

Litigation and Alternative Dispute Resolution of the United Nations Human Rights Treaty Bodies

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I. INTRODUCTION

This Article investigates the extent to which elements of litigation and alternative dispute resolution (ADR) have been woven into the United Nations (U.N.) human rights treaty body system. Section II of this Article provides an overview of the treaty body system. Section III critically examines the monitoring functions of these treaty bodies. Section IV analyzes the elements of litigation and ADR in the treaty body system.

II. UNITED NATIONS TREATY BODIES

There is a broad range of treaty bodies which supervise the implementation of treaties covering a wide array of topics.¹ These treaties are binding

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instruments; thus, State Parties which expressed their consent thereto must comply with the treaty provisions in good faith.² Token compliance would not suffice. Nothing less than a sincere effort to abide by these provisions is required.

There are nine core international human rights treaties of the U.N.³ The two main ones are the International Covenant on Civil and Political Rights (ICCPR)⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵ There are other thematic human rights treaties. These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);⁸ Convention on the Rights of the Child;⁹ International Convention on the

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1. Office of the United Nations High Commissioner for Human Rights, Monitoring the Core International Human Rights Treaties, *available at* <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (last accessed Oct. 31, 2016) [hereinafter U.N. Core International Human Rights Treaties].
2. Vienna Convention on the Law of Treaties art. 26, *adopted* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
3. Office of the United Nations High Commissioner for Human Rights, The Core International Human Rights Instruments and their Monitoring Bodies, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last accessed Oct. 31, 2016) [hereinafter U.N. Instruments and Monitoring Bodies].
4. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
5. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).
6. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).
7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].
8. Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sep. 3, 1981).
9. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990).

Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW);¹⁰ Convention on the Rights of Persons with Disabilities (CRPD);¹¹ and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).¹² Supplementing some of these human rights instruments are Optional Protocols, which are also monitored by the treaty bodies.¹³

Each treaty has a monitoring body, also called a treaty body, which is composed of independent human rights experts.¹⁴ Each treaty body — save for the Committee on Economic, Social and Cultural Rights (CESCR), which supervises the implementation of the ICESCR — is created by the treaty itself. The CESCR was created by a resolution of the U.N. Economic and Social Council which was originally tasked by the Covenant to supervise the implementation of the treaty.¹⁵

Each treaty body is dedicated to a specific theme, such as racial discrimination, torture, and enforced disappearance, as well as women, children, persons with disabilities, and migrant workers.¹⁶ The treaty bodies are made up of independent experts nominated and elected by the assemblies of State Parties to the treaties.¹⁷ These treaty bodies are equipped with a range of monitoring procedures,¹⁸ which are the subject of this Article.

10. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter ICMW].

11. Convention on the Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

12. International Convention for the Protection of All Persons from Enforced Disappearance, *adopted* Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010) [hereinafter CPED].

13. U.N. Instruments and Monitoring Bodies, *supra* note 3.

14. U.N. Core International Human Rights Treaties, *supra* note 1.

15. E.S.C. Res. 1985/17, U.N. Doc. S/RES/1985/17 (May 28, 1985).

16. Global Bersih, International Conventions, *available at* <http://www.globalbersih.org/human-rights-2/international-conventions> (last accessed Oct. 31, 2016).

17. Office of the United Nations High Commissioner for Human Rights, Elections of Treaty Body Members, *available at* <http://www.ohchr.org/EN/HRBodies/Pages/ElectionsofTreatyBodiesMembers.aspx> (last accessed Oct. 31, 2016).

18. *See* Office of the United Nations High Commissioner for Human Rights, Human Rights Bodies — Complaints Procedures, *available at* http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HR_TBPetitions.aspx (last accessed Oct. 31, 2016) [hereinafter U.N. Complaints Procedures].

There are other human rights bodies of the U.N. which are not covered by this Article. These bodies which trace their authority, ultimately, back to the U.N. Charter are called “charter bodies.”¹⁹ One of these charter bodies is the U.N. Human Rights Council, which is the successor of the U.N. Human Rights Commission.²⁰ Composed of U.N. Member States, the Council undertakes a Universal Periodic Review of the “human rights records of all [U.N.] Member States.”²¹ It also has a confidential complaint procedure for consistent patterns of gross and reliably attested violations of human rights.²² The Council also appoints thematic and country-specific special procedures mandate holders who are able to carry out country visits and issue allegation letters, urgent appeals, and press releases.²³

This Article focuses on the procedural aspect of the aforementioned treaties in the course of the investigation of the human rights treaty bodies of the U.N. Moreover, the specific features of these procedures which relate to litigation and ADR are given particular attention.

III. MONITORING FUNCTIONS OF TREATY BODIES

The procedures of each of the U.N. human rights treaty bodies differ. But generally, they include:

- (1) reporting procedure;
- (2) individual communications procedure;
- (3) inter-State communications procedure; and
- (4) visit procedure.

19. See Office of the United Nations High Commissioner for Human Rights, Human Rights Bodies, *available at* <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last accessed Oct. 31, 2016) [hereinafter U.N. Human Rights Bodies].

20. *Id.*

21. Office of the United Nations High Commissioner for Human Rights, Universal Periodic Review, *available at* <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last accessed Oct. 31, 2016).

22. Office of the United Nations High Commissioner for Human Rights, Human Rights Council Complaint Procedure, *available at* <http://www.ohchr.org/EN/HRBodies/CCPR/ComplaintProcedure/Pages/CCPRComplaintProcedureIndex.aspx> (last accessed Oct. 31, 2016).

23. Office of the United Nations High Commissioner for Human Rights, Special Procedures of the Human Rights Council, *available at* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (last accessed Oct. 31, 2016).

Some other procedures specific to certain human treaty bodies are mentioned, but not extensively discussed in this Article. These are the: (1) “unrestricted and unannounced visits”²⁴ under the Optional Protocol to the CAT; and (2) urgent action and referral procedures²⁵ under the CPED.

A. Reporting Procedure

A reporting procedure requires each State Party to submit a periodic report on the measures it has taken to give effect to its obligations in the treaty.²⁶ The treaty body considers each report and issues comments, observations, or recommendations as it deems appropriate.²⁷

The reporting procedure is based on a dialogue.²⁸ Apart from the official government reports of the State Parties, parallel reports²⁹ by civil society groups and national human rights institutions on the human rights situation in their countries are also important sources of supplementary information for the dialogue. In Morten Kjærums words, these groups often possess knowledge about specific issues of which governments are not sufficiently aware of, or which they prefer to exclude from their official reports.³⁰

24. Association for the Prevention of Torture, OPCAT: Opening up Places of Detention, *available at* <http://www.apr.ch/en/opcat> (last accessed Oct. 31, 2016). *See also* Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, art. 13, U.N. Doc. A/RES/57/199 (June 22, 2006).

25. Office of the United Nations High Commissioner for Human Rights, Working Group on Enforced or Involuntary Disappearances — Procedures, *available at* <http://www.ohchr.org/EN/Issues/Disappearances/Pages/Procedures.aspx> (last accessed Oct. 31, 2016).

26. Office of the United Nations High Commissioner for Human Rights, Monitoring the core international human rights treaties, *available at* <http://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx> (last accessed Oct. 26, 2016) [hereinafter U.N. Monitoring].

27. *Id.*

28. Morten Kjærums, *State Reports*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER 22 (Gudmundur Alfresson, et al. eds., 2009).

29. Parallel reports are also called “shadow reports” or “alternative reports.” *See* Office of the United Nations High Commissioner for Human Rights, Minorities and the United Nations: Human Rights Treaty Bodies and Complaint Mechanisms, *available at* <http://www.ohchr.org/Documents/Publications/GuideMinorities4en.pdf> (last accessed Oct. 31, 2016).

30. Kjærums, *supra* note 28, at 22.

These parallel reports have been an important development in reporting procedures over the past decade. They cover largely the same ground as government reports but provide a much more critical perspective. When these reports are accurate, detailed, and concise, they can have a major impact on the reporting process.³¹ Since it is in the interest of governments to present facts in the most favorable light in their reports, other sources of information like parallel reports are an essential aspect of informed monitoring.³²

The reporting system does not relate to particular incidents; rather, it describes the general human rights situation in a country.³³ As Kerstin Mechlem observes in relation to the treaty bodies, which are also referred to as “Committees,” the procedure is not of an adjudicatory nature, but aims at a “constructive dialogue” between the State Parties and the Committee involved.³⁴ By means of a courteous, systematic, and constructive exchange of views, concrete results are sought to be achieved.³⁵ In the context of the CAT, Roland Bank points out that the system makes it possible for the Committee to make “remarks pertaining to diverse categories, including positive aspects[;] factors and difficulties impeding the application of the Convention [;] issues of concern[;] and recommendations.”³⁶

The reporting procedure can serve as an important tool for clarifying normative issues.³⁷ To illustrate, the Committee on Enforced Disappearances can address normative issues through “concluding observations”³⁸ comprised of country-specific comments, which it can issue as part of its reporting

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31. HENRY STEINER, ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS — TEXT AND MATERIALS* 855 (3d ed. 2008).
 32. Ineke Boerefijn, *Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights*, 17 *HUM. RTS. Q.* 766, 783 (1995) (citing Francesco Capotorti, *The International Measures of Implementation Included in the Covenants on Human Rights*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS: PROCEEDINGS OF THE SEVENTH NOBEL SYMPOSIUM, OSLO* 137 (Asbjørne Eide & August Schou, eds., 1968)).
 33. See U.N. Human Rights Bodies, *supra* note 19.
 34. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 *VAND. J. TRANSNAT'L L.* 905, 923 (2009).
 35. Boerefijn, *supra* note 32, at 772.
 36. Roland Bank, *International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?*, 8 *EUR. J. INT'L L.* 613, 620 (1997).
 37. Mechlem, *supra* note 34, at 927.
 38. *Id.* at 923.

procedure as provided in Article 29 of the CPED.³⁹ These concluding observations serve as specific comments on the human rights situations in States which have submitted reports, and can be an important vehicle for clarifying the text of the Convention.⁴⁰ As Thomas Buergenthal observes with respect to the comparable reporting system under the ICCPR, the practice is to adopt concluding observations which provide an assessment of the State's human rights situation as well as an insight into the manner in which the Committee interprets the ICCPR.⁴¹

Not only can the treaty body issue concluding observations as part of the reporting procedure, it can also issue a General Comment that aims to clarify the text of the treaty.⁴² The power to issue General Comments can leave little room for "loopholes or disingenuous interpretations."⁴³ General Comments of the U.N. Human Rights Committee⁴⁴ (CCPR) today even go well beyond the literal text of the ICCPR.⁴⁵ As Philip Alston observes, the General Comment is "one of the potentially most significant and influential tools available" to treaty bodies.⁴⁶

The reactions of States to these General Comments are varied. Some governments have claimed that certain General Comments are an unwarranted attempt to attribute to provisions meanings that they do not have.⁴⁷ Still, according to the International Law Association Committee on International Human Rights Law and Practice, courts have generally

39. CPED, *supra* note 12, art. 29.

40. Mechlem, *supra* note 34, at 923.

41. Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. U.N. L. 341, 350 (2001) (J.A. Frowein & R. Wolfrum, eds., 2001) (citing STEINER, ET AL., *supra* note 31, at 853).

42. Mechlem, *supra* note 34, at 927.

43. Antonio Cassese, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83 AM. J. INT'L L. 128, 129 (1989).

44. The U.N. Human Rights Committee is a treaty-based body, as compared to the U.N. Human Rights Council, which is a charter-based body. See U.N. Human Rights Bodies, *supra* note 19.

45. STEINER, ET AL., *supra* note 31, at 884.

46. Philip Alston, *The Historical Origins of the Concept of "General Comments" in Human Rights Law*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY 763 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas, eds., 2001).

47. *Id.* at 764 (citing INEKE BOEREFIJN, THE REPORTING PROCEDURE UNDER THE COVENANT ON CIVIL AND POLITICAL RIGHTS: PRACTICE AND

noted that [] while treaty bodies are not courts, their findings are relevant and useful in some contexts. However, they have usually stopped short of concluding that they are obliged to follow treaty body interpretations, even in cases in which the treaty body has expressed a view on a specific case or law from the jurisdiction in question.⁴⁸

Henry Steiner and Alston add that U.N. bodies, such as the Human Rights Council, the General Assembly, the International Court of Justice,⁴⁹ and regional human rights courts, regularly invoke General Comments to interpret treaty provisions.⁵⁰ Mechlem cites the “normative significance of [the] general significance of General Comments for the development of human rights law.”⁵¹

Treaty bodies also have a rich experience with follow-up procedures through the CCPR’s Rules of Procedure.⁵² For instance, in accordance with Rule 71 (5) of its rules, the CCPR identifies priority concerns in its concluding observations on which a State Party will submit follow-up information within one year, rather than its next periodic report.⁵³ In accordance with Rule 72, the CCPR analyzes this follow-up information through a special rapporteur appointed for the purpose.⁵⁴ The Committee against Torture has a similar special rapporteur, while the Committee on the Elimination of Racial Discrimination has assigned one of its members to follow-up on its concluding observations.⁵⁵

PROCEDURES OF THE HUMAN RIGHTS COMMITTEE (1999 ed.)). Alston gives the example of the objection to the U.N. Human Rights Committee’s General Comment 24 that relates to reservations. *Id.*

48. International Law Association Berlin Conference, Berlin, Germany, 2004, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, ¶ 8.

49. Statute of the International Court of Justice, Oct. 24, 1945, 33 U.N.T.S. 993.

50. STEINER, ET AL., *supra* note 31, at 885.

51. Mechlem, *supra* note 34, at 929.

52. Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.8 (Sep. 22, 2005).

53. Marcus Schmidt, *Follow-Up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council — Recent Developments*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER 29 (Gudmundur Alfresson, et al. eds., 2009).

54. *Id.*

55. *Id.* at 29–30.

Still, concerns about the sustainability and duplication in relation to the reporting systems of treaty monitoring bodies have been raised.⁵⁶ As Steiner and Alston point out, the reporting system is fragmented, complex, and under-resourced, and the overlapping reporting burden and the uncoordinated responses of different committees are increasingly being challenged by governments.⁵⁷ They cite a report commissioned by the U.N. General Assembly suggesting three long term options for reducing reporting burdens: (i) reducing the number of treaty bodies and, hence, the number of reports required;⁵⁸ (ii) encouraging States to produce a single, global report to be submitted to all relevant treaty bodies;⁵⁹ and (iii) replacing the requirement of comprehensive periodic reports with specially tailored reports.⁶⁰ Kjærum emphasizes that the treaty body system could have a greater impact on the development of human rights if some of the reporting obligations were harmonized and simplified.⁶¹ A group of former and current members of various treaty bodies have advocated enhanced coordination among the different procedures of U.N. treaty bodies while respecting each treaty body's autonomy and specific working methods.⁶² Such commentary is indicative of the on-going reform process that aims at consolidation and unification.⁶³

56. Zdzislaw Kedzia, *Mainstreaming Human Rights in the United Nations*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER 237 (Gudmundur Alfresson, et al. eds., 2009).

57. STEINER, ET AL., *supra* note 31, at 921.

58. U.N. Secretary General, *Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, Commission on Human Rights, U.N. Doc. E/CN.4/1997/74 (Mar. 27, 1997). *See also* World Conference on Human Rights, Apr. 20, 1993, *Status of Preparation of Publications, Studies and Documents for the World Conference*, U.N. Doc. A/CONF.157/PC/62/Add.11/Rev.1 (Apr. 22, 1993).

59. *Id.*

60. *Id.*

61. Kjærum, *supra* note 28, at 23.

62. International Seminar of Experts on the Reforms of the United Nations Human Rights Treaty Body System, Poznan, Pol., Sep. 28-29, 2010, *The Poznan Statement on the Reforms of the UN Human Rights Treaty Body System*, ¶ 16.

63. Michael Bowman, *Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform*, 7 (1) HUM. RTS. L. REV. 225, 226 (2007).

The ongoing reform process does not diminish the importance of the reporting procedure as a monitoring tool.⁶⁴ As Heli Niemi and Martin Scheinin observe, reporting makes a government accountable for its human rights policies before an international body.⁶⁵ Still, the reporting procedure stands to be improved.⁶⁶ As Michael O’Flaherty points out, citing the Dublin Statement on the Process of Strengthening of the U.N. Human Rights Treaty Body System⁶⁷ (Dublin Statement) by 35 past and current members of treaty bodies, “[r]eform should be a continuing process rather than an isolated event.”⁶⁸ It ought to be the “normal state of the treaty body system.”⁶⁹

B. Individual Communications Procedure

A treaty body may also be competent to receive and consider communications from or on behalf of individuals who are subject to a State Party’s jurisdiction but, at the same time, claims to be victims of treaty violations by the concerned State Party itself.⁷⁰ Admissibility requirements are observed.⁷¹ For instance, the Committee on Enforced Disappearances considers a communication inadmissible when:

64. HELI NIEMI & MARTIN SCHEININ, REFORM OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODY SYSTEM SEEN FROM THE DEVELOPING COUNTRY PERSPECTIVE 69 (2002).

65. *Id.* at 68.

66. The limitations on the Committee’s time and resources are discussed in Section IV of this Article.

67. University of Nottingham Human Rights Law Centre, The Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System, available at <http://www.nottingham.ac.uk/hrlc/documents/specialevents/dublinstatement.pdf> (last accessed Oct. 31, 2016).

68. Michael O’Flaherty, *Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement*, 10 HUM. RTS. L. REV. 319, 331 (2009) (citing University of Nottingham Human Rights Law Centre, The Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System, available at <http://www.nottingham.ac.uk/hrlc/documents/special events/dublinstatement.pdf> (last accessed Oct. 31, 2016)).

69. *Id.*

70. Office of the United Nations High Commissioner for Human Rights, Human Rights Treaty Bodies — Individual Communications, available at <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> (last accessed Oct. 31, 2016).

71. *Id.*

- (1) The communication is anonymous;
- (2) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;
- (3) The same matter is being examined under another procedure of international investigation or settlement of the same nature; or []
- (4) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.⁷²

“For the purpose of exhaustion of domestic remedies as a condition of admissibility, it seems that what is required is exhaustion not of *all* domestic remedies, but of *effective* domestic remedies only.”⁷³

An individual communications procedure can promote a more effective implementation of the explicit guarantee of the right not to be subjected to enforced disappearance in the CPED and enhance its enjoyment. To borrow the words of Andrew Byrnes and Jane Connors, this procedure can provide redress for individual grievances, stimulate changes in laws and practices, and create public awareness of the right.⁷⁴ The procedure in Article 31 of the CPED is based on the similar procedures of the First Optional Protocol to the ICCPR,⁷⁵ the CAT,⁷⁶ the ICMW,⁷⁷ and the Optional Protocol to the CEDAW,⁷⁸ which have made important contributions to the implementation of human rights standards.

72. CPED, *supra* note 12, art. 31 (2).

73. Ricardo A. Sunga, III, *The Committee on Enforced Disappearances and its Monitoring Procedures*, 17 DEAKIN L. REV. 151, 160 (2012).

74. Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women’s Convention*, 21 BROOK. J. INT’L L. 679, 699 (1996).

75. Optional Protocol to the International Covenant on Civil and Political Rights art. 3, *adopted* Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol to the ICCPR*].

76. CAT, *supra* note 7, art. 22 (2).

77. ICMW, *supra* note 10, art. 77.

78. First Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women art. 4, *adopted* Oct. 6, 1999, 2131 U.N.T.S. 83 (entered into force Dec. 22, 2000).

Nonetheless, the individual communications procedure is only optional.⁷⁹ A State Party needs to accept it by declaring at the time of ratification or at any time afterwards that it recognizes the treaty body's competence to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of the treaty.⁸⁰ Bal Sokhi-Bulley identifies the voluntary nature of the individual communications procedure as one of its weaknesses — States can refuse the competence of the Committee by simply not accepting it.⁸¹ Although the optional character of the individual complaint system is one of its weaknesses, it is unrealistic to expect States to make it mandatory.

As with the reporting procedure, human rights treaties similarly do not preclude the possibility of a follow-up procedure through the treaty body's rules.⁸² The CCPR has developed its own follow-up procedure upon the reasoning that it has the implied power to do so.⁸³ Accordingly, it has appointed a special rapporteur for follow-up on its views.⁸⁴ As a matter of practice, a State Party is given 90 days to provide information on measures taken to comply with its recommendations in its views.⁸⁵ If the State Party does not provide any, the special rapporteur may send a reminder, consult with State Party representatives directly, or organize a follow-up mission.⁸⁶ The Committee against Torture, Committee on the Elimination of Racial Discrimination, and the Committee on the Elimination of Discrimination against Women have developed their own follow-up procedures that build on the experience of the CCPR.⁸⁷

Through its case law in its individual communications system, not only can a treaty body determine whether there has been a violation of the treaty, but it can also clarify normative issues.⁸⁸ Though non-binding, the treaty

79. Bal Sokhi-Bulley, *The Optional Protocol to CEDAW: First Steps*, 6 HUM. RTS. L. REV. 143, 145 (2006).

80. *Id.*

81. *Id.* at 157.

82. Schmidt, *supra* note 53, at 25.

83. *Id.* at 26.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 25-27.

88. Alfred de Zayas, *Petitions before the United Nations Treaty Bodies: Focus on the Human Rights Committee's Optional Protocol Procedure*, in INTERNATIONAL

body's views have "practical effects."⁸⁹ States often respond to these views and treat them as a serious matter.⁹⁰ On the one hand, Manfred Nowak and Elizabeth McArthur go as far as calling treaty bodies like the CCPR "quasi-judicial" bodies⁹¹ while CCPR serving as its decisions on individual communications as authoritative interpretations of the ICCPR.⁹² On the other hand —

Steiner has argued that the Committee cannot realistically serve the basic dispute[]resolution function that informs adjudication by courts in many national legal systems. Nor can it effectively do justice in the individual case within the limits of its jurisdiction and[,] to that extent[,] vindicate the rule of law. Nor can it effectively protect rights under the ICCPR through deterrence. What remains is the function of 'expounding (elucidating, interpreting[,] and explaining) the Covenant so as to engage the Committee in an [on-going], fruitful dialogue' with all relevant actors.⁹³

Despite the divergent opinions on the exact legal status of the views, their utility as vehicles for clarifying normative issues is difficult to dispute. As Alfred de Zayas observes, though the CCPR is not a judicial body, its interpretation of the ICCPR has yielded quotable jurisprudence.⁹⁴ The development of follow-up procedures improves the implementation of its views and contributes to the perception that these views are meaningful expressions of human rights law.⁹⁵

An individual communications procedure also includes the power to grant interim measures, which can also be useful in urgent cases.⁹⁶ At any

HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER 37 (Gudmundur Alfresson, et al. eds., 2009).

89. Robert McCorquodale, *The Individual and the International Legal System*, in *INTERNATIONAL LAW* 318 (Malcolm Evans ed., 2006).

90. *Id.*

91. MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* 581 (2008 ed.). Nowak and McArthur explain that all inquiries of the Committee against Torture so far have been based on information from NGOs. *Id.*

92. RAIJA HANSKI & MARTIN SCHEININ, *LEADING CASES OF THE HUMAN RIGHTS COMMITTEE* 22 (2003 ed.) (citing STEINER, ET AL., *supra* note 31, at 915).

93. STEINER, ET AL., *supra* note 31, at 916.

94. de Zayas, *supra* note 88, at 76.

95. *Id.*

96. *Id.* at 40.

time after the receipt of a communication and before a determination on the merits has been reached, a treaty body can transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation.⁹⁷ Where a treaty body exercises its discretion, this “does not imply a determination of the merits of the communication.”⁹⁸

Interim measures are an important feature of individual communications procedures of treaty bodies. The CCPR has requested interim measures in a variety of cases.⁹⁹ Though its Optional Protocol does not mention interim measures, it has issued them as a matter of practice in accordance with its rules.¹⁰⁰ In an early case, *O.E. v. S*,¹⁰¹ the Committee requested that an alleged victim who had sought refuge in a country be not expelled to another country pending consideration of the case.¹⁰² In *Altesor v. Uruguay*,¹⁰³ it requested information on the state of health of an alleged victim who was reportedly beaten and subjected to electric shocks during detention.¹⁰⁴

In *Piandiong et al. v. Philippines*,¹⁰⁵ the Committee had occasion to describe its own interim measures as essential to its role in an individual communications system.¹⁰⁶ In that case, involving a request for a stay of the execution of three inmates on death row, the Committee stated that the mechanism should not be flouted by irreversible measures.¹⁰⁷

97. *Id.*

98. *Id.*

99. *Id.*

100. Rules of Procedure of the Human Rights Committee, *supra* note 52, rule 86.

101. *O.E. v. S*, United Nations Human Rights Committee, Comm. No. 22/1977, U.N. Doc. CCPR/C/OP/1 (July 26, 1978).

102. *Id.* at 5.

103. *Altesor v. Uruguay*, United Nations Human Rights Committee, Comm. No. 10/1977, U.N. Doc. CCPR/C/15/D/10/1977 (Mar. 29, 1982).

104. *Id.* at 2.

105. *Piandiong et al. v. Philippines*, Comm. No. 869/1999, CCPR/C/70/D/869/1999 (Oct. 19, 2000).

106. *Id.*

107. *Id.*

The Committee against Torture has similarly issued interim measures in accordance with its rules.¹⁰⁸ In *TPS v. Canada*,¹⁰⁹ acting on an applicant's allegation of a risk of torture in the event of deportation to India, the Committee against Torture requested that the applicant not be deported pending examination of his communication. The African Commission on Human and Peoples' Rights has similarly issued interim measures.¹¹⁰ In *International Pen v. Nigeria*,¹¹¹ the African Commission adopted interim measures requesting a stay of the execution by the Nigerian military regime of a writer and activist Ken Saro-Wiwa, Jr.¹¹²

Interim measures are central to a treaty body's protective function.¹¹³ As Jo Pasqualucci observes, "[t]he overriding importance of interim measures in human rights cases arises from their potential to terminate abuse."¹¹⁴ The consideration of communications can go on for months or even years.¹¹⁵ Interim measures can be a tool for saving lives and avoiding irreparable injury.¹¹⁶

C. Inter-State Communications Procedure

In the inter-State communications procedure, a State Party can recognize the competence of a treaty body to receive and consider communications, relaying its claim that another State Party is violating its treaty obligations.¹¹⁷ The treaty body will not receive communications concerning a State Party that has not made such a declaration.¹¹⁸

108. United Nations Committee Against Torture Rules of Procedure, U.N. Doc. CAT/C/3/Rev.3, rule 108.

109. *TPS v. Canada*, Committee against Torture, Comm. No. 99/1997, U.N. GAOR A/55/44, annex VIII, § A (May 16, 2000).

110. Gino Naldo, *International Measures in the UN Human Rights Committee*, 53 INT'L & COMP. L.Q. 449, 450 (2005) (citing *International Pen v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. Nos. 137/94, 139/94, 154/96, & 161/97 (2000)).

111. *International Pen*, Comm. Nos. 137/94, 139/94, 154/96 & 161/97.

112. Naldo, *supra* note 110, at 450.

113. *Id.* at 453.

114. Jo Pasqualucci, *Interim Measures in International Human Rights: Evolution and Harmonization*, 38 VAND. J. TRANSNAT'L L. 1, 3 (2005).

115. *Id.* at 41.

116. *Id.* at 4.

117. U.N. Complaints Procedures, *supra* note 18.

118. *Id.*

This mechanism is the weakest monitoring mechanism¹¹⁹ because it does not seem likely to be used.¹²⁰ Similar procedures in other human rights treaties have never been resorted to in practice.¹²¹ As Scott Leckie points out, a possible reason for the lack of resort to the inter-State communications is the perceived political motivation for its use and its being potentially damaging and threatening to a State's interests.¹²² In Egon Schwelb's words, it is not conducive to friendly relations between States.¹²³ For these reasons, those who had drafted the CRPD did not see the importance of providing for such a monitoring mechanism.¹²⁴

Nonetheless, Leckie asserts certain procedural, legal, and institutional benefits that can be derived from its use and argues that it remains relevant as evident from its use in other contexts like the case between Tunisia and Libya within the monitoring system of the International Labour Organization (ILO) and the case involving Turkey before the Council of Europe.¹²⁵ But other than these instances that Leckie cites from over 20 years ago, there is little indication of any added value to be gained from having the inter-State procedure.

D. Visit Procedure

When authorized to do so, upon receipt of reliable information indicating a State Party's serious violation of the provisions of the treaty, a treaty body, after consultation with the State Party concerned, may request its members to conduct a visit to the State Party concerned.¹²⁶ The treaty body must "notify the State [P]arty concerned, in writing, of its intention to organize a visit, indicating the composition of the delegation and the purpose of the

119. NOWAK & MCARTHUR, *supra* note 91, at 701.

120. U.N. Complaints Procedures, *supra* note 18.

121. *Id.*

122. Scott Leckie, *The Inter-State Complaints Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUM. RTS. Q. 249, 250 (1988).

123. Egon Schwelb, *The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol*, 12 TEX. INT'L L.J. 141, 161 (1977).

124. U.N. Complaints Procedures, *supra* note 18.

125. Leckie, *supra* note 122.

126. Article 33 does not state the purpose of the visit and apparently leaves it to the Committee to determine the purpose. See CPED, *supra* note 12, art. 33 (1).

visit. The State [P]arty should answer the treaty body within a reasonable time.”¹²⁷

Upon a State Party’s substantiated request, the treaty body may opt to postpone or cancel its visit.¹²⁸ Should the State Party agree to the visit, the treaty body and the State Party concerned should agree on the modalities of the visit.¹²⁹ The State Party should organize all the facilities that will be needed by the treaty body in the course of the visit.¹³⁰ After the visit, the treaty body must communicate to the State Party concerned its observations and recommendations.¹³¹ This visit procedure is not subject to an explicit declaration by State Parties to accept the competence of the treaty body, but they can opt out by means of a specific reservation to the provision granting the treaty body competence to carry out visits.¹³²

The visit enables a treaty body to respond to systematic violations of the rights that the Convention guarantees.¹³³ This visit procedure is exemplified by the inquiry procedure in Article 20 of the CAT that may include a visit.¹³⁴ The procedure authorizes the Committee against Torture to receive reliable information from any source, including non-government organizations (NGOs).¹³⁵ In relation to past experience with the inquiry procedure, Nowak and McArthur observe that the inquiry procedure “resembles to some extent *actio popularis* by NGOs,” on account of all inquiries of the Committee against Torture so far being based on information from NGOs.¹³⁶ In relation to the inquiry procedure of the

127. *Id.* art. 33 (2).

128. *Id.* art. 33 (3).

129. *Id.* art. 33 (4).

130. *Id.*

131. *Id.* art. 33 (5).

132. See CPED, *supra* note 12, art. 32.

133. *Id.* art. 33 (1).

134. CAT, *supra* note 7, art. 20 (1). A similar inquiry procedure is provided for in Articles 8 and 9 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and in Articles 6 and 7 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. See First Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 78, arts. 8-9 & Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, arts. 6-7, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

135. CAT, *supra* note 7, art. 20 (2).

136. NOWAK & MCARTHUR, *supra* note 91, at 65.

Committee on the Elimination of Discrimination against Women, Cees Flinterman and Ginney Liu state that the inquiry procedure is an opportunity for NGOs to report to the Committee alleged systematic or grave violations of women's human rights.¹³⁷

What sets the procedure into motion is reliable information indicating that a State Party is seriously violating the provisions of a treaty.¹³⁸ Flinterman and Liu have said that it is not a complaint procedure; rather, the treaty body has complete discretion to initiate the procedure after a determination that there is reliable information on gross or systematic violations of human rights.¹³⁹

However, while the inquiry procedure of the Committee against Torture is confidential,¹⁴⁰ the visit procedure of the Committee on Enforced Disappearances is not. Whereas, Article 20 of the CAT characterizes the inquiry procedure as confidential, Article 33 of the CPED makes no such characterization of the visit procedure and, in fact, makes it a duty of the Committee to communicate to the State Party concerned its observations and recommendations at the end of a visit.¹⁴¹ For the inquiry procedure, which relies on "close cooperation with the government concerned,"¹⁴² confidentiality translates to easier acceptance by States.¹⁴³ Still, the inquiry procedure provides for the possibility of the inclusion of a summary account in the annual report of the Committee against Torture.¹⁴⁴ Such a possibility "constitutes the main tool of pressure on State Parties that choose to ignore the provisions of the CAT and practice torture in a systematic and widespread manner, or prove to be uncooperative during the procedure."¹⁴⁵

137. Cees Flinterman & Ginney Liu, *CEDAW and the Optional Protocol: First Experiences*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER 96 (Gudmundur Alfresson, et al. eds., 2009).

138. CPED, *supra* note 12, art. 33 (1).

139. Flinterman & Liu, *supra* note 137, at 96.

140. CAT, *supra* note 7, art. 20 (5). The deliberations, in particular, are confidential. *Id.*

141. Compare CAT, *supra* note 7, art. 20 (5), with CPED, *supra* note 12, art. 33 (5).

142. NOWAK & McARTHUR, *supra* note 91, at 662.

143. *Id.*

144. CAT, *supra* note 7, art. 20 (5).

145. AMRITA MUKHERJEE, TORTURE AND THE UNITED NATIONS: CHARTER AND TREATY-BASED MONITORING 103 (2008 ed.).

For the visit procedure, lack of confidentiality poses a challenge to the Committee on Enforced Disappearances to devise ways to cooperate closely with States that it needs to consult with¹⁴⁶ and work together with them to define the modalities of a visit and identify the facilities needed for the successful completion of a visit.¹⁴⁷ But the opportunity to communicate its observations and recommendations without restriction can serve as an important pressure-point for the Committee on Enforced Disappearances to make the most of the visit procedure.¹⁴⁸

The visit procedure may well develop into an important fact-finding tool.¹⁴⁹ In Khushal Vibhute's words, it is an innovative procedure for effectively preventing human rights violations.¹⁵⁰ Furthermore, what Sokhi-Bulley has said that it can contribute to a more detailed elaboration of the meaning of the obligations of State Parties.¹⁵¹ Bent Sørensen adds that the inquiry procedure is "potentially forceful."¹⁵² For her part, Mukrita Mukherjee states that although the procedure is time-consuming and relies on the responses of States and dialogue, it "has developed into an advanced monitoring procedure" on account of its fact-finding methodology that has produced detailed accounts.¹⁵³

IV. LITIGATION AND ALTERNATIVE DISPUTE SETTLEMENT

The procedures of treaty bodies partake of the nature of litigation and ADR. On one hand, the individual communications procedure is highly litigious — once an individual submits a communication under this procedure, the State concerned is given the opportunity to respond to it, provided that

146. CPED, *supra* note 12, art. 33 (1).

147. *Id.* art. 33 (4).

148. *Id.* art. 33 (5).

149. The inquiry procedure is also a key feature of the Optional Protocol to the International Covenant on Economic, Social and Culture Rights. Optional Protocol to the ICCPR, *supra* note 75. See also Claire Mahon, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 HUM. RTS. L. REV. 617 (2008).

150. Khushal Vibhute, *The 2007 International Convention against Enforced Disappearance: Some Reflections*, 2 MIZAN L. REV. 287, 309 (2008).

151. Sokhi-Bulley, *supra* note 79, at 157.

152. Bent Sørensen, *CAT and Articles 20 and 22*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER 100 (Gudmundur Alfresson, et al. eds., 2009).

153. MUKHERJEE, *supra* note 145, at 103.

admissibility requirements are met.¹⁵⁴ Views are then rendered at the end of procedure, with the goal of making a finding of a violation and enumerating appropriate steps that a State Party ought to take.¹⁵⁵

On the other hand, the reporting procedure, inter-State communications procedure, and visit procedure have elements of arbitration, conciliation, and mediation. In the reporting procedure, a State Party submits a report on steps it has taken to comply with its obligations under the treaty.¹⁵⁶ The treaty body then behaves like an arbiter, evaluating the sufficiency of these steps and offering its thoughts on what the State Party should do.¹⁵⁷ In the visit procedure, the treaty body, in carrying out its inquiry, similarly performs the function of an arbiter who decides if serious violations of human rights are being committed by a State Party.¹⁵⁸ In the inter-State communications procedure, the treaty body serves as a conciliator and mediator.¹⁵⁹ In this procedure, which remains unused, there is an effort to bring the State Parties to a peaceful settlement of their differences.¹⁶⁰

It is important to take stock of the treaty bodies' limitations in order to understand and evaluate their roles and characters. Like other international bodies, there are constraints on what the treaty bodies can do.

A. Treaty Bodies Lack Enforcement Procedures

Treaty bodies have no enforcement powers. After all, unlike commercial obligations, human rights obligations are generally non-reciprocal.¹⁶¹ As renowned jurist Antonio Cassese explains, States are not induced to comply with human rights obligations for fear that other States might otherwise feel at liberty to disregard them.¹⁶²

154. See Office of the United Nations High Commissioner for Human Rights, *supra* note 70.

155. See Schmidt, *supra* note 53, at 25.

156. See U.N. Monitoring, *supra* note 26.

157. *Id.*

158. CPED, *supra* note 12, art. 33 (1).

159. See Leckie, *supra* note 122.

160. *Id.*

161. Preeti Baghani, *Revisiting the Countermeasures Defense in Investor-State Disputes*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013-2014 463 (Andrea Bjorkland ed., 2015).

162. Cassese, *supra* note 43, at 151.

Even when the right to initiate [*ex post facto*] adjudication is given to individuals and international bodies and not just [S]tates, we should not expect that it will compel compliance to the same extent as more reciprocal obligations, where the inherent incentives to comply are stronger. The prospect of an adverse human rights judgment is simply not as fearful to [S]tates as the continuing threat of retaliatory economic disadvantage that may follow from the breach of a commercial treaty.¹⁶³

Such a limitation has led to calls for reform that includes the possibility of a world court of human rights — an international human rights body that has the ability to establish the facts, to decide on alleged violations, and, in case of violations, to provide adequate reparation.¹⁶⁴

Where litigation stops, ADR begins for treaty bodies. Follow-up procedures of treaty bodies are a significant and encouraging development.¹⁶⁵ Marcus Schmidt describes follow-up activities as now being at the core of the activities of treaty monitoring bodies.¹⁶⁶ He observes a growing realization that effective follow-up activities provide the crucial link — and a window of opportunity — for better and more consistent implementation by these bodies at the domestic level.¹⁶⁷ With physical compulsion outside of its competence, the challenge is greater for the treaty bodies to build on past experiences with follow-up procedures and to make creative use of its mandate to induce respect for human rights.¹⁶⁸

B. Treaty Bodies Lack Time and Resources

Treaty bodies are subject to limitations with respect to the availability of time and resources. Kofi Quashigah establishes a link between budgetary constraints and the effectivity of a treaty body.¹⁶⁹ The CCPR is subject to similar limitations —

163. ANTONIO CASSESE, *THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS OF ANTONIO CASSESE* 361 (2008 ed.).

164. Manfred Nowak, *Eight Reasons Why We Need a World Court of Human Rights*, in *INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER* 697 (Gudmundur Alfresson, et al. eds., 2009).

165. Schmidt, *supra* note 53, at 25.

166. *Id.* at 33.

167. *Id.*

168. *Id.* at 29.

169. Kofi Quashigah, *The African Charter on Human and Peoples' Rights: Towards a More Effective Reporting Mechanism*, 2 *AFRICAN HUM. RTS. L.J.* 261, 279-80 (2002).

The Committee meets for three sessions annually, each three weeks long, at the [U.N.] Office in Geneva (twice) and at the [U.N.] headquarters in New York. There is some intersessional work by individual members in the context of Working Groups, which meet for one week prior to the start of each session. Living and travel expenses are paid by the [U.N.] but since 2002[,] an annual honorarium of \$3,000 previously paid to members had been reduced to a token of \$1, in order to save money. The work is part-time, members hold 'regular,' often full-time, jobs, and must fit the Committee's work into already busy schedules.¹⁷⁰

Insofar as the CCPR is concerned, in spite of time and resource constraints, it "has assumed the character, structure[,] and functions that it has."¹⁷¹ There is the challenge to transcend these limitations if it is to make its own contribution to fostering greater respect for human rights. Similarly, there is a need for treaty bodies to work within existing parameters and make the most out of their roles in order to make a meaningful contribution.

V. CONCLUSION

Human rights have improved vastly throughout the years. Standards have been set and compliance with these standards by States has also increased.¹⁷² The dialogue made possible by U.N. human rights treaty bodies has contributed to this development. This dialogue has included what may be considered to be various permutations of litigation, arbitration, mediation, and conciliation.

The developments in the field of human rights have not stopped. New treaties are being adopted and, consequently, new treaty bodies are being established. Along with the increase in the procedures of these treaty bodies, standards are also being refined.¹⁷³ The broadness of human rights is now being more fully understood. Creative ways to induce compliance with human rights obligations have resulted in a far greater reach of human rights protection than ever before seen. It is a process that will not probably have an end in the near future. One way of looking at this process is that it is really about determining and making available the best possible mix of elements of human rights litigation and ADR.

170. STEINER, ET AL., *supra* note 31, at 847.

171. *Id.* at 844.

172. Office of the United Nations High Commissioner for Human Rights, Revised Targets, *available at* http://www2.ohchr.org/english/OHCHRreport2015/allegati/21_A_II_Revised_targets_2015.pdf (last accessed Oct. 31, 2016).

173. *Id.*