

THE FUTURE OF
UN HUMAN RIGHTS TREATY
MONITORING

EDITED BY
PHILIP ALSTON AND
JAMES CRAWFORD



CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge, CB2 2RU, UK <http://www.cup.cam.ac.uk>
40 West 20th Street, New York, NY 10011-4211, USA <http://www.cup.org>
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

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First published 2000

Printed in the United Kingdom at the University Press, Cambridge

Typeset in 10.5/13.5pt Minion [gC]

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication data

The future of UN human rights treaty monitoring / edited by Philip
Alston and James Crawford.

p. cm.

ISBN 0 521 64195 0 (hardback). – ISBN 0 521 64574 3 (paperback)

1. Human rights. 2. United Nations—Commissions. I. Alston,
Philip. II. Crawford, James, 1948– .

K3240.4.F88 2000

341.4'81—dc21 99-34665 CIP

ISBN 0 521 64195 0 hardback

ISBN 0 521 64574 3 paperback

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THE UN HUMAN RIGHTS TREATY SYSTEM: A SYSTEM IN CRISIS?

JAMES CRAWFORD*

A. The evolution of the United Nations treaty system

In 1945, almost for the first time, the United Nations Charter announced the idea of human rights as real rights at the universal level.¹ That required the development of substantive human rights standards, a process commenced with the Universal Declaration of Human Rights in 1948 and substantially extended through the two International Covenants in 1966, the Racial Discrimination Convention in the same year, and a large number of other instruments, general or specific in scope. All this has been in addition to the development of human rights standards and structures at regional level.

The articulation of new universal standards and new treaties has not ceased (although norm fatigue and avoiding the most obvious forms of duplication must, presumably, mean that it will become progressively more selective). But the need for their implementation remains, as much for the older standards and treaties as for the newer. Here the approach adopted at the universal level in 1966 had the following features:

- (1) the establishment of specialist bodies charged with the oversight of treaty performance, each concerned with a specific treaty;
- (2) regular reporting obligations for states parties, on the assumption that the examination of reports would lead to a dialogue between each state and the relevant treaty body, and to progressive improvements in compliance, associated with limited reliance on state-to-state or individual complaints procedures;

* My thanks to James Heenan for his very helpful research assistance in the preparation of this chapter.

¹ See UN Charter, articles 1, 55.

- (3) the absence of decision-making powers of a judicial or quasi-judicial character vested in the treaty bodies.²

This was in contrast with the regional systems in Europe and the Americas, in which:

- (1) the development of regional standards relied much more on the adoption of protocols to a single basic treaty, with the corollary that only a single institution or set of institutions remained involved;
- (2) there was much more emphasis on individual complaints procedures as the basic supervisory tool, with the possibility of state-to-state complaints but little or no reliance on periodic reporting;
- (3) the supervisory bodies dealing with such complaints had judicial or at least quasi-judicial powers: they could make decisions and even award compensation.

These contrasts were the result of deliberate decisions, and there were reasons – for the most part, good reasons – for them. But as time has gone

² The language of the relevant provisions is not that of judicial determination. For example, Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 9 (2) states that the Committee ‘may make suggestions and general recommendations’ based on state reports received. See also International Covenant on Civil and Political Rights (ICCPR), article 40 (4); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 21 (1); Convention against Torture (CAT), article 20 (4) (authorising the Committee to make ‘comments and suggestions’ to states parties regarding well-founded allegations of systematic torture); Convention on the Rights of the Child (CRC), article 45 (d). Even under the Optional Protocol to the ICCPR, article 5 (3), the Human Rights Committee shall simply ‘forward its views’ to the state party and individual concerned. In *Wellington District Legal Services Committee v. Tangiora* [1998] 1 NZLR 129, the New Zealand Court of Appeal held that the Human Rights Committee is not ‘[a]ny administrative tribunal or judicial authority’ within the meaning of the Legal Services Act 1991 since (a) it is not called a court (cf. the International Court of Justice (ICJ)) or a tribunal (cf. the UN Administrative Tribunal); (b) the process set out in the Optional Protocol is exiguous and not that expected of a judicial body or tribunal; and (c) the wording of the Protocol is not the language of a binding obligation, as is the case with other bodies set up to resolve disputes of an international character. See generally D. McGoldrick, *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1994), paras. 2.21–2.22. As to the nature of the Committee on Economic, Social and Cultural Rights, established by Economic and Social Committee (ECOSOC) Res. 1985/17 subsequent to the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) itself, see M. C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development* (Oxford: Clarendon Press, 1995), pp. 56–7.

on the contrasts have grown even sharper. At the regional level, we have seen the consolidation of institutions, with increasing emphasis on their judicial or quasi-judicial character;³ at the universal level, there has been a proliferation of bodies, and a certain decline, or at the least a failure to develop, complaints procedures as distinct from reporting. Despite a relative decrease in the resources available at the universal level, the proliferation of instances has continued, with a host of special procedures and personnel dealing with particular problems, thematic or geographic, as well as the establishment in 1994 of a United Nations High Commissioner of Human Rights (UNHCHR). At the regional level, by contrast, the original institutions have largely retained their central roles, and the problems of coordination and avoiding duplication are far less.

No doubt the contrast can be overdrawn, and it is not a simple case of regional success stories set against universal decay. As the chapters which follow show, the United Nations human rights treaty system has its own record of successes. It must also be stressed how rapidly the UN human rights treaty body system has developed, in parallel with the treaties themselves. The first such body, the Committee of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), first met in January 1970. By 1991 there were six treaty bodies; a seventh, the Migrant Workers' Committee, is envisaged. Participation in the treaties themselves has grown exponentially, as Table 1 shows.

During this period the treaty bodies have developed and consolidated methods of considering reports, have pioneered and developed the institution of general comments, have developed forms of coordination with each other and (to a lesser extent) with other human rights institutions, especially UN High Commissioner for Human Rights (UNHCHR), have increasingly involved non-governmental organisations in their work, and generally have sought to keep up with a greatly increased workload. If the system is in difficulty, this is to a large degree a product of its success in attracting the participation and involvement of states and of other bodies. But the fact remains that the system *is* in difficulty, a difficulty characterised by some as crisis.

³ Especially with the 1994 adoption by the Council of Europe of Protocol 11 to the European Convention on Human Rights, and the eventual abolition of the European Commission on Human Rights.

Table 1.1 *Participation in UN human rights treaties*
(as at 1 December 1998)

Treaty	Date of adoption	Time to enter into force (number of parties required)	Time to reach 100 parties	Present number of parties
CERD	21 Dec 1965	3 yr 1 m (27)	12 yr 10 m	151
ICESCR	16 Dec 1966	9 yr 1 m (35)	14 yr 10 m	138
ICCPR	16 Dec 1966	9 yr 3 m (35)	15 yr 1 m	140
Optional Protocol	16 Dec 1966	9 yr 3 m (10)	_____	92
CEDAW	18 Dec 1979	1 yr 9 m (20)	10 yr 7 m	162
CAT	10 Dec 1984	2 yr 6 m (20)	11 yr 6 m	110
CRC	20 Nov 1989	11 m (20)	2 yr 1 m	191

Notes: Acronyms for the UN human rights treaties are CERD – Convention on the Elimination of Racial Discrimination; ICESCR – International Covenant on Economic, Social and Cultural Rights; ICCPR – International Covenant on Civil and Political Rights; CEDAW – Convention on the Elimination of Discrimination against Women; CAT – Convention against Torture; CRC – Convention on the Rights of the Child.

B. Symptoms of success: Crises of the treaty system

Details will be provided in the chapters which follow, but the following summary gives some indication of the character of these difficulties and of their extent.

1. CORROSIVE EFFECTS OF THE BACKLOG IN STATE REPORTING

The first and most obvious issue is the huge backlog in state reports due under the various treaties. The progressive deterioration can be seen from Table 2.

There is, however, no provision which enables delinquent states to be censured, other than by committees noting the delays in their annual reports, and by repeated and so far ineffectual calls on the part of the General Assembly.

2. DELAYS IN PROCESSING REPORTS AND COMMUNICATIONS

A second symptom is the delays presently experienced within the committees, whether it takes the form of delay between the date of submission of a

Table 1.2 *Overdue reports under UN human rights treaties*
(as at 1 December 1998)⁴

Treaty	Number of parties		Parties with overdue reports		Total overdue reports
	1993	1998	1993	1998	1998
CERD	119	151	65	124	390
ICESCR	115	138	64	97	134
ICCPR	132	140	112	97	145
CEDAW	118	162	78	134	245
CAT	71	110	36	72	105
CRC	126	191	59	124	141

report and the date of its consideration, or (in the case of the committees which deal with individual petitions or communications) delay between their submission and their consideration by the committee.

In confronting these delays the committees are in a dilemma: they must give sufficient attention to individual reports and communications, whatever their source, while at the same time the number of states parties and of communications has increased and is increasing. Some committees (e.g. CERD) simply increase the number of reports considered at a session, but beyond a certain point this strategy will break down; moreover state representatives who have travelled to the meeting of a committee to discuss a report are entitled to a degree of attention: a system based on 'constructive dialogue' has to allow time for that dialogue even if the state is generally in compliance with the treaty. The underlying fact is that none of the committees has received any sustained increase to its regular meeting time, and no such increases can be expected. Moreover it is difficult to make use of intersessional time, because committee members are not paid for intersessional work (even if their other commitments left them time to do it); moreover problems of communication and lack of internet access for many members make intersessional work difficult and cumbersome.

It needs to be stressed that these unacceptable delays are occurring at a time when many reports are overdue. If all states were to report on time,

⁴ Adapted from Alston, Final Report (E/CN.4/1997/74) 14.

the delays in dealing both with reports and individual communications would become extreme: it is not too much to say that the system, established to oversee state compliance, depends for its continued functioning on a high level of state default.⁵ As to individual complaints procedures, the delays are even less excusable. Arguably the reason the Human Rights Committee is not itself in breach of the spirit of article 14 of its own Covenant through the delay in dealing with communications is, precisely, its non-judicial character.⁶

3. RESOURCE CONSTRAINTS

One possible solution to such problems is, quite simply, a substantial increase in the resources available. If the principle of state reporting and periodic review is right, as has been repeatedly asserted, then the first step must surely be to allow to all the committees the time, resources and staff to deal efficiently with the backlog, at the same time examining on the basis of other available materials the record of compliance in states whose reports are seriously overdue. But no informed observer believes that any substantial injection of resources for the system as a whole is likely. Recent limited improvements experienced by the Committee of the Convention on the Rights of the Child (CRC) are so far the exception rather than the norm. This alone raises serious questions of sustainability.

Resource constraints, identified in the chapters which follow, have a number of different features.

⁵ Alston estimated that as at 1996, somewhere between seven and twenty-four years, approximately, would be required to review all state reports overdue, if they were to be submitted forthwith: *ibid.*, p. 17. The only exception was the CRC (four years), which only commenced operations in 1991 and thus had less time to develop a backlog. By December 1998, however, 141 state reports were overdue in respect of the CRC.

⁶ In *Prosecutor v. Tadic*, 105 ILR 419, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held that the 'due process' requirements laid down in ICCPR, article 14 (1), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), article 6 (1) and American Convention on Human Rights (ACHR), article 8 (1) do not apply to proceedings conducted before an international tribunal (at para. 42). Notwithstanding this, the Chamber concluded that such a tribunal 'must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments' (at para. 45). Note, however, that the requirement that any hearing take place 'within a reasonable time', embodied in both ECHR, article 6 (1) and ACHR, article 8 (1), does not form part of ICCPR, article 14 (1).

Secretariat/personnel constraints

Committee secretariats are understaffed and underpowered. A handful of people (less than the number of support staff in a standard department in a medium-sized university) has to staff the six committees.⁷ The number is hardly more than twice the number of persons in the secretariat of the European Social Charter.⁸ This acute staff shortage is exacerbated by such factors as the over-specialisation of staff (each person only works for a single treaty body), leading to gaps in expertise available to the system as a whole (e.g. the lack of Russian-speaking lawyers despite the growing number of communications in that language). Recruitment of short-term interns does not resolve the problem.⁹

Other financial constraints

In certain cases acute lack of funds has led to the cancellation of sessions (e.g. CERD). More generally there are complaints at restrictions on documentation, constraints arising from the lack of or delays in translation,¹⁰ the absence of funds for field visits to member states (cf. CERD's missions), for cooperation between treaty bodies (e.g. joint or thematic working groups), or for attendance of members at other committees' sessions.

Limited technology

The United Nations cannot provide access to internet or email for committee members, although this is by far the cheapest and most efficient way to develop texts and generally to consult outside of sessions. The UNHCHR website is a good, though overdue, first step, but by no means all UN human rights material is available electronically. Better use of databases would help redress the problem of lack of a corporate memory within committees.

4. PROCEDURAL ISSUES

There are no doubt inherent problems with a system for human rights protection based essentially on self-criticism and good faith. The system

⁷ See Leckie, *infra*, chapter 6. ⁸ See Harris, *infra*, chapter 16.

⁹ See Schmidt, *infra*, chapter 22; Evatt, *infra*, chapter 21.

¹⁰ See Evatt, *infra*, chapter 21.

encourages states to view compliance only in the context of a rather sporadic reporting procedure, with a lack of follow-up mechanisms for both periodic reports and communications. On the other hand a more selective approach by committees, focusing only on serious breaches which are suspected or have come to notice, would give rise to complaints of selectivity: there is, as Scott Leckie notes, a continuing concern not to alienate states parties whose cooperation is assumed and is necessary for the idea of constructive dialogue to work.¹¹ To some extent these constraints are inbuilt, but the contrast drawn by Daniel Bodansky with the environmental bodies (e.g. under the Climate Change Convention), with their use of state visits, *ad hoc* teams, wide dissemination of views etc., suggests that improvements can nonetheless be made.¹²

5. PROBLEMS OF COMMUNICATIONS PROCEDURES

Henry Steiner's review of the Human Rights Committee's communications procedure shows the problems inherent in 'mandatory jurisdiction'. There is no correlation between the general level of complaints (or for that matter their complete absence) and the state of human rights compliance in a given country. For example the 'death row' phenomenon is highlighted in one country, or one region, but not in others where it may be just as prevalent. To avoid the Committee becoming a 'fourth instance', some discretionary element may need to be introduced at the stage of admissibility (such as most final appellate courts exercise within national systems). But the tendency is the other way; the Committee normally telescopes admissibility and merits, and it is reticent to develop criteria for admissibility which would inevitably reduce the focus on the individual and – except in clear cases of individual injustice – would tend to focus on systemic considerations. But the communications procedures are themselves so occasional, overall and for most countries, as to raise questions about their underlying rationale. As Steiner points out, over the twenty years from 1977 to 1997, the Committee had issued views in only about 260 cases, and its capacity to process communications is estimated at around thirty communications per year. If every state party to the Optional Protocol were to generate only one communication per year, the backlog would soon

¹¹ See Leckie, *infra*, chapter 6. See also O'Flaherty, *infra*, chapter 20.

¹² See Bodansky, *infra*, chapter 17.

become intolerable. A more differentiated and selective approach to communications seems necessary.

6. COMPOSITION OF COMMITTEES

Many members of the treaty bodies have given dedicated, and largely unremunerated, service. But the electoral process (like most such processes within the UN) is haphazard and takes limited account of qualifications. Vote trading between unrelated UN bodies is so common as to be unremarked. This is of course part of a broader problem. UN electoral processes are no doubt irreducibly political, but there has been no effort to distinguish between the political properly so-called and the purely venal. Some form of scrutiny of candidates for minimum qualifications could bring great dividends in terms of the quality of membership, but there is for the time being no prospect that the electorate of state party representatives will adopt such a step.¹³ There may, however, be room for non-governmental organisations (NGOs) to have some informal input into the electoral process, something presently lacking.

7. PROBLEMS WITH RECENT OR PROPOSED REFORMS

Some of the reforms that have been adopted, or that are proposed, carry their own costs, as Markus Schmidt demonstrates in his analysis of the disadvantages of Plans of Action.¹⁴ In addition to being quite costly to implement (the budget for the CRC plan is about \$1.25 million annually), they rely on voluntary contributions from states parties. If these are not pledged or paid in time, the plan may have to be reduced in scope, shortened or simply abandoned. More fundamentally, they shift the emphasis from financing of treaty body activities through the regular UN budget to financing from outside, and could thereby open the door to influence-peddling.

¹³ One of the difficulties is that major reform is extremely difficult to achieve, and tinkering is unlikely to help. Still, there are steps in the right direction in other bodies, which may provide precedents in terms of any long-term restructuring. For example, the new electoral process for judges of the European Court of Human Rights requires governments to nominate several candidates who are then subject to a form of scrutiny; cf. also the prohibition of re-election of judges, under the Rome Statute of the International Criminal Court, 17 July 1998 (A/CONF.183/9) article 36 (9) (a) (which, if extended to the treaty bodies, would require longer and staggered terms of office).

¹⁴ See Schmidt, *infra*, chapter 22.

8. LIMITED POLITICAL SUPPORT FROM STATES

The underlying problem is no doubt the limited will of the states parties to improve the system. There is a view that inclusion of more states parties is to be preferred to the integrity of the treaty, and this manifests itself in the lack of reaction by many states to questionable reservations, to overdue or inadequate reports and even to failures of compliance.¹⁵ For those dedicated to the application of universal human rights standards the position can appear a depressing and even dispiriting one. As against this, however, certain comments should be made.

First of all, the 'system' (the committees and their secretariats, the member states) is capable of responding strongly on occasion. For example, when North Korea purported to withdraw from the International Covenant on Civil and Political Rights (ICCPR), the position taken by the United Nations as depositary, by the Human Rights Committee (HRC) itself, and by member states was that it could not validly do so,¹⁶ and it continues to be treated as a member *malgré lui*.¹⁷ The response by many states, at least in Europe, to the United States reservation with respect to the imposition of the death penalty on juveniles was also strong and consistent.¹⁸

Secondly, the attitude of member state governments is almost bound to be different from that of the committees, with their specific mandate to encourage compliance with their own treaty. Governments confronted with a wide range of problems and having only limited (possibly contracting) resources are likely to respond routinely and in a lower key to what are seen as routine requirements of an established system. They are certainly not

¹⁵ See e.g. Banton, *infra*, chapter 3.

¹⁶ In response to an attempted withdrawal by the Democratic People's Republic of Korea from the ICCPR, the Secretary-General ruled that 'a withdrawal from the Covenant would not appear possible unless all States Parties to the Covenant agree with such a withdrawal': C.N.467.1997.TREATIES-10, 12 November 1997. The Human Rights Committee (HRC) agreed (HRC, General Comment 26 (61), adopted by the Committee at its 1631st meeting, 8 December 1997), as did a number of governments.

¹⁷ The position under the Optional Protocol is of course different: article 14 specifically allows withdrawal and this option has been taken up recently by Barbados and by Trinidad and Tobago in response to the many death penalty communications brought against them. See N. Schiffrin, 'Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights', 92 *AJIL*, 1998, p. 563.

¹⁸ See the objections lodged by Belgium (5 October 1993), Denmark (1 October 1993), Finland (28 September 1993), France (4 October 1993), Germany (29 September 1993), Italy (5 October 1993), Netherlands (28 September 1993), Norway (4 October 1993), Portugal (5 October 1993), Spain (5 October 1993) and Sweden (18 June 1993).

inclined to encourage more rigorous scrutiny of their own human rights record, and problems in other countries tend only to obtrude on specific occasions, usually involving major incidents, trials or crises. The burden of day-to-day scrutiny is thus left to the committees. But the fact remains that the committees are attempting valiantly to square a vicious circle resulting from the proliferation of instruments, a huge increase in participation and static resources. Member state apathy at this situation is, certainly, a problem, whatever excuses or explanations may be offered.

C. The structure of this volume

Against this background, the chapters in this volume are organised in the following way. In **Section A**, the work of each of the six existing committees is reviewed by a knowledgeable observer or participant, as is the crucial work of NGOs in relation to the committees. The human rights treaty system acts, however, not for itself but in order to promote and monitor developments in the national systems parties to the treaties. Thus, the uneven, but by no means negligible, effect of the treaty system on national law and practice is reviewed in **Section B**. In a volume of this size, this review can only be highly selective, but the cases chosen (the Nordic states, Japan, South Africa, Hong Kong and the United States) range quite widely: from countries with strong institutions or traditions of human rights to countries struggling to establish them; from countries open, or at least opening, to international human rights influence to countries resolutely closed or closing. The *particularity* of this experience is in each case notable, resulting from particular historical circumstances and social and political developments, in contrast to the universality of values the treaty bodies claim to represent and foster.

Section C presents, for the purposes of illustration as well as contrast, the experience of state reporting under three distinct systems, two regional (the Inter-American System and the European Social Charter), one functional (under global environmental treaties).

Against this background of the treaty bodies in action, of a sample of the legal and social systems with which they interact, and of some other treaty systems from which they might learn, **Section D** surveys some of the common problems they are experiencing. Again it has been necessary to be selective: the themes chosen are those of duplication, diversity, focus, and the need for and the provision of resources. Of particular importance here

is the question of focus. Are the treaty bodies to be seen as having a general mandate to deal with situations arising within the field of 'their' treaty, or are they better seen as specialist agencies performing a particular function of supervision in the context of a specific system of reporting? The experience of the treaty bodies confronted with widespread violations in Bosnia and Herzegovina raises that question in an acute form.

Finally, in the concluding **Section E** a comparison is undertaken of the approach generally shared by the contributors to this volume with an alternative approach which attributes relatively little importance to the universality of the system and instead advocates restricting participation in the treaty regime to those states which are deemed to be democratic.