NILS-HENDRIK GROHMANN

Strengthening the UN Human Rights Treaty Bodies

Jus Internationale et Europaeum
202

Mohr Siebeck

Jus Internationale et Europaeum

herausgegeben von
Thilo Marauhn und Christian Walter

202

Nils-Hendrik Grohmann

Strengthening the UN Human Rights Treaty Bodies

An Analysis of the Committees' Legal Powers and Possibilities for Reform

Mohr Siebeck

Nils-Hendrik Grohmann, born 1992; Law studies at the University of Münster and Oslo; 2018 Research assistant at the Chair of European and International Law at the University of Potsdam; 2022 Legal clerk at the Kammergericht Berlin.
orcid.org/0000-0001-8328-2944

At the same time doctoral thesis, University of Potsdam, 2023

ISBN 978-3-16-162825-2 / eISBN 978-3-16-162826-9
DOI 10.1628/978-3-16-162826-9

ISSN 1861-1893 / eISSN 2568-8464 (Jus Internationale et Europaeum)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at *https://dnb.dnb.de*.

The book was printed on non-aging paper and bound by Gulde Druck in Tübingen.

Printed in Germany.

Preface

This thesis was accepted at the Faculty of Law of the University of Potsdam in the winter semester 2022/2023. Due to the ongoing reform process of the UN Human Rights Treaty Bodies, new developments are constantly emerging and unfolding. Available sources and documents were taken into account as far as possible until summer 2023.

Special thanks go first and foremost to my supervisor and Doktorvater, Professor Dr. Andreas Zimmermann LL.M. (Harvard). This thesis was written during my time as a research assistant at his Chair of European and International Public Law. The success of the work is largely due to his constant support and encouragement. I always enjoyed working at the Chair, it opened up new areas of international law for me and was decisive for the success of my PhD. I would also like to thank Professor Dr. Wojciech Burek for the speedy preparation of his review of my thesis.

Representing the entire team at the Chair, I would like to mention Ullrike Schiller in particular, who, along with Mr. Zimmermann, always has an open ear for all members of staff and, like everyone else, made me feel very welcome from the very first day in September 2018.

Among those in my private life, I would like to thank Dr. Lena Gumnior first, who wrote her PhD at the same time as me and who was always open for discussions and encouraging conversations; and who also accompanied me many times at the Staatsbibliothek Berlin. I would also like to mention Johannes Becker, Charlotte Föcking, Marcin Korbanek, Lydia Kühn, Kamil Pawłowski and Dr. Frauke Rödel. They have learned almost as much as I have about the UN treaty bodies over the past few years and have therefore always been able and willing to make critical comments on my writing.

The same holds true for my husband, Marco Štorman, who was probably more closely and constantly involved in the writing process than any other person. Thank you for your encouragement and support, for bearing with me during some stressful times and for patiently listening when I shared my thoughts out loud.

Finally, the greatest thanks go to my parents, Martina and Dr. Olaf Grohmann, who have supported me in every conceivable way throughout my entire life and without whom I would probably never have started and completed a PhD. This thesis is dedicated to them.

Berlin, December 2023

Overview

Table of Contents

Introduction

A. United Nations human rights treaty bodies

At the global level, the main responsibility for the protection and advancement of human rights standards resides with the United Nations human rights treaty bodies.[1] These are the Human Rights Committee, established by the International Covenant on Civil and Political Rights (ICCPR),[2] the Committee on Economic, Social and Cultural Rights (CESCR Committee), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[3] the Committee on the Elimination of Racial Discrimination (CERD Committee), established by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[4] the Committee on the Elimination of Discrimination against Women (CEDAW Committee), established by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[5] the Committee against Torture, established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[6] the Committee on the Rights of the Child (CRC Committee), established by the Convention on the Rights of the Child (CRC),[7] the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW Committee), established by the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW),[8] the Committee on Enforced Disappearances (CED Committee), established by the International Convention for the Protection of All Persons from Enforced Disappearance (CED),[9] and finally the Committee on the Rights of Persons with Disabilities (CRPD Committee), which has been established by the Convention on the Rights of Persons with Disabilities.[10]

---

[1] *Keller/Ulfstein*, Introduction, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, p. 2.

[2] Adopted 16 December 1966, entered into force 23 March 1977, 999 UNTS 171.

[3] Adopted 16 December 1966, entered into force 03 January 1976, 993 UNTS 3.

[4] Adopted 21 December 1965, entered into force 04 January 1969, 660 UNTS 195.

[5] Adopted 18 December 1979, entered into force 03 September 1981, 1249 UNTS 13.

[6] Adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85.

[7] Adopted 20 November 1989, entered into force 02 September 1990, 1577 UNTS 3.

[8] Adopted 18 December 1990, entered into force 01 July 2003, 2220 UNTS 3.

[9] Adopted 20 December 2006, entered into force 23 December 2010, 2716 UNTS 3.

[10] Adopted 13 December 2006, entered into force 03 May 2008, 2515 UNTS 3.

The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, established by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[11] is yet another treaty body operating at the UN level.[12] However, it differs from the other nine treaty bodies in that its mandate is limited to preventive action against torture by establishing a system of regular visits and providing advice and assistance to State parties and national preventive mechanisms.[13] It will thus not be considered in the work at hand.

These monitoring bodies are composed of independent experts who serve in their personal capacity and who normally meet not more than three months a year in total. By ratifying one of the UN human rights core treaties, a State party automatically submits itself to the mandatory State reporting procedure, existent under each of the UN human rights core treaties. Among various possible enforcement mechanisms, State reporting presents the arguably weakest and the most sovereign-friendly solution,[14] and is hence the procedure that is most likely accepted by contracting parties.

Under the reporting procedure, each State party is obliged to periodically submit reports on measures taken to implement treaty guarantees. These reports are subsequently reviewed by the respective treaty body.[15] After the examination, the Committees adopt concluding observations, which reflect the Committee's dialogue with the State party under review and comprise both positive developments and areas of concern with regard to the State party's human rights record. A reporting cycle is terminated with a written follow-up procedure, under which the State party concerned is expected to submit information on the implementation of specific recommendations identified by the Committees.

In addition, treaty bodies may receive and consider individual communications, but subject to the acceptance of State parties, as they must either ratify the respective Optional Protocol foreseeing such a procedure,[16] or make a decla-

---

[11] Adopted 18 December 2002, entered into force 22 June 2006, 2375 UNTS 237.

[12] Adopted 18 December 2002, entered into force 22 June 2006, 2375 UNTS 237.

[13] For an overview of the mandate of the Subcommittee on the Prevention of Torture, see *Buchinger*, Article 11, Mandate of the Subcommittee, in: Nowak/Birk/Monina (eds.), The United Nations Convention Against Torture and its Optional Protocol: A Commentary, Second Edition, 2019; see also *Byrnes*, The Committee against Torture and the Subcommittee for the Prevention of Torture, in: Mégret/Alston (eds.), The United Nations and Human Rights: A Critical Appraisal, Second Edition, 2020, pp. 513–517; *Kessing*, New Optional Protocol to the UN Torture Convention, Nordic Journal of International Law 72 (2003), 571.

[14] *Kälin*, Examination of state reports, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, p. 17; *O'Flaherty*, The United Nations Human Rights Treaty Bodies as Diplomatic Actors, in: O'Flaherty et al. (eds.), Human Rights Diplomacy: Contemporary Perspectives, 2011, p. 157.

[15] The review by independent experts sets the review process decisively apart from the Universal Periodic Review, which serves as the second "main" forum at the global level to evaluate State parties as regards their compliance with human rights standards.

[16] The individual complaints procedure before the Human Rights Committee is provided

ration to accept said complaints procedure pursuant to relevant treaty provisions.[17] Especially in countries that are not members of one of the three regional human rights systems, the UN human rights treaty bodies constitute the only supervisory system as far as human rights are concerned and thus provide individual redress and relief for victims at the international level.

Next to these two kinds of supervisory mechanisms, most of the UN human rights treaty bodies adopt so-called General Comments, by which they clarify their own understanding of substantive treaty provisions or provide guidance to State parties as to how to meet the requirements of periodic reports, for instance.[18] Further functions discharged by treaty bodies and that complete the picture include the inter-State complaints mechanism,[19] the early warnings and urgent actions procedure,[20] and the inquiry procedure.[21] Specifically, the last of these constitutes a complementary function to both the reporting and complaints

---

for by the First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171; before the CESCR Committee by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 05 May 2013), UN General Assembly, Resolution 63/117, UN Doc. A/RES/63/117; before the CEDAW Committee by the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 06 October 1999, entered into force 22 December 2000), 2131 UNTS 83; before the CRPD Committee by the Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 03 May 2008), 2518 UNTS 283; before the CRC Committee by the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014), UN General Assembly, Resolution 66/138, UN Doc. A/RES/66/138.

[17] Article 14(1) CERD; article 22(1) CAT; article 31(1) CED; and article 77(1) CMW, however, so far, the required number of ten submitted declarations pursuant to article 77(8) CMW has not yet been reached.

[18] See generally *Keller/Grover*, General Comments of the Human Rights Committee and their legitimacy, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, pp. 116–198.

[19] Until recently, the inter-state complaints mechanism has been lying dormant, but three procedures are currently pending before the CERD Committee, see for their documentation: https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx (last access: 21.08.2023).

[20] The CERD Committee developed said procedure under article 9(1)(b) CERD, Report of the Committee on the Elimination of Racial Discrimination (42nd and 43rd session), UN Doc. A/48/18 (1993), Annex III; *Thornberry*, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary, 2016, The Convention and the Committee, pp. 49–51; under the CED, it is article 30 that provides for the urgent action procedure.

[21] The inquiry procedure is provided for by article 20 CAT, article 33 CED, article 8 OP CEDAW, article 6 OP CRPD, article 11 OP ICESCR and article 3 Third OP CRC.

procedure, as it allows the treaty bodies to react to "allegations of systematic, grave, or serious violations".[22]

Provided that a State party has ratified all of the nine UN human rights core treaties, it will be subject to international scrutiny regarding a wide range of human rights, covering both civil and political rights and socio-economic rights, as well as more group- and issue-specific treaties. Next to their manifold functions and mandates, treaty bodies are also said to have contributed to the development of both international law in general, and human rights law in particular,[23] for instance the approach to invalid reservations or the broadening of substantive standards.

Against this backdrop, the UN human rights treaty bodies might appear to be an unprecedented success story in terms of implementing human rights and developing international standards further. But what may sound promising on paper is anything but entirely positive in reality. Instead, the human rights treaty bodies are confronted with a considerable number of challenges when exercising their mandates.

B. Problems faced by human rights treaty bodies

First, there are inherent weaknesses, such as the non-binding status of treaty body recommendations or views adopted under the individual complaints procedure,[24] which sets treaty bodies apart from regional human rights courts, for instance. At the same time, this kind of finding does not necessarily signify that treaty body pronouncements are void of any effect.[25] They are accorded "great

---

[22] *Oette*, The UN Human Rights Treaty Bodies: Impact and Future, in: Oberleitner (ed.), International Human Rights Institutions, Tribunals, and Courts, 2018, p. 107.

[23] *Oette*, The UN Human Rights Treaty Bodies: Impact and Future, in: Oberleitner (ed.), International Human Rights Institutions, Tribunals, and Courts, 2018, p. 104, with specific reference to the CESCR Committee and socio-economic rights; *van Alebeek/Nollkaemper*, The legal status of decisions by human rights treaty bodies in national law, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, p. 357; *Klein*, Impact of Treaty Bodies on the International Legal Order, in: Wolfrum/Röben (eds.), Developments of International Law in Treaty Making, 2005, p. 575, who detects a "norm creating function" in relation to General Comments.

[24] *Tomuschat*, Human Rights: Between Idealism and Realism, Third Edition, 2014, p. 233; *Ulfstein*, Individual Complaints, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, p. 94; *O'Flaherty*, The Concluding Observations of United Nations Human Rights Treaty Bodies, Human Rights Law Review 6 (2006), 27, 32, who accords "advisory" character to concluding observations; see *Helfer/Slaughter*, Toward a Theory of Effective Supranational Adjudication, Yale Law Journal 107 (1997), 273, 280, who nonetheless argue that the Human Rights Committee began to act more and more like a court.

[25] See for instance *Neuman*, Giving Meaning and Effect to Human Rights, The Contribution of Human Rights Committee Members, in: Moeckli/Keller/Heri (eds.) The Human Rights Covenants at 50: Their Past, Present, and Future, 2018, p. 34, who observes that treaty

weight"[26] or an "authoritative status",[27] and State parties that have ratified the human rights core treaties are at least expected to comply in good faith with their treaty obligations, which also entails giving due respect to the output generated by the Committees.[28] Second, looking at the implementation of recommendations, treaty bodies exhibit a weak mandate with regard to the enforcement of recommendations and views.[29] Most of the treaties do not provide for any express power to follow-up the implementation of recommendations or views. The missing "legal and actual capacity to enforce the obligations"[30] signifies that treaty bodies may well articulate useful and valuable recommendations in the course of examining a State party's human rights record, but once the constructive dialogue in Geneva is over, there is hardly any possibility for treaty bodies to influence the situation on the ground.

Among the various functions and tasks exercised by treaty bodies, it is especially the State reporting procedure that has given rise to serious concerns. State parties do not comply with their reporting obligations, both in terms of non-submission as well as reports of low quality.[31] State reports often do not even provide a minimum of sufficient information for treaty bodies to examine the respective State party's human rights record in a reasonable manner. In these cases, treaty bodies need to rely on other sources of information, but these may present themselves equally "highly selective" or just focus on a particular prob-

---

body findings may persuade State parties or may "reinforce internal political forces and social movements arguing for reform."

[26] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, at para. 66.

[27] *Reiners*, Transnational Lawmaking Coalitions for Human Rights, 2021, pp. 33–35; *Kälin/Künzli*, The Law of International Human Rights Protection, Second Edition, 2019, p. 218; *Payandeh*, Fragmentation within international human rights law, in: Andenas/Bjorge (eds.), A Farewell to Fragmentation: Reassertion and Convergence in International Law, 2015, p. 305, who states that treaty body pronouncements are "highly authoritative and significantly influence legal discourse and human rights practice"; *O'Flaherty*, The Concluding Observations of United Nations Human Rights Treaty Bodies, Human Rights Law Review 6 (2006), 27, 36, speaking of "notable authority", but under the restriction that the recommendation must be linked to the respective treaty body's instrument and must not refer to extraneous and unrelated matters.

[28] Human Rights Committee, General Comment No. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/33, 25.06.2009, para. 15, which states that a "duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations."

[29] *Ramcharan*, Modernizing the UN Human Rights System, 2019, p. 176.

[30] *Gaer*, Implementing Treaty Body Recommendations: Establishing Better Follow-Up Procedures, in: Bassiouni/Schabas (eds.), New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?, 2011, p. 107.

[31] *Giegling*, Challenges and Chances of a Written State Report: Analysis and Improvement of a Monitoring Instrument on the Implementation of Human Rights, 2021, p. 66.

lem and thus do not provide a comprehensive overview of the situation in the State party concerned.[32] In line with the weaker institutional design of treaty bodies, possible reactions on the part of treaty bodies to put an end to non-compliance are likewise scarce. And even when State parties have submitted their reports in a timely manner, appeared before the treaty bodies and have participated in the constructive dialogue, this does not automatically signify that the State party under review will eventually respect and implement the recommendations made by the respective Committee. At the same time, however, it must not be overlooked that non-compliance does not always represent a deliberate breach of reporting obligations, but can also result from a State party simply being unable to meet all of its numerous reporting obligations.[33] Provided that a State party has ratified all of the UN human rights core treaties, it theoretically must submit an average of two reports per year,[34] not to mention the preparation and submission of other reports under regional human rights treaties.[35]

Moreover, quite paradoxically, the treaty body system is also taken to be a victim of its own success.[36] Both the uncoordinated growth of the system and the increasing number of ratifications have pushed it to its limits.[37] Due to prevailing resource constraints, treaty bodies would not be able to handle the workload that would exist if all State parties were fully compliant with their reporting obligations under each treaty, let alone the increasing number of filed and pending individual communications that await consideration.[38]

---

[32] *Bayefsky*, Introduction, in: Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century, 2000, p. xviii.

[33] *Kälin*, Examination of state reports, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, p. 18.

[34] *Morijn*, Reforming United Nations Human Rights Treaty Monitoring Reform, Netherlands International Law Review 58 (2011), 295, 302.

[35] In the European context, a comparable reporting system, which is to entail periodic reports submitted to an independent expert organ, is established by articles 21 to 29 of the European Social Charter, for an overview of the system, see *de Schutter/Sant'Ana*, The European Committee of Social Rights (the ECSR), in: de Beco (ed.), Human Rights Monitoring Mechanisms of the Council of Europe, 2012, pp. 71–99; in the African context, article 62 of the African Charter on Human and Peoples' Rights requires State parties to submit every two years a report on the legislative or other measures taken to give effect to rights and freedoms enshrined in the Charter. For an overview of the procedure, see *Murray*, The African Charter on Human and Peoples' Rights: A Commentary, 2019, Article 62, State Reporting.

[36] *Crawford*, The UN human rights treaty system: A system in crisis?, in: Alston/Crawford (eds.), The Future of UN Human Rights Treaty Monitoring, 2000, p. 3.

[37] *Abashidze/Koneva*, The Process of Strengthening the Human Rights Treaty Body System: The Road towards Effectiveness or Inefficiency?, Netherlands International Law Review 66 (2019), 357, 362; between 2004 and 2012, the treaty body system has doubled in size with the addition of four new treaties and three additional individual complaints procedures, *Pillay*, Strengthening the United Nations human rights treaty body system, p. 17; see also the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2, 22.03.2006, para. 18.

[38] *Kälin*, Examination of state reports, in: Keller/Ulfstein (eds.), UN Human Rights Treaty

Further problems which add up to the system's shortcomings are the quality and independence of treaty body members,[39] the lack of visibility of and knowledge about the system,[40] and the growing volume of documentation, which is a logical consequence of more and more State parties ratifying and reporting under UN human rights treaties.[41] The latter specifically requires additional costs of translation, which again has negative repercussions on the system's already scarce resources.

Probably the most disillusioning aspect of the whole treaty body system is the fact that the above-described findings have been threatening the system almost since its inception and despite repeated attempts at reform, no significant improvements have been achieved yet.[42] The fact that the Committees are chronically lacking the necessary resources is not a novelty, but recent calls made indicate that the situation has only deteriorated.[43] Unexpected budgetary constraints would have almost led to the cancellation of treaty body sessions in autumn 2019, which posed a serious threat to undermine the system and would have had a considerable impact on all of the functions performed by the various Commit-

---

Bodies: Law and Legitimacy, 2012, pp. 71–72; *Rodley*, Duplication and Divergence in the Work of the United Nations Human Rights Treaty Bodies: A Perspective from a Treaty Body Member, American Society of International Law Proceedings 105 (2011), 512; *Bayefsky*, Introduction, in: Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century, 2000, p. xviii.

[39] *Carraro*, Electing the experts: Expertise and independence in the UN human rights treaty bodies, European Journal of International Relations 25 (2019), 826, 828, who describes the election of treaty body members as "highly politicized" and marked by "negotiations and exchanges of votes between countries". The author also detects variances with a view to the level of expertise and independence of Committee members; *Ulfstein*, Individual Complaints, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, pp. 85–86, suggesting to elect treaty body members openly, contrary to the current *modus operandi* with elections by secret ballot; cf. Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2, 22.03.2006, para. 22.

[40] *Pillay*, Strengthening the United Nations human rights treaty body system, p. 88; *Morijn*, Reforming United Nations Human Rights Treaty Monitoring Reform, Netherlands International Law Review 58 (2011), 295, 302.

[41] *Pillay*, Strengthening the United Nations human rights treaty body system, p. 24.

[42] See *Egan*, Transforming the UN Human Rights Treaty System: A Realistic Appraisal, Human Rights Quarterly 42 (2020), 762, 765, speaking of a "perpetual crisis"; UN General Assembly, Status of the human rights treaty body system, Report of the Secretary-General, UN Doc. A/77/279, 10.01.2020, paras. 14–18, with an overview of the reporting compliance by State parties. 86 per cent of all State parties have at least one report outstanding. Under current working methods, the Committees would need approximately 3.2 years to clear the backlog of reports, see in the same document para. 18. With a view to individual communications pending before the Committees, the situation seems equally dramatic with 1.800 communications currently pending paras. 19–21.

[43] See exemplary the call made by the Human Rights Committee in one of its more recent annual reports, Report of the Human Rights Committee (126th, 127th and 128th session), UN Doc. A/75/40 (2020), paras. 39–40.

tees. As one can imagine, the COVID-19 pandemic also played its part in exacerbating the situation and has brought the system to a halt.[44]

Last but not least, it is one thing for a State party to formally participate in the State reporting procedure, but quite another for it to accept and eventually implement the recommendations adopted by the treaty bodies. Whereas the lack of political will at the national level might be one explanation for implementation deficits, the phenomenon of low compliance might also be the result of imprecise and superficial concluding observations, leaving it unclear to the State party how to comply with their substantive treaty obligations.[45] Yet, given that concluding observations reflect the dialogue with the State party concerned, which in turn is (partially) based on the State report submitted, reports of low quality will also lead to the adoption of concluding observations with limited informative value.[46] It is in these cases that information submitted by NGOs and civil society representatives can close this lacuna.[47] However, this does not guarantee that the treaty's implementation is comprehensively covered by this information and such approach presupposes the existence of active and participating NGOs in the country under review.[48] Ultimately, notwithstanding the fact that the quality of concluding observations is said to have improved, it hinges on the will of State parties to implement treaty body findings, and the exact influence of treaty bodies is generally considered hard to measure.[49]

---

[44] "Work of human rights treaty bodies at risk, warn UN Committee Chairs", https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26147&LangID=E (last access: 21.08.2023); see also Discussion paper of the Informal Working Group on COVID-19, https://www.ohchr.org/EN/HRBodies/AnnualMeeting/Pages/Session32.aspx (last access: 21.08.2023).

[45] See generally for the quality of concluding observations *O'Flaherty*, The Concluding Observations of United Nations Human Rights Treaty Bodies, Human Rights Law Review 6 (2006), 27.

[46] *Kälin*, Examination of state reports, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, p. 60.

[47] See exemplarily for the importance of NGOs under the reporting procedure, *Mutzenberg*, NGOs, Essential Actors for Embedding Covenants in the National Context, in: Moeckli/Keller/Heri (eds.), The Human Rights Covenants at 50: Their Past, Present, and Future, 2018, pp. 77–84.

[48] *Kälin*, Examination of state reports, in: Keller/Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, pp. 62–63.

[49] For studies on the effect of treaty bodies at the domestic level, see *Creamer/Simmons*, The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties, American Journal of International Law 114 (2020), 1; *Krommendijk*, The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?, Intersentia, 2014; *Heyns/Viljoen* (eds.), The Impact of the United Nations Human Rights Treaties on the Domestic Level, 2002.

C. Fragmentation of human rights law within the treaty body system

The underlying theoretical reason for the system's shortfalls may well be the fragmented status of human rights law, and the arguably equally fragmented state of the UN human rights treaty system. Under general international law, the debate about the fragmented state of the law, its negative and positive implications and how to overcome or deal with fragmentation might have had their "heydays" in the 2000s and the proliferation of sub-regimes, and its consequences might have been largely accepted by now.[50] It now primarily focuses on ways and means of dealing with the fragmented state of international law.[51]

As a matter of fact, all characteristics of the fragmentation of the general international legal order can be found in the specialized field of human rights law.[52] Due to increased norm-setting activities at the universal and regional level, several "human rights sub-treaty regimes" have been developed. Group- and issue-specific treaties have been added, driven by the belief or necessity to focus on the respective vulnerable and marginalized group of individuals or the specific form of violation of rights. The establishment of yet another treaty often entails the establishment of another monitoring body, which applies and interprets its own constituent instrument. Ensuing from said multiplication of entities entrusted with applying and monitoring their own treaties, which overlap to a great extent as far as substantive rights and guarantees are concerned,[53] "decisional fragmentation" might occur. This term signifies that "two courts seized of the

---

[50] *Peters*, The refinement of international law: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law 15 (2017), 671, 674; see also *Broude*, Keep Calm and Carry on: Martti Koskenniemi and the Fragmentation of International Law, Temple International & Comparative Law Journal 27 (2013), 279, 280.

[51] See for example *Andenas*/*Bjorge* (eds.), A Farewell to Fragmentation: Reassertion and Convergence in International Law, 2015; with specific focus on human rights law, *Heyns*/*Killander*, Universality and the Growth of Regional Systems, in: Shelton (ed.), The Handbook of International Human Rights Law, 2013, p. 695, who state that "the dangers of the fragmentation of international human rights law by breakaway movements have not come to pass."

[52] *Payandeh*, Fragmentation within international human rights law, in: Andenas/Bjorge (eds.), A Farewell to Fragmentation: Reassertion and Convergence in International Law, 2015, pp. 298–299, who argues that similar problems related to fragmentation can be found between the UN human rights treaties and treaty bodies themselves; see also *Ajevski*, Fragmentation in International Human Rights Law – Beyond Conflict of Laws, Nordic Journal of Human Rights 32 (2014), 87.

[53] *Morijn*, Reforming United Nations Human Rights Treaty Monitoring Reform, Netherlands International Law Review 58 (2011), 295, 317; the research on diverging or congruent interpretations in international human rights law often compares the approaches taken by the regional bodies or compares regional bodies with selected human rights treaty bodies, see for instance the contributions in Buckley/Donald/Leach (eds.), Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems, 2016.

same issue render contradictory decisions."[54] While diverging interpretations as such might lead to a broader and "denser"[55] body of case law in the first place and could secondly prompt international courts and tribunals to develop the most sophisticated and well-reasoned solution to a legal problem,[56] State parties could as well shield themselves behind contradicting judgments, views or recommendations.[57] They could just accept the less far-reaching solution as to the restriction of governmental powers, or could simply refuse to comply with *any* of the recommendations made if they contradict each other.[58] On the other hand, diverging opinions offer at the same time the possibility of filing petitions with the one institution that is deemed to render the most applicant-friendly decision. In this case, forum shopping proves to be a positive means that offers advantages and thus strategic opportunities to individuals seeking legal protection at the international level.[59]

Applied to UN human rights treaty bodies, it is hence very likely that the outcome of similar communications might be different, or even diametrically opposed to each other, as different treaty bodies might prioritize different interests or rights.[60] Such a result seems all the more imaginable given the fact that the establishment of group- or issue-specific treaty was driven by a "specialization logic",[61] and that the respective treaty body will consider itself an advocate of the

[54] *Webb*, International Judicial Integration and Fragmentation, 2013, p. 6.

[55] *Peters*, The refinement of international law: From fragmentation to regime interaction and politicization, International Journal of Constitutional Law 15 (2017), 671, 681.

[56] *Ulfstein*, The international Judiciary, in: Klabbers/Peters/Ulfstein (eds.), The Constitutionalization of International Law, 2009, p. 138.

[57] Cf. *Walker*, International Human Rights Law: Towards Pluralism or Harmony? The Opportunities and Challenges of Coexistence: The View from the UN Treaty Bodies, in: Buckley/Donald/Leach (eds.), Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems, 2016, p. 493, who observes that contradictions might lead to confusion and could also challenge the credibility of human rights courts and tribunals.

[58] By way of example, reference shall be made to an order rendered by the German Constitutional Court in which it relied, inter alia, on contradicting treaty body recommendations to reinforce its position that domestic courts neither had to abide by the jurisprudence of treaty bodies nor that the position of the CRPD Committee was legally convincing, BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14, para. 77.

[59] On the possibility of forum shopping for individuals in the context of human rights law generally, see *Helfer*, Forum Shopping for Human Rights, University of Pennsylvania Law Review 148 (1999), 285.

[60] *Payandeh*, Fragmentation within international human rights law, in: Andenas/Bjorge (eds.), A Farewell to Fragmentation: Reassertion and Convergence in International Law, 2015, p. 308; *Ulfstein*, The international Judiciary, in: Klabbers/Peters/Ulfstein (eds.), The Constitutionalization of International Law, 2009, p. 139.

[61] *Brems*, Smart human rights integration, in: Brems/Ouald-Chaib (eds.), Fragmentation and Integration in Human Rights Law: Users' Perspectives, 2018, pp. 170–178.

Index