III. Das Recht der Vereinten Nationen

The UN Treaty Body Strengthening Process and Fundamental Social and Labour Rights

Niklas Bruun

I. Introduction

Since the Declaration of Human Rights was adopted in 1948 as a resolution by the UN General Assembly the UN system for the regulation and monitoring of human rights has expanded enormously. Today we have 10 general UN treaties on human rights, which are monitored by different specialized bodies.

The Human Rights Committee (CCPR) monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols; the Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966); the Committee on the Elimination of Racial Discrimination (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Committee on the Elimination of Discrimination against Women (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); the Committee against Torture (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); the Committee on the Rights of the Child (CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000); the Committee on Migrant Workers (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990); the Committee on the Rights of Persons with Disabilities (CRPD) monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006); the Committee on Enforced Disappearances (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006); and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) established pursuant to the Optional Protocol of the Convention against Torture (OPCAT) (2002) visits places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

All the treaty bodies are independent and they have traditionally decided to a large extent themselves on procedures and internal rules in accordance with general provisions in the specific Treaty regulating it. The treaty bodies receive support from the Human Rights Treaties Division of OHCHR[1] in Geneva which provides secretariats for the different bodies. Since the 90s human rights have not only been promoted within the UN system by the system of Conventions and Treaty bodies, but also through a number of so called special procedures. A number of special rapporteurs have been appointed and given country-specific or thematic mandates, the Universal Periodic Review process (UPR) has been initiated and an intergovernmental Human Rights Council established, separate ad hoc mechanisms created and measures have also been taken through different other instruments like Security Council resolutions.[2]

There has been an ongoing debate for several years both within the UN system and among academics in which arguments have been made that the Treaty body system actually is facing serious challenges and should be reformed. Common arguments have been that due to a lack of meeting time many treaty bodies have considerable backlogs in the number of reports examined and also backlogs in the examination of individual communications. Furthermore it has been argued that the only reason for why the system does not collapse altogether is that many States are late in reporting, which again as such is a problem for the legitimacy of the system and might indicate that there is least monitoring of States in which the human rights problems are most significant.

In this article I will try to present the key proposals made in the debate concerning a reform of the functioning of the Treaty bodies, which are not so well known outside the UN system. I also want to analyze the different objectives and purposes among stakeholders towards this process of reform. The reform is taking place in a period of time marked by strongly differing views among the UN Member States on the significance of human rights generally and the functioning of treaty bodies specifically. Due to economic constraints within the UN the lack of any realistic hope of significantly increased financial resources for the human rights monitoring system also creates a strong pressure for finding ways of reducing costs within the present system. This creates the challenge for human rights defenders of trying to find ways of improving and strengthening the treaty bodies without any significant increase of resources. In this context some of the UN Member States clearly bark on initiatives aiming at getting rid of some types of human rights control and some of the activities of the treaty bodies which they regard as "too activist". Another perspective on the treaty bodies is offered by the expert members of these Com-

1 OHCHR is the Office of the High Commissioner for Human Rights.
2 See for instance UN Security Council Resolution 1325 (2000) "Women, Peace and Security" and its follow-up resolutions 1820 (2008), 1888 (2009), 1889 (2009) and 1960 (2010).

mittees who usually do not get paid for their work and therefore regard the treaty body system as rather cheap. Also the NGOs who are strongly supporting the treaty bodies are closely following the process.

The focus of this presentation is to evaluate the planned reform from the point of view of implementation and monitoring of fundamental social rights. Is there a risk that these more complicated categories of rights might be marginalized in the context of a streamlined Treaty body reform. This is a suitable subject to be discussed in a *liber amicorum* for *Klaus Lörcher* who has been an active and consistent human rights defender for fundamental social rights and labour standards during many, many years.

II. Key proposals

1. Background

Treaty bodies have a core function which is to examine the State Parties periodic reports concerning the implementation of the conventions they have ratified and are members to. All treaty bodies, except one do this. Treaty bodies undertake, however also a range of complementary functions, which have increased during the last 15 years. Most treaty bodies issue General Comments or Recommendations regarding the provisions of the various treaties and many consider individual communications and undertake inquiries, while the Sub-committee on Prevention of Torture, operates largely through field missions. They carry out these functions in accordance with committee-specific rules of procedure and with the support of a OHCHR (The Office of the High Commissioner for Human Rights) secretariat.

There is a general understanding especially entertained by the OHCHR that over the past decades the capacities of the system have been stretched to their limits for many reasons including the inadequacy of resources. The multiplication of treaties, monitoring bodies and corresponding procedures has allowed for increased and more specific protection of a growing number of rights holders' groups. However, it has also meant that the system has become increasingly complex. It has long been argued that the system would benefit from reform in order to render it more efficient and effective, robust, sustainable, and accessible.

In order to address the problems a number of international meetings were initiated and conducted. Against the background of many discussions and consultations

of which the Dublin I and Dublin II meetings[3] can be mentioned in which participated many human rights experts, both treaty body Members and others, including observers from the Office of the High Commissioner for Human Rights. These meetings came up with long lists of recommendations. The debate finally resulted into a discussion in the General Assembly which made a decision on the further process in February 2012.

2. Decision by the General Assembly[4] and the High Commissioner´s report

The debate resulted in February 2012 in a request of the President of the General Assembly to launch, within the framework of the General Assembly, an open-ended intergovernmental process to conduct open, transparent and inclusive negotiations on how to strengthen and enhance the effective functioning of the human rights treaty body system. Two co-facilitators were appointed to conduct this process.

It was also decided that the intergovernmental process shall take into consideration the relevant proposals on strengthening and enhancing the effective functioning of the human rights treaty body system, including those contained in the reports of the Secretary-General and the compilation report to be prepared by the United Nations High Commissioner for Human Rights, and in this regard invited the High Commissioner to present the compilation report to the General Assembly in June 2012.

The report was published in June 2012.[5] The key proposals compiled in the report include:

- Establishing a comprehensive reporting calendar ensuring strict compliance with human rights treaties and equal treatment of all States parties;
- Enhancing independence and impartiality of members, and strengthening the election process;
- Establishing a structured and sustained approach to capacity building for States parties for their reporting duties;
- Ensuring continued consistency of treaty body jurisprudence in individual communications;

3 Dublin consultation for treaty body members organized by the University of Nottingham (November 2009), Dublin II consultation organized by the University of Nottingham (November 2011). See the OHCHR website at: http://www2.ohchr.org/english/bodies/HRTD/index.htm (March 2013).

4 A/66/L.37 General Assembly 16 February 2012.

5 See Pillay, Navanethem, Strengthening the United Nations human rights treaty body system. A report by the United Nations High Commissioner for Human Rights. June 2012.

- Increasing coordination among the treaty bodies on their work on individual communications and their adoption of common guidelines on procedural questions;
- Increasing accessibility and visibility of the treaty body system, through webcasting of public meetings and use of other new technologies;
- A simplified focused reporting procedure to assist States parties to meet their reporting obligations with cost savings for them and the UN while maintaining the quality of the process;
- Alignment of other working methods to the maximum extent without contradicting the normative specificities of the treaties;
- Limitation of the length of documentation.

In addition each segment of the report addresses recommendations to stakeholders, namely treaty bodies, States parties, national human rights institutions, civil society and United Nations entities. The High Commissioner argued that each of the recommendations is implementable independently, but if taken together as a "package", they would be mutually reinforcing and thus would have much greater impact.

Several of these points are quite clear. Concerning the reporting calendar which is aimed to remedy the backlog it is worth looking at the actual reporting by States parties.

As of April 2012, 626 State party reports were overdue. If the trend of ratification growth or the establishment of new treaty bodies continues, this figure will increase.[6]

SUBMISSION OF REPORTS

1. Treaties (and State parties); 2. Overdue initial reports; 3.Percentage of overdue initial reports; 4. Overdue periodic reports; 5. Percentage of overdue periodic reports; 6. Total number of overdue reports; 7. Percentage of total number of overdue reports.

1.	2.	3.	4.	5.	6.	7.
CAT (150)	29	19%	39	26%	68	45%
ICCPR (167)	26	16%	58	35%	84	50%
CED (32)	0	0%	0	0%	0	0%
CEDAW (187)	10	5%	30	16%	40	21%
ICERD (175)	13	7%	74	42%	87	50%
ICESCR (160)	35	22%	41	26%	76	48%
ICRMW (45)	21	47%	8	18%	29	64%
CRC (193)	2	1%	61	32%	64	33%
CRC-OPSC (156)	76	49%	0	0%	76	49%

6 The following statistical data is from Pillay (2012), p. 23, see footnote 5 above.

1.	2.	3.	4.	5.	6.	7.
CRC-OPAC(147)	52	36%	0	0%	52	36%
CRPD (112)	50	46%	0	0%	50	46%
Totals	315		311		626	

Even at this level of non-compliance described above, treaty bodies face backlogs amounting to a cumulative 281 State party reports pending consideration (as of 21 March 2012). As a result, as it presently operates, States parties that invest the time to prepare their reports are made to wait for the holding of the constructive dialogue for years after their submissions.

For those treaty bodies that consider individual communications, the increasing number of petitions (an average of 480 such communications pending in 2011) has also led to significant delays in this procedure. For instance, for the Human Rights Committee, with 333 pending cases, the average time lag between registration and final decision on a case is around three and a half years. The average time lag for the Committee against Torture, which has 115 cases pending, is two and a half years.[7] These examples which represents the extreme have had a negative impact on petitioners who face a long wait before their case is decided upon, and on States parties who are often faced with a Committee's request for implementation of interim measures over a long period of time. It can also be noted that some States do not cooperate with the Committees despite frequent reminders to submit their comments on the individual communications, thereby further delaying the consideration of the complaint.

a) "The Addis Ababa Guidelines"

In parallel with the preparation of the High Commissioner´s proposal the chairs of the different treaty bodies came together in Addis Ababa in June 2012 and expressed their support of some of the reforms planned, for example the "comprehensive reporting calendar" and a simplified reporting procedure, page limitations relating to the reporting process and the use of modern technologies such as webcasting and videoconferencing. The most important outcome of the Addis Ababa meeting was the so called "Addis Ababa Guidelines".[8]

Here some general principles were stated. The Chairpersons argued that the "independence and impartiality of members of the human rights treaty bodies is essential for the performance of their duties and responsibilities and requires that they serve in their personal capacity". Furthermore "(T)reaty body members shall not only be independent and impartial, but shall also be seen by a reasonable ob-

7 See Pillay, Ibid.
8 UN GA A/67/222, 2 August 2012.

server to be so". Especially attention was drawn to the following general principles:[9]

Real or perceived conflicts of interest and challenges to the requirements of independence and impartiality may be generated by many factors, such as a member's nationality, place of residence, current and past employment, membership of or affiliation with an organization, or family and social relations. In addition, conflicts of interest may also arise in relation to the interest of a State of which a member is a national or resident. Consequently, a treaty body member shall not be considered to have a real or perceived conflict of interest as a consequence of his or her race, ethnicity, religion, gender, disability, colour, descent or any other basis for discrimination as defined in the core international human rights treaties.

Treaty body members commit themselves to abide by the principles of independence and impartiality when making their solemn declaration under the relevant treaty.

The principle of independence requires that members not be removable during their term of office, except to the extent that the treaty in question so provides. They may not be subject to direction or influence of any kind, or to pressure from the State of their nationality or any other State or its agencies, and they shall neither seek nor accept instructions from anyone concerning the performance of their duties. Consequently, members are accountable only to their own conscience and the relevant treaty body and not to their State or any other State.

Considering that within each treaty body, members are nationals of only a limited number of States parties, it is important that the election of one of its nationals to a given treaty body shall not result in, or be thought to result in, more favourable treatment for the State or States, as the case may be, of which the member is a national. In this regard, members holding multiple nationalities shall inform, on their own initiative, the chairperson of the relevant treaty body and its secretariat accordingly. Members holding multiple nationalities shall not participate in the consideration of reports, individual complaints, or take part in visits or inquiries relating to any of the States of which she or he is a national.

All members shall avoid any action in relation to the work of their treaty body which might lead to or might be seen by a reasonable observer to lead to bias against States. In particular, members shall avoid any action which might give the impression that their own or any given State was receiving treatment which was more favourable or less favourable than that accorded to other States.

These principles were elaborated quite in detail and endorsed by most Committees. These principles are also largely reflected in the internal rules of these Committees.

9 Annex I to UN GA A/67/222, 2 August 2012, II General principles.

b) An alternative agenda – the Russian position paper

During the consultative process it has become clear that separate State Parties have a very different approach to the treaty bodies reform process and that it is questionable whether everyone actually supports the genuine "strengthening" of the treaty bodies. For instance the Russian Federation has been rather active in the debate and submitted in September 2012 an extensive letter to the UN Secretary General concerning the Russian Federation approaches to the reform.[10]

The Russian Federation argued the following:

> "The so-called alternative procedure for the preparation of reports, whereby States parties to a treaty do not submit "full" reports but merely answer questions transmitted in advance by the treaty bodies, is currently being tested and the modalities have not been finalized. Nevertheless, some shortcomings of this procedure have already become evident:
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> - An excessive number of questions posed by the committees, requiring States to exceed substantially the recommended length for answers in order to provide detailed and objective information;
> - The misuse of general theoretical questions by the treaty bodies, preventing States from providing concise answers that are also as complete as possible;
> - The formulation of questions that go beyond what is set forth in the respective international treaties, resulting in encroachment on the competence of other treaty bodies."

In order to avoid these problems the Russian Federation proposes a number of limitations on the new procedure as making its use dependent on the consent by the State Party concerned, questions of a factual nature must be based on reliable information that has been verified several times and the number of questions to be answered by the State Party should be limited.

The Russian Federation is also highly critical of the inclusion of NGOs in the monitoring process:

> "Taking into consideration their institutional, political, social, economic, cultural, religious and other characteristics, States themselves should decide whether any national consultations are feasible or necessary and whether civil society institutions and national human rights mechanisms should be involved in the preparation of the report."

The Russian Federation also has strong views concerning the work of the treaty bodies. Regarding the practice of giving access to so called alternative sources the Russian Federation has a highly critical view:

> "In order to enhance the transparency of the treaty bodies and to ensure their true independence, objectivity and impartiality, the practice of conducting "closed" meetings of

10 Letter dated 21 September 2012 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, 25.9.2012, UN 67th session, Agenda items 69 and 119 (AD/67/390).

> committee experts and various stakeholders must cease. All events and meetings held through the treaty bodies should be open to representatives of all stakeholders."

The Russian Federation also presents some reflections on the follow-up procedure that has been adopted by most committees. It states:

> "The international treaties in effect do not contain any provisions concerning what is known as the follow-up to the consideration of national reports. Any State party that is willing to engage in dialogue with the treaty bodies on this matter does so purely on a voluntary basis."

The Russian Federation wants State parties to be involved in the elaboration of general recommendations or comments:

> "The Russian Federation holds that it is necessary to institute a practice whereby general comments are prepared by the treaty bodies in close collaboration with the States parties and that the unique social, economic, political, religious and cultural features of particular States must be taken into consideration."

The Russian Federation is rather critical of the present performance of treaty bodies:

> "There is a need for a set of measures designed to depoliticize the activity of the treaty bodies, make the experts more objective and ensure that they are truly independent, not only of States parties but also of other groups seeking to exert influence, including civil society institutions, the academic community and United Nations system entities."

Individual Communications are clearly not – according to the opinion of the Russia Federation – a core task for the treaty bodies:

> "Owing to the nature of the treaty bodies, the decisions they adopt on individual communications are not legally binding and serve only as recommendations. Materials relating to a communication and its consideration may be published or otherwise disclosed only with the mutual consent of the State party and the author of the communication. Failure to respect that condition constitutes a violation of the individual's right to privacy."

These highlights the Russian position which is not the most radical from the point of view of questioning some of the basics of present practice of monitoring of human rights within the UN system, shows that the strengthening of treaty bodies is not a straight forward approach among State parties within UN.

III. Treaty body reform and fundamental social and labour rights

Many of the UN Treaty bodies are addressing social, cultural and labour rights. Not only the International Covenant on Economic, Social and Cultural Rights is focused on such rights, they are equally important under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the

Rights of the Child, the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and finally for the Convention on the Rights of Persons with Disabilities.

All these treaties include the obligation to respect certain fundamental labour standards. Usually these labour standards are also protected by ILO fundamental core labour instruments (the eight core conventions) or by some other ILO Conventions. This is important since the UN and ILO efforts can reinforce one another, and the detailed monitoring done by the ILO can be used by UN monitoring bodies, that can put requests and recommendations from the ILO into a more general human rights obligations framework.

The demands for streamlining the UN treaty body systems are to a certain extent justified. On the other hand the debate is often characterized by views which clearly seem to indicate that the UN system should focus on real or core human rights issues which are understood to be traditional political and civil rights. The implicit view seems to be that social and economic rights are those rights which might lead to a "politicized approach" and less time, efforts and resources should be allocated to them.

Experience from treaty bodies clearly show that the evaluation of the fulfillment of economic and social rights is more complicated and requires more questioning and expertise in different areas (working life, education, health etc) than the assessment of traditional civil and political rights. It is therefore of utmost importance to make sure that the monitoring bodies and those who decide on individual communications have enough expertise and access to expertise (the secretariat) in the life areas covered by the conventions. The proposal by the Office of the High Commissioner to establish one common committee to assess communications under all conventions is therefore unrealistic and dangerous. Its side-effect might be that much less attention is focused on the specifics of different conventions like for instance problems relating to gender stereotypes and different forms of indirect discrimination under the CEDAW Convention.

It is therefore important to keep the jurisprudence related to different treaties separate and it should clearly be emphasized that the strong requirement for consistency within the jurisprudence of different treaty bodies, which the Office for the High Commissioner emphasizes, does not restrict the application of treaty specific doctrines and practice.

One weakness in the debate on the UN treaty body system is that the system is strongly perceived as a closed system where State parties interact with treaty bodies and the treaty bodies (mainly) with State parties and each other. The future relationship between the UN treaty bodies system and other international organizations should be integrated into the debate. Regarding fundamental labour standards the main concern is that we need to create stronger links between the UN treaty bodies

and ILO-standards, monitoring of ILO-standards and also generally to the work within the ILO, for instance in the form of technical assistance. At present these links exist, but they are not institutionalized in a sufficient manner, and they are to a large extent dependent on individual initiatives and activities.

Another weakness in the debate is the lack of linkage to regional human rights instruments and their monitoring and enforcement. Again the UN system could benefit from a stronger cooperation with such efforts, and some efforts to create some institutional forms for such cooperation are needed.

Especially in times of financial and economic crisis the human rights framework comes under pressure since the State parties have difficulties in delivering increased and improved protection for fundamental rights. On the contrary, standards are undermined and lowered, human rights are put aside. Again the special problems in relation to economic crisis should be addressed also in the context of treaty body reform. It seems that different ways and means to integrate international financial institutions like the International Monetary Fund (IMF) and the World Bank into the system of treaty obligations and monitoring must be explored.

We live today in "an Age of Human Rights" where human rights have become a form of universal secular religion accepted by most people and societies in a general and principal form.[11] In such a context the future of the monitoring of social and labour rights within the UN system should not be an issue debated only by the Members States of the UN together with some academics, experts and bureaucrats within the UN system, but the future of the human rights is something that largely should involve different stakeholders as trade unions, women´s organizations, NGOs in all fields and other stakeholders.

11 See Marks, S., Human rights in disastrous times, in: Crawford, J./ Koskenniemi, M. (eds.), International Law, Cambridge University Press 2012 (307-326) p. 313.

Die Bedeutung der UN-Behindertenrechtskonvention für das Wahlrecht der Beschäftigtenvertretungen in Deutschland*

Wolfhard Kohte

Seit vielen Jahren hat Klaus Lörcher seine fachliche und wissenschaftliche Arbeit auf das Europäische und Internationale Arbeits- und Sozialrecht gerichtet. Dies wird in seiner gesamten Breite von ihm erfasst und diskutiert. Diese Diskussion ist nicht statisch, es geht nicht um eine schematische 1:1-Umsetzung von unvermeidlich zu übernehmenden Vorgaben, sondern immer auch um die Frage, welche produktive Bedeutung die Leitbilder des internationalen Rechts für das tägliche deutsche Recht haben.

I. Produktive internationale Leitbilder

Besonders produktiv werden diese Leitbilder durch den „Spill-over-Effekt", mit dem nicht nur konkrete, durch das europäische und internationale Recht verlangte Änderungen erfolgen, sondern auch weiterführende Änderungen, die zur Konkordanz der nationalen Rechtsordnung sinnvoll und geboten sind.[1] So war z. B. das Wahlrecht zur Betriebsverfassung und Personalvertretung vor 1972 bzw. 1975 an das Wahlrecht zum Deutschen Bundestag gebunden, so dass ausländische Beschäftigte nicht zum Betriebsrat bzw. zum Personalrat wählbar waren. Mit dem Verbot der Diskriminierung wegen der Staatsangehörigkeit war dieser Ausschluss nicht vereinbar; angesichts der geringen Anpassungsbereitschaft der nationalen Parlamente war es plausibel, dass mit der VO 1612/68 vom Instrument der Verordnung Gebrauch gemacht wurde.

Im Gesetzgebungsverfahren zum BetrVG wurde erwogen, das passive Wahlrecht ausschließlich auf „EWG-Arbeitnehmer" zu erstrecken.[2] Es setzte sich schnell die Position durch, dass dies zu neuen Widersprüchen führen würde, so dass generell das Wahlrecht zur Betriebsverfassung vom Wahlrecht zum Deutschen Bundestag getrennt wurde. Im Personalvertretungsrecht war diese Abkopp-

* *Für vorbereitende und begleitende Diskussionen danke ich Claudia Beetz, Cathleen Rosendahl und Tina Zielinski.*

1 Grundlegend Bercusson, European Labour Law, 1996, 221; Kohte, in: FS 50 Jahre BAG, 2004, S. 1219, 1251.

2 BT-Drs. VI/1806, S. 41.