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The Future of UN Human Rights Treaty Monitoring

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بحث تكميلي لنيل درجة الماجستير في الترجمة

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The current circumstances in Bosnia and Herzegovina afford new and different challenges. They invite still further procedural innovation and afford occasions for the committees to take strong positions on important principles of system-wide significance. Criteria for engagement with these matters must be somewhat distinct from those applicable to the emergency procedures, not least given the significant possibility for making constructive contributions. Treaty bodies also have the opportunity to play a central role in implementation of a peace agreement in a manner which may bode well for similar future engagement elsewhere and for consequent enhancement of both their visibility and effectiveness.

Already the CERD Committee has shown some willingness to address the post-GFA situation. It and the other treaty bodies have yet, however, to show whether they intend to exploit the full range of possibilities. Notwithstanding their limited time and resources, it is to be hoped that the treaty bodies will so do. Energetic timely action will ensure that benefit continues to be rendered both to themselves and to Bosnia and Herzegovina.

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ENSURING EFFECTIVE SUPERVISORY PROCEDURES: THE NEED FOR RESOURCES

ELIZABETH EVATT

A. Introduction

Maintaining the supervisory procedures of the human rights treaty bodies calls for a certain sleight of hand – to turn less into more. At a period when the treaty bodies are seeking to make the monitoring system more effective, and when the demands on them are increasing (more parties, more reports, more individual communications), the resources available to support their work seem to be diminishing.[1]

Insufficient resources have been a constant problem for the treaty bodies. Despite provisions in some instruments that 'the Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee'[2] it has long been

[1] See generally P. Alston, 'Interim Report of Study on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty Bodies' UN Doc. A/CONF.157/PC/62/Add.11/Rev.1, 22 April 1993; P. Alston, 'Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System', UN Doc. E/CN.4/1997/74, 7 March 1997. A. F. Bayefsky, 'Making the Human Rights Treaties Work', in *Human Rights: An Agenda for the Next Century* (eds. Louis Henkin and J. L. Hargrove), American Society of International Law, Washington DC, 1994, p. 229; *Plan of Action to Strengthen the Implementation of the Convention on the Rights of the Child Prepared by the UN High Commissioner for Human Rights*, November 1996. See also the Report on the July 1996 meeting of the members of the Human Rights Committee to discuss reform of the procedures of the Committee, and the reports of the meeting of persons chairing the human rights treaty bodies, convened pursuant to General Assembly Resolution 49/178 of 23 December 1994.

[2] International Covenant on Civil and Political Rights (ICCPR), article 36. See also Convention on the Elimination of Discrimination against Women (CEDAW), article 17.9; Convention against Torture (CAT), article 18.3; Convention on the Rights of the Child (CRC), article 43.11. Different arrangements apply to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and to the Convention on the Elimination of Racial Discrimination (CERD).

recognised that the funding of the treaty bodies and their resources are inadequate to allow them to carry out their mandate effectively.[3] Too few professional staff have been assigned to treaty body work, and even those staff who have been assigned to this work have sometimes been seconded to other work. Some meetings have been cancelled, interpreting has sometimes been restricted and summary records are sometimes not prepared.

Far from improving, this situation threatens to get worse. Limits have been imposed on documentation and delays in translations have been chronic. Petty restrictions on the distribution of documents have frustrated the work of the Human Rights Committee (HRC). These demoralising restrictions have come at a time when the increase in ratifications, in the number of communications and in the length of reports, together with the Committee's attempts to make its procedure more effective, have increased the workload of the Secretariat. In an effort to ensure that the quality of its work is not jeopardised, the Committee has asked that in the restructuring of the Office of the UN High Commissioner for Human Rights (UNHCHR), provision be made to increase the specialised staff assigned to it, in relation both to the monitoring of reports and to the consideration of communications under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).[4]

Against this background, the natural tendency on the part of the treaty bodies is to deal with the problem through techniques of crisis management, making minor savings here and there, working only from one session to the next. However understandable, this tends to obscure the real long-term problem. If effectiveness meant no more than efficiency in the use of existing resources, we could simply focus on how to do what is being done more efficiently. But effectiveness should also look to the goals and outcome of the process. The question then is different – what kind of servicing and resources are needed by the treaty bodies to make the monitoring system effective, that is, to enhance the level of compliance. This 'optimum effectiveness' may require further resources. In a context of diminishing United Nations resources, such effectiveness could not be achieved without seeking new sources of support. Thus it is necessary to ask not only how the level of resources historically available can best be used, but what level of

[3] Alston, *supra* note 1, pp. 197–206.
[4] See e.g. 'Report of the Human Rights Committee', Vol. 1, UN Doc. A/52/40 (1997), para. 19.

resources is required, as a minimum, if the treaty bodies are effectively to discharge their mandates, and how such resources might be obtained. Only when these questions have been answered is it possible to assess possible or proposed reforms.

B. Effectiveness as a function of the goals of the treaty system

The effectiveness of the treaty system, in terms of its intermediate and long-term goals, entails a number of different things.

1. EFFECTIVE MONITORING AND FOLLOW-UP

Human rights instruments create legally binding obligations for state parties to implement: they must respect and ensure the rights protected by the instrument, and also take part in the supervisory, or monitoring system established by it. States parties have voluntarily assumed these obligations and must be taken to have the intention to fulfil them. To do so in good faith, they must at the minimum present reports as required by the treaty, consider and respond to the treaty bodies' observations on the report, take follow-up action, cooperate in any communications procedure, and make appropriate responses to the views of the treaty body.

The monitoring system contributes to the effectiveness of the treaty in that the treaty body is able to assess how far states have fulfilled their legal obligations and to encourage and assist states to take corrective action when necessary.[5] The role of the treaty bodies is especially important in the context of multilateral treaties, in that the states themselves have not made use of other mechanisms to secure compliance by other parties.[6]

For monitoring to be effective, the treaty bodies need to have an adequate understanding of the current law and practice in each reporting state, of the institutional framework for protecting rights, of the extent to which rights are enjoyed in practice and the deficiencies in the implementation of rights. State reports seldom, if ever, provide the kind of information and analysis needed for such an understanding. Members of treaty bodies may do their own research, but this work is not consolidated into a working

[5] Though its discontinuance has been suggested: Bayefsky, *supra* note 1, p. 264.
[6] The procedure under article 41 ICCPR, under which a state may make a complaint against another state party (if both states have accepted the procedure) has not been used. Some states have, however, objected to reservations made by other states parties.

document. No provision has been made for corporate memory in regard to the situation in states parties, even though the monitoring process is intended to extend over generations. There is a need for continuing analytical studies in respect of the states parties covering the issues mentioned, studies which should be undertaken by qualified personnel. They should be updated and kept available as reference documents within the Office of the UNHCHR.

Since implementation of treaty obligations within national systems is a major goal of human rights instruments, the monitoring process should use whatever means are available to encourage states to introduce the laws, policies and institutions necessary to comply, to prepare quality reports and to take part in discussion with the treaty body. It should monitor follow-up action taken after the discussion by the state in order to implement the recommendations of the treaty body. Both the reporting process and the communications procedure should have adequate follow-up mechanisms.

2. EFFECTIVE TREATY BODIES

A number of initiatives have been taken by the treaty bodies towards greater effectiveness. For example, the HRC established a Working Group in 1995 with the task of finding ways to expand on the resources of the Committee.[7] The Working Group secured independent funds to hold a one-week meeting, followed by a special out-of-session meeting of the whole Committee immediately following the July 1996 session. The result was a detailed examination of the working methods of the Committee, agreement on some significant procedural changes and an attempt to define aspects of the work which could be undertaken as projects funded by outside agencies. Rules have been drafted to implement some of the proposals, for example, to provide for communications to be dealt with in a one-step procedure, rather than in two stages of admissibility and merits, as then the practice.

The fact that the treaty bodies seek improvements in their methods of work should give some impetus to reform. But there are constraints on

[7] The special Working Group was chaired by T. Buergenthal. The impetus for the Working Group came from a concern that there had been delays in considering some communications because of problems over translation and lack of resources available to the Communications Division of the Office of the UNHCHR.

what those bodies can achieve within the existing structures, especially when it comes to proposals which would require the members to give more time to the work of the HRC. Most have other full-time professional commitments, and carry out their functions in the treaty body on an essentially honorary basis. Secretariat support is essential to the introduction of new procedures. Inevitably, where reforms would make additional demands on resources, their introduction will require either additional staff or resources provided from outside the UN budget.

Another constraint on the treaty bodies is their isolation from each other. Apart from the annual meetings of chairpersons of the human rights treaty monitoring bodies they have little contact, and little opportunity to discuss the kind of reforms which would make the system more effective. If they could work more closely together they might have more influence on those who decide on the allocation of resources and they might be able, for example, to help resolve the problems caused by overlapping mandates, and the plethora of instruments and reports. In the long term it would be desirable to amalgamate the treaty bodies into a single monitoring mechanism, by consolidating the instruments.[8] This would strengthen the monitoring bodies as well as overcoming the difficulties caused to states by overlapping provisions and the fragmentation of the reporting process.

3. EFFECTIVE SECRETARIAT SUPPORT FOR TREATY BODIES

The proper functioning of the treaty bodies depends to a very great extent on the existence of a strong professional staff in the Secretariat, with specialised skills and experience. Consolidation of the treaties and the ultimate creation of a single monitoring body would call for a unified Secretariat, with a significant responsibility to work with an essentially full-time independent treaty body. Other, intermediate, proposals outlined below would also need an expansion of professional staff.

C. Possible reforms and their impact on resources

Human rights issues are assuming a growing importance in international relations. If the UN human rights system is to maintain its place in the

[8] This might be achieved for those states which have ratified all six instruments, leaving others to the present system. See also chapter 19 of this volume.

vanguard of the development of human rights, it needs to be reshaped. The treaty body system, as the main independent agency within the UN human rights system, should be recognised as having a significant role in the interpretation of standards, as a significant resource to assist states in compliance, and as a source of information to the whole UN system about the situation in particular states. In all this, it should make full use of modern technology.

1. MULTIPLE REPORTING PROCEDURES AND OVERLAPPING INSTRUMENTS

The reality is that human rights violations occur within individual national systems, and states parties can only comply with their treaty obligations by attending to the content and administration of their own legal systems. At that level there is a need for a unitary approach. By contrast, the existence of separate treaties, each with a separate monitoring body, and the need for separate consideration of the same issues by several different bodies, imposes unnecessary burdens on states and could lead to inconsistency and confusion.

A single treaty body considering a single comprehensive report has been suggested as a way of overcoming overlapping mandates and reducing the burden of reporting under many instruments. A single treaty body would almost certainly require full-time paid members. It would need considerably more staff resources. Though this proposal may not be practicable as an immediate solution, it should be kept in mind as a possible long-term solution, and planning for the development of the system should be done in a way that would make the transition to a single mechanism easier. For example:

- A member of one treaty body could sit as an observer at all or part of the session of another treaty body, for example when the same state is to have its reports considered in both bodies. This might help to prevent the same issues being raked over unnecessarily.
- Joint working groups, consisting of members of more than one treaty body, could be established to prepare guidelines for states explaining clearly how to deal with areas of overlap between the different instruments.
- Thematic working groups of representatives of several treaty bodies could be called together by the Office of the UNHCHR or by UN agencies to develop guidelines for states in preparing reports on particular areas of human rights covered by more than one instrument.
- Arrangements could be made to bring the Convention on the Elimination of Discrimination against Women (CEDAW) into the same servicing structure as the other treaty bodies.

2. PREPARATION AND CONSIDERATION OF REPORTS

It is generally accepted that the programme of state reports should be set by the treaty body at least two sessions ahead, and a list of questions or issues given to the state party one session ahead. In addition, the country rapporteur, with the assistance of the Secretariat, should prepare an analysis of the human rights situation in each state whose report is to be considered, as the basis for requesting further information on laws, decisions, etc. from the state and for selecting the issues and questions to be discussed.

Such an analysis would, however, have value beyond the first consideration of a report. It would become part of an ongoing study of that state and its human rights situation. It would bring together, at Secretariat level, the reports of that state under each of the instruments, as well as information from UN agencies and non-governmental organisations (NGOs). Such continuous analysis seems essential if the treaty body system is to engage seriously in assessing state compliance. It would make the monitoring system a valuable source of information about human rights in the member states. It would open the way to a quicker and more selective examination of some states, and would enable the treaty body to focus on significant issues with other states. It might even make the process of report writing simpler for the state.

An authoritative analysis of this kind would be resource intensive. It would require high level researchers with suitable experience and qualifications. The treaty bodies could determine the priorities for this work, that is, which countries and which issues should first be studied. They might cooperate in setting the ambit of this work, through a joint working group or rapporteurs nominated for the purpose.

While this work would be done primarily by Secretariat staff, under the direction of the treaty body, it could also be a potential area of work for interns attached to the treaty bodies (with knowledge of the appropriate languages and legal systems), provided that they have a sufficient length of time to carry out useful work, for example, a minimum of one or two years.

It might be possible to seek specific funding from foundations, or support from universities for interns or post-graduate students. Perhaps a proposal could be put forward for a pilot scheme to assess the value of the proposal.

3. FOLLOW-UP TO THE REPORTING PROCESS

Follow-up to the reporting process is not well developed, at least in the HRC. Procedures should be developed to ensure that requests by treaty bodies for states to provide further information are complied with, that the information has in fact been provided and that it has been considered by the treaty body. Otherwise there seems little point in asking for it. The state might also be requested to provide information as to whether the observations and recommendations made by the treaty body were considered at state level and what response was made. Other matters which may need to be confirmed are recommendations to give publicity to concluding observations.

A comprehensive follow-up programme needs to be instituted as a necessary part of the reporting process. It should be placed under the responsibility of the country rapporteur or a general rapporteur for follow-up, with assistance of the Secretariat. The possibility of a visit to the state party to discuss aspects of the follow-up should be included in the procedure.

4. COMMUNICATIONS

In the HRC, too few professional staff are available for communications work, and serious delays are developing. Nevertheless, the reforms which are contemplated do not all involve a reduction in the workload for the communications procedures.

For example, the possibility of hearings at the request of the parties, now under consideration, would add to the time taken by some cases, though this could be offset by the new one-stage procedure (combining both admissibility and merits issues), and other changes which might speed up the handling of other cases. The follow-up to communications is gradually being made more effective and is taking up more time of the rapporteur and the Secretariat. This could increase further, especially if visits to states, or extended discussions with states are considered necessary. The new practice of assigning each communication to a case rapporteur involves an even greater commitment of time from individual members.

5. GENERAL COMMENTS

The HRC has adopted twenty-seven General Comments and more are planned. Those adopted in recent years appear to be more detailed; the result is that more time is spent in their drafting and consideration in the Working Group and in the Committee. The practice has been for these comments to be drafted by members, not by the Secretariat, although the Secretariat may provide some input. By contrast other treaty bodies may rely to a greater extent on the assistance of their Secretariat to draft general comments.

In any event, there is certainly a potential role for Secretariat staff or specialist interns to assist in the preparatory work of drafting comments. With the expansion of work and the need for members to undertake more and more tasks, there could be problems for members to find time to prepare draft comments. However, if some of this work is to be done other than by members, the responsible officer should work closely with one or more members who might form a working group for that purpose. It is envisaged that a member would always be responsible for introducing the draft to the Committee and leading the discussion.

6. BETTER USE OF INFORMATION TECHNOLOGY

The cost of going electronic is a cost that must be incurred if the treaty monitoring system is to remain viable. All material produced in the Office of the UNHCHR should be available on electronic database and, if possible on the Internet. Adequate search mechanisms should be provided. The cost of providing a modem, or even a lap top personal computer with modem for each member during their term, with access to the Internet, would be minor, and would be offset by savings in paper, copying, storage, distribution and postage. Outside organisations such as foundations could perhaps be approached to support specific parts of this transition.

D. Resource implications of these reforms

The proposals outlined above would require additional staff and additional funds to carry out the further activities intended to make the system more effective. The following section outlines the kind of resources needed.

1. MEMBERS OF TREATY BODIES

Resources would need to be available for members of treaty bodies, and support staff for the Secretariat, in a number of areas:

- additional working groups, including joint working groups and thematic working groups with members of other treaty bodies;
- greater contact with members of other treaty bodies, including attendance of members at sessions of other committees;
- visits to states parties (for technical assistance and follow-up activities in connection with reports and communications);
- access to technology, email and the Internet.

Increases in duties would require appropriate honoraria to be paid, especially to members of treaty bodies which at present have no provision for this.[9] It might also require education seminars to assist new members and enhance professional development.

Treaty bodies probably take the view that more time is needed to deal with their workload of reports. This would certainly be true if all overdue reports were presented by states. At present there are considerable backlogs. In the case of the Human Rights Committee some reports wait eighteen months to two years before consideration. Extending sessions or allocating additional sessions would require extra resources, not just to meet the cost, but also in terms of secretariat staff. It would add significantly to the time which members would need to commit to their work on the treaty body.

The functions that treaty bodies have taken on, and those contemplated here, suggest an expanding role for the members, one which will become increasingly difficult to perform on a part-time honorary basis. States need to recognise the actual demands on members, and should ensure that adequate support services are available. The proposals made here are based on a belief that there must inevitably be a consolidation of the whole system. Moving CEDAW to the Office of the UNHCHR would be just one step in this process.

2. THE SECRETARIAT

In general, the professional staff of the Secretariat are highly competent. Nevertheless, the Secretariat is understaffed, and needs to be strengthened

[9] See also chapter 8 of this volume, note 42, for further details.

by additional professional staff, able to respond to the growing needs of the treaty bodies. The professional staff should be able to work for more than one treaty body. Their functions should include:

- preparing in-depth evaluation of state reports and analysis of the human rights situation in a particular country, as working documents for the committees;
- working with joint working groups and thematic working groups to prepare guidelines for states parties relating to overlapping instruments;
- preparing draft lists of issues and questions;
- dealing with communications, preparation of drafts, etc.;
- follow-up to reporting and communications;
- preparing drafts of annual reports;
- preparation of draft general comments in association with one or more members of the treaty body;
- technical advice and assistance to states.

Some of these tasks might be performed by special interns or research fellows.

3. TECHNICAL ASSISTANCE

The provision of enhanced technical assistance to states, to improve the quality and regularity of reports, and to assist with the follow-up to the reporting process, would require a further commitment of professional resources at the Office of the UNHCHR. Nevertheless some of these extra costs might be offset by savings, if the result made the reporting process easier to manage.

4. CONSULTATION BETWEEN TREATY BODIES AND SECRETARIAT

Major decisions about the level of funding of treaty bodies and about the reform of the whole system will be made at the higher political levels of the UN. Nevertheless, impetus could be given to reform proposals by a common commitment of members of treaty bodies and of the Secretariat. Regrettably there is often tension between these two groups, and this has been added to by the way in which restructuring has proceeded. There is some disagreement as to how far the Secretariat should consult with

members of treaty bodies about priorities and structures in the Office of the UNHCHR.

In the longer term, it is easy to foresee that there will be growing pressure to develop a more integrated system, a system which consolidates the monitoring system, with a more or less permanent independent monitoring body. Steps along the way include increasing interaction between the treaty bodies themselves and closer working relationships between the treaty bodies and the Secretariat. It makes sense to prepare now by establishing appropriate consultation mechanisms between the Secretariat and the treaty bodies about the structure of the Office of the UNHCHR.[10]

E. Increasing resources

Increasing the resources of the treaty bodies by securing a greater allocation from the UN General Budget might seem the simplest approach, but it is also the most difficult. Other alternatives include outside funding for specific projects to be carried out for and under the direction of the treaty bodies or the Secretariat. This could prove to be a flexible way to expand resources if the UN does not take up its responsibilities in this area. On this basis, potential sources of direct funding, servicing and other support for treaty bodies should include the following:

- the general budget of the UN;
- states parties;
- specialised agencies and UN bodies;
- independent private bodies;
- interns and externs;
- fellowships in human rights;
- NGOs.

These will be discussed in turn.

1. FUNDING OF THE TREATY BODIES BY THE UN

The financing of the treaty bodies is, with some exceptions, provided from the General Budget of the UN. The actual servicing of all bodies other than

[10] This was called for by the annual meeting of chairpersons of the human rights treaty monitoring bodies, 1996, para. 40.

CEDAW is provided by the Office of the UNHCHR. The Division for the Advancement of Women, based in New York, provides servicing for CEDAW. In the past the Convention on the Elimination of Racial Discrimination (CERD) and the Convention against Torture (CAT) were funded by the states parties in accordance with their Conventions. This proved unsuccessful, and amendments to the instruments provide for these treaty bodies to be funded from the General Budget.

The treaty bodies are dependent on the funding of the Office of the UNHCHR and on the decisions made by the Secretariat as to the staff structure and the allocation of funds. As is well known, the UN is perennially short of funds, due to the failure of many states (most notably the United States) to pay their dues. Various proposals have been made to persuade states to do so, or to secure an adequate financial base for the UN in other ways, including private endowment funds, international taxation schemes and an annual UN lottery.[11] Until this problem is solved, the funding of treaty bodies from the General Budget will likely remain inadequate.

The World Conference on Human Rights held in Vienna in 1993 called for a substantial increase in the resources for the human rights programme from within existing resources and for 'urgent steps to seek increased extra budgetary resources'.[12] It also called for an increased proportion of the regular budget to be allocated to the Centre for Human Rights (now the Office of the UNHCHR), to cover its work including that related to the treaty bodies, and for sufficient funds to be provided to the Centre to enable it to be effective. There is, however, a large gap between the rhetoric and the reality. Indeed it is not at all clear that any additional resources have been made available to the treaty bodies as a whole since 1993. Nevertheless, though the funds available generally have not been increased, recent proposals from the Office of the UNHCHR, and devoted to the improvement of the implementation of the Convention on the Rights of the Child (CRC), call for a considerable increase in the resources allocated by the Office to the work of the Committee.[13] This suggests that it may be possible

[11] Brian Urquhart and Erskine Childers, *Renewing the United Nations System*, Dag Hammarskjold Foundation, Uppsala, Sweden, 1994, pp. 142, 208.

[12] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14–25 June 1993, A/CONF.157/23, 12 July 1993, Plan of Action, paras. 9, 10, 11, 12.

[13] *Supra*, note 1, *Plan of Action*. The amount called for was US$ 549,000 for five substantive officers, plus rather more for technical cooperation, training courses, missions and workshops, making a total of US$ 1,390,239 to come from extra-budgetary, voluntary contributions by governments.

to augment resources, and that similar plans could be developed for other treaty bodies.

Some might argue that the treaty bodies, as independent agencies, should have their own dedicated budget, to manage in accordance with their own decisions. This possibility should certainly be on the agenda for the consultations envisaged above. If a consolidation of treaty bodies were to occur, a dedicated budget for a consolidated body would have to be given serious consideration.

2. THE STATES PARTIES

The unfortunate experience of CERD and CAT suggests that it would be unwise to develop plans which made the treaty bodies dependent on direct funding by the states parties. The need to maintain the independence of the treaty bodies further underlines the point that the core activities of those bodies should not depend on direct contributions by states.

States might, however, be invited to provide resources for particular projects of benefit to the treaty bodies. For example, the Japanese Government provided funds for the editing and publication of the *Yearbook of the Human Rights Committee.*[14] States might also contribute to the support of regional seminars to advance awareness of the conventions and the work of the treaty bodies.[15] The voluntary fund for technical cooperation and assistance is another means by which states can support the human rights programme.[16] A voluntary fund could be a way to support an expanded intern programme.

3. SPECIALISED AGENCIES AND OTHER UN BODIES

The treaty bodies have developed working relationships with the specialised agencies, and there is potential to build further on this. The agencies provide information to the treaty bodies about issues falling within their

[14] Now called the *Official Records of the Human Rights Committee.*

[15] For example, a South Pacific Women's Seminar was supported by the Australian and New Zealand Governments, as well as by the Division for the Advancement of Women in 1991.

[16] The Vienna Plan of Action called for 'generous contributions' to the voluntary funds. Vienna Declaration and Programme of Action, *supra*, note 12, I, para. 10.

mandate which are relevant to the particular instrument. Much of this information is state specific. Agencies take part in Working Group discussions on states whose reports are to be considered. The CRC makes provision for the UN Children's Fund (UNICEF) and other agencies to be represented at the consideration of reports and to provide advice and information.[17] In fact the CRC Committee has received considerable support from UNICEF.[18] The other treaty bodies do not have this kind of support.

UN agencies such as the International Labour Organisation (ILO) are responsible for monitoring treaty obligations which may overlap with the human rights instruments. More could be done to examine these areas of overlap, especially as the ILO Conventions may also include reporting obligations. A cooperative approach might help to ease the burden of reporting for the states, treaty bodies and the agencies.

The specialised agencies could be encouraged to do more to support the work of the treaty bodies, by promoting wider knowledge of the human rights system where it has special relevance to their work.[19] Where particular human rights standards in one or more states are relevant to the work of an agency, that agency could undertake studies in consultation with the treaty bodies of the application of those standards in those countries. Agencies such as the World Bank might be encouraged to commission background papers dealing with the extent of implementation of specific human rights standards in states in which they have development programmes.

Agencies concerned with a particular area of human rights could bring treaty bodies together to discuss how the issues could best be dealt with in accordance with their mandate. In 1996 the Glen Cove Roundtable[20] made many recommendations about improving cooperation between the treaty bodies and the specialised agencies. Agencies were encouraged to integrate human rights concerns into their work and to be more involved in the work of the treaty bodies.

[17] CRC, article 45 (special recognition of agencies); cf. CEDAW, article 22.

[18] *Supra*, note 10, para. 19.

[19] Ibid., paras. 31, 51, 52.

[20] Glen Cove Roundtable, 'Briefing Note and Final Recommendations of the Roundtable of Human Rights Treaty Bodies on the "Human Rights Approach to Women's Health with a Focus on Reproductive and Sexual Health Rights"', Glen Cove, New York State, 9–11 December 1996, WHG/97/3/8.

4. INDEPENDENT PRIVATE BODIES, FOUNDATIONS ETC.

It would be difficult for the treaty bodies to receive direct funding from private sources, due to the lack of any entity, such as a trust, to control the allocation of these funds.[21] However, the treaty bodies could ask private agencies, foundations or academic institutions to fund specific research projects which would directly or indirectly advance their work. The role of the treaty bodies (in association with the Office of the UNHCHR) would be limited to a consultant or overseeing role. A Projects Committee could devise or approve projects which might then be funded externally. Examples might include the following:

- research fellowships for persons attached to an academic institution to carry out a defined project in the Secretariat for one or more treaty bodies, under the general guidance of representatives of a Projects Committee;
- long-term interns, who could be assigned to specific projects;
- providing travel costs for special experts, e.g. former members of treaty bodies, approved by the Projects Committee to carry out specific projects;
- direct support to the work of the Office of the UNHCHR, such as that provided by the Netherlands Institute of Human Rights (SIM) in providing access to its database of human rights decisions.

While there could be a danger of over-dependency on outside support, it would be worthwhile for the treaty bodies to establish a pilot project to test the viability of this proposal.

5. INTERNS AND EXTERNS

Interns are a valuable additional resource for the professional officers in the Secretariat and for the treaty bodies. Their use is, however, limited by the short duration of their appointment (generally three months) and by the fact that one professional officer cannot easily supervise the work of more than one or two interns. To make more and better use of interns, a special scheme could be devised to provide for terms of up to one or two

[21] The Working Group of the Human Rights Committee, mentioned earlier, also foresaw that if other funds were available, the allocation from the UN budget might be cut.

years. This might reduce the burden on the professional staff and enable interns to take on a wider range of responsibilities.

The Special Working Group of the Human Rights Committee discussed the role and use of interns. A number of points were later agreed in principle by the Committee: first, the responsibility of the Secretariat for the selection and supervision of interns; secondly, the need for them to have at least a basic professional degree and preferably two working languages, and thirdly a minimum term of service of at least one year. This would require a waiver of current Secretariat rules. Funding would be needed to support an intern for such a period, and the Committee should explore the possibility of funding from independent sources (under conditions which maintain the Committee's independence). But the number of interns would still be limited by the ability of the Secretariat staff to provide supervision.

The term 'extern' would be used when the person concerned did not work at the Office of the UNHCHR, but possibly under the supervision of one or more members of a treaty body or other person. They could, perhaps, help case rapporteurs or country rapporteurs.

6. FELLOWSHIPS IN HUMAN RIGHTS

Private foundations and academic institutions could be encouraged to establish Fellowships in Human Rights to be held by persons chosen in consultation with one or more treaty bodies, to undertake research projects approved by and for the benefit of the relevant bodies, for example, a draft general comment. The treaty bodies could set up a joint committee (in association with the Secretariat) to explore this idea, as well as those mentioned earlier, with private foundations and academic institutions.

Former members of treaty bodies willing to volunteer their time might also be recognised as fellows or special experts, so that their expertise could be used to augment the resources of the Secretariat and the committees. For example, certain tasks related to communications could be performed by former members, such as assisting the rapporteur on follow-up by analysing the relevant material, or by carrying out research on current communications. A recognised status within the Office would ensure that these former members could have appropriate access to files. However, while former members may give their time freely, not many would be able or willing to cover their fares to Geneva or accommodation for the period necessary. Funding would thus need to be secured to support this idea.

7. CONTRIBUTION OF NGOS

The treaty bodies value highly the input from both international and national NGOs.[22] Most treaty bodies receive information and briefings from NGOs. CEDAW receives 'alternative reports' on the states whose reports are being examined, provided by International Women's Rights Action Watch (IWRAW). The NGO, Defence of Children International, organises national groups to prepare alternative country reports under the Convention on the Rights of the Child. Other treaty bodies do not have a support group of this kind which brings in material from national organisations on a regular basis. Ideally, one would like the state party to consult with national and local NGOs at the time the report is being prepared, but this is rare.

International NGOs such as Amnesty International, Human Rights Watch and Lawyers' Committee for Human Rights provide considerable material to the Committees, but these organisations do not have the resources to coordinate their work, and there is often duplication.

National NGOs generally have few resources, they do not necessarily know when the meetings of treaty bodies are to be held, they do not have copies of the reports, and they do not know how to prepare material for the Committees. The quality of their material is uneven. There is often far too much material from NGOs in affluent states.[23] For others, where the need may be great, nothing is provided, because nothing is known about the treaty monitoring system. With few exceptions, the national NGOs have little ability to coordinate their efforts or to contribute to the resources of the Committees beyond the material they have compiled.

A well-organised NGO movement would make the work of the treaty bodies easier. It would be less time-consuming for those bodies if the submissions of NGOs, especially national NGOs, were coordinated. The treaty bodies could lend their support to proposals for strengthening the work of

[22] The HRC has, since July 1996, invited NGOs to meetings with the pre-sessional Working Group. Participants include Amnesty International, Organisation mondiale contre la torture (OMCT), International Commission of Jurists (ICJ), International Federation of Human Rights (IFHR), International Alliance Against Torture (IAAT). In New York, the Lawyers' Committee for Human Rights (LCHR) and Human Rights Watch (HRW), would be expected to be present.

[23] The most active national NGOs in supporting the work of the Human Rights Committee in recent years have been those of Hong Kong, Ireland, Japan, the United Kingdom and the United States – voluminous, but uncoordinated.

national and international NGOs and to the funding submissions they may make to foundations. NGOs could consider establishing a single liaison group to work with the treaty bodies. Such a group might be able to attract further funding, perhaps from foundations.

A new initiative of the International Federation for Human Rights (Fédération internationale des droits de l'homme-FIDH) would help member organisations to come to the UNHCHR office in Geneva and to receive training on their means of actions in the treaty monitoring bodies and to participate in the sessions of treaty bodies when their country report is being considered. Funding is being sought by FIDH for this initiative. The treaty bodies should encourage and support proposals of this kind.

F. Conclusion

Any independent observer of the present system would conclude that the treaty body system needs a complete overhaul. But is there any commitment to do this, and to provide the necessary resources? It is extremely doubtful.

22

SERVICING AND FINANCING HUMAN RIGHTS SUPERVISORY BODIES

MARKUS SCHMIDT

A. The background

Since their inception in the 1970s, UN treaty-based procedures in the field of human rights have become gradually better known. The number of states parties to the major UN human rights instruments has risen dramatically since 1989: with 191 ratifications the Convention on the Rights of the Child (CRC) has become the most widely ratified of any UN convention. Human rights education campaigns and programmes in many countries provide information about the various procedures, and encourage citizens to avail themselves of these mechanisms. But as always, exposure and success have their price: as more and more states ratify the various UN human rights instruments, the respective supervisory bodies have experienced increasing difficulties in coping with a growing workload under the periodic state reporting and individual complaints procedures. They must examine more periodic state reports and more complaints every year if they are to avoid an unacceptable backlog of complaints and reports, opening themselves to the charge that 'justice delayed is justice denied'.

At the same time, the meeting time allotted to the treaty bodies in the UN conference calendar and by UN conference services has remained by and large unchanged; treaty bodies hold two to three sessions totalling six to twelve weeks of meetings each year. Requests by treaty bodies to be allotted more meeting time have met with limited success. While the workload of supervisory bodies has more than doubled over the past decade, the UN Secretariat staff resources available to service their work have, in real terms, been reduced over the same period of time.

Of the UN treaty bodies, the Human Rights Committee (HRC) has drawn attention to this unsatisfactory situation in its Annual Report to the General Assembly for many years. Thus, in 1990, it noted that its 'increased workload means that the Committee will not be able to examine communications at the same speed or to maintain the same level of quality unless the Secretariat staff is reinforced'.[1] In 1994, it became more specific, noting that with its increased workload under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), it could no longer examine communications expeditiously; this highlighted 'the urgent need to reinforce the Secretariat staff'. The HRC called upon the UN Secretary-General 'to ensure a substantial increase in the number of staff, specialised in the various legal systems, assigned to service the Committee', and reiterated that its work under the Optional Protocol 'continues to suffer as a result of insufficient Secretariat resources'.[2] The HRC's request was politely noted, but little if anything was done in real terms to remedy the situation, and the financial crisis which has plagued the UN since 1995 has led to further retrenchment in the Secretariat.

Other treaty bodies, such as that of the Convention on the Elimination of Racial Discrimination (CERD) Committee, have similarly complained about the fact that lack of financial resources has resulted in sessions being simply cancelled. In mid-1994, the Committee devoted part of a meeting to the issue of its available logistics and resources. In response to the experts' concerns, the Assistant Secretary-General outlined a number of measures designed to improve the situation, including regularisation of professional posts and improvement of electronic communications.[3] But two years later, identical problems persisted, and the UN financial crisis prompted another reduction in documentation services to the Committee.[4]

B. Financing of UN treaty bodies

The budget for the activities of UN human rights treaty bodies is determined through the normal biennial budget cycles: the proposed biennial

[1] See Annual Report of the HRC for 1990, UN Doc. A/45/40, vol. I, para. 595.
[2] Annual Report of the HRC for 1994, UN Doc. A/49/40, vol. I, para. 383.
[3] See UN Doc. CERD/C/SR.1050, 25 September 1996, pp. 7–15. It should be noted that this summary record was produced more than two years after the meeting, which took place on 5 August 1994. Serious delays in the production of official and summary records are another factor which may hamper the efficiency of the treaty bodies' work.
[4] See UN Doc. CERD/C/SR.1158, 9 August 1996, para. 3.

budget of the Office of the UN High Commissioner for Human Rights (UNHCHR) is submitted to the UN's budgetary authorities and is subject to negotiations in the Fifth Committee of the General Assembly.[5] Usually, a biennial budget is discussed and adopted sufficiently in advance for human rights supervisory bodies to be able to assess realistically what will be available to them over the next two-year budget cycle, both in terms of meeting time, travel allocations, secretariat staff resources, and other activities.

The major UN budgetary authorities, in particular the Programme Planning Budget Board and the Advisory Committee on Administrative and Budgetary Questions (ACABQ) have been reluctant in recent years to appropriate the funds necessary for the proper discharge of all of the mandated activities of the Office of the UNHCHR. Treaty body activities have not been spared in this process.[6] Thus, in the context of the financial crisis which hit the UN in 1995–1996, the HRC was urged to agree to economies in the servicing of its fifty-sixth session in March 1996, held in New York. The Committee Chairperson agreed to reduce the number of staff servicing the Optional Protocol procedure, and only a limited number of cases were examined as a result during this session. That such concessions are subsequently interpreted as final and not only temporary, and that they may prompt further requests for economies, became evident during preparations for the Committee's fifty-ninth session in March-April 1997 and its sixty-second session in March-April 1998. Similar considerations apply to the limitation of documentation decreed as a measure of economy.

Urgent or new activities which have not been budgeted for the ongoing biennium are always difficult to approve *ex post facto*, however necessary they may be. Thus, it took several *démarches* by the HRC before a one-week extension of its summer session in 1994 was approved, which allowed it to reduce its deplorable backlog of pending complaints under the Optional Protocol to the ICCPR.[7] As noted before, the CERD Committee could only schedule one annual meeting for many years because of financial

[5] See chapter 23 of the organisation's budget.
[6] The composition of the ACABQ in recent years has not always been propitious for the approval of higher budgetary appropriations for the human rights programme.
[7] During this extra week, the HRC adopted sixteen Views (i.e. decisions on the merits) under article 5, para. 4, of the Optional Protocol, and declared eleven cases inadmissible. In its Annual Report for 1994, the HRC notes, however, that failure to provide more staff for the preparation of the extended session resulted in a bigger backlog in the Secretariat's handling of incoming complaints and thus in a smaller number of newly registered cases – Annual Report, *supra*, note 2, para. 384.

difficulties and because there were no appropriations for its meetings in the regular budget of the UN.

The political realities of the UN, the unwillingness of major contributors to the UN budget to approve substantial budget increases, as well as the current reorientation of priorities within the UN human rights programme justify the following unpalatable but sober conclusion: the treaty bodies will have to live with the *status quo* in terms of services available in the foreseeable future. At worst, they may have to accept another reduction in Secretariat services available to them. It is clear that the treaty bodies must oppose a reduction in services, but they should consider alternative mechanisms for the financing of their activities.

In the long term, the financing of treaty body activities through the regular budget of the UN alone will not suffice. Financing of activities through extra-budgetary resources and voluntary contributions must be considered seriously in the short term. Through voluntary contributions, in particular, the resources at the disposal of the Secretariat may be improved over and above what can be done within the regular budget. The equipment of the Secretariat with up-to-date information technology and computers, the creation of web sites, the design and implementation of new databases, etc., are among improvements that could be effected through voluntary contributions. While some might object on principle to such voluntary contributions because they open the activities of the human rights supervisory bodies to all kinds of external influences, the likelihood of influence-peddling is small. In some respects, voluntary contributions may be likened to private sector sponsoring of activities; and such 'sponsoring' is becoming increasingly important in the activities even of international and regional organisations. Imaginative fund-raising activities are obviously a serious alternative way of alleviating the treaty bodies' plight in the short term.

One device to strengthen substantive support to treaty bodies which *may* – and the emphasis is on the conditional – help them discharge their mandates more effectively in the short term is the adoption and implementation of so-called Plans of Action, under which voluntary contributions from states parties earmarked for a treaty body will finance the activities of additional staff – consultants, experts, etc. – assigned specifically to that treaty body's activities. The CRC Committee was the first to discuss and adopt such a Plan of Action and to secure the necessary voluntary contributions. It summarised the rationale for the Plan as follows:

> [3] The CRC through its innovative methods of work has become an international focal point in identifying problems in protecting the rights of the child, suggesting appropriate solutions and, when necessary, helping to mobilize the intellectual and material resources of the international community to help implement these solutions. It is important to explore ways of strengthening the operation of the Committee in order to maximize its impact on the effective enjoyment by children of their rights. Based on the recommendations and requests of the Committee made in the first five years of activity, two types of support will be necessary. First, the substantive support for the Committee's work with States parties reports should be significantly strengthened. Second, follow-up mechanisms will be devised to transform recommendations into reality. This will necessitate resources and coordination.[8]

The Plan envisages a support team of four staff members who would primarily carry out research and prepare the preliminary analysis of states parties' reports for consideration by the Committee, collect and analyse information on the follow-up of the Committee's recommendations, and assist the Committee in the preparation of substantive background papers.[9] The support team for the Committee assumed its duties in the second half of 1997. Although an assessment of the effectiveness of its work is perhaps premature, there are indications that the *support team* has worked primarily as a *servicing team*; several of the team's duties as envisaged in the Plan of Action have not been carried out because of lack of funds.

Other treaty bodies, notably the Committee on Economic, Social and Cultural Rights, have equally formulated a Plan of Action, but the voluntary contributions for the effective implementation of the Plan have not lived up to expectations. The implementation of Plans of Action is indeed costly – the CRC Committee estimated the resources required from voluntary contributions, on an annual basis, to be approximately US$1.25 million.[10]

Useful as they are, Plans of Action designed to help strengthen the activities of treaty bodies present major problems. First, they rely entirely on voluntary contributions from states parties to the relevant instruments, and if contributions are not pledged or not paid in time, the plan may have to be reduced in scope, shortened in its life span, or simply abandoned. Second, they shift the emphasis from financing of treaty body activities through the regular budget of the UN to financing such activities from

[8] UNHCHR, *Revised Plan of Action to Strengthen the Implementation of the Convention on the Rights of the Child*, Geneva, 1996, para. 3.

[9] Ibid., para. 19. [10] This figure excludes 13 per cent of UN programme support costs.

outside the regular budget. Third, they could open the door to influence-peddling on the part of the major contributors to such plans.

These considerations have prompted a number of states parties to the conventions to voice strong reservations about the desirability and practicality of Plans of Action. They argue, with much justification, that such plans seem to belie the fact that treaty bodies' activities are a core element of the UN human rights programme and one which by any reckoning should be financed through the organisation's regular budget. Furthermore, Plans of Action are seen as a stopgap measure for the long-term problems faced by all treaty bodies. As a Plan's life span is limited and entirely dependent on voluntary contributions, it may be terminated at any time, and jeopardise the successful implementation of the activities of the treaty body concerned. Some treaty bodies, therefore, have been reluctant to engage in any substantive discussion about tailor-made Plans of Action.[11]

A second possibility which might benefit the activities of treaty bodies in the short term would be for states parties to the various UN human rights instruments to consider the financing of so-called junior professional officers (JPOs), who would be specifically assigned to the work of the treaty bodies and based in the Office of the UNHCHR. At present, many states in the Western group finance programmes for JPOs, but they are generally assigned to technical cooperation projects, or to field offices of the UN Development Programme, and then usually for a two-year period.

Treaty bodies could request states parties to assign JPOs to the regular UN Secretariat, but it would be preferable to do so for a three-year period, so as to give them the opportunity to acquire the necessary experience to become a fully operative and effective member of the Secretariat team.[12] The cost-benefit ratio for assignments of a lesser duration is questionable, as past experience has shown that new staff members may take up to twelve months before they are familiar with all the subtleties of the treaty bodies' procedures. JPOs who are assigned to the treaty bodies' work for a sufficiently long duration would assist the Secretariat in reducing the

[11] The HRC was a case in point – a preliminary draft for a Plan of Action was prepared but not discussed by the experts for a considerable time. By mid-1999 the Committee agreed to the adoption of the Plan of Action.

[12] By mid-1997, there were indications that between four and six JPOs funded by Western European states might be assigned to the Support Services Branch of the Office of the UNHCHR, which services the activities of treaty bodies.

backlog in processing of periodic reports and individual complaints. Subject to sufficient budgetary resources, JPOs might subsequently be employed on a regular basis. This option, if pursued with vigour, could yield positive results quickly. It is a positive sign that two Scandinavian JPOs were assigned to the treaty bodies' activities in 1998.

Reliance on the work of competent JPOs would be useful, but their services would not constitute a panacea to the problems faced by treaty bodies. Another, third, possibility is to tap into the resources of large academic institutions and, or alternatively, European or North American foundations (notably those in Germany, the United States, the United Kingdom, Canada and Scandinavia). These institutions could finance long-term internships of flexible duration (six to twelve months) with the Secretariat of the treaty bodies. Informal arrangements under which academic institutions have sent promising graduate students in law, political science or international relations for internships of between three and twelve months to the Office of the UNHCHR have existed in the past. On balance, they have worked well and have helped the Secretariat to cope with increasing backlogs in individual complaints.

Some academic institutions and foundations have provided financial assistance to interns working in the Office of the UNHCHR. An informal survey among treaty body experts who are either affiliated with academic institutions or maintain links with large foundations indicates that several such institutions or foundations would consider funding or endowing scholarships for longer-term internships with human rights supervisory bodies. For the UN, this opportunity of assistance to treaty bodies is almost cost-free (only office space and data processing equipment would have to be provided) and it is one that can be activated with minimal lead times.

C. Servicing activities of the supervisory bodies

Experience has shown that all measures taken so far by treaty bodies to cope with growing backlogs both under periodic state reporting and complaints procedures are palliatives which amount to good medicine but not to a cure for the major ills of the system. An innovative approach is required. If the treaty bodies do not radically alter their decision-making mechanisms and streamline their procedures in the near future, they will run up backlogs of such proportions that their activities may well become

irrelevant to states parties. It must be added that the regional human rights organisations, and in particular the Council of Europe and the Organization of American States (OAS), are facing similar problems and have either adopted or are in the process of considering radical reform proposals.[13]

Jamaica was the first state party to react to the backlog in the examination of individual complaints under the Optional Protocol to the ICCPR when it denounced the Optional Protocol on 23 October 1997. Its Solicitor-General deplored the fact that the HRC had failed to find ways to examine the numerous capital punishment cases pending against Jamaica under the Optional Protocol more expeditiously.[14]

It is unrealistic to expect a substantial increase in the staffing or financial resources available to treaty bodies in the near or medium-term future. So far, the impact of appeals to this effect by the HRC and the now annual meetings of the chairpersons of the treaty bodies has been negligible. On the contrary, the slogans that all activities have to be serviced 'from within existing resources' and that 'more has to be done with less', carry the day. This has become particularly obvious during the process of restructuring which the UN human rights programme has undergone since 1996. In relation to the servicing of treaty bodies, the following measures should be considered.

1. STREAMLINING AND SIMPLIFICATION OF PROCEDURES

Treaty body procedures should be streamlined and simplified considerably. In the decision-making processes, it would be desirable to abandon the time-honoured but time-consuming practice of deciding by consensus. The time has come to have all decisions of treaty bodies adopted by majority vote, which would save the treaty bodies considerable time. The difficulties experienced by the HRC in adopting consensus decisions on many difficult Optional Protocol cases in recent years demonstrates that

[13] Thus, Protocol 11 to the European Convention on Human Rights, which entered into force in November 1998, provides for a merger of the European Commission of Human Rights and the European Court of Human Rights, and envisages a complex 'chamber system' for the Court. Within the OAS, a seminar convened in Washington, DC, in December 1996 discussed reform proposals for the Inter-American Human Rights System – see Document OEA/Ser. G, CP/doc.2828/96 ('Toward a New Vision of the Inter-American Human Rights System').

[14] See UN Doc. CCPR/C/SR.1623, 23 October 1997; *Journal de Genève*, 4 November 1997.

consensus decision-making, while well suited for the *treaty-making process*, is less appropriate for the *treaty interpretation process* of human rights supervisory bodies with a quasi-judicial mandate. Moreover, deciding by consensus is not only time-consuming but actually *lowers* the quality of decisions, as it suffices for one expert to challenge a text otherwise acceptable to all other committee members for there to be another round of discussion. Majority voting generally improves the quality of decisions and, far from eroding their authority, contributes to the enhancement of their standing.[15] Resort to majority voting is a solution that is easy to implement and is actually provided for in the rules of procedure of the bodies concerned.

Some treaty bodies, in particular the HRC and the CERD Committee, are acutely aware of the need to adapt their procedures to a context of shrinking Secretariat resources. In July 1996, the HRC discussed a detailed report from its Working Group on Procedures, which proposed far-reaching changes in the examination of periodic reports and individual communications. It envisages, for example, authorising the Committee's Working Group on Communications to declare complaints inadmissible and that the Committee might join the consideration of the admissibility and the merits of a complaint.[16] The CERD Committee has similarly amended its rules of procedure to allow the joinder of admissibility and merits decisions.[17] Between November 1996 and July 1997, the HRC amended its rules of procedure to reflect many of the proposals of the Working Group on Procedures.[18] The revised rules will enable the HRC to examine individual complaints under the Optional Protocol more expeditiously, such that the average gain of time in the examination of a complaint should be approximately one year. As a rule, the admissibility and the merits of complaints will be considered jointly in the future.

[15] On this point see M. Schmidt, 'Individual Human Rights Complaints Procedures Based on UN Treaties and the Need for Reform', 41 *International and Comparative Law Quarterly*, 1992, pp. 645–59, at pp. 657–8.

[16] The report of the Working Group on Procedures was not made public; the Committee's rules of procedure were subsequently amended during the fifty-eighth, fifty-ninth and sixtieth sessions.

[17] Rule 94, para. 7, reads: 'The Committee may, in appropriate cases and with the consent of the parties concerned, decide to deal jointly with the question of admissibility and the merits of a communication.' See Annual Report of the CERD Commitee for 1994, UN Doc. A/48/18, Annex V, pp. 138–9.

[18] The amended Rules of Procedure are reproduced in UN Doc. CCPR/C/3/Rev. 5, 11 August 1997. The changes concern Rules 91 to 97.

Parallel to the streamlining of treaty body procedures, the Secretariat can and should simplify the handling of periodic reports and individual communications. Treaty bodies should agree to the rule that communications under individual complaints procedures must be submitted in one of the official languages of the UN or, preferably, in the Secretariat working languages of English, French or Spanish. The current practice which allows for the submission of complaints in all languages is impractical and extremely resource-intensive. In the past, this has led to situations in which complaints submitted in a language other than a Secretariat working language were left unattended for months and ultimately filed away.[19] Until now, the treaty bodies have not required complaints to be submitted in one of the Secretariat working languages. In 1995, the HRC expressed concern at the long-known fact that an increasing number of cases are submitted in languages other than the Secretariat's working languages, and at the consequent delay in the examination of such complaints.[20]

With the reduction of translation services within the UN, the handling of complaints in non-UN languages becomes increasingly problematic. For at least one official UN language, Russian, the backlog that has built up over the years has reached alarming proportions, especially after the accession of most of the former Soviet republics to the existing human rights instruments. Financial implications notwithstanding, a lawyer proficient in Russian must be added to the Secretariat.

In respect of periodic reporting procedures, the current practice of preparation of country profiles and comparative analyses is time-consuming and labour-intensive. In their current format, their benefit to experts is limited and does not outweigh the strain placed on scarce resources. It is submitted here that alternative reports, prepared by NGOs and submitted to treaty bodies as a counterweight to a state's official periodic report, are of more use to experts. Alternatively, one might devise an altogether new format for comprehensive country profiles and analyses, which would rely on country data collected by other UN departments and specialised agencies, and which could be prepared by the Research and Right to Development Branch of the Office of the UNHCHR.

[19] Thus the HRC expressed concern over the perceived Secretariat practice of informing prospective complainants that they had to submit their cases in one of the Secretariat working languages.

[20] Annual Report of HRC for 1995, UN Doc. A/50/40, vol. I, para. 491.

2. TOWARDS BETTER USE OF THE MEETING TIME OF TREATY BODIES

Treaty body experts have, within the time available to them during meetings, been making considerable efforts to apply their legal experience and skills to the drafting and fine-tuning of decisions under the complaints procedures, to the formulation of compromise proposals, of general comments and of concluding observations on periodic state reports. Several committees now regularly form small 'drafting groups' during their sessions. This is a positive development which, though admittedly placing an added burden on the experts, provides undeniable benefits. Many decisions and documents which would have been referred to subsequent committee sessions in previous years have been adopted in a more timely fashion on the basis of such 'drafting group' texts.

An appeal can be made to treaty bodies to exercise more discipline in their deliberations. At present, there is still too much duplication in questions addressed by experts to states parties during the examination of periodic reports, as well as unnecessarily prolonged debates over comparatively small procedural details in the examination of individual complaints.[21] If time is a scarce commodity for treaty bodies, they must use it in the most rational manner possible. On the other hand, it makes little sense to confine the examination of a report to one meeting or even parts thereof, or to schedule several reports per day, as has been done by the CERD Committee on past occasions. A meaningful exchange of views between treaty body experts and state party representatives would simply become impossible in such a situation.

Several proposals for a more effective use of the treaty bodies' time have been formulated recently. Buergenthal suggests that in order to increase the number of complaints decided under the Optional Protocol to the ICCPR, the HRC should set up chambers consisting of seven or nine members, which would be allowed to make final decisions on the merits of complaints. In the absence of a formal amendment to the Optional Protocol, the committee plenary would retain formal authority to endorse the decisions of the chambers.[22] Such proposals deserve support, but for the

[21] For periodic reports, this point is made by T. Buergenthal, 'The Human Rights Committee', in *The United Nations and Human Rights: A Critical Appraisal* (ed. P. Alston), 2nd edn, Oxford, 1999.

[22] Ibid.

Secretariat, they are not without their problems. If two committee chambers decide on the merits of complaints, this would imply that, at least in theory, the Secretariat would be required to prepare double the number of case files or drafts. At the very least, the Secretariat would require databases with powerful search engines, and ultimately an increase in staff would be necessary.

If each of the chambers requires simultaneous interpretation and the translation of all documents in all or several working languages, matters become more complicated. Also, given the costs of interpretation and translation services in the UN system,[23] a chamber system would require a sizeable increase in budgetary appropriations. Given the UN's precarious financial situation, a chamber system may therefore be envisaged only if at least one chamber works without simultaneous interpretation facilities and without translation of most of its documents. Whether this is acceptable to the experts concerned is an open question.

Another possibility for treaty bodies to use their time more effectively would be to move towards some form of discretionary jurisdiction, insofar as examination of complaints under the individual complaints procedures is concerned. It has become evident that as these procedures have gradually become better known, the treaty bodies concerned have been running up increasing backlogs in the handling of complaints. The life span of complaints under the Optional Protocol to the ICCPR now averages between three and four years. Assume, for a moment, that large and populous states parties to the Optional Protocol encourage their citizens to have recourse to the procedure before the HRC. The HRC would be flooded with complaints and could not be expected to do justice to each and every individual complaint. In such circumstances it should take the bold step of accepting for consideration only those cases which raise serious issues of interpretation of the ICCPR (or other relevant instrument), or cases which lend themselves to elucidating the scope of the substantive provisions of the ICCPR. This proposal is formulated forcefully by Professor Steiner in chapter two of this volume. Admittedly, his proposal would require an amendment to the Optional Protocol, but it deserves serious discussion and support.

Finally, the inter-sessional periods (that is, the time between sessions of treaty bodies) should be used more effectively than they have been until

[23] It is estimated, for example, that the translation and editing of a single page of a document into all official UN languages costs approximately US$1,100.

now. For example, follow-up to decisions adopted under individual complaints procedures and to concluding observations on periodic reports should be undertaken. In respect of the former, the inter-sessional activities of a former Special Rapporteur for Follow-Up on Views of the HRC illustrate what can be done between sessions.[24]

Although treaty bodies have historically been hesitant about delegating more authority to the Secretariat than is required by the routine of daily activities, it is ultimately unavoidable that they agree to do so. Delegation of authority should extend to the adoption of routine decisions by the Secretariat, especially for simple procedural issues or cases which fall clearly outside the remit of the treaty body concerned. One could even envisage that ultimately, routine inadmissibility decisions are made by the Secretariat, after consultation with the treaty bodies concerned. While creating additional work for the Secretariat, this would take pressure off the agenda of treaty body plenary sessions.

3. RELIANCE ON MODERN INFORMATION TECHNOLOGY

Better use of existing information technology may help the Secretariat to perform its duties more effectively. If all available technological possibilities were to be used, the need for additional staff resources could be reduced significantly. If the existing databases are improved or updated and new ones created, this would make the day-to-day handling of individual complaints and periodic reports by the Secretariat far more efficient. The development of electronic information systems – recommended by the Commission on Human Rights as early as 1989 – was not a priority for the Office of the UNHCHR until recently.[25] It was not until 10 December 1996 that the High Commissioner's website was launched,[26] but since then it has been upgraded and expanded on a continuous basis and become a valuable source of information for treaty bodies.

[24] On the activities of the Special Rapporteur for Follow-Up on Views, see M. Schmidt, 'Portée et suivi des constatations du Comité des droits de l'homme de l'ONU', in *La protection des droits de l'homme par le Comité des droits de l'homme des Nations Unies*, Actes du colloque de Montpellier, 6–7 March 1995, pp. 157–69. The Committee's Annual Reports for 1996 (UN Doc. A/51/40, vol. I), 1997 (UN Doc. A/52/40, vol. I) and 1998 (UN Doc. A53/40, vol. I) contain a separate chapter on follow-up activities.

[25] This point was made forcefully by the chairpersons of the UN treaty bodies during their seventh meeting in September 1996 – see UN Doc. A/51/482, 10 October 1996, para. 37.

[26] The site address is: http://www.unhchr.ch.

A full text database for CRC was developed by the UN Children's Fund (UNICEF) in collaboration with the Office of the UNHCHR.[27] The High Commissioner has indicated that full text databases for the other treaty bodies would be developed as quickly as possible. In October 1997, information technology consultants began to design a comprehensive database and electronic information retrieval system for the individual complaints procedures implemented by three treaty bodies. Apart from enabling the Secretariat to research issues quickly, the availability of such a database (including possibly comparative jurisprudence in the field of civil and political rights or racial discrimination) would greatly benefit the experts during their meetings. A prototype of this database is being tested; the database is now operative but is thus far accessible only within the Office of the UNHCHR.

Lastly, the UN Secretariat and treaty bodies should rely more on human rights databases developed for the World Wide Web, notably by the human rights programmes and libraries of the University of Minnesota, University of Cincinnati, Yale Law School, etc., whose administrators regularly meet in the context of the so-called 'DIANA' project.[28] One cannot but endorse the recent recommendation of chairpersons of the UN human rights treaty bodies that the Office of the UNHCHR should make particular efforts to cooperate with the development of these academic databases.[29]

4. IMPROVING PROFESSIONAL FLEXIBILITY IN THE SECRETARIAT

Finally, there should be a move towards much more flexibility *within* the Secretariat. Experience with the servicing of treaty bodies in recent years suggests that the current hyper-specialisation of Secretariat staff may lead to bottlenecks in the servicing of supervisory procedures. If staff are

[27] See UNHCHR, *supra*, note 8, para. 24.

[28] For a general overview of DIANA, see N. Finke et al., 'DIANA: A Human Rights Database', 16 *Human Rights Quarterly*, 1994, pp. 753–6; remarks by H. Koh, American Society of International Law, Proceedings of the eighty-ninth Annual Meeting, 5–8 April 1995, pp. 13–14. Apart from DIANA, the European Coordination Committee on Human Rights Documentation also regularly discusses human rights information technology issues.

[29] UN Doc. A/51/482, para. 37; see also the updated report by Philip Alston, 'Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System', UN Doc. E/CN.4/1997/74, 7 March 1997, paras. 60–6, also discussed in C. Scott, chapter 19, above.

responsible *only* for individual complaints or *only* for periodic reports, the ensuing specialisation creates more difficulties than it *a priori* solves. In the event of staff movements, suitable replacements are difficult to find, and treaty body activities may be held in abeyance because qualified staff are unavailable.

Under the new structure of the Office of UNHCHR, approved in 1996, staff are required to be more flexible for assignments within sections of the Office. Thus, it is envisaged that staff members of the two treaty implementation teams in the Office's Support Services Branch have responsibility for all treaty body activities: reports, complaints, and general comments. The job descriptions for professional posts have been redesigned to reflect the need for more professional versatility and flexibility. It makes eminent sense to have staff members responsible for individual complaints procedures, who have acquired particular expertise on particular countries, contribute to the drafting of concluding observations on periodic reports of these countries.

The move towards a better integrated servicing of supervisory procedures deserves full support. It should be incremental, so that the 'institutional memory' of the procedures can be disseminated evenly throughout the system. The lead times for making integrated teams fully operative are, however, longer than expected: the restructuring of the Office of UNHCHR has taken much longer than even its detractors had prophesied. Some treaty bodies have also expressed concern about the new structure, but this relates more to the absence of consultation of treaty bodies during the restructuring process. The seventh meeting of the chairpersons of UN treaty bodies in September 1996 did, however, rightly point out that if the restructuring process leads to the elimination of the posts of committee secretaries, this would be 'inefficient, counter-productive and ultimately unworkable'.[30] Without the function of committee secretaries who, in many ways, become the institutional memory of the treaty bodies over time, the work of the treaty bodies would face considerable disruptions.

D. The outlook for the future

In the years 1994–1998, there have been major reorientations within the UN human rights programme. The first UN High Commissioner for

[30] See UN Doc. A/51/482, paras. 40–2.

Human Rights, Mr Ayala Lasso, placed major emphasis on the development of technical cooperation programmes, of preventive mechanisms and on human rights field presence, either in the form of field operations or field offices. With this recent emphasis on field activities, the UN human rights programme has, in the first High Commissioner's own words, 'gained a new dimension, one which will be an important part of its future'.[31]

It is a fact that this reorientation of priorities was effected 'from within existing resources', and that the activities of supervisory bodies suffered as a result, since Secretariat resources have been taken away from the treaty bodies in recent years. With some degree of simplification, it can be said that they have been reallocated to technical cooperation and field activities. There is little reason for treaty bodies to expect an improvement of this situation in the short term. The blame for this situation cannot be placed only at the door of the current High Commissioner, Ms Mary Robinson. In most respects, she merely seeks to implement the 1993 Vienna Declaration and Programme of Action. Furthermore, it is undeniable that human rights field presence is both necessary and desirable.

The restructuring of the Office of UNHCHR, completed in 1998, should result in the more effective delivery of programmes, which should in principle also benefit the activities of the UN treaty bodies, though on longer lead times than had been anticipated. It is undeniable that more emphasis will have to be placed in the future on a more effective *management* of the Office. A combination of imaginative and charismatic leadership and effective management might not be easy to achieve in a highly politicised environment, but it would incite those working towards the implementation of human rights supervisory procedures to face new challenges with renewed vigour and determination. The management adage coined by Warren Bennis, that 'managers do things right; leaders do the right thing', is not out of context here.[32]

From a longer-term perspective, increased cooperation between the UN supervisory bodies and their regional counterparts is another *desideratum*.

[31] See the High Commissioner's 1996 Report to the General Assembly, UN Doc. A/51/36, 18 October 1996, chapter IV, para. 51.

[32] During the restructuring of the Office of the UNHCHR in 1996–1997, the management consulting firm hired to coordinate and lead the restructuring process emphasised the need to introduce sounder management practices. For an illustrative example of the management literature, see W. Bennis and B. Nanus, *Leaders – The Strategies for Taking Charge*, New York, 1985.

The first High Commissioner, Mr Ayala Lasso, indicated that he was anxious to encourage horizontal cooperation between the treaty bodies and parallel regional bodies, for example, those of the Council of Europe.[33] At the Secretariat level, regular exchanges of professional staff members between the UN and regional organisations would help both parties to familiarise themselves with the other's procedures. They may further prompt or catalyse improvements in procedures and programmes on either side, on the basis of the experiences gained in a different institutional environment. Such cross-over secondments are procedurally possible and could be effected 'from within existing resources'.

Finally, one does well not to forget the following dilemma: if the Secretariat were to operate with maximum efficiency in the servicing of all of the treaty bodies' activities, the treaty bodies would not be in a position to examine, within the meeting time allotted to them, all the periodic reports and individual communications presented to them. The same situation would obtain if all states always submitted their periodic reports within the imparted deadlines, which is far from being the case.[34] Over time, the backlog of reports would simply assume unmanageable proportions.

A reduction of overlapping reporting requirements could be achieved if the reporting guidelines of the treaty bodies were harmonised and consolidated, though because of the different mandates of the bodies concerned, harmonisation can only go so far. Ultimately, consolidation would not address the far broader problem of duplication, which is inherent in the structure of the UN human rights protection system itself. Over time, the UN has adopted increasingly specialised and narrowly focused instruments, which by and large supplement the two Covenants of 1966 and deal in more detail with issues already covered by the Covenants.[35]

Some experts have advocated that for states parties to more than one UN human rights convention, treaty bodies might replace the current plurality of reports by one comprehensive, 'global' report which would enable at

[33] See UN Doc. CERD/C/SR.1151, 15 March 1996, at para. 63.

[34] As of 1 December 1998 there were 1,160 overdue reports to the six treaty bodies, as Table 2 in Chapter 1 of this volume illustrates. The trend shows no sign of abating as illustrated by the Human Rights Committee's observation in July 1999 that two-thirds of states parties to the ICCPR had not submitted their reports in time, and that thirty-seven of those states were five or more years overdue in submitting reports. UN Press Release HR/CT/99/26, 29 July 1999, p. 1.

[35] This point is rightly made by E. Tistounet in 'Reporting Procedures and Related Issues', 61/62 *Nordic Journal of International Law*, 1994, pp. 233–8, at p. 235.

least those states to deal with all their reporting obligations jointly.[36] Yet, during the last meetings of the treaty body chairpersons, the issue of 'global reports' was not discussed in any meaningful detail, and the participants focused on revision of the treaty bodies' methods of work instead. Nonetheless, the submission of 'global reports' by states parties to the various instruments deserves serious consideration and encouragement. It would reduce both the recurrent duplication in reporting requirements and enable the Secretariat to streamline its servicing of the examination of periodic reports.

'Great necessities call forth great leaders.' This old saying may well apply to the UN human rights programme. In the current financial situation of the UN, it will require imaginative and far-sighted leadership if all mandated activities are to be serviced effectively in a context of stagnant or diminishing resources. To this end, the cooperation and the commitment of all concerned – states parties to the relevant treaties, concerned citizens, non-governmental organisations, the UN Secretariat and UN treaty and supervisory bodies – will be required.

[36] Cf. F. Pocar, 'Codification of Human Rights Law by the United Nations', in *Festschrift in Honor of Judge Manfred Lachs*, The Hague, 1995, pp. 139–58, at p. 158.

E

LOOKING TO THE FUTURE

23

BEYOND 'THEM' AND 'US': PUTTING TREATY BODY REFORM INTO PERSPECTIVE

PHILIP ALSTON*

The contributors to this volume have adopted approaches which are essentially empirical and critical. They are empirical in that most of the authors have been actively involved in the work of the treaty bodies, either as members of the treaty bodies, non-governmental organisation (NGO) participants, Secretariat members, or close observers. While there is a great deal of work that needs to be done from both theoretical and conceptual perspectives to explain the reasons for the successes and failures of the system,[1] this is not the task the contributors to this volume have set themselves. Their approaches are critical in the sense that the main focus is on the demonstrated shortcomings and failures of the monitoring activities of the expert, independent committees established to monitor government compliance with obligations voluntarily accepted under each of the six principal UN human rights treaties.

A. Considering alternative approaches

The volume as a whole covers the gamut of problems and challenges, ranging from such petty but demoralising restrictions as the removal of pencils

* I am grateful to James Crawford for his very helpful comments on an earlier draft.

[1] For all the sophistication and volume of the analyses that have been devoted to the work of the United Nations in the human rights field, there is a surprising paucity of analyses of the type that have been undertaken either in relation to international law in general or to international environmental law in particular. See for example B. Kingsbury, 'The Concept of Competing Conceptions of International Law', 19 *Michigan Journal of International Law*, 1998, p. 345, and other contributions to the same symposium, ibid., pp. 303–579; and E. Brown Weiss and H. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, Cambridge, Mass., 1998.

and paper from the meeting rooms in Geneva (in the wake of the financial crisis precipitated by the United States withholding of its assessed dues to the UN), through artificial Secretariat-enforced delays in making language translations of documents available, to much larger issues which rightly preoccupy most of the contributors. These larger issues include the wholly inadequate funding of the system, the reluctance of most governments to increase the effectiveness of the procedures, the use of reservations in an effort to ensure the domestic marginality of the treaties, the lack of expertise and the questionable independence of some committee members, and the inadequate follow-up which occurs in relation to many of the outcomes produced by the treaty bodies, whether in the form of 'concluding observations' on country reports or 'final views' on individual complaints. There is ample room for criticism and it is difficult to disagree with Elizabeth Evatt's assessment that '[a]ny independent observer would conclude that the treaty body system needs a complete overhaul'.[2]

For those who are looking for a diagnosis of the system as it is, and for prescriptions as to how it might be improved, the foregoing chapters provide a rich resource. The purpose of the present chapter is not to replicate those analyses, nor to summarise them. The problems they address are too diverse for a synthesis of the type which purports to discern an emerging consensus from a multiplicity of diagnoses.

Nevertheless, there appears to be a shared belief on the part of the contributors to the volume that the basic assumptions upon which the treaty body system is based are valid. In particular, the assumption of the desirability of universal participation in the system is not contested by any of them. Indeed, this assumption is now a reality, given that there is no state in the world which is not a party to at least one of the six treaties and that the vast majority of states are a party to many of them. There are some commentators, however, who have questioned the validity of this assumption. The most persistent critic in this respect has been Anne Bayefsky. Since her critique is typical of an approach that is not represented in the present volume it seems appropriate to compare the assumptions broadly shared by the contributors to this volume with her diagnoses and prescriptions. In particular, her work provides an important point of comparison since it has been more systematic and comprehensive, and has continued over a longer period of time, than any other comparable scholarly work on the subject.

[2] E. Evatt, chapter 21 *supra*.

Over the past five years Bayefsky has published several detailed critiques of the system. The first was published in 1994 in the wake of the Vienna World Conference on Human Rights and was part of a major initiative by the American Society of International Law to identify a human rights agenda for the next century.[3] The second, published in 1996, was a detailed report prepared for the Committee on International Human Rights Law and Practice of the International Law Association.[4] Another, published in 1998, consisted of a paper presented at the previous year's Annual Conference of the American Society of International Law.[5]

The analysis which follows will focus first on the diagnosis offered by Bayefsky and secondly on her prescriptions, which emphasise, among other things, the unworkability of a treaty system which counts 'non-democratic' states among its participants. In brief, my contention is that her criticism of the system is based on highly unrepresentative examples and does not provide an accurate or balanced picture and that her diagnosis is based on a fundamental misunderstanding of the nature and objectives of the system. Those problems appear to result from a greatly oversimplified contrast between 'us' (the liberal democratic states) and 'them' (the 'extreme delinquents' who have 'no democratic aspirations'),[6] which seems to be the golden thread that runs through all of the analyses.

B. The perceived shortcomings of the system

Bayefsky begins her most recent analysis by suggesting that those who question the optimism of international lawyers in relation to the work of the treaty bodies are 'frequently branded as disloyal or cynical'.[7] Perhaps there have been such responses, although I am unaware of them. In any event,

[3] A. Bayefsky, 'Making the Human Rights Treaties Work', in *Human Rights: An Agenda for the Next Century* (eds. L. Henkin and J. L. Hargrove) Washington DC, 1994, pp. 229–95 (hereinafter referred to as 'Bayefsky (1994)').

[4] A. Bayefsky, 'Report on the UN Human Rights Treaties: Facing the Implementation Crisis', contained in Committee on International Human Rights Law and Practice, First Report of the Committee (International Law Association, Helsinki Conference (1996)) (hereinafter referred to as 'Bayefsky (1996)').

[5] 'Remarks by Anne F. Bayefsky', Panel discussion entitled: 'The UN Human Rights Regime: Is it Effective?', 91 *Proceedings of the Annual Meeting of the American Society of International Law 1997*, Washington DC, 1998, p. 460, at pp. 466–72 (hereinafter referred to as 'Bayefsky (1998)').

[6] Ibid., p. 472. [7] Ibid., p. 466.

the contributions to this volume, written though they are by a group which is essentially supportive of what the present system seeks to achieve, are, as already noted, almost uniformly critical of various aspects of the current functioning of the system.

Bayefsky's analysis is based upon the identification of seven 'unfortunate details' or shortcomings of the system. The first three focus on: (i) non-reporting and late reporting by states; (ii) the existence of a large backlog of reports awaiting examination by the treaty bodies; and (iii) the ineffectual working methods used by the treaty bodies. Most commentators are in agreement that these present real problems, and that there is much room for improvement. The shortcomings of existing practices and possible means by which to remedy them have been detailed in the three reports I prepared for the UN General Assembly as an 'independent expert',[8] in the various reports adopted in recent years by the Meetings of the Chairpersons of the Human Rights Treaty Bodies,[9] as well as in the analyses contained in the present volume. In short, none of these shortcomings is disputed by most observers of the system, even though their prescriptions vary to a degree.

The remaining four issues identified by Bayefsky also pertain to matters in relation to which most commentators would be in agreement. They concern: (iv) publicity and accessibility; (v) the fact-finding capacities of the system; (vi) the weakness of complaints systems; and (vii) the inadequacy of measures to follow up on the work of the treaty bodies. In my view, however, her analysis of most of these matters is based on a selection of one-sided and unrepresentative examples which, rather than providing an accurate reflection of the overall situation, paints an unduly bleak picture. This in turn makes the radical solutions proposed seem both more justifiable and more politically acceptable than they are. Underlying both the critique and the solutions is a highly debateable set of assumptions as to the functions and objectives of the treaty system and its monitoring

[8] 'Long-term Approaches to Enhancing the Effectiveness of United Nations Human Rights Treaty Bodies: Expert Study Prepared by Mr Philip Alston', UN Doc. A/44/668 (1989); 'Interim Report on Updated Study by Mr Philip Alston', UN Doc. A/CONF.157/PC/62/Add.11/Rev.1 (22 April 1993); and 'Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System', UN Doc. E/CN.4/1997/74 (7 March 1997).

[9] For the most recent reports see UN Docs. A/53/432 (1998) [tenth session]; A/53/125 (1998) [ninth session]; A/52/507 (1997) [eighth session]; and A/51/482 (1996) [seventh session].

apparatus. I shall deal in turn with each of the three matters that affect the reporting system, leaving aside point (vi), which is adequately dealt with in chapter 2 of this volume.[10]

1. PUBLICITY AND ACCESSIBILITY

The fourth shortcoming of the work of the treaty bodies, according to Bayefsky, is that it is conducted in isolation from the media and NGOs. She identifies four constituencies that she considers especially important in this context, all of which she portrays as being uninvolved or marginalised.

> Normally only a handful of individuals, if any, from the country concerned observe the dialogue on the country report. National news media rarely attend. One or two representatives of international nongovernmental organizations (NGOs) are usually present. International news media are almost never there.[11]

The first two groups are nationals from the reporting state and international NGOs. In relation to the first group, she cites the example of the Canadian report considered by the Committee of the Convention on the Elimination of Discrimination against Women (CEDAW) in 1997. 'National NGOs learned of the date of the consideration of the Canadian report by the Committee only weeks in advance, and not one attended.'[12] But this is rather unusual by the standards of most of the treaty bodies. When Canadian reports were presented to the Committee supervising the International Covenant on Economic, Social and Cultural Rights (ICESCR) in both 1993 and 1998, there was standing room only in the conference room. A large number of national NGOs participated in the process and attended the dialogue between the Government and the Committee, and many hundreds of pages of information (indeed, thousands of pages in 1998) were submitted to the Committee by post, email, fax and in person. The reports dealing with Hong Kong, submitted to the Human Rights Committee by the United Kingdom on various occasions in the late 1980s and 1990s, were also observed by a very large number of NGO representatives and other

[10] See H. Steiner, chapter 2, *supra*. In essence, Bayefsky's critique focuses on her view that existing petitions systems are an inadequate alternative to faulty reporting systems because of their low rate of acceptance by states, the small number of complaints lodged, the slow handling of complaints, and the minimal contribution made by the committees in cases involving complexity and legal subtlety. See Bayefsky (1998), p. 469.

[11] Ibid., p. 467. [12] Ibid., p. 468.

observers,[13] and many other such examples could be cited. Even if these could be considered to be exceptional cases, it is clear that the average is much closer to the middle than to the single extreme case cited by Bayefsky.

Nor is there any hard and fast rule according to which only the reports of developed countries attract significant NGO attention. In her 1996 report Bayefsky noted that '[w]hile dozens of people may attend the reports of the United States, the United Kingdom or Japan, there is often a sole representative of Amnesty International or one or two other persons from international NGOs watching the reports of developing countries'.[14] Again, to take the case of the ICESCR Committee, reports from states as diverse as the Dominican Republic, Nigeria, Hong Kong, Israel and Sri Lanka have all drawn large numbers of both national observers and international NGOs.

It is important in any event not to accept what might be termed a 'conference-room head count' as the sole criterion for assessing the degree of interest and participation in the work of these committees. One of the principal problems confronted by the members of most committees today is how to cope with an ever-expanding volume of information submitted by an increasingly diverse set of actors at both the national and international levels. This raises many questions: how to ensure the transparency of the process; how to evaluate the credibility of the information; how to do justice to the enormous efforts made by many NGOs; how to communicate with these often distant partners; how to enable governments to have sufficient notice of the critiques in order to be able to respond to them; and how to structure the overall process so as to profit from these inputs without allowing them to dominate the agenda or control the dialogue as a whole? One thing is clear, however. This overwhelming trend is not consistent with the suggestion that the monitoring process is isolated from civil society.

The other two constituencies which are said to be relatively uninvolved in the process are the national and international media. Bayefsky cites the example of the examination of the US report to the Human Rights Committee in 1995, an event which she notes 'went unreported, except by the *Washington Post* . . .'.[15] Leaving aside the notorious lack of interest by the US media in news of this type, the example is not at all representative of the reaction of national news media. The involvement of a wide range of Irish NGO representatives in the process involving the Human Rights

[13] These are described in some detail in this volume by A. Byrnes, chapter 13, *supra*.

[14] Bayefsky (1996), p. 8.

[15] Bayefsky (1998), p. 467.

Committee's 1993 examination of that country's report was accompanied by considerable media interest within the country, and resulted in an *Irish Times* correspondent going to Geneva.[16] Reports by Canada to the ICESCR Committee drew heavy media coverage in both 1993 and 1998. The Canadian media were represented in Geneva and newspaper, television and radio coverage was extensive. A report by the United Kingdom to the same Committee in 1998 resulted in a front page story in *The Guardian* and a range of other media stories. Nor is media coverage limited to the developed countries. Assuming even a moderately free media, UN treaty bodies often attract what might even be considered to be disproportionately high media attention in many developing countries. The media in Nigeria, the Dominican Republic, Panama, Hong Kong and elsewhere have devoted very extensive coverage to the activities of the ICESCR Committee in relation to national reports.[17]

It is true, of course, that the work of the treaty bodies rarely provides grist for the mills of the British Broadcasting Corporation's *BBC World*, Cable News Network (CNN), and their like in other languages. Nor can it be said that the media coverage attracted by most treaty bodies in most cases is as strong as it should be. But the situation is not at all accurately portrayed by saying that '[n]ational news media rarely attend [and] . . . international news media are almost never there'.[18]

More importantly, such statements are of limited value since they proceed on the basis of the wrong criteria. For the most part, for reasons of cost, the media rarely seek to provide direct coverage of events that extend over the course of several days and which, by their very nature, have few defining, dramatic, especially photogenic or telegenic, moments. Such events are inevitably covered at arm's length, through reliance upon UN press releases or interviews outside the conference room, or on the basis of press conferences by NGO representatives or by the chairperson of the relevant committee. For example, Madame Christine Chanet, as Chairperson of the Human Rights Committee in 1997–1998, succeeded in

[16] This dimension is chronicled in some detail in M. O'Flaherty and L. Heffernan, *International Covenant on Civil and Political Rights: International Human Rights Law in Ireland*, Dublin, 1995, pp. 69–82.

[17] The Department of Public Information, at the UN Office in Geneva, collects newspaper clippings from around the world and makes them available from time to time to the treaty body concerned.

[18] Bayefsky (1998), p. 467.

significantly raising the media profile of that committee. Nor is media coverage the sole test against which to measure the impact of the treaty bodies. The US case mentioned by Bayefsky is revealing in that respect. It drew great interest from human rights and other interest groups around the USA,[19] and attracted scholarly attention as far afield as India.[20] In this respect it gave substance to the complaint sometimes voiced, at least in private, by US diplomats to the effect that their participation in such monitoring exercises comes at a higher price than that of most other countries because of the particular vigilance of the organs of civil society in their country.

A reaction by the government concerned is, in most respects, the most desirable outcome of the relevant procedures, but such responses are particularly hard to track and the causal link is usually impossible to demonstrate. Two illustrations must suffice. The first concerns the issue of fees for tertiary education in the canton of Zürich, Switzerland, an issue which arose in the context of the work of the ICESCR Committee. On the basis of detailed information presented to it, and in anticipation of its examination of the report of Switzerland, the ICESCR Committee wrote a letter to the Swiss Government in 1997 outlining some considerations which it believed should be taken into account in the ongoing consideration of budget policy options in relation to university fees. This was a classic exchange of letters – *notes verbales* in the arcane language of diplomacy – which journalists could not have seen and were unlikely to discover. Nevertheless, the exchange became an important part of the public debate and the Committee's letter was widely publicised in the Swiss news media.

The second example comes from an Australian newspaper report of March 1999 which began:

> The Government filled the position of Aboriginal Social Justice Commissioner after a 14-month delay – on the eve of a United Nations committee hearing into Australia's recent record on Aboriginal rights. The Committee of the Convention on the Elimination of Racial Discrimination (CERD) issued an 'early warning' notice to Australia in August [1998] . . . [The] move will take some heat off the Government in Geneva next week, when it will face detailed questioning from the UN committee.[21]

[19] See generally *supra* S. Grant, chapter 14.

[20] U. Baxi, '"A Work in Progress": The United States Report to the United Nations Human Rights Committee', 36 *Indian Journal of International Law*, 1996, pp. 34–53.

[21] M. Kingston, 'Aboriginal Justice Job Filled after UN Warning', *Sydney Morning Herald*, 4 March 1999, http:/www.smh.com.au/news/9903/04/text/national1.html.

In such a context the formal proceedings in Geneva may be of more symbolic value. They act as a catalyst to action taken far from any UN committee room. For that reason, counting the number of media or NGO representatives sitting in the conference room does not capture the impact of the exercise. Nor would one expect any government to acknowledge that it had taken any initiative with a view to heading off criticism from the CERD Committee. The real impact of the work can only emerge from a more nuanced and in-depth analysis.

2. THE FACT-FINDING CAPACITIES OF THE SYSTEM

Bayefsky's fifth criticism focuses on the fact that 'the treaty bodies do not engage in fact-finding'.[22] Because she considers neither NGOs nor the experts themselves to be entirely reliable, this implies that the information base is flawed and that political considerations can subvert the process. In order to overcome these difficulties she proposes the following solutions:

> The treaty bodies should visit states parties in order to engage in fact-finding prior to the scheduled consideration of state reports. Fact-finding for every state party should be carried out on a routine, non-discriminatory basis. It would not be necessary for all members of the treaty bodies to visit every state.
>
> The treaty bodies should visit state parties which have not reported for an unreasonable length of time, in order to engage in fact-finding and facilitate the production of a report or solicit alternative sources of information.
>
> The General Assembly should ensure that the treaty bodies have sufficient resources and administrative support to engage in fact-finding.[23]

She notes further that NGOs 'are not without their political agendas', and that the information submitted 'is often highly selective'.[24] But this goes to the very nature of NGOs. They are political organisations in the sense that the heart-felt advocacy of specific policies is their very *raison d'être*. To expect an NGO lobbying, for example, in favour of greater per capita expenditure on prisons, or on child vaccinations, to submit a comprehensive picture of all the relevant budgetary considerations as well as the counter-arguments against their own positions would be entirely unrealistic – though they can be expected to be honest and not to attempt to mislead by suppressing relevant information.

[22] Bayefsky (1998), p. 468. [23] Bayefsky (1996), pp. 15–16. [24] Bayefsky (1998), p. 468.

In any case the treaty bodies are protected in various ways from being misled. First, NGOs cover a very broad spectrum of political views and a submission by one is very often juxtaposed against a submission by another which provides a significantly different perspective or interpretation. Second, the weight to be accorded to information provided by a given NGO inevitably reflects the track record – in terms of reliability, accuracy and balance – the NGO has achieved in the past, thus providing NGOs with an incentive to meet basic standards of probity. Third, it is highly likely that the government in question will provide a detailed refutation of any information which may be wrong or unbalanced. Fourth, the role of Committee members is precisely to exercise their informed judgment, on the basis of a multiplicity of sources, as to which allegations appear to be well-founded and which do not.

Nevertheless, Bayefsky believes that the treaty bodies have often 'been unduly driven by such limited [NGO] contributions'.[25] It is true that most of the treaty bodies now take extensive account of information provided by NGO sources and there may have been cases in which undue weight has been accorded to such information, although Bayefsky does not provide any examples. But such occasional errors must be placed in perspective. All available official sources of information are used, as are media reports and any other credible sources. NGO information is thus taken into a balance and weighed against those other sources. It is sometimes found wanting, but this is as it should be. The process of information gathering can be greatly improved, but it can never be rendered 'scientific' in any full sense,[26] and, having regard to resource constraints, the exclusion or downgrading of NGO information would certainly not improve the process. Indeed, 'fact-finding', by which Bayefsky seems to mean *in situ* missions to the country concerned, is usually only useful if it takes full account of information provided by NGO sources, both within and outside the country concerned.

A second argument for abandoning government reports and relying instead upon *in situ* fact-finding missions is that 'treaty body members

[25] Ibid.

[26] See, for example, the extensive writings of Majone on the interplay between science and politics, even in areas such as the setting of health, safety and environmental standards. He notes that such standard-setting exercises are 'in reality a microcosm in which conflicting epistemologies, regulatory philosophies, national traditions, social values and professional attitudes are faithfully reflected'. G. Majone, 'Science and Trans-Science in Standard Setting', 9 *Science, Technology and Human Values*, 1984, p. 15.

often are nominated by governments concerned to ensure state representation in the guise of independent experts', a practice which is said to provide 'opportunities for straying from the legal framework for implementation'.[27] This may well be true, but it is unclear how fact-finding missions conducted at considerable expense by those very same members will obviate the problem. The only example given concerns the treatment of Israel, by both the CERD and the ICESCR Committees, 'under conditions that have not been applied to any other state party'.[28] No details are provided in relation to the CERD Committee's alleged unfair treatment, but in relation to the ICESCR, the Committee is said to have permitted NGO oral criticism of Israel at two sessions in 1996 'on non-Covenant subjects such as the implementation of the Oslo agreements, in the absence of having scheduled a dialogue with the state party or the consideration of a state report'.[29] Leaving aside the questions of whether a Committee can censor NGO statements in advance, and of whether the 1993 Oslo Accords between the Israeli Government and the Palestine Liberation Organisation could be said to have no bearing upon the very wide range of issues covered in the ICESCR, these assertions are simply wrong. The initial report of Israel under the ICESCR was already overdue in 1996 and the Committee had previously received representations from NGOs containing information which, if correct, would have provided grounds for serious concern in terms of Israel's obligations under the Covenant. Under the circumstances, the Committee followed a procedure which had previously been applied in a number of cases (e.g. Canada, Nigeria and the Philippines) and invited the Government of Israel to submit its overdue report, thus providing it with the opportunity to refute the allegations made.

As to the proposed solution of universal and compulsory *in situ* fact-finding missions to the territory of every state which is a party to each of the six human rights treaties (recall, for example, that the Convention on the Rights of the Child has 191 parties), such an approach would indeed transform the system. However, it flies directly in the face of all indications from virtually all states as to what they consider to be the acceptable limits of the treaty supervisory system. Such missions are extremely expensive, involving interpreters, staff members and committees composed of between ten and twenty-three members. The grossly inadequate funding currently provided would need to be multiplied perhaps fifty times over,

[27] Bayefsky (1998), p. 468. [28] Ibid. [29] Ibid., note 10.

a remote prospect at a time of incessant budget-cutting in international organisations. Moreover, the nature of the system would be transformed beyond recognition and certainly beyond anything which governments could be said to have accepted under the terms of the existing treaty texts. The governments of developed countries would be every bit as averse to such a transformation as would those of the developing countries.

3. THE INADEQUACY OF FOLLOW-UP MEASURES

Bayefsky correctly notes that successful implementation is, to a significant extent, a function of follow-up. But she considers this to be especially weak in the case of the treaty bodies. This is manifested in various ways. The first problem is: 'States parties often fail to answer questions put by the treaty body members, for lack of time, ability or inclination . . . Written responses are usually not requested, and if received are almost never published.'[30] The latter point is indeed a problem. In principle, all of the documentation forming part of the exchange between the Committee and the state should be accessible in some way, as I pointed out in my 1997 report to the Commission on Human Rights.[31] It is also the case that information sought is often not provided, but this does not mean that the most appropriate or productive response is to engage in a form of never-ending paper warfare.

In most cases, the dialogue with states is best seen as the culmination rather than the mid-point of a lengthy process. In terms of the dialogue itself, the exchange between the committee and the government is designed to provide the governmental representatives with the opportunity to respond to all issues raised by the committee. To the extent that they do so to the satisfaction of the committee, the dialogue has served its purpose. To the extent that some issues are left unaddressed, or that the replies provided are unconvincing, it is for the committee to draw the appropriate conclusions, but again the dialogue may well have served its purpose. Moreover, it is a continuing dialogue, which will be resumed on the occasion of the next periodic report. In the case of second or subsequent reports, there will be an existing agenda of unresolved issues, and a state party may after reflection respond in ways it refused to do earlier. The process can be frustrating, and takes time. But it is a process, and its strengths need to be appreciated as well as its weaknesses.

[30] Ibid., p. 470. [31] UN Doc. E/CN.4/1997/74, *supra* note 8, paras. 55–6.

The second problem highlighted goes to transparency:

> Follow-up also requires access to the process. Since attendance at the treaty body meetings is so difficult, a comprehensible, timely, written account of the proceedings is essential. However, it is also virtually impossible to obtain.[32]

As noted earlier, attendance at the meetings occurs to a much greater extent than this characterisation would suggest. Nevertheless, it is clear that the vast majority of those who are potentially interested in the process will never be able to attend. The question then is whether they can obtain access to the relevant information which they require. Bayefsky's analysis focuses entirely on the availability of 'summary records' which can indeed take a long time to appear even in a single language. This is, again, a result of the financial 'crisis' which has been inflicted upon the UN by those states which have failed to pay their assessed dues. But the focus on summary records again leaves us with a distorted picture of the issue. In the first place, the summary records are, in fact, available in either English or French within a reasonably short space of time. Requiring an interested individual to speak one or more foreign languages or obtain assistance with a translation is burdensome, but it is a burden with which most of those appearing before, or aspiring to work with, the committees have long had to cope.

Second, the UN issues 'press releases' which appear within hours of every meeting of a treaty body (except where confidentiality applies) and are available on the Internet. These too tend to alternate in French or English, but this need not be too much of a deterrent when automatic translation software is available free on the Internet and at low cost commercially. Such software programmes leave much to be desired, but the essence of a document is usually captured. Until recently, press releases were remarkably detailed and provided a reliable record of the meeting, despite their formally 'unofficial' status. The latter is a diplomatic nicety which enables instant news reports to be generated without holding up the process so governments can approve or disapprove the content, as is theoretically the case with the summary records. The latter may be 'corrected' by those concerned within a specified time of their issuance, but happily such corrections usually only serve to draw attention to the disputed report and they are thus resorted to mainly as a formality to pacify foreign ministries.

[32] Bayefsky (1998), p. 470.

But for the purposes of NGOs and almost anyone else wanting to know what has transpired in treaty body discussions, the press releases which are available worldwide on the Internet within hours are important resources.[33]

Third, the most important outcome of the 'dialogue' is the 'concluding observations' adopted by each committee at the end of its consideration of every governmental report. These observations are available as soon as they are adopted and are usually posted very soon thereafter on the Internet. In this respect, Bayefsky's sole focus on the summary records is unjustified and accords undue importance to one document, while ignoring the far more important one (the concluding observations) and a reasonable substitute for the summary records (the press releases).

Finally, there is a rapidly growing network of NGO-organised information services which make the details of the consideration of any given report widely and quickly available to many of the most interested constituencies. Indeed, it is not unknown for diplomats to complain to the UN secretariat that NGOs in their home country were disseminating copies of the concluding observations before the diplomatic mission had been able to send them back to the government.

Overall, the suggestion that 'it is . . . virtually impossible to obtain' an adequate record of treaty body proceedings is misleading.

Bayefsky draws a further conclusion. In her view '[f]ollow-up of concluding observations by potentially interested non-governmental sources in a state party is consequently often very weak, if done at all'.[34] Again, while much remains to be done in this regard, it is clear from the examples identified in this volume alone that this statement is a considerable overstatement, and is not supported by the facts.

The further suggestion is that bodies such as the General Assembly and the Commission on Human Rights, 'which have a responsibility to follow up treaty body conclusions', do not do so because 'they are driven by political considerations'.[35] Political organs are usually driven by political considerations but a great variety of factors can go into the political calculations

[33] Sadly, since this analysis was written, it needs to be said as the volume goes to press, that the quality of the press releases being produced in Geneva appears to have dropped dramatically in late 1998 and in 1999. Recent press releases have been excessively brief, lacking in essential detail and filled up with standard information which should not be included in an average press release purporting to report news. This is a particularly lamentable development which should be reversed.

[34] Bayefsky (1998), p. 470. [35] Ibid., pp. 470–1.

that are made in any given case. Moreover, the relationship between the treaty bodies and the political organs is an issue which is far more complex than such simplifications would suggest. The independence of the treaty bodies *per se* has in fact been respected to a remarkable extent by the political organs of the UN. They have not intervened when they think that a treaty body has got it wrong. Nor, happily, have they sought to intervene at the behest of states parties looking for a way of overturning the conclusions reached by a committee. For the political organs to become more involved *vis-à-vis* 'delinquents' would be, at best, a double-edged sword.

While the involvement of the political organs in relation to financial and administrative matters is inevitable given the structure of the UN system, drawing the line between the substantive matters in relation to which they might reasonably and constructively intervene and those on which they should not is extremely difficult. In addition, the intervention of the political organs risks removing the matter from the effective realm of the treaty body. Yet a measure of continued cooperation is needed if the system is to function, and there will usually be no point in pressing an issue immediately, and risking a rupture of relations with the government concerned. There is of course much more that could be done (resources permitting) in terms of follow-up, but this is a far more complex question than Bayefsky suggests.

C. The overall assessment

It is hardly surprising that, on the basis of the various assessments and judgments described above, Bayefsky arrives at a rather negative view of the system as a whole. Thus, in her 1994 study, she characterised the UN human rights system as being dominated by a solid 'front of rejection'. Since the end of the Cold War, '[s]erious efforts at implementation and behavioral changes [have been] thwarted at every opportunity'. The human rights treaty mechanisms 'remain as relics of the past' which 'contain gigantic loopholes that are taken up with new zeal by large numbers of holdouts'.[36]

Her 1996 study was equally pessimistic in its outlook. The centrepiece of the work of the treaty bodies – the dialogue between states and the committees – 'frequently amounts to a series of unclear, incomplete, misleading,

[36] Bayefsky (1994), p. 231.

or dishonest representations, on the one hand, and a series of polite, but sceptical responses, on the other hand'.[37] She concluded that, 'on a procedural level the enforcement regime [sic] associated with the treaty bodies is seriously flawed' and that the 'system of implementation . . . is riddled with major deficiencies'.[38] In sum, there is an 'implementation crisis . . . of dangerous proportions'.[39]

By the time of her 1998 study, neither the overall assessment nor the outlook had improved:

> . . . the information available is not comprehensive; input is not obtained from all interested parties; the dialogue, for these reasons as well as constraints upon time, accessibility, and follow-up, is often marginally constructive, and with those states that need it most, frequently never takes place.[40]

Clearly some of this is true; the system does suffer from some serious weaknesses. But, as an overall assessment, Bayefsky's analysis is unbalanced and unrealistic (a) in its assessment of what the committees, within the constraints of existing or foreseeable resources, might do; and (b) in its image of what form an international human rights implementation mechanism might reasonably take.

D. Identifying the underlying causes of the weaknesses

Having identified the principal weaknesses in the system of treaty supervision, the next step is to seek to identify the underlying causes for the inadequacies of the 'seriously flawed' system. In so far as it proves possible to isolate such factors, and particularly if a limited group of countries can be seen to be responsible for them, it makes sense to seek to counter them. Bayefsky's choice of targets, however, is highly selective and her choice of means (penalising those responsible, and if this does not work, expelling them from the system) impractical and counter-productive.

In her analysis, the culprits, it seems, are developing countries in general and non-democratic ones in particular. Thus, the fact that the dialogue frequently consists of 'a series of unclear, incomplete, misleading, or dishonest representations' is demonstrated by examples taken from replies given by Tunisia, Algeria, Mexico, Nigeria, Jamaica, Senegal, Pakistan and Libya.[41] Not a single example is given in relation to a Western country, but

[37] Bayefsky (1996), p. 6. [38] Ibid., p. 10. [39] Ibid., p. 11.
[40] Bayefsky (1998), p. 471. [41] Bayefsky (1996), pp. 6–7.

this is not for want of possible examples. Similarly 'States having the largest number of overdue reports frequently include those with extremely poor human rights records, such as: Togo, Liberia, the Central African Republic, Somalia, Afghanistan, Cambodia and Lebanon'.[42] Five of those seven have in fact been immersed in devastating civil wars for a rather long period of time. But instead of this being seen as some sort of explanation for a poor record of compliance with rather demanding and bureaucratic reporting mechanisms, it is simply translated into their having dreadful human rights records.

The reporting process itself is also seen to be particularly marginal and ineffective in relation to most developing countries. Thus, Bayefsky observes that while 'dozens of people' may attend when the reports of developed countries are presented, the reports of developing countries are often watched only by 'a sole representative of Amnesty International or one or two other persons from international NGOs . . .'.[43] Individual petition procedures are also undermined, or at least condemned to a level of superficiality, by the record of a range of developing countries, most of which would presumably qualify under Bayefsky's criteria as 'non-democracies'. Thus, the complaints procedure under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) is flawed because '[n]ot even a single case has been registered from . . . such states as Algeria, Bulgaria, Chad, Congo, El Salvador, Malawi, Namibia, Nepal, Romania, Somalia and Uganda'.[44] The fact that the United States has refused to permit its citizens to lodge such complaints, or that the United Kingdom, Ireland, the United States and various others have refused to make the declaration which would permit the CERD Committee to examine complaints relating to those countries, is nowhere mentioned. The presence of developing countries within the regime also seems to explain why the Optional Protocol process 'has been of little assistance in the context of the human rights problems of Western democratic states'.[45]

> The cases decided . . . relate to states with widely differing human rights conditions. The members of the Committee also come from states with substantially different human rights records. These circumstances appear to result in a number of instances in which the Committee handles egregious violations of the Covenant more easily than others.[46]

[42] Bayefsky (1998), p. 467. [43] See *supra* note 14. [44] Bayefsky (1998), p. 469.
[45] Bayefsky (1996), p. 11. [46] Bayefsky (1998), p. 469.

The non-involvement of the General Assembly and the Commission on Human Rights is criticised. This is attributed to the fact that 'they are driven by political considerations, which almost always exclude taking action on specific states'. In particular, they are criticised for having failed to take up the negative assessments of relevant treaty bodies in relation to Egypt and Syria.[47] As noted earlier, it is hardly surprising that political bodies take full account of political considerations in their work, but it is certainly not the case that this has precluded either of them from singling out a large number of specific states for criticism. While it is true that they have usually not done so in response to treaty body reports, there may well be strong prudential reasons for the political organs not opting to take up every case of a violation identified by the treaty bodies. Even taking up only the more serious cases, on an individual basis and specifically in response to a finding by one treaty body, raises major policy issues which need to be carefully considered.

Overall then, virtually every specific example Bayefsky chooses to cite points consistently to developing countries as the cause of the system being so 'seriously flawed', although in fact the point on the democratic spectrum at which they would be placed by most observers would seem to differ greatly within the group of those she names.

E. The prescriptions that follow from the diagnosis

Bayefsky's recommendations for reform follow from her diagnosis. Her 1994 report proposed, *inter alia*, denial of access to, or expulsion from, the treaty regime of:

- 'those states that do not adhere to a set of minimum requirements';
- 'those states that fail to withdraw incompatible reservations';
- 'any state that does not allow individual communications'; and
- any 'states that disallow . . . media events' such as press conferences and media interviews linked to the work of the treaty bodies.[48]

In her 1998 report she concluded that one of the major problems with the treaty monitoring system is that it 'includes many states that share no common democratic aspirations'. In her view, 'extensive resistance to [the types of reform that she advocates] comes from nondemocratic states'. This, she says, gives rise to two further questions:

[47] Ibid., p. 471. [48] Bayefsky (1994), pp. 264–5.

> (1) What is the best method for securing democratic reform? Through the equal participation of nondemocracies within the treaty system? Or through alternative venues for interchange outside the treaty system, such as the marketplace – that is, economic pressure for reform? (2) Who is the system for? Is it aimed at assisting democracies, or aspiring democracies, to adjust and calibrate their laws and practices? Or is it aimed at the unrepentant social deviant, and intended to expose the depravity and provide a tool for critics everywhere?[49]

Her conclusion, in effect, is that 'unrepentant social deviants' or 'extreme delinquents', by which she apparently means 'non-democracies', should be excluded from the treaty system by one means or another. This is mainly because the continuing participation of such states depends on 'continued low levels of resources, tolerance of illegitimate reservations, and feeble institutional methodologies'.[50]

There are, however, a number of major problems with this conclusion. First, as already suggested earlier, the difference between the behaviour of democratic and non-democratic states, or of developed and developing states, is, in many respects, one of degree. There are Western states which have a poor reporting record and there are developed states with poor human rights records which have been assiduous in the submission of reports. There are certainly some developing states which are disdainful of the process and deaf to the suggestions of the committees. There are also Western states which barely react to criticism from a treaty body because they find it hard to comprehend how fault could have been found. This stems from an implicit assumption that, even if their record is imperfect, it is so much better than that of Bayefsky's 'non-democracies' that no criticism could be justified. Similarly, the reservations lodged by some Islamic states to certain treaties are lamentably sweeping and imprecise, but those put forward by the United States have also been widely criticised.[51] Nonetheless key Western states, even when they criticise such reservations, are hostile to the idea that the committees have an autonomous competence to invalidate reservations and even more so to the idea that committees are competent to 'expel' states parties.[52]

When it comes to financial and political support for the system as a whole there are certainly major differences from one country to the next, but it is not at all clear that these attitudes closely mirror the extent to which

[49] Bayefsky (1998), pp. 471–2. [50] Ibid., p. 472.
[51] See *supra* S. Grant, chapter 14. [52] Bayefsky (1998), p. 472.

a state is democratic or not. The United States, for example, has consistently opposed the payment of an honorarium (currently $3,000 per year) to the members of the three treaty bodies which do not currently receive them, despite the fact that independence and expertise are even less likely to be attracted where no remuneration at all is provided. In general then, it would seem both unwise and not consistent with the record to base a set of prescriptions on the assumption that there are clear cut and fundamental differences between the two groups of states in their relationship to the treaty system.

Second, the basis upon which a country qualifies as democratic or not is never spelled out by Bayefsky, but the implicit definition is evidently a wide one. Indeed it seems to encompass any state party which would resist the radically transformed system advocated by Bayefsky. The problem with this sort of analysis is that many of the democratic states which she sees as ideal citizens in this respect have steadfastly resisted the strengthening of the system in the ways she advocates (or indeed in any other ways), have refused to withdraw reservations subject to sustained challenges, have prevented additional resources flowing to the system, have themselves failed to report for a decade or longer, have refused to heed all of the recommendations directed at them, or have refused to accept some or all of the various international complaints procedures.

Third, Bayefsky effectively refuses to take any account of the differences in capacity between rich and poor countries in terms of their ability and preparedness to participate fully in the treaty system. It is one thing to insist that respect for basic human rights cannot be contingent upon per capita gross national product (GNP, or any other comparable economic indicator); it is quite another to demand that poor countries will be able or willing to devote the same level of resources to reporting and complaints procedures as some developed states with strong internal human rights constituencies. It is precisely for this reason that considerable emphasis has been placed upon the need for technical assistance to such states. As I noted in my 1997 report, in relation to the question of whether the international community should be providing resources to facilitate the ratification of treaties by such states and to assist them in meeting the subsequent reporting burden, at least initially:

> Curiously, it has yet to be acknowledged that such activities, which are essential to laying the foundations for a stable and peaceful world in which human rights are respected, should be funded adequately within the United Nations

> framework. It almost seems to be thought that efforts to promote the acceptance of human rights norms would somehow be tainted if progress were purchased at a price, in terms of the necessary technical assistance. In contrast, the principle was recognized long ago in the environmental area in which many of the arrangements made in relation to key treaties provide for financial and other forms of assistance to help States to undertake the necessary monitoring, to prepare reports and to implement some of the measures required in order to ensure compliance with treaty obligations.[53]

Yet Bayefsky is dismissive of the role of technical assistance,[54] and makes no provision for it in a list of recommendations covering ten pages.[55]

Fourth, Bayefsky proposes that economic sanctions of some unspecified type should be brought to bear against any state which is not prepared to accept the approach that she proposes. Democratic reform, she says, is best achieved through 'economic pressure for reform'.[56] Her 1994 report was more explicit: '. . . at bottom, tying economic interests to improving human rights protection is the only message rejectionists are likely to understand'.[57] Leaving aside the very unsatisfactory track record of most human rights-linked economic sanctions, it is entirely unclear who would impose them, what triggers would be used, or what form they might take. Presumably a *coup d'état* or other setback on the road to democracy would lead to an ultimatum being issued by one or more of the treaty bodies (what if they disagreed in their assessments?) to the state concerned and failure to comply would lead to expulsion. It is, to say the least, rather difficult to see how such a system would function. No doubt linking sanctions in this way to the treaty supervisory system would transform the nature of the system, but it seems highly unlikely that it would be for the better.

What would remain in the aftermath of such a revolution? First, a much smaller system: 'membership would be limited to those states sharing democratic aspirations' (more probably, to a sub-set of such states).[58] It would then presumably look very much like the membership of existing regional human rights organisations, thus putting into stark relief the question as to what is to be gained from a universal system? This result contradicts Bayefsky's perception that there are certain states who need to benefit from the system more than others.[59] However great the shortcomings of the

[53] UN Doc. E/CN.4/1997/74, 1997, *supra* note 8, para. 25. See also *supra* D. Bodansky, chapter 17.
[54] Bayefsky (1996), p. 10. [55] Ibid., pp. 12–22. [56] Bayefsky (1998), p. 472.
[57] Bayefsky (1994), p. 265. [58] Ibid. [59] *Supra*, note 40.

existing system might be, 'improvements' of the type advocated would *be regressive.*

F. Conclusion

The human rights treaty supervisory system has come a very long way in a relatively short time. As recently as 1969 there was not a single human rights treaty body in existence. States were extremely reluctant to subject their human rights record to any sort of scrutiny. The terms agreed in the text of the several treaties that had been adopted envisaged a minimalist approach to monitoring. No treaty-based individual complaints system existed and the prospects for any coming into force were not considered good. The only human rights reporting exercise that had been tried had yielded almost nothing.[60]

Thirty years later the system has developed so rapidly that it has problems of which human rights proponents in earlier eras could only have dreamed. Those problems are certainly considerable, but they must be viewed against the background of the historical evolution of the system as a whole and in light of a range of other factors. The latter include the determined gradualism which inevitably characterises developments in the human rights field, the reluctance of all governments to facilitate the emergence of a truly effective international human rights monitoring regime, and the shrinking resources available to the United Nations for such activities. In addition, it is inevitably difficult to achieve flexible institutional and substantive changes in the context of a regime which has its foundations in a range of treaties, each of which was, to some extent, drafted in such a way as to limit the possibilities of dramatic change from within, by processes of interpretation and application as distinct from amendment.

For these and other reasons there are no short cuts to the development of an effective monitoring system and there are no magic formulae (such as the expulsion of non-democratic states) which will transform the capacity of

[60] The system established in 1956 and disbanded in 1981 called upon states to report to the Commission on Human Rights, on the basis of the Universal Declaration of Human Rights. The reports were expected to describe 'developments and the progress achieved during the preceding three years in the field of human rights, and measures taken to safeguard human liberty'. CHR Res. 1 (XII) (1956), para. 1. See generally P. Alston, 'The Commission on Human Rights', in *The United Nations and Human Rights: A Critical Appraisal* (ed. P. Alston), 1992, pp. 183–4.

the system to promote compliance with human rights norms. What is needed instead is a systematic examination of the possibilities that exist to strengthen each of the individual elements that together determine whether the system as a whole works and how effectively it does so. International human rights treaty supervision cannot usefully be seen as an all or nothing proposition.

The value of a book such as this is, as Jacobson and Brown Weiss have pointed out in their study of factors affecting compliance with environmental treaties, that it can focus on those factors 'that can be manipulated in the relatively short run through policy interventions'.[61] In that context the situation of developing countries is of particular interest, although not because more of them may be undemocratic by comparison with their developed country counterparts. As Jacobson and Brown Weiss note, 'it would not be very surprising or particularly helpful to those interested in improving compliance for us to discover that rich countries are more likely to comply with treaties than are poor countries . . .'.[62]

The more interesting challenge is to identify the measures which are capable of encouraging, enabling and as necessary pressuring, those countries to comply with their human rights treaty obligations. Democratisation is certainly a key factor, but it is not a result which is ever likely to be brought about solely by measures taken within a human rights treaty system. Condemnation by a treaty body can contribute to pressures towards democratisation by reinforcing and legitimising opposition demands and even by helping to call into question, both internally and externally, the legitimacy of the government. At the end of the day, it remains the case that no set of concluding observations, no matter how trenchant or incisive, can bring about a transition to democracy. But neither will expulsion from the treaty system.

The treaty supervisory process should not be viewed in monochrome. It is not a case of either a committee or a government 'winning' in the sense that a failure by a committee to elicit any meaningful response from a government means that it has 'failed'. The process itself is much more complex than such a one-dimensional snapshot in black and white can capture. The principle of accountability can be furthered merely by the act of submitting a report. In the case of states which are notably reluctant to accept meaningful international scrutiny, and examples vary from the

[61] See *supra* Brown Weiss and Jacobson, note 1, p. 9.
[62] Ibid.

United States to China, the very act of reporting is significant, as is the process of defending the report and responding to questioning. Similarly, even where the position of a government remains clearly unmoved by the entire process, the government itself should not be seen as the sole actor of importance. Opposition groups, civil society in general, the media, regional and international organisations and other states can all draw significant inferences from the critical conclusions drawn by the treaty bodies.

Where states fail to report at all, the situation is admittedly much less satisfactory. But again, the process must be seen in a longer-term perspective as one in which persistently delinquent governments will eventually have a price to pay, if only in the sense that their delinquency is one more factor in justifying the taking of other measures.

Moreover, the treaty body system should not be considered in isolation. An excessive emphasis on the condemnatory or punitive aspects of the treaty supervisory process only serves to obscure the fact that a large part of the overall international human rights regime is far better equipped than the treaty bodies to undertake such activities. The Commission on Human Rights, the General Assembly and even the Security Council, are all able to respond to serious violations in a more nuanced, tailored, and potentially effective manner than is an expert committee that meets two or three times a year and has a very limited range of options available to it. Ironically, the legal foundations of any measures taken by the political organs would in fact be significantly weakened by the expulsion of the states in question from the individual treaty regimes. Such expulsions would also be likely to give a dramatic impetus to a thus far reasonably well repressed urge on the part of some governments to withdraw from treaty regimes which they feel have subjected them to excessive criticism.

Thus, rather than focusing on expulsion, the treaty bodies should continue to develop the quality and depth of their analyses and conclusions while also exploring the development of the encouraging and enabling functions which they are able to perform. Recent studies of compliance with environmental treaty reporting obligations have highlighted the crucial importance of administrative capacity. In order to produce strong reports and to maximise responsiveness to the process as a whole, states need to have an adequate number of personnel available for the task. Those personnel in turn need to have sufficient expertise, be adequately supported in financial terms, and have a strong domestic legal mandate to do the job properly. In many (but perhaps not all) respects, 'administrative

capacity correlates with total GNP and GNP per capita'.[63] For these reasons, environmental treaties have placed increasing emphasis on positive incentives to encourage compliance. They might take the form of 'special funds for financial or technical assistance, training programmes and materials, access to technology, or bilateral or multilateral assistance outside the framework of the Convention, from governments, multilateral development banks, or, in some cases, the private sector'.[64]

It is striking that so few of these techniques have been developed in any serious and systematic fashion in relation to the human rights treaties. In addition to the many other incremental recommendations for reform which are canvassed in this volume, much more needs to be done to explore the ways in which compliance with human rights treaty obligations can be both facilitated and encouraged through the provision of positive incentives. It is time for governments and international organisations to put their money where their mouths are by investing in the long-term future of the human rights treaty monitoring system which they have put in place and upon which so many expectations have been placed.

[63] Ibid., p. 531. [64] Ibid., p. 546.