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## Less is more: Proposals for how UN human rights treaty bodies can be more selective

Netherlands Quarterly of Human Rights

1–7

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DOI: 10.1177/0924051919899636

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### Abstract

The UN human rights treaty body system will again be under scrutiny for reform in 2020, after more than a decade of fruitless attempts to strengthen it. This column explores some proposals for how the treaty bodies and the process of State reporting can become more effective. The central idea is that treaty bodies need to be more selective and avoid duplication to stop the current negative vicious circle and evaluation fatigue. To make the dialogue more constructive, the number of issues discussed should be limited to a handful and treaty bodies should consider smaller review panels and face to face seating.

### Keywords

UN human rights treaty bodies, reform, State reporting, evaluation fatigue, constructive dialogue, concluding observations, domestic actors and mobilisation

2020 will be marked by the umpteenth review of the UN human rights treaty body system to address the ‘challenges’ the system is confronted with.<sup>1</sup> This euphemistic UN speak hides the fact that the stakes are high, especially in times when human rights are increasingly under attack.<sup>2</sup> When in July 2019, the Kingdom of the Netherlands appeared before the Human Rights Committee, I was shocked to learn that much of the UN system has remained the same since I completed

1. For more information, see United Nations Human Rights Office of the High Commissioner, ‘Treaty Body Strengthening’ (United Nations Human Rights Office of the High Commissioner) <<https://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx>> accessed 15 November 2019.

2. See, however, on a more optimistic note David Petrasek, ‘Not dead yet: Human rights in an illiberal world order’ (2019) 74(1) *International Journal*.

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my PhD dissertation on treaty bodies in 2014.<sup>3</sup> The lack of change remains despite the process – positively labelled as treaty body strengthening – that started in 2009. From hearsay, I understood that there was frustration on all sides. Government officials lamented the unproductive barrage of questions which did not allow for any reflection, while Committee members and civil society actors were allegedly unhappy with the short and superficial answers.

The meeting in Geneva is generally referred to as a ‘constructive dialogue’. But can one talk of a ‘dialogue’ when States are bombarded with questions covering a broad and varied number of issues and have to ‘dish out answers’? Does such an interrogation satisfy the definition of ‘constructive’, namely being ‘useful and intended to help or improve something’?

## Evaluation fatigue

Surprisingly little has thus changed in the operation of treaty bodies in the last few years since I finished my PhD dissertation on the effectiveness of State reporting under UN human rights treaties in July 2014. After my PhD, I decided to stop following the UN human rights treaty bodies out of a sense of frustration with the functioning of the system and limited improvements on the ground. I do not blame these problems on the often dedicated and overworked expert members of these bodies who commit themselves to such important tasks, often in their free time besides their busy jobs. It is the State Parties that are eventually responsible for the system. They must equip it with sufficient financial and human resources and ensure that they nominate independent members.

To my mind, the main challenge or persistent problem is the ineffectiveness of the whole State reporting exercise. In my PhD I found that almost no measures were taken that would not have come about without treaty body recommendations, the so-called Concluding Observations (‘COs’). This was based on an empirical study of three States of which you would expect the system to have most effect, namely established liberal democracies which also have the bureaucratic and financial capacity to satisfy the burdensome reporting requirements and follow-up on COs: the Netherlands, New Zealand and Finland.<sup>4</sup> If the system is not working in these States the chance is high that it will be even more ineffective in transitioning countries, let alone undemocratic or illiberal countries.

From my research on those three countries it emerged that the treaty bodies and their recommendations are hardly considered legitimate and useful by government officials responsible for the implementation. This is particularly problematic for a system that lacks teeth and depends upon softer enforcement mechanisms based on persuasion and legitimacy. Government officials in the three States examined lamented, not entirely without valid reasons, the poor preparation of some committee members, their one-sided approach and their overreliance on NGOs. They had the feeling that some of the COs were already completed before the actual dialogue and they pointed

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3. Jasper Krommendijk, ‘The (in)effectiveness of UN human rights treaty body recommendations’ (2015) 33(1) Netherlands Quarterly of Human Rights; Jasper 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).
  4. Ian Seiderman, ‘The UN High Commissioner for Human Rights in the age of global backlash’ (2019) 37(1) Netherlands Quarterly of Human Rights; See, however, Beth Simmons, *Mobilizing for human rights. International law in domestic politics* (Cambridge University Press 2009) 149-153. For a rebuttal of this argument, see my PhD thesis, Krommendijk (n 3) 49-52 and 387-388.

to factual mistakes and misunderstanding of the domestic context in some COs. I do not think that the views of officials in other States would be much different.<sup>5</sup>

The ineffectiveness also relates to the broad and vague formulation of the majority of COs, merely recommending to ‘take adequate policy measure’ or to ‘continue strengthening’. Such COs frequently coincide with existing policy or legislative measures without having (had) any effect on them. These views, coupled with a duplication of reporting requirements for States in different international contexts, further exacerbate an evaluation fatigue. There is a constant need to update information and produce new documents for the treaty bodies within one reporting cycle: the State report, replies to the list of issues, the presentation of oral information, the submission of additional written information after the dialogue as well as follow-up reporting with respect to the implementation of particular COs.

## **Stopping the negative vicious cycle**

The most important objective for the 2020 review is to stop this negative vicious cycle and make changes to the system. Many sensible recommendations, for example on the selection of experts or the individual complaints procedure, have already been put forward in the 2020 review process and previous cycles of reform. It is not my aim to repeat those. I would also caution against all too radical solutions, such as a unified standing treaty body or a single State report that is subject to review by all or several treaty bodies in the same week. These proposals all have some merit, but one wonders whether they are easy to realise from a practical perspective. Given the fact that progress at the UN level is slow, I would propose relatively easy measures that nonetheless could change things considerably.

My proposals are based on the idea that the external problems that the treaty bodies are confronted with (such as the insufficient meeting time, the limited financial resources and expertise) are unlikely to improve in a significant way in the near future.<sup>6</sup> What is more, the demands placed on treaty bodies are also growing, given the increasing number of ratifications of treaties, in theory leading to more reports being submitted. More optional protocols with individual complaints procedures have come into existence as well and have already led to a growing number of individual communications. Some treaty bodies are also confronted with inter-State complaints. The following proposals are relatively easy to apply by treaty bodies themselves. They do not necessarily require any approval on the part of the States Parties or any additional funding.

## **Being more selective and avoiding duplication**

The motto for my proposals is simply ‘less is more’. Treaty bodies should no longer conduct a comprehensive assessment of the implementation of the entire treaty and all problematic areas. The current six or nine hours for the dialogue are simply not enough to discuss the entire human rights situation in a country. Doing so results in a dialogue which is superficial, irrelevant, not constructive and which only results in poorly informed COs. Treaty bodies should thus be more

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5. Christof Heyns and Frans Viljoen examined the impact of UN human rights treaties in twenty countries and concluded ‘mechanisms used by the treaty bodies appear to have had a very limited demonstrable impact thus far’. See, Christof H. Heyns and Frans Viljoen, ‘The impact of the United Nations human rights treaties on the domestic level’ (2001) 23(3) *Human Rights Quarterly* 488.

6. The proposals are based on the recommendations formulated in my PhD thesis, Krommendijk (n 3) 390-392.

strategic in how they utilise their scarce resources. They should concentrate on a limited number of the most urgent and critical issues or articles of the treaty. Treaty bodies should ideally focus on the five most serious problems instead of the entire treaty and all the developments which have taken place in previous years. Such a focus requires States to increase the quality and detail of input in their reports to the treaty bodies. The latter would enable treaty body members to have more detailed, specific and technical knowledge about these issues. It also allows for a (more) structured and in-depth dialogue instead of the current superficial dialogue of an enormous amount of issues. In addition, it would facilitate the adoption of more focused and SMARTly formulated COs which better reflect the realities on the ground.<sup>7</sup> The follow-up to such COs could also be better monitored by domestic actors and by the treaty bodies.

In their choice of topics, treaty bodies should avoid unnecessary duplication and should – in principle – not focus on issues that other treaty bodies have sufficiently dealt with before or in the near future. This implies that there should be a better division of labour among the treaty bodies and coordination between them. In practical terms, this, for example, means that the Human Rights Committee should *in principle* leave the consideration of the issue of gender equality or the position of ethnic minorities to the Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination, at least with respect to States that have ratified these two treaties and also report (regularly) to those respective Committees. Why should every treaty body discuss domestic violence, human trafficking, violence against children and alien detention? Within less than two years, the Dutch government, for example, discussed almost all of these issues with five different treaty bodies in the period from January 2009 to November 2010. Treaty bodies should, however, not be precluded altogether from examining such issues related to specific rights-holders when they are topical and pertinent at the time of the review. One pitfall of greater selectivity is that certain rights remain entirely unreviewed and fall through the cracks. Such a situation should obviously be prevented. I see a clear responsibility for the Office of the High Commissioner for Human Rights to maintain oversight and facilitate proper coordination between treaty bodies.

A justification for this more selective approach of the treaty bodies is the Universal Periodic Review ('UPR') process which has been conducted by the Human Rights Council since 2007. We should be careful in placing too much confidence in this highly political peer review process led by diplomats instead of independent legal experts monitoring concrete treaty norms. Nonetheless, the UPR functions relatively well with (almost) all States submitting their reports and being scrutinized every four years. The UPR also focuses on all human rights issues in a particular country. This provides an argument for treaty bodies to be more selective and focus on the areas in which States are in (clear) breach of their obligations. In addition, it is not only the Geneva-based process that is valuable. The UPR has been able to attract more media, public and political attention than treaty body reviews.<sup>8</sup> As I will further argue below, compliance with human rights norms and the effectiveness of international recommendations depends upon the mobilisation of domestic actors other than the government. The UPR does considerably better than the treaty bodies in this respect.

Treaty bodies should also focus (more) on problematic areas where there is a mismatch between the treaty and the practice on the ground. To date, treaty bodies have insufficiently differentiated

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7. SMART is an acronym for 'Specific, Measurable, Achievable, Relevant, and Timely'.

8. Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the UN Universal Periodic Review and Treaty Bodies' (2019) 63(4) *International Studies Quarterly*, 1079-1093.

between clear breaches of treaties and areas where States should ideally do more. The COs are usually fairly short and lack a legal and evidential basis and often do not make clear how the recommended measures are related to particular treaty norms. It is thus not surprising that many States treat the COs as sweeping statements of a general nature, an aspirational wish list or mere opinions that can easily be disregarded as opposed to authoritative and compelling statements. This is also the position in literature, where scholars argue that such aspirational COs are less authoritative than COs that determine that a State Party's legislation, policy or practice is not in conformity with its treaty obligations.<sup>9</sup> A determination of a violation is considered an 'indication' that the State Party is obliged to remedy the situation.<sup>10</sup> The problem is that such determinations are often hidden in an extensive wish list containing far-ranging aspirational recommendations. I am not suggesting that treaty bodies can only issue recommendations in case of a (alleged) treaty breach, but COs should in any case be SMARTly-formulated and carefully outline the problem, contain concrete policy suggestions or references to best practices in other countries that can inspire governments. This also enhances their (potential) effectiveness. Almost all COs that were effective in the Netherlands, New Zealand and Finland were specific recommendations outlining a concrete course of action.

I do not propose a one-size-fits-all approach. Rather, treaty bodies should differentiate between particular States. Treaty bodies should not at all relax the standard for States that hardly report and are not subject to regular international scrutiny of a regional human rights organisation. A more comprehensive review of a greater variety of issues could be justified in relation to such States. By contrast, treaty bodies should reduce the burden for 'cooperating' States that comply relatively well with their reporting obligations and appear before treaty bodies on a regular basis. At the moment, the system is by and large focused on countries which need them least. For such countries, treaty bodies should perform a more secondary role rather than demanding ever more from them.

## Exercising restraint and being more timely

The following proposal would also limit both the work of the treaty bodies as well as States. Several steps have already been taken in this direction and started to work with a List of Issues Prior to Reporting ('LOIPR'). The government's answers to the LOIPR replace the necessity of writing a separate periodic State report prior to the LOI. This practice still complies with the legal duty of State reporting under UN human rights treaties, but just in a different shape so that no treaty change is required. Doing away with the State report is no problem, because the added value of such reports has been questionable. By the time of the dialogue, the information in the State report is often outdated and superseded. It is not uncommon that there is a four years period between the end date of the period examined and the discussion in Geneva. It seems that most treaty bodies have now endorsed the practice and have made the simplified reporting procedure available on an optional basis, albeit rightly so not with respect to initial State reports. This step is to be praised. If treaty bodies comply rigorously with this approach, this clearly diminishes the reporting burden on the part of the State as well as the preparation time of treaty bodies (and translation costs!). But all treaty bodies should (uniformly) apply this approach as the standard and shift from an opt-in to an

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9. Michael O'Flaherty, 'The Concluding Observations of United Nations human rights treaty bodies' (2016) 6(1) *Human Rights Law Review* 34-36. Walter Kälin, 'Examination of state reports', in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 56-57.

10. Martin Scheinin as quoted in O'Flaherty (n 9) 34.

opt-out model, as the Human Rights Committee decided recently under the motto ‘predictable review’.<sup>11</sup>

Nonetheless, there are still certain points worthy of attention. First, questions on the part of the treaty bodies in the LOIPR should be limited and specifically formulated as far as possible. This requires restraint from treaty bodies.<sup>12</sup> When governments are asked to write more or less the same as they would have done in the absence of a LOIPR, the earlier mentioned gains are not realised. The 2015 LOIPR of the Committee Against Torture for the Netherlands clearly does not fit with this approach.<sup>13</sup> This was a fourteen-page document that basically served as an instruction of how to write a State report. The following two general questions should, for example, as far as possible be avoided: ‘What recent efforts have been made to strengthen the mechanisms available to provide effective remedies against discrimination and to promote substantive equality?’<sup>14</sup> and ‘Please provide information on significant political and administrative measures taken since the previous report to promote and protect human rights under the Covenant since the previous report’.<sup>15</sup> The way in which the LOIPR has been used recently by the Human Rights Committee vis-à-vis the Netherlands is a step in the right direction because of the specific nature of the questions that often asked the State to respond to particular allegations or reports. In addition, it was a six-page document with 30 paragraphs that resulted in a State report of ‘only’ 38 pages.<sup>16</sup> By contrast, the previous Dutch state report of 2007 was 96 pages long, excluding annexes, and the replies to the List of Issue amounted to another 54 pages. Future LOIPR of the Human Rights Committee will probably be even shorter since the Committee decided to strive to limit the number of questions to twenty five.

Second, another critical note is the time span between all documents preceding the dialogue. The LOIPR for the Netherlands, for example, was adopted in October 2019 with a deadline for answering one year later. The review is scheduled only in May 2021. The ‘predictable review calendar’ presented by the Human Rights Committee also foresees two years between the LOIPR and the actual review. This is (still) too much. The constructive dialogue should take place shortly after the submission of the government’s answers to LOIPR, while at the same time allowing NGOs and National Human Rights Institutions (‘NHRIs’) sufficient time to respond to the government’s answers. Shorter intervals of weeks instead of months would benefit a timely dialogue.

## Turning it into a true constructive dialogue: Face-to face seating and review panels

Another rather simple concrete proposal that has been put forward elsewhere could also enhance the constructive nature of the dialogue, namely face-to-face seating during the dialogue with fewer people in the room.<sup>17</sup> It is certainly not uncommon to have forty to fifty persons in one big room,

11. Human Rights Committee, ‘The Predictable Review Cycle’ (Human Rights Committee) <<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/PredictableReviewCycle.aspx>> accessed 15 November 2019.

12. This corresponds with the General Assembly’s Resolution’s reference to ‘a limit on the number of questions’. For this, see UN Doc. A/68/L.37 (2014), para 1.

13. UN Doc. CAT/C/NLD/QPR/7 (2015).

14. UN Doc. CCPR/C/AUS/Q/6 (2012), para 9.

15. UN Doc. CCPR/C/DNK/Q/6 (2011), para 2.

16. UN Doc. CCPR/C/NLD/QPR/5 (2017).

17. See the response of the Norwegian Centre for Human Rights of 18 March 2019 on <[https://www.ohchr.org/Documents/HRBodies/TB/HRTD/3rdBiennial/CSO/NorwegianCentre\\_HumanRights.docx](https://www.ohchr.org/Documents/HRBodies/TB/HRTD/3rdBiennial/CSO/NorwegianCentre_HumanRights.docx)> accessed 15 November 2019.

seated in a very unpractical way, sometimes even with their backs to each other or with the committee on a podium. The proposals advanced in this column would facilitate a smaller set-up, since the focus on five instead of an endless amount of issues means that delegations of twenty officials are no longer needed. Probably only a third or even a quarter would suffice.

Another, more far-ranging step proposed in the same position paper, would be to create smaller treaty body chambers or review panels in line with the operation of (international human rights) courts. This seems logical as well, because States might be reluctant to size down their delegations when they are confronted with a committee of eighteen experts. Knowing that you ‘only’ face, for instance, five members might reduce the need to impress the treaty body with a whole ‘army’ of officials. A chamber system would also be a perfect measure to reduce the backlog in the consideration of State reports (and individual and inter-State complaints). It could also ensure that the dialogue follows shortly after the submission of the LOIPR.

### **Ultimately it is up to domestic actors**

One should not exaggerate the possible gains of these proposals. This caution could at the same time be a reason for not being too reluctant to make changes in practice. This is because the effectiveness of the system of State reporting ultimately depends upon domestic stakeholders such as NGOs, Members of Parliament, journalists and officials from NHRIs. There is naturally a propensity of governments *not* to act upon COs from their own motion. This stalemate can only be broken by domestic actors pressing and persuading the government to act. Domestic actors benefit from more selective treaty bodies that adopt better informed and more specific COs on only the most pertinent issues. When the treaty bodies do less, domestic actors could do more.

### **Declaration of conflicting interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.