies as a system started in 1988,²⁵ but the current incarnation of these attempts started in 2009 as an OHCHR initiative, with a series of structured discussions within and among Treaty Bodies, Member States, civil society and other stakeholders. This large consultative process culminated in a report by the High Commissioner dated June

²⁴ See among others, Başak Çalı and Alexandre Skander Galand, 'Towards a Common Institutional Trajectory? Individual Complaints Before UN Treaty Bodies During Their 'Booming' Years' (2020) 24(8) *The International Journal of Human Rights* 1103.

²⁵ See the reports by Independent Expert Philip Alston (1988–1996); the UN Secretary-General's proposal of a single report (2002–2006); High Commissioner Arbour's proposal of a unified standing treaty body (2006); the treaty body strengthening process (2009–2014), which resulted in United Nations General Assembly, 'Strengthening and enhancing the effective functioning of the human rights treaty body system' (9 April 2014) A/RES/68/268.

2012 on ‘Strengthening the United Nations human rights treaty body system’.²⁶ The precious collective wisdom generated by these numerous consultations and captured in this report guided all subsequent efforts, namely, the intergovernmental process that resulted, after two years of negotiations, in the most comprehensive UN General Assembly resolution 68/268 of 9 April 2014.²⁷ This resolution was innovative in many ways. First, it achieved cost savings and reinvested them in an improved functioning of the UNTBs. Resolution 68/268 (2014) also initiated an innovative funding formula that links assessed meeting time to the required resources based on the number of State reports and individual communications submitted for review by the UNTBs. This resolution also created a useful regular assessment in the form of biennial Secretary General Report on the status of the treaty body system. Last, but not least, the resolution also provided for a review, no later than six years after its adoption, to consider any further changes. This is generally known as the 2020 review of the UNTBs system.

This landmark resolution, in terms of clarity, innovation and built-in regular assessment process, achieved important results that were useful to the Treaty Body system, States parties, rights holders, as well as individual UNTBs. The resolution, first and foremost, concretely approaches the UNTBs as a system and no longer considers their respective financial and logistic needs in separate General Assembly resolutions. This resolution, through reallocated cost savings, added human resources to the OHCHR to support treaty bodies’ work, granted them 20 weeks of additional meeting time, adopted a mathematical formula to assess the meeting time of treaty bodies every two years based on the number of State party reports and individual communications received over the previous years. However, it should be noted that this formula of resources is retroactive, as it is based on previously submitted reports and received communications. The lack of a prospective formula that counts the totality of due reports and not only the average of received reports is a shortcoming that requires adjustment. Resolution 68/268 also established a capacity-building programme to support States with their reporting obligations. However, the end goal of a sustainable efficient and effective treaty body system is yet to be achieved.

The non-implementation of the funding formula stipulated by General Assembly resolution 68/268 since 2018, as States faced financial crisis, was aggravated by the economic consequences of the COVID-19 pandemic leading to severe consequences on the functioning of the UNTBs. The non-provision of the human resources, as assessed in four successive Secretary General reports,²⁸ led to the inability of the OHCHR to use in part the additional meeting time allocated for the UNTBs. The COVID-19 pandemic led to the postponing of State reviews by most UNTBs for more than a year, thus re-creating the backlog of State reviews and individual

²⁶ United Nations High Commissioner for Human Rights, ‘Strengthening the United Nations human rights treaty body system’ (26 June 2012) UN Doc. A/66/860.

²⁷ See among others, Christen Broecker and Michael O’Flaherty, ‘The outcome of the General Assembly’s Treaty Body Strengthening Process: An important Milestone on a Larger Journey’ (Universal Rights Group, Policy Brief, June 2014); Michael O’Flaherty, ‘The Strengthening Process of the Human Rights Treaty Bodies, Proceedings of the Annual Meeting (American Society of International Law)’ (2014) 108 *The Effectiveness of International Law* 285.

²⁸ See the respective UN Secretary General biennial reports, ‘Status of the human rights treaty body system’ (18 July 2016) UN Doc. A/71/118; ‘Status of the human rights treaty body system’ (6 August 2018) UN Doc. A/73/309; ‘Status of the human rights treaty body system’ (10 January 2020) UN Doc. A/74/643; ‘Status of the human rights treaty body system’ (8 August 2022) UN Doc. A/77/279.

communications. This experience shows the importance of embracing modern technology to avoid interruption in State reviews, despite difficult circumstances.

As we stand today, '[t]he treaty body system is surviving because of the dedication of the experts, who are unpaid volunteers, the support of staff in OHCHR and States' non-compliance with reporting obligations'.²⁹ Indeed, States reporting has not increased since the adoption in 2014 of General Assembly resolution 68/268. Only 14 per cent of States are regularly fulfilling their reporting obligations by submitting their reports on time.³⁰ Even with such low compliance rate, the COVID-19 pandemic has resulted in a massive backlog in State reports.³¹ At the current review capacity of the nine treaty bodies of approximately 140 State reports per year, it would take over three years to clear the backlog. At the same time, the petitions section of the work of the UNTBs is facing a massive backlog that urgently requires additional financial and human resources, including IT solutions, to deal with the backlog and to manage petitions efficiently.³² The Human Rights Committee has the largest backlog among the treaty bodies with 1,273 cases, showing that its ability to address the problem is seriously compromised if no action is taken by the General Assembly to increase available resources.³³ Although of a different nature than individual cases, there are some 1,534 urgent actions registered under the procedure of the Committee on Enforced Disappearances to urgently seek and find a disappeared person, of which 1,005 are open, and 529 have been closed, discontinued or suspended, including for reasons that a disappeared person has been found dead or alive. In addition, there is a backlog of about 300 cases pending to be registered. The situation of petitioners is not far from justice denied because of such long delays in deciding the cases, especially after exhaustion of local remedies.

2.1.2 Steps needed to address the problems faced by the UNTBs

Realizing the need to act as a coherent system, the UNTBs' chairs during their 33rd meeting in June 2021, as indicated in their 2021 report:

agreed that it was preferable to have one schedule of reviews for all treaty bodies and a review periodicity that is predictable (while taking into account the respective mandates of the Covenant Committees and the Convention Committees, in particular of the CED and SPT), as States and other stakeholders have been requesting and are strongly expecting enhanced harmonisation, efficiency and predictability.³⁴

Paragraphs 40–55 of the same report indicate the variable approaches of different UNTBs on how to achieve such a predictable review calendar. The need for consulting all members of the ten UNTBs required more time to refine these different perspectives and integrate them into

²⁹ Introduction, OHCHR (n 26).

³⁰ UN Doc A/77/279, para. 14.

³¹ As of end of December 2021, there are 441 State reports pending to be reviewed by the nine UNTBs, UN Doc A/77/279, para. 18.

³² As of end of December 2021, there are 1,800 registered individual communications pending examination, UN Doc A/77/279, para. 21. Of these, 420 individual communications are ready for an admissibility and/or merits decision by the relevant treaty bodies.

³³ Human Rights Committee, 'Annual report to the General Assembly' (24 March 2022) UN Doc CCPR/C/134/R.1, paras 24–25 (numbers as of 31 December 2021).

³⁴ Note by the Secretary-General, 'Implementation of human rights instruments' (19 July 2021) UN Doc. A/76/254, para. 40.

a common coherent predictable review calendar. Agreeing on the common predictable review calendar marks the beginning of tough rounds of advocacy and human rights diplomacy before States may agree to the extra financial costs necessarily generated by such a calendar that would ensure full compliance with States reporting obligations, as opposed to the current average of 14 per cent timely reporting compliance rate.

To facilitate this joint exercise, the CRPD Committee Chair, who chaired the UNTBs chairs' 33rd meeting, submitted a detailed proposal to progress towards implementing the outcomes of the 2020 review for treaty body strengthening.³⁵ The foundational premise of this proposal, in the view of the CRPD Chair is, precisely, that:

Historically, Treaty Bodies were not established as one system, but subsequent growth has required a coherent Treaty Body system to avoid fragmentation of international human rights law. If we have fragmentation in the development of law, there is a significant risk that different and conflicting human rights standards are developed, which enables States to ignore some standards and preference others and which weakens the protections for all people. We need to respect and acknowledge the importance of the specific mandate of each treaty body, but we also need to develop a consistent and coherent body of law that provides holistic protection for rights holders and certainty for States in meeting their human rights obligations. It is only through treaty bodies working as a coherent system that we preserve our credibility and receive the respect of States.³⁶

This proposal was a promising development, because it accelerated a needed discussion among all treaty bodies' experts, and not only their chairs, thus widening the scope of participation in shaping the future of the treaty body system. Indeed, in its response to the CRPD Committee proposal, the Human Rights Committee emphasized key elements of convergence that could lead to a unified position on the details of a common predictable review calendar, harmonized working methods among all UNTBs and a digital uplift that empowers the treaty body system to modernize itself and use new technologies wherever this adds value to the different functions of treaty bodies. This needed discussion builds on the prior agreed decisions and recommendations of the previous treaty body chairs' meetings. Indeed, at their 31st meeting held in 2019, the chairs had agreed on a shared position statement, which constituted the chairs' vision for the 2020 review.³⁷ At the 32nd meeting held in 2020, the chairs also agreed on a written contribution for the co-facilitators of the 2020 review.³⁸ This written contribution further developed the elements of the position statement from the 31st chairs' meeting, including in

³⁵ For more information visit United Nations Human Rights Officer of the High Commissioner, 'Annual Meeting of Chairpersons of Human Rights Treaty Bodies' (*OHCHR*, 2022) <https://www.ohchr.org/en/treaty-bodies/annual-meeting-chairpersons-human-rights-treaty-bodies> accessed 15 September 2022.

³⁶ *Ibid.*, Proposal by the Committee on the Rights of Persons with Disabilities (3 August 2021), 33rd meeting of Chairs.

³⁷ Note by the Secretary-General, 'Implementation of human rights instruments' (30 July 2019) A/74/256, Annex III, indeed, the 2019 Vision of the Chairs agreed on a range of innovative measures and proposals to harmonize working methods further (introducing a Periodic Review Cycle Calendar, offering simplified reporting to all States, reducing duplication across Committees, further aligning working a number of procedures). The most innovative and reformist proposal from the Chairs' Vision is the predictable review calendar.

³⁸ Note by the Secretary-General, 'Implementation of human rights instruments' (14 September 2020) UN Doc. A/75/346, para. 46.

relation to a predictable review cycle and the option of replacing every second review with focused reviews in situ reflected in the report of the co-facilitators.³⁹

The leadership role of the UNTBs in shaping their own monitoring system is hampered by the lack of sufficient time for experts to discuss their own working methods, let alone harmonizing them with all other committees. However difficult though, shaping their own system as such should be an indispensable strategic priority for all treaty body experts. The first handicap is that their annual chairpersons' meeting of five days is effectively their only tool to achieve the coordination of their increasingly complex system. A second challenge lies in many experts not agreeing that the chairpersons' meeting of the UNTBs has decision-making powers, given the independence of each treaty body and of each individual expert member. It is not easy to ensure adequate coordination among the main institutional stakeholders, while at the same time safeguarding this process from external interferences that may compromise the independence of the UNTBs. This independence is the main guarantee for the fulfilment of their monitoring functions in full integrity and objectivity.

Treaty body experts are expected to fill the leadership gap that results from their missing 'institutional backbone' for this process. General Assembly Resolution 57/202 (2003) encourages each human rights treaty body to continue to give careful consideration to the relevant conclusions and recommendations contained in the reports of the persons chairing the human rights treaty bodies on their meetings.⁴⁰ This is confirmed by General Assembly Resolution 68/268 (2014) which encourages the human rights treaty bodies to continue to enhance the role of the chairs with a view to accelerate the harmonization of the treaty body system.⁴¹ This latter resolution would allow the treaty bodies to empower their chairs to work in partnership with OHCHR, as recommended by the co-facilitators, to develop proposed options for costings in relation to three main components of treaty body strengthening, which are the need for a predictable schedule of reviews, harmonized working methods, and a digital uplift.

The 2021 CRPD Committee proposal responded to the concerns and expectations of a critical mass of States parties and numerous civil society organizations,⁴² and coalitions, for the treaty body chairs to provide leadership to progress, streamline and modernize the treaty body system.⁴³ The proposal provoked constructive tensions and lively debates within treaty bodies and among their chairs. This ultimately led to a positive result which is the outcome of the 34th Chairpersons' meeting of June 2022, namely an agreement on a common eight-year predict-

³⁹ United Nations General Assembly, 'Letter dated 14 September 2020 from the Permanent Representatives of Morocco and Switzerland addressed to the President of the General Assembly' (17 November 2020) UN Doc. A/75/601.

⁴⁰ Resolution adopted by the General Assembly, 'Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights' (16 January 2003) UN Doc. A/RES/57/202, para. 2.

⁴¹ See para. 38 of this resolution.

⁴² See the TB-Net statement for the 33rd Meeting of Chairpersons of the Human Rights Treaty Bodies (n 35). See also the Geneva Academy and their human rights platform, including the documents contained therein which show the importance of the contributions of specialised NGOs, Geneva Academy, 'Academic Platform on Treaty Body Review 2020' (*Geneva Academy* 2022) <https://www.geneva-academy.ch/tb-review-2020/documents> accessed 15 September 2022. This broad consultation process resulted in a final report, entitled 'Optimizing the UN Treaty Bodies System' (The Geneva Academy of International Humanitarian Law and Human Rights, May 2018).

⁴³ United Nations Human Rights Office of the High Commissioner, '33rd meeting of Chairpersons' (OHCHR, 2022) <https://www.ohchr.org/en/node/102109> accessed 15 September 2022.

able review calendar, with a follow-up review in between principal reviews. This is a major positive shift towards harmony and synergy. This is also the current basis of human rights advocacy of the UNTBs, supported by the fourth United Nations Secretary-General report on the status of the treaty body system and the 34th meeting of UNTBs chairpersons.

One of the major political challenges for the UNTBs is that States' concerns and expectations from the strengthening process are not identical, to say the least. This is another rationale of the imperative need to enhance the independence of treaty body experts, but also their unity, synergy and leadership as prerequisites of any successful strengthening process of the oldest and widest range human rights protection architecture. While experts are independent, they do not act in a vacuum. The expectations of States, civil society organizations and other relevant stakeholders are very important factors to be taken into account. Indeed, one of the main political features and dynamics of the treaty body system is that it is the most multi-stakeholders human rights eco-system in the whole United Nations architecture. It is also the human rights mechanism which engages States most frequently, if States report on time. This explains much of the complexity of the UNTBs system and the rather slow pace of its evolution. Moreover, the high frequency of change in the membership and chairing of the UNTBs is not always a positive factor in terms of continuity and leadership. Unlike the Special Procedures system, where each mandate is held by only one expert or a small working group, the UNTBs are collegiate bodies, and need longer time and higher effort to agree on procedural matters and to ensure substantive coherence, both within and then among committees.

Ultimately, a consistent and coherent treaty body system requires harmonized working methods, up-to-date digital platforms and adequate human and financial resources. Not all of these elements are under the exclusive control of the UNTBs or of the OHCHR. States are the sole creators and main beneficiaries of the treaty body system, with individuals as the ultimate beneficiaries. Hence, engaging with States is an indispensable component of the human rights experts' diplomacy, a concept which deserves further exploration and enhanced attention. Current resources levels, some working methods, most digital platforms and budgeting arrangements do not create a conducive environment for an efficient and coherent treaty body system. Their insufficiency and inadequacy leave the treaty body system with an objective impossibility to achieve its purpose as prescribed in the human rights treaties. This is strikingly illustrated by the current reports and individual complaints backlog, the inadequacy of the online interface, including for the petitions' unit, and inadequate resourcing to support treaty body experts to fulfil their mandates. The challenges facing the UNTBs and their need to remain fit for purpose require leadership that promotes innovative solutions, creative working methods, adequate resourcing, and advanced, integrated on-line platforms. This would maximize synergies and reduce duplication in order to take account of the increase in State party reviews and their legitimate expectations of rationality and effectiveness.

A predictable schedule of State reviews is a prerequisite for UNTBs to become a coherent system, rather than a random series of overlapping exercises. That would ensure the full and equal review of all States parties, enabling the UNTBs system to fulfil its mandate and achieve its purpose of monitoring States' compliance with human rights obligations and assisting States in improving their compliance. The lessons learnt from the COVID-19 pandemic and the need for States to build back better make such a common predictable review calendar more central than ever for a serious and sustainable monitoring of the human rights situation across the globe in an objective and equal manner among all States parties. The post COVID-19

rebuilding offers a natural opportunity to rectify the ad hoc approaches and the rather organic development towards an efficient and cost-beneficial treaty body system.

2.1.3 Interim remarks

From the States' perspective, the tensions surrounding both the functioning and the strengthening proposals of the treaty body system are clearly of a political nature. Moreover, the intention to strengthen the UNTBs is not necessarily equally shared, in addition to the large diversity of views as to how to achieve this aim. Challenges facing States regarding the future of the UNTBs system are political, technical, and financial. This constitutes an extremely complex combination to confront. A 'do-nothing' or 'wait-and-see' approach seems to have been the easiest way out for a large number of States. Indeed, in 2020, General Assembly Resolution 75/174 on the treaty bodies system even failed to mention the COVID-19 impact and the challenges facing the UNTBs, including the re-rising backlog, poor digital platforms for on-line meetings, connectivity issues, time difference, limited interpretation time on-line, non-accessible on-line platforms for persons with disabilities, staffing and financial challenges. The simple fact that these significant challenges are not even adequately acknowledged, let alone properly handled, can only aggravate these essential problems.

Regrettably, the 'blame game', or 'passing the buck', is a traditional part of human rights politics that continue to be futile yet popular exercises. Moreover, a real political problem is that even many States that are generally friendly to the UNTBs believe that the latter have not fully implemented General Assembly Resolution 68/268, on, among others, aligning working methods, limiting the number of questions to States, focusing recommendations, etc. Thus, the EU representative regretted to hear from the Chair of the CRPD Committee during her presentation to the Third Committee, that there was a lack of progress among Chairs in reaching consensus as a follow-up to their 2019 vision and contribution to the co-facilitators and urged all chairs to urgently find common ground.⁴⁴

In contrast to States, there are no political conflicts of interest among the UNTBs themselves, as they are independent from States' competing political positions. The main challenge for the various Committees and individual members is to find the time and will to sort out their divergent views and to agree on a common approach for implementing their already shared vision of 2019.⁴⁵ There are many details in the working methods established for the functioning of the UNTBs, which need to be streamlined. Challenges facing experts are therefore numerous, even if they are of a more technical than political nature.

2.2 Political Dynamics Surrounding the Work of the UNTBs

Having dealt with the UNTBs' 2020 strengthening process, our focus shall turn to the UNTBs' main activities, namely State reporting, individual communications, general comments or general recommendations, and inter-State complaints. The analysis will highlight the political dynamics of the interaction between States and the UNTBs, as well as among States parties themselves when it comes to the inter-State complaints.

⁴⁴ EU Statement, 'Interactive Dialogue with the chair of the UN Committee on the Rights of Persons with Disabilities, Ms. Rosemary Kayess' (21 October 2021) Third Committee of the 76th UNGA.

⁴⁵ See documents for the 31st Chairpersons Meeting, held from 24 to 28 June 2019 (n 35).

2.2.1 State reporting and follow-up

State reporting is one of the main activities of the UNTBs. This subsection will focus on the extent to which the State reporting process is perceived to be politicized, and what consequences politicization has on its credibility.⁴⁶ Carraro argues that the State reporting process of the UNTBs is perceived as unable to produce political pressure as a further prompt for States to implement received recommendations and, when politicization arises, it exclusively has negative consequences on the credibility of the committee.⁴⁷ Her study surveys have addressed country bias, issue bias and the instrumental use of cultural relativism.

The survey results show that country bias is believed to exist to a much smaller extent in the Treaty Bodies than in the Universal Periodic Review (UPR).⁴⁸ Some of the ways in which bias is shown appears when committee members are more exigent towards more resourceful and developed countries than when they are reviewing countries plagued by severe human rights problems, or the other way around; when some committee members are not equally strict to all countries due to the political ties of their governments with the countries under review; or when one of the committee members is an expert from the reviewed State itself.⁴⁹ However, she notes that the stage subsequent to the constructive dialogue and prior to the adoption of Concluding Observations, appears to be effective at limiting the appearance of country bias in the final country evaluation, because Concluding Observations are debated in a plenary meeting of committee members and their content must be adopted by consensus.⁵⁰ Importantly, however, the UNTBs are aware of such potential conflict of interest or any other source of a perception of bias. This is why the UNTBs chairpersons adopted in 2012 the Addis Ababa guidelines on the independence and impartiality of members of the human rights treaty bodies.⁵¹ This action by the chairpersons of the UNTBs provides an excellent example of how their leadership in taking such independent initiatives can reduce the impact of political factors on the credibility and integrity of their work. This is why self-regulation is an important institutional measure that protects the independence of the UNTBs and immunizes their credibility against political pushback. States appreciated the Addis Ababa guidelines, which implicitly confirm the competence of the UNTBs to regulate and supervise their own independence.⁵² From a political perspective, even more interesting is the fact that this reference by States

⁴⁶ See, among others, Carraro (n 18).

⁴⁷ *Ibid.*, 969.

⁴⁸ *Ibid.*, 956. Her analysis is based on the results of a survey distributed to member State delegates and Treaty Body committee members, and on 39 interviews conducted with officials involved in the Universal Periodic Review or the State reporting procedure under the UNTBs, either as member State delegates, secretariat officials, Treaty Body committee members, or civil society representatives.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 957.

⁵¹ Annex I, 'Guidelines on the independence and impartiality of members of the human rights treaty bodies ('the Addis Ababa guidelines')', in Note by the Secretary-General, 'Implementation of human rights instruments: Note by the Secretary-General' (2 August 2012) UN Doc. A/67/222.

⁵² See A/RES/68/268 (n 24) para. 36, noting 'the adoption, at the 24th annual meeting of the Chairs of the human rights treaty bodies, held in Addis Ababa 25–29 June 2012, of the guidelines on the independence and impartiality of members of the human rights treaty bodies (the Addis Ababa guidelines), 12 which are aimed at ensuring objectivity, impartiality and accountability within the treaty body system, in full respect for the independence of the treaty bodies, and in this regard encourages the treaty bodies to implement the guidelines in accordance with their mandates.'

to the Addis Ababa guidelines was qualified. Indeed, in the same resolution, the General Assembly encouraged:

the human rights treaty bodies to continue to consider and review the Addis Ababa guidelines, inter alia, by seeking the views of States parties and other stakeholders on their development, and in this regard invites the Chairs of the treaty bodies to keep States parties updated on their implementation.⁵³

With regard to issue bias, the above-mentioned survey results indicate that respondents perceive some issues are given more attention than others at a frequency slightly inferior to that of the UPR.⁵⁴ A minority of respondents had the impression that political motivations were at the roots of this phenomenon, whereas in most cases, this had to do with the expertise of committee members or the way they interpreted their mandate.⁵⁵ Similarly, she concludes that Concluding Observations are adopted by consensus of all committee members, which often prevents uninformed recommendations from being included in the outcome document.⁵⁶

With regard to the instrumental use of cultural relativism, Carraro's survey reveals that recommendations made by committee members are perceived to be less culturally controversial than those issued by State representatives in the UPR setting.⁵⁷ However, when it comes to the respondents' perception whether the recommendations never or seldom clash with countries' cultural, religious, or ideological values, while the majority thinks so, a substantial minority believes that this occurs often, and no respondent believes that this is always the case.⁵⁸

While all UNTBs request State parties to provide information in their periodic report on the implementation of their previous concluding observations, seven treaty bodies have follow-up procedures,⁵⁹ whereby they select a limited number of recommendations that they consider urgent, protective, and implementable within a short time (one to three years) and request the State party to report on progress with implementing them. The follow-up reports submitted by the State parties are then assessed and graded by these UNTBs, according to specific criteria. Some States have objected to this procedure as not being grounded in the treaty. Others have objected to the evaluation by the Committees. In both instances, political considerations seem to be the main driver of the attitudes of many States in this respect.

2.2.2 Individual communications and follow-up

There are eight UNTBs which can receive individual communications.⁶⁰ So far, the Human Rights Committee has received the majority of cases, but in more recent years individual communications submitted to other committees have increased in number.

⁵³ Ibid., para. 37.

⁵⁴ Carraro (n 18) 959.

⁵⁵ Ibid.

⁵⁶ Ibid., 960.

⁵⁷ Ibid., 964.

⁵⁸ Ibid.

⁵⁹ Namely CESCR, CCPR, CERD, CAT, CEDAW, CRPD, and CED. For more information see United Nations Human Rights Officer of the High Commissioner, 'Follow-Up to Concluding Observations' (*OHCHR*, 2022) <https://www.ohchr.org/en/treaty-bodies/follow-concluding-observations> accessed 15 September 2022.

⁶⁰ These committees are CCPR, CERD, CAT, CESCR, CEDAW, CRPD, CRC and CED. For more information see United Nations Human Rights Officer of the High Commissioner, 'Individual

Table 14.1 *UNTBs pending individual communications*

Committee	CCPR	CAT	CESCR	CRC	CRPD	CEDAW	CERD	Urgent Actions	Total
Number of living cases*	1203	213	195	90	44	41	17	1007 (open UAs)	2810
<i>Including IMs granted</i>	149	133	175	49	13	14	2	305	840

Note: * Living cases are those in which the parties are submitting observations and comments or that are pending examination by the relevant treaty body.

The main problems facing UNTBs with regard to individual communications, besides those addressed under section 2.1 above concerning adequate resources, are lack of cooperation by some State parties during the processing of the complaints and non-enforcement of rendered decisions. Lack of adequate cooperation by some States during the processing of individual complaints is reflected in formal responses which barely address admissibility issues, sometimes rebuking the UNTBs for having registered the cases, to instances where a State does not provide any information even when prompted several times by the treaty body through the Secretariat. This creates a difficult situation for the UNTBs on ascertaining the facts and reaching a sound decision.

The implementation of the decisions (or views as some committees call them) rendered by the UNTBs where they find a violation of the treaty is problematic from several aspects, including institutional difficulties concerning the follow-up process, as well as inadequate State compliance and cooperation. Since there is no unified procedure among the eight UNTBs that can receive individual complaints concerning implementation, each of them has its own procedure for following up on its own decisions. If the State party fails to take appropriate action within 180 days, the case is kept under consideration under the follow-up procedure. A dialogue is pursued with the State party and usually the case remains open until satisfactory measures are taken. Information related to follow-up is not confidential and the UNTBs meetings during which this information is discussed are public.

Some countries are not complying with interim measures or decisions rendered by the UNTBs. In this case also, the UNTBs do not have a general practice of publicly rebuking State parties for non-compliance. An exception perhaps was the December 2021 press release where the CAT Committee deplored Burundi's lack of cooperation in the individual complaints procedure and its failure to implement the committee's decisions in all cases where human rights violations were found.⁶¹ The reason for such a step might have been the fact that Burundi provided follow-up information on the measures taken to implement the committee's decisions only on one of the 14 decisions finding a violation.

Communications: Human Rights Treaty Bodies' (*OHCHR*, 2022) <https://www.ohchr.org/en/treaty-bodies/individual-communications> accessed 15 September 2022.

⁶¹ See United Nations Human Rights Officer of the High Commissioner, 'Burundi: UN Torture Committee deplores lack of cooperation in torture complaints procedure' (*OHCHR*, 21 December 2021) <https://www.ohchr.org/en/press-releases/2021/12/burundi-un-torture-committee-deplores-lack-cooperation-torture-complaints> accessed 15 September 2022.

Table 14.2 UNTBs general comments and recommendations

Committees	CERD	CCPR	CESCR	CEDAW	CAT	CRC	CMW	CRPD	CED
Number of General Comments or General Recommendations	36	37	25	38	4	25	5	7	0*

Note: * First general comment under preparation.

2.2.3 General comments and the development of international human rights law

All the UNTBs, except the CED Committee, have developed general comments or general recommendations, with the terminology varying among different committees, in connection with their mandates (Table 14.2).⁶²

The UNTBs have issued 177 general comments. The Human Rights Committee has issued 37 general comments,⁶³ the last two respectively on the right to life and on the right to peaceful assembly. Its sister covenant committee, on Economic, Social and Cultural Rights, has issued 25 general comments, the latest adopted on 30 April 2020 on science and economic, social and cultural rights.⁶⁴ CAT Committee’s General Comment No. 4 on the implementation of article 3 (prohibiting refoulement) of the Convention in the context of article 22 (individual communications) was adopted on 6 December 2017.⁶⁵ On 20 November 2020, the CEDAW Committee issued General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration.⁶⁶ On 24 November 2020, the CERD Committee adopted General Recommendations No. 36 on preventing and combating racial profiling.⁶⁷ On 2 March 2021,

⁶² For more information see United Nations Human Rights Officer of the High Commissioner, ‘General Comments: Treaty Bodies’ (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/general-comments> accessed 15 September 2022. CEDAW and CERD refer to their documents as general recommendations, whereas the other UNTBs refer to them as general comments.

⁶³ CCPR Committee’s General Comments are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, ‘Treaty Bodies: Human Rights Committee’ (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/ccpr> accessed 15 September 2022.

⁶⁴ CESCR Committee’s General Comments (GC) are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, ‘Treaty Bodies: Committee on Economic, Social and Cultural Rights’ (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/cescr> accessed 15 September 2022. Its previous GC was General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities.

⁶⁵ CAT Committee’s General Comments are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, ‘Treaty Bodies: Committee against Torture’ (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/cat> accessed 15 September 2022. Its previous GC was General comment No. 3 (2012) on ‘Implementation of article 14 by States parties’, on the right to adequate compensation.

⁶⁶ CEDAW Committee’s General Recommendations (GRs) are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, ‘Treaty Bodies: Committee on the Elimination of Discrimination against Women’ (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/cedaw> accessed 15 September 2022. Its previous GR was General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, adopted on 8 March 2018.

⁶⁷ CERD Committee’s General Recommendations are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, ‘Treaty Bodies: Committee on the Elimination of Racial Discrimination’ (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/cerd> accessed 15 September 2022. Its previous GR was General recommendation No. 35 on ‘Combatting racist hate speech’, adopted in 2013.

the CRC Committee released General Comment No. 25 (2021) on children's rights in relation to the digital environment.⁶⁸ On 7 October 2021, the CMW Committee adopted General Comment No. 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention.⁶⁹ On 21 September 2018, the CRPD Committee adopted General Comment No. 7 on 'Article 4.3 and 33.3: Participation of persons with disabilities, including children with disabilities, in the implementation and monitoring of the Convention'.⁷⁰ As Table 14.2 above shows, the UNTBs have adopted a significant number of general comments or recommendations on State obligations under the treaty, relevant treaty provisions, or specific topics.

Some States have raised concerns that the UNTBs are interpreting broadly State obligations under international human rights treaties in these guiding documents and that this exceeds the competence of treaty bodies. Other controversies around the adoption of general comments or recommendations concern the access of stakeholders to the process, inclusion of views of State parties, the use of references to the practice of other human rights mechanisms than the UNTB concerned, and the subject matter of the document. In reality, the process of adoption of these important interpretative statements is structured and transparent. This process has become more complex and inclusive over the years, with increased participation by various stakeholders, including State parties, NGOs and civil society, individual scholars, and even cities. Also, it is interesting to contrast the shorter texts of earlier general comments or recommendations, with the longer, better-structured, analytical, and exhaustive texts of the more recent ones, as a reflection of increased maturity of the UNTBs monitoring system.

In formal dialogues between the UNTBs and State parties, or during reporting by the chairs of the UNTBs to the UN General Assembly, some States have raised concerns when they perceive that UNTBs are adding new obligations to the respective treaties, are making references to other treaties or mechanisms, or are drawing conclusions they do not agree with because of their own domestic law requirements. Interestingly, some committees have adopted joint statements or joint general comments, as the CMW and the CRC Committee.⁷¹ Some of the

⁶⁸ CRC Committee's General Comments are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, 'Treaty Bodies: Committee on the Rights of the Child' (*OHCHR*, 2022) <https://www.ohchr.org/en/treaty-bodies/crc> accessed 15 September 2022. Its last document was General Comment No. 24 (2019) on children's rights in the child justice system.

⁶⁹ CMW Committee's General Comments are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, 'Treaty Bodies: Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families' (*OHCHR*, 2022) <https://www.ohchr.org/en/treaty-bodies/cmw> accessed 15 September 2022.

⁷⁰ CRPD Committee's General Comments are accessible through its webpage at United Nations Human Rights Officer of the High Commissioner, 'Treaty Bodies: Committee on the Rights of Persons with Disabilities' (*OHCHR*, 2022) <https://www.ohchr.org/en/treaty-bodies/crpd> accessed 15 September 2022. Its previous GC was General Comment No. 6 on 'Article 5: Equality and non-discrimination', adopted on 9 March 2018.

⁷¹ See UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (16 November 2017) CMW/C/GC/3-CRC/C/GC/22; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries

more recent general comments or general recommendations such as those concerning climate change, sexual health and reproductive rights, and rights of indigenous groups, have the potential to give rise to more objections by some State parties.

2.2.4 Inter-State complaints

The possibility of inter-State complaints is included in several of the core UN human rights treaties.⁷² However, the procedure remains underdeveloped and has only been invoked three times, with all cases being brought before the CERD Committee. These cases are discussed in the following subsections.⁷³ There are differences among the various human rights treaties as to how these procedures are envisioned and carried out, with three types of dispute resolution frameworks, with an emphasis respectively on contentious jurisdiction, on conciliatory commission, or negotiation and thereafter arbitration or referral to the International Court of Justice (ICJ or Court).⁷⁴ This has resulted in some situations having been brought before other dispute settlement mechanisms.

The first form, reflected in Article 21 of CAT and Article 74 of CMW, sets out a procedure for the respective Committee to consider complaints from one State party which considers that another State party is not giving effect to the provisions of the Convention. However, this procedure applies only to States parties who have made a declaration accepting the competence of the Committee in this regard. The second form, reflected in Articles 11–13 of CERD and Articles 41–43 of ICCPR,⁷⁵ sets out a more elaborate procedure for the resolution of disputes between States parties over a State's fulfilment of its obligations under the relevant treaty through the establishment of an ad hoc Conciliation Commission.⁷⁶ The third form includes a sequenced interaction including negotiation, arbitration, or referral to the ICJ. Thus, Article 29 of CEDAW, Article 30 of CAT and Article 92 of CMW provide for disputes between States parties concerning interpretation or application of the Convention to be resolved in the first instance by negotiation or, failing that, by arbitration. If the parties fail to agree arbitration terms within six months, one of the States involved may refer the dispute to the ICJ. States parties may opt out from this procedure by making a declaration at the time of ratification or accession, in which case, they are also barred from bringing cases against other States parties.

of origin, transit, destination and return' (16 November 2017) CMW/C/GC/4-CRC/C/GC/23. Both these joint general comments were adopted in 2017.

⁷² For more information see United Nations Human Rights Officer of the High Commissioner, 'Inter-state complaints' (*OHCHR*, 2022) <https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/inter-state-complaint> accessed 15 September 2022. The inter-State complaint procedures are generally optional and reciprocity-based under several UN human rights treaties including Articles 41–42 ICCPR; Article 21 CAT; Article 76 CMW; Article 32 ICED; Article 10 Optional Protocol ICESCR; Article 12 Optional Protocol CRC. In contrast, the procedure under Articles 11–13 of CERD is compulsory.

⁷³ See, among others, H el ene Tigroudja, 'Procedural Developments at International Human Rights Courts and Bodies' (2020) 19 *The Law and Practice of International Courts and Tribunals* 312.

⁷⁴ Five of the main UN human rights treaties confer jurisdiction on the ICJ, namely Article 22 CERD; Article 29 CEDAW; Article 30 CAT; Article 92 CMW; and Article 42 CED.

⁷⁵ With a notable difference that whereas such a procedure is mandatory under CERD, it is optional under the ICCPR, with 50 States having made the declaration provided for under Article 41(1) of the Covenant as at 24 March 2022.

⁷⁶ The procedure for settlement is further detailed in Human Rights Committee, 'Rules of Procedure of the Human Rights Committee' (4 August 2004) CCPR/C/3/Rev.7, 78–87.

2.2.4.1 CERD Committee: *Qatar v Saudi Arabia and Qatar v. United Arab Emirates*

On 8 March 2018, for the first time in the history of UNTBs, Qatar submitted to the CERD Committee two inter-State communications, respectively against Saudi Arabia and the United Arab Emirates under Article 11 of the convention.⁷⁷ Qatar claimed a violation of Articles 2, 4, 5 and 6 of the convention, in the context of enforcement of coercive measures taken by the respondent States in 2017. While an ad hoc Conciliation Commission was established, on 11 January 2021, Qatar submitted a *note verbale*, requesting the suspension of the proceedings regarding the communications, following the Al Ula political agreement reached by both States parties to the dispute and other concerned Gulf States, on 5 January 2021. This clearly demonstrates the impact of political fluctuations on the work of the UNTBs. The case was suspended and the parties to the case can inform the Conciliation Commission within a year whether they wish to resume the consideration of the matter before the ad hoc Conciliation Commission or to provide any relevant information.⁷⁸

An interesting aspect of these disputes is that there was a parallel case, submitted to the ICJ on 11 June 2018 by Qatar against the United Arab Emirates. On 4 February 2021, the ICJ decided that it had no jurisdiction to entertain the case.⁷⁹ It must be noted that the ICJ and CERD Committee seem to have taken different positions on whether ‘nationality’ is a ground of discrimination included under CERD.⁸⁰ In more recent years, more cases based on international human rights treaties have been brought before the ICJ,⁸¹ which also involve issues that could be raised before the UNTBs. Most important for our purposes is the relationship between potential concurrent proceedings before a UNTB and the ICJ. In the *Qatar against the United Arab Emirates* case, the CERD Committee held the view that:

the word ‘or’ between ‘by negotiation’ and ‘by the procedures expressly provided for in this Convention’ in article 22 of the Convention clearly indicates that the State parties may choose between the alternative proposed by that provision. Moreover, the Committee, an expert monitoring body entitled to adopt nonbinding recommendations is not convinced that a principle of *lis pendens* or *electa una via* is applicable which should rule out proceedings concerning the same matter by a judicial body entitled to adopt a legally binding judgment.⁸²

⁷⁷ For more information see United Nations Human Rights Officer of the High Commissioner, ‘Inter-state communications: Committee on the Elimination of Racial Discrimination’ (OHCHR, 2022) <https://www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications> accessed 15 September 2022.

⁷⁸ United Nations Human Rights Officer of the High Commissioner, ‘Decision of the ad hoc Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication Qatar v. the Kingdom of Saudi Arabia’ (15 March 2021); United Nations Human Rights Officer of the High Commissioner, ‘Decision of the ad hoc Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication Qatar v. the United Arab Emirates’ (15 March 2021); both decisions available through OHCHR (n 77).

⁷⁹ ICJ, ‘Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), (Preliminary objections)’ (4 February 2021) para. 115.

⁸⁰ See respectively, Committee on the Elimination of Racial Discrimination, ‘Admissibility of the Inter-state communication submitted by Qatar against the United Arab Emirates’ (27 August 2019) UN Doc. CERD/C/99/4, paras 53–63; ICJ (b 79) paras 88 and 100–101.

⁸¹ See inter alia Gentian Zyberi, ‘The Interpretation and Development of International Human Rights Law by the International Court of Justice’, in Martin Scheinin (ed.), *The Relevance of Human Rights Norms before ‘Other’ International Courts and Tribunals* (Cambridge University Press 2019), pp 28–61.

⁸² CERD (n 80) para. 49, see more generally paras 42–52.

Moreover, the CERD Committee failed to see how the existence of ‘parallel’ proceedings would entail the risk of compromising the fairness of the procedure and the equality of arms between the parties, since both parties have equal procedural rights before the two bodies.⁸³ For the CERD Committee, this was the more so when the term ‘parallel’ applies essentially to the concurrent time at which two proceedings are being held when the purport and scope of the decision called for in those two proceedings were dissimilar.⁸⁴ Ultimately, the CERD Committee did not consider there was a problem with such parallel proceedings.

2.2.4.2 CERD Committee: *Palestine v. Israel*

On 23 April 2018, Palestine brought a case against Israel. Palestine claims that Israel has violated Articles 2 (State obligations), 3 (prohibition of racial segregation and apartheid) and 5 (prohibition and elimination of racial discrimination) of CERD with regard to Palestinian citizens living in the Occupied Palestinian Territory, including East Jerusalem.⁸⁵ The CERD Committee had to decide on several contentious matters between the parties on jurisdiction and admissibility, including the existence of treaty relations and the exhaustion of domestic remedies. On jurisdiction, the CERD Committee noted that ‘under the inter-State communication procedure under Articles 11 to 13 of the Convention, States parties do not need to give their prior agreement or consent to the Committee for the latter to be seized with an inter-State communication’, considering this as an automatic mechanism.⁸⁶ Additionally, it held that Articles 11–13 of CERD provide for ‘a unique instrument to settle inter-State disputes, set up for the common good of all State Parties’.⁸⁷ The CERD Committee came to the conclusion that it has jurisdiction to examine the inter-State complaint without prejudice of the existence or not of treaty relations between the State parties.⁸⁸ On admissibility, the CERD Committee considered that the existence of a generalized discriminatory policy and practice should not merely be alleged, but prima facie evidence of such a practice must be established.⁸⁹ Based

⁸³ Ibid., para. 51.

⁸⁴ Ibid.

⁸⁵ Committee on the Elimination of Racial Discrimination, ‘Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel’, (30 April 2021) CERD/C/103/R.6, para. 2. For a more detailed discussion see among others, Jan Eiken, ‘Breaking new ground? The CERD Committee’s decision on jurisdiction in the inter-State communications procedure between Palestine and Israel’ (*EJIL:Talk! Blog of the European Journal of International Law*, 29 January 2020) www.ejiltalk.org/breaking-new-ground-the-cerd-committees-decision-on-jurisdiction-in-the-inter-state-communications-procedure-between-palestine-and-israel accessed 15 September 2022; Jan Eiken, ‘Breaking new ground – Again? The CERD Committee’s decision on admissibility in Palestine v. Israel’ (*EJIL:Talk! Blog of the European Journal of International Law*, 31 May 2021) www.ejiltalk.org/breaking-new-ground-again-the-cerd-committees-decision-on-admissibility-in-palestine-v-israel accessed 15 September 2022; David Keane, ‘Towards an ‘Amicable Solution’ in the Universal Human Rights System: Inter-State Communications under the International Convention on the Elimination of Racial Discrimination’ (*Völkerrechtsblog*, 28 April 2021) <https://voelkerrechtsblog.org/towards-an-amicable-solution-in-the-universal-human-rights-system> accessed 15 September 2022.

⁸⁶ Committee on the Elimination of Racial Discrimination, ‘Inter-State communication submitted by the State of Palestine against Israel’ (12 December 2019) CERD/C/100/5, para. 3.39.

⁸⁷ Ibid., para. 3.41.

⁸⁸ Ibid., para. 3.44. See also para. 3.50 for the summary of the conclusions of the CERD Committee on jurisdictional matters.

⁸⁹ Committee on the Elimination of Racial Discrimination, ‘Decision on the admissibility of the inter-State communication submitted by the State of Palestine against Israel’ (30 April 2021) CERD/C/103/R.6, paras 62–64, especially at para. 63.

on the submissions of the State parties and its concluding observations, the CERD Committee was satisfied that the threshold of prima facie evidence of a generalized policy and practice that touch upon substantive issues under the Convention was fulfilled and consequently, the rule on exhaustion of domestic remedies did not apply.⁹⁰ Having found the case admissible, the CERD Committee requested its chair to appoint, in accordance with Article 12(1) of CERD, the members of an ad hoc Conciliation Commission, which shall make its good offices available to the States concerned with a view to an amicable solution of the matter on the basis of States parties' compliance with the convention.⁹¹ An ad hoc Conciliation Commission composed of five members was appointed by the Chair of the CERD Committee during its 105th session, under Article 12(1)(b) of CERD with due consideration given to an equitable geographical distribution with the inclusion of one member from each of the five UN Regional Groups.⁹² Considering its reaction in early May 2021, it is doubtful whether Israel will engage with the established Conciliation Commission.

2.2.4.3 *Interim remarks*

These three cases brought in 2018 were the first engagement of UNTBs to resolve inter-State disputes.⁹³ This is an interesting development, since until recently inter-State disputes were usually brought before regional or international courts. The fact that such cases are being brought before various dispute settlement mechanisms, including UNTBs, constitutes a new development in international human rights law. While parallel procedures might be considered as unproblematic, especially when it comes to the use of an ad hoc Conciliation Commission alongside seizing the ICJ, such international litigation or dispute settlement strategies create the potential for conflicting jurisprudence on substantive (or procedural) legal matters. Despite the conciliatory function of the UNTBs, such cases are brought under highly politicized environments and conflictual relations between the State parties. Under such circumstances, the utility of this procedure can be questioned. Moreover, the UNTBs need to be provided with the necessary resources or expertise to process such sensitive and legally complex cases. It remains to be seen what contribution these inter-State cases will bring to the further development of international human rights substantive and procedural law.

⁹⁰ Ibid., para. 64. in para. 3, the CERD Committee notes that the present document should be read in conjunction with CERD/C/100/3, CERD/C/100/4 and CERD/C/100/5 (n 86).

⁹¹ CERD/C/103/R.6 (n 89) para. 64. in para. 3, the CERD Committee notes that the present document should be read in conjunction with Committee on the Elimination of Racial Discrimination, 'Inter-state communication submitted by the State of Palestine against Israel' (12 December 2019) CERD/C/100/3; Committee on the Elimination of Racial Discrimination, 'Inter-State communication submitted by the State of Palestine against Israel: supplementary submissions** , ***' (16 June 2021) CERD/C/100/4 and CERD/C/100/5 (n 86).

⁹² For a more detailed discussion see among others Jan Eiken and David Keane, 'Appointment of the Ad Hoc Conciliation Commissions under ICERD' (*EJIL:Talk! Blog of the European Journal of International Law*, 13 December 2021) www.ejiltalk.org/appointment-of-the-ad-hoc-conciliation-commissions-under-icerd accessed 15 September 2022. The five members of the Conciliation Commission are Verene Albertha Shepherd (Jamaica), Gun Kut (Turkey, chair), Faith Dikeledi Pansy Tlakula (South Africa), Chinsung Chung (Republic of Korea) and Michal Balcerzak (Poland).

⁹³ See United Nations, 'Report of the Committee on the Elimination of Racial Discrimination' (2021) UN Doc. A/76/18, 'V. Consideration of communications received under article 11 of the Convention', paras 44–49.

CONCLUDING REMARKS

Human rights have shaped international relations, influencing the way individuals and governments relate to one another.⁹⁴ A human rights-based approach to the multilateral agendas increasingly informs the contemporary practices at the United Nations at large. The process of strengthening the work of UN human rights mechanisms more generally, and the UN treaty bodies more specifically, respond to deep social needs to enhance the protection of human rights across the world. This process also highlights the political dynamics surrounding these rights and their custodian institutions, indicating the tensions they face regarding complex issues such as sovereignty, decision-making processes and the pushback instrumentalizing cultural and religious particularities. While such tensions are unavoidable, strengthening the independent expert component of the UN human rights architecture can attenuate the politicization of human rights discourse and practice. Innovative engagement among the different stakeholders is important for producing change in political attitudes through technical expertise. Human rights diplomacy, dictated by the multi-stakeholder nature of human rights work, is a discipline in need of further development in order to move the human rights discourse and action towards a better balance between sustained pressure and constructive engagement that leads to sustainable changes in societies.

The COVID-19 pandemic aggravated the challenges facing the UNTBs system which has reached a critical juncture of its development. This unique architecture, by its scope of coverage and size, is well placed to be the locomotive of a de-politicization of the human rights discourse to the largest extent possible and to ensure the building back better agenda after the pandemic draws the necessary lessons. The UNTBs have unique comparative advantages, namely independence, knowledge, geographical representation of all world cultures and civilisations. Unleashing the huge potential of the treaty bodies system can achieve this great strategic goal of the technical expertise defusing polemics and politicisation. Therefore, the human rights community should invest in the UNTBs. The anomalies of low compliance rate and inadequate resources can no longer be accepted, otherwise the system would suffer a protracted stagnation to the point of drowning under its growing workload. This situation can and should change. That is why, already in 2009, the then High Commissioner launched a process of reflection among all stakeholders on how the system can be strengthened. Ten years ago, in 2012, the High Commissioner wrote in her report that:

We now have a wealth of proposals, some grand and some small, that present a blueprint for a way forward. In my report, I present a package of proposals, each ready to be implemented on its own but which if taken together would bring many times the returns we could have expected from the sum of each. The functioning of the treaty bodies would be strengthened indeed, as would the ability of State parties to meet their obligations, and ultimately, the access to the system by rights-holders, who are the ultimate beneficiaries. It is clear now more than ever that strengthening depends on States parties, treaty bodies and my Office making the decisions within their respective authorities and in coordination with each other. To enable the system to function properly, all must do their part. In concrete terms, this means that there are very important decisions to be taken by each — even in the midst of a financial crisis. I am optimistic. With the General Assembly seized of the matter, and treaty body experts willing to move forward towards a fully effective system, the momentum for change

⁹⁴ Scicluna (n 8) 190.

exists. Let us not lose the moment, for the system requires action, and action now. I count on your commitment in reaching our common goal and I pledge to support you in this endeavour.⁹⁵

Our concluding question, a decade after High Commissioner Pillay's June 2012 report, must be: has the momentum she mentioned then been lost already or is it still possible to strengthen the treaty body system, and how much longer will this take? The answer is in the making and in the hands of various stakeholders, within their distinct yet interdependent roles and responsibilities. While it is our hope and expectation that the treaty bodies system will emerge stronger from this important process, this is not a foregone conclusion.

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