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Introduction

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The adoption of the Charter of the United Nations in 1945 marked a breakthrough for international human rights, with the following decades dedicated to their codification. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted in 1965, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the International Covenant on Civil and Political Rights (ICCPR) were adopted in 1966. This phase was followed by the adoption of an array of thematic human rights conventions, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984), which have attracted an impressive number of ratifications.[1]

Whereas the twentieth century was devoted to the drafting of human rights conventions, human rights advocates in the twenty-first century are focusing on securing better compliance with the standards set out in them. Increasing focus has therefore been placed on the effective implementation of human rights treaty obligations in national law. The UN Human Rights Commission (which was replaced by the Human Rights Council) established its own mechanisms for responding to gross human rights violations[2] and developed 'special procedures', consisting of

[1] The number of ratifications as of 25 April 2011 was: ICERD 174, ICESCR 160, ICCPR 167, CEDAW 186 and CAT 147: United Nations Treaty Collection, http://treaties.un.org/ (last visited end of May 2010).

[2] ECOSOC, 42nd Session. *Question of the Violation of Human Rights and Fundamental Freedoms, including Policies of Racial Discrimination and Segregration and of Apartheid in all Countries, with particular reference to Colonial and other Dependent Countries and Territories*, 6 June 1967, Res. 1235 (XLII), UN Doc. E/4393; ECOSOC, 48th Session. *Procedure for Dealing with Communications relating to Violations of Human Rights and Fundamental Freedoms*, 27 May 1970, Res. 1503 (XLVIII), UN Doc. E/4832/Add.1, revised by ECOSOC, Resumed Organisational Session for 2000: *Procedure for Dealing*

independent Rapporteurs and working groups. The Human Rights Council also conducts the Universal Periodic Review (UPR), which subjects all UN member states to the monitoring of compliance with applicable human rights standards every four years.[3]

The main responsibility for the international monitoring of national implementation is, however, entrusted to the UN human rights treaty bodies. These bodies are established by the respective human rights conventions and are composed of independent experts. This book examines these bodies from three perspectives: the legal aspects of their structure, functions and decisions; their effectiveness in ensuring respect for human rights obligations; and the legitimacy of these bodies and their decisions. The analysis herein should be read in light of the ongoing effort to strengthen treaty bodies under the auspices of the UN High Commissioner of Human Rights and with the involvement of relevant stakeholders.[4]

Legal aspects

The mandate of human rights treaty bodies must be understood against the backdrop of the special features of international human rights protection. Human rights conventions differ from, for example, international trade agreements in that they are not primarily regulating reciprocal relationships between states. It is therefore difficult to rely on traditional inter-state mechanisms, such as state responsibility for the breach of treaties, counter-measures, or dispute settlement between states, to ensure their fulfilment. In this sense, human rights conventions are more like international environmental agreements with their collective approaches to non-compliance. Again though, human rights conventions differ, since they aim to protect individual human rights. The international supervisory system for human rights is accordingly not based primarily on inter-state action, but on a combination of collective and individual approaches to protection.

with Communications concerning Human Rights, 16 June 2000, Res. 2000/3, UN Doc. E/2000/99.

[3] UN GA, Resolution on the Human Rights Council, 3 April 2006, UN Doc. A/RES/60/251, para. 5(e); HR Council, 5th Session. *Institution-building of the United Nations Human Rights Council*, 18 June 2007, UN Doc. A/HRC/RES/5/1, Annex, para. 14.

[4] See the website titled, 'The Treaty Body Strengthening Process', established by the UN High Commissioner for Human Rights: www2.ohchr.org/english/bodies/HRTD/index.htm (last visited 25 April 2011).

The human rights treaty bodies are creatures of the human rights conventions establishing them. They are not formal international organisations.[5] However, as we typically find in international organisations, the human rights conventions establish a plenary organ, i.e. the meeting of the states parties. At the same time, the function of this plenary body is limited: it is entrusted with electing the members of the treaty bodies. Furthermore, the treaty bodies are not subsidiary bodies; they are independent in their function and responsible for supervising states' implementation of their human rights obligations. The conventions creating them do not establish a separate secretariat for each of the treaty bodies, but rely on secretarial resources of the UN Office of the High Commissioner for Human Rights in Geneva. Despite this relationship, both the treaty bodies and the meetings of the states parties are independent from the UN High Commissioner for Human Rights, as well as from the UN General Assembly and the Human Rights Council. Given the unique legal status of treaty bodies under international law, their legal character as well as their interaction with the meeting of the states parties, the Human Rights Council, the General Assembly and the Secretariat merit scrutiny.

The scope of treaty bodies' supervisory functions is defined in the respective human rights conventions. Their main responsibility is to examine reports from the states parties on the fulfilment of treaty obligations. As well, many conventions have supplementary protocols establishing the possibility for individuals to complain of human rights violations committed by a state party to the relevant treaty. Treaty bodies also adopt General Comments, i.e. authoritative interpretations of treaty obligations. Finally, some treaty bodies are empowered to conduct inquiries on the territory of states parties if they have reason to believe that serious human rights violations are taking place. While the examination of state reports and inquiries may be seen as an administrative or investigative function, the determination of individual complaints is a function comparable to that of courts, and the adoption of general complaints has elements that resemble legislation. The legal basis and nature of these functions deserve close analysis.

The treaty bodies have through the years adopted a large number of decisions in the form of Concluding Observations on the basis of state

[5] G. Ulfstein, 'Reflections on Institutional Design – Especially Treaty Bodies' in J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Cheltenham: Edward Elgar Publishing, 2011) 695–721.

report examinations, Views in response to individual complaints, and General Comments as summary answers to general questions on the practice of human rights. Such decisions are not legally binding. This does not, however, mean that they are without legal importance. But the basis for according such decisions legal weight has been debated.[6] Should they be regarded as a form of subsequent state practice under the Vienna Convention on the Law of Treaties, or as the practice of international organs? The legal status of the decisions may also depend on what is purported by the treaty body: is the decision phrased as a recommendation on how to best implement the treaty obligations, or does the treaty body state that an obligation has been violated? Moreover, it may depend on the type of decision: Concluding Observations, Views, interim measures ordered before Views are adopted, or a General Comment. One might also ask whether the decision only has legal significance in the individual case or whether it is imbued with a precedential effect as concerns the interpretation of treaty obligations in comparable cases. Finally, their legal effect in international and national law must be distinguished: obviously the latter may vary between states.

Effectiveness

While political scientists have done empirical research on the effects of ratifying human rights conventions, less focus has been placed on the particular effect of treaty bodies' activities.[7] This effectiveness may vary between the different functions of the treaty bodies: while decisions on the basis of individual complaints are primarily addressed to the defendant states and their implementation of the relevant decision, they also contribute to the general jurisprudence that is to be respected by all states parties. Concluding observations, however, are directed at a specific state party and, beyond commenting on the specific implementation of treaty obligations, may also recommend how the state party

[6] M. Scheinin, 'Impact on the Law of Treaties' in M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) 23–37, 33.

[7] See O. Hathaway, 'Do Human Rights Treaties Make a Difference?', *Yale Law Journal* 111 (2002) 1935–2042; R. Goodman and D. Jinks, 'Measuring the Effects of Human Rights', *European Journal of International Law* 14 (2003) 171–83: O. Hathaway, 'Testing Conventional Wisdom', *European Journal of International Law* 14 (2003) 185–200; E.M. Hafner-Burton and K. Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology* 110 (2005) 1373–1411; B.A. Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge University Press, 2009).

could better fulfil the objectives of the relevant human rights convention. It is necessary to assess the effectiveness of each of the functions of the treaty bodies, as well as the combined effects of their activities.

The effectiveness of the treaty bodies' work depends on several factors. First, it is limited by the capacity of the treaty bodies as well as their Secretariat. The UN High Commissioner for Human Rights has stated that the treaty body system is probably not far from reaching its limits, as resources have not kept pace with the system's growth in size, output and visibility.[8] This is an important restraint on their work.

Secondly, the willingness of states to respect treaty bodies' decisions may depend on the international legal status of such decisions. If the treaty bodies' findings are considered to carry significant legal weight, states parties may be more inclined to implement them. One way of improving their effectiveness could be to make their findings in response to individual complaints legally binding by amending the respective conventions. An alternative would be to establish a World Court of Human Rights.[9] Such proposals have so far, however, not received much support from states parties. Finally, one might cast doubts on whether legally binding decisions would help much in relation to recalcitrant states.[10]

An alternative is to exert pressure on states parties to implement decisions from the treaty bodies. The follow-up procedure applied by the treaty bodies is one way of pressuring states. Some argue that the political bodies of the UN, such as the Human Rights Council (e.g. through the new UPR procedure), the General Assembly and the Security Council should apply such pressure.[11] In doing so, however, there exists the risk that human rights standards might be sacrificed on the altar of political expediency, for example by the Human Rights Council too easily rubber-stamping low human rights standards in some

[8] Ms Navanethem Pillay, United Nations High Commissioner for Human Rights, Launch of the Poznan Statement, 7 March 2011: www2.ohchr.org/english/bodies/HRTD/docs/HCStatementTBStrengthening_070311.pdf (last visited 25 April 2011).

[9] G. Ulfstein, 'Do We Need a World Court of Human Rights?' in O. Engdahl and P. Wrange (eds.), *Law at War – The Law as it Was and the Law as it Should Be* (Leiden: Brill, 2008) 261–73.

[10] H.J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 15–55, 30.

[11] M. Scheinin, 'The International Covenant on Civil and Political Rights' in G. Ulfstein, T. Marauhn and A. Zimmermann (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, 2007) 48–70, 69.

countries. Positive incentives in the form of assistance could also promote the implementation of treaty bodies' findings by states.[12] Further, the interaction between the international and national legal systems might be improved.

Finally, while an increasing number of international human rights treaty bodies have received positive recognition for their work, serious concerns have also been expressed regarding the possible overlap in their jurisdictions, forum shopping and conflicting or inconsistent jurisprudence.

A valid argument is that the fragmentation between different human rights treaty bodies is not as important as the fragmentation of international courts, since the treaty bodies do not deliver binding judgments. But to the extent that their members are authoritative interpreters of their respective conventions, difficulties with respect to their particular jurisdictions and differences in their jurisprudence may cause problems for effective human rights protection. Last but not least, there is an additional need to keep an eye on the parallel protection activities of regional human rights courts.

The increasing number of human rights treaty bodies also creates problems for states parties and the Secretariat. States must submit reports to several treaty bodies and participate in their activities, be they the examination of reports or responding to individual complaints. This may be a heavy burden, especially for small developing countries. Moreover, the Secretariat must serve several treaty bodies without receiving a commensurate increase in its allocated resources.

Legitimacy

As international institutions acquire broader competences, the exercise of power by them is increasingly questioned in terms of legitimacy.[13]

[12] P. Alston, 'Beyond "them" and "us": Putting Treaty Body Reform in Perspective' in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 501–27, 523–25.

[13] See the rich literature on legitimacy in international law: T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990); D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', *American Journal of International Law* 93 (1999) 596–625; M. Koskenniemi, 'Legitimacy, Rights, and Ideology. Notes Towards a Critique of the New Moral Internationalism', *Associations* 7 (2003) 349–373; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', *European Journal of International Law* 15 (2004) 907–931; A. Buchanan, *Justice, Legitimacy and Self-determination. Moral Foundations for International Law* (Oxford University Press, 2004); T.M. Franck, 'The Power of Legitimacy

State consent – including the democratic procedures involved during ratification – has served as the primary basis for legitimising traditional inter-state treaties, such as those dealing with bilateral trade or boundary delimitation. Such consent may, however, not be sufficient for the legitimacy of treaties establishing international organs with decision-making powers. The reason is that international organs can adopt decisions beyond the control of individual member states' constitutional organs, and with important legal and practical effects for these states. The legality of treaty bodies' work output combined with political pressure to implement these bodies' findings may result in undesired incursions into state sovereignty. Such interference occurs in an area that has traditionally been the sole prerogative of the state, i.e. the relationship between the state and its inhabitants.

Some of these concerns could be partially alleviated by practices such as emphasising the importance of exhausting local remedies, or granting greater discretion to states parties in the implementation of human rights obligations. The doctrine of 'margin of appreciation' is well-known in the European Court of Human Rights system. Another possibility is to design remedies in a way that allows states a certain flexibility to decide how they should implement the decisions of treaty bodies. Such practices of subsidiarity come at a certain price, however, and need to be balanced against the primary responsibility of the treaty bodies to uphold the effective protection of human rights.

Legality and legitimacy are related but not identical standards. Legality is an element of legitimacy to the extent that lawful decisions are presumed to be legitimate. Decisions may, however, be legal and still illegitimate, or illegal yet legitimate. The requirement of legality would in our context mean that the treaty bodies must respect the law as defined by the states parties in the applicable conventions. Given the fact that the language in all human rights treaties is rather broad and ambiguous, traditional canons of treaty interpretation should guide the development of the law. However, human rights conventions are concerned with the protection of individual human rights. Therefore the key question is to

and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law* 100 (2006) 88–107; V. Röben and R. Wolfrum, *Legitimacy in International Law* (Berlin: Springer, 2008); A. Follesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights', *Journal of Social Philosophy* 40 (2009) 595–607; J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, 2010).

what extent this distinction should justify treaty bodies applying special rules of interpretation to these conventions.

The vagueness of international human rights obligations, e.g. fair trial or freedom of expression, means that considerable discretion is delegated to the treaty bodies in defining their scope. A dynamic interpretation of these obligations could mean that their content may become rather different from what was foreseen at the time of a treaty's ratification. It has also been argued that economic, social and cultural rights leave particular discretion to the treaty bodies, in light of their aspirational character.

The limits of state consent at the time of ratification and legality as legitimising factors have given rise to several suggestions of other factors that may imbue the work of treaty bodies with legitimacy. The independence and expertise of these bodies are strong candidates in this regard. The independent nature of their activities should ensure that their work is dedicated to the protection of human rights, and not to extraneous factors, such as promoting particular national, economic or social interests. Furthermore, their expertise should guarantee that the decisions are based on the best legal and factual knowledge.

But the requirements of independence and expertise are not unproblematic. While independence is unquestionably an essential concern in determining individual cases, it is not obvious that the general legal standards applied in practice should be beyond democratic control. Hence, the cumbersome amendment process of the human rights conventions may represent a dilemma from a legitimacy point of view. What kind of expertise is needed for the different functions of the treaty bodies and whether the existing nomination and election procedures are ideally suited to ensure independence as well as attract the best candidates are also open to question.

Procedural legitimacy may alleviate deficiencies in state consent and democratic accountability. To the extent that the parties are heard, other stakeholders are involved in a transparent process and due process guarantees are respected, compliance with treaty bodies' decisions may be facilitated. Of course, standards of procedural fairness may vary among these bodies and between the different functions they perform, as well as being dependent on the resources available.

The work product of treaty bodies may also help to legitimise them. The protection of human rights is one of the basic objectives of the international legal system, and thus at the outset not reproachable. However, the treaty bodies are not established to promote the protection

of general human rights values, but specific human rights standards as formulated in the applicable conventions. The legitimacy of treaty bodies therefore depends, on the one hand, on their respect for relevant principles of treaty interpretation. On the other hand, it is also a function of their ability to effectively promote the protection of human rights.

The aforementioned aspects suggest that a categorical affirmation or rejection of the legitimacy question is not possible. Legitimacy cannot be discussed in such terms, but is rather a matter of degree. Furthermore, different criteria of legitimacy may conflict, such as ensuring effective human rights protection and providing for democratic accountability. Or conforming to accepted standards of equality, fairness, justice or freedom. Legitimacy must also be assessed in relation to each of the functions of the treaty bodies. The various ways to enhance legitimacy may conflict. For example, the qualifications needed for members of treaty bodies to examine state reports may differ from those needed to decide individual complaints.

A sociological or normative perspective might offer different insights to the legitimacy concern. Sociological legitimacy emphasises what the relevant actors – be they states, NGOs or victims of human rights violations – would consider relevant criteria for justifying the decisions taken. Normative legitimacy would on the other hand ask whether such criteria are acceptable from a more objective perspective founded in legal-political theory.

Finally, the interaction between legitimacy and effectiveness is a decisive factor in this context. Since international law lacks effective enforcement, legitimacy may play a crucial role in states' willingness to implement international obligations – and in our case, to respect non-binding decisions by human rights treaty bodies. At the same time, the more effective human rights treaty bodies are in ensuring the full implementation of their decisions, the more their legitimacy will increase. The different chapters of this book will deal functionally with all of these different aspects of legitimacy without applying a single definition of this concept.

The plan of this book

This study aims to provide a comprehensive examination of the treaty bodies established by different international human rights conventions, although prominence is given to the Human Rights Committee, which monitors the implementation by states parties of obligations in the

International Covenant on Civil and Political Rights. The authors are lawyers, and so legal aspects of the treaty bodies and their work are naturally at the forefront. But the authors also seek to address how the treaty bodies work in practice, for example the successes and challenges they confront and possible responses to the latter, as well as their legitimacy.

The circle of authors consists of pure academics and insiders – former or current members of the Human Rights Committee (HRC). Some contributors fall into both categories, each of which has its merits and limitations. The insiders can bring their experience to bear on their analysis of issues and offer readers insights not readily available in the public domain. Past and present HRC members, however, are understandably loyal and committed to the HRC, which might dull the sharpness of their criticism. Outsiders on the other hand have the advantage that they keep more distance from the human rights bodies and can, therefore, assess their work more critically. However, this distance and lack of direct experience with the work of the treaty bodies risks the rendering of critiques that are somewhat unrealistic in light of the practical limitations facing these bodies.

Experience, knowledge and availability were decisive factors in choosing the individual authors for each chapter in this volume. Additionally, one editor's personal network had a certain impact on the main focus of the book, namely the practice of the HRC. Finally, the experts available for contributions to this volume belong exclusively to a circle of Western European academics. A truly Asian or African perspective is not represented by any of the authors in this volume. Also not represented is the perspective of any individual state or non-state actor.

Chapters 2–4 deal with the three classical functions of human rights treaty bodies: the examination of state reports, decisions on individual complaints and the adoption of General Comments.[14] Chapter 5 discusses the particular problems raised by the supervision of economic and social rights. Interpretation methods applied by the treaty bodies are examined in Chapter 6. The relationship between the treaty bodies and the Human Rights Council is addressed in Chapter 7. Next, the legal status of decisions by the treaty bodies in national law is dealt with in Chapter 8. Finally, we draw some conclusions.

[14] The book does not deal with a fourth competence, namely the power to start special investigations. Only two human rights bodies have such a power, see art. 20 CAT and art. 8 CEDAW.