

Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective



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Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCHR	Co-ordinating Committee on Human Rights (Philippines)
CCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW-OP	Optional Protocol to the CEDAW
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DAC	The OECD Development Assistance Committee
Doc.	Document
ECOSOC	United Nations Economic and Social Council
GNP	Gross national product
HRC	United Nations Human Rights Committee
IACHR	Inter-American Commission of Human Rights
ILA	International Law Association
ILO	International Labour Organization
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
NGO	Non-governmental organisation
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
OP1	Optional Protocol to the CCPR
UN	United Nations

UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNTS	United Nations Treaty Series
WEOG	The Western European and Other States Group at the UN

Tiivistelmä

Tutkimuksessa tarkastellaan YK:n ihmisoikeussopimusjärjestelmän tilaa ja kehittämismahdollisuuksia kehitysmaiden näkökulmasta. Miten voitaisiin ihmisoikeussopimusten valvonnan osalta kehittää kansainvälisten järjestöjen toimintaa nykyistä demokraattisemmaksi siten, että kehitysmaiden asema, intressit ja näkemykset otettaisiin nykyistä paremmin huomioon? Tämän tulisi kuitenkin tapahtua tavalla, joka ei vaaranna ihmisoikeuksien kansainvälisen valvonnan tehokkuutta ja riippumattomuutta. Tutkimuksessa ilmaisu “kehitysmaiden näkökulma” on ymmärretty sillä tavoin väljästi, että kysymys on asianomaisten valtioiden tai niiden hallitusten virallisen äänen kuulemisen ohella myös kansalaisjärjestöjen ja muiden kansalaisyhteiskunnan toimijoiden näkemysten ja tarpeiden huomioon ottamisesta. Tutkimuksessa on siten pyritty hakemaan ratkaisuja, jotka edistäisivät kehitysmaiden sisäistä aktiivista ihmisoikeuskeskustelua ja toimivaa vuoropuhelua ihmisoikeussopimusten kansainvälisten valvontajärjestelmien kanssa.

Tutkimus kohdistuu YK:n kuuteen keskeiseen ihmisoikeussopimukseen ja niiden valvontajärjestelmiin. Kyseiset sopimukset ovat vuoden 1966 yleissopimukset yhtäältä taloudellisista, sosiaalisista ja sivistyksellisistä oikeuksista (CESCR) ja toisaalta kansalaisoikeuksista ja poliittisista oikeuksista (CCPR) sekä yleissopimukset rotusyrjinnän vastustamisesta (CERD), naisten oikeuksista (CEDAW), kidutuksen ja muun epäinhimillisen kohtelun vastustamisesta (CAT) ja lapsen oikeuksista (CRC). Kutakin sopimusta valvomaan on asetettu erillinen riippumaton asiantuntijaelin (*treaty body*), joka käsittelee kaikkien sopimusvaltioiden määräaikauskertomuksia sekä neljän sopimuksen osalta myös yksilövalituksia (CCPR, CERD, CEDAW ja CAT). Vuonna 1990 laadittu siirtotyöläisten ja heidän perheenjäsentensä oikeuksia koskeva yleissopimus (MWC) ei ole vielä astunut voimaan, joten sen valvontajärjestelmä ei ole mukana tarkastelussa.

Tutkimusaineistona on sopimustekstien ohella sopimusten valvontakäytäntö sekä siihen ja sen uudistamismahdollisuuksiin kohdistuva suhteellisen laaja kirjallisuus- ja asiakirja-

aineisto. Kun tähänastinen keskustelu sopimusjärjestelmän kehittämisestä on pitkälti tapahtunut joko valvontamekanismien (YK:n tai sopimuselinten) tai kehittyneiden länsimaiden näkökulmasta, tässä tutkimuksessa on pyritty tarkastelemaan ihmisoikeussopimusten valvontaa nimenomaan kehitysmaiden näkökulmasta. Kehitysmaita koskevan sopimuselinten käytännön ohella tärkeänä tutkimuksen lähteaineistona on siksi toiminut vuodelta 2000 oleva *Christof Heynsin* johdolla laadittu ns. *Impact Study*, jonka 20 kohdemaasta 11 oli kehitysmaita. Heynsin tutkimuksessa kansalliset vastuuhenkilöt huolehtivat mm. eri toimijoiden haastattelujen avulla laajan, monipuolisen ja vertailukelpoisen aineiston kokoamisesta YK:n kuuden ihmisoikeussopimuksen valvontajärjestelmien käytännön vaikutuksesta kohdemaissa. Koska näin syntynyt perusaineisto on käyttökelpoisuudessaan ainutlaatuinen, tässä tutkimuksessa on tukeuduttu samojen esimerkkimaiden valintaan kuin Heynsin tutkimuksessa. Lähemmän tarkastelun kohteiksi ovat siten valikoituneet seuraavat yksitoista kehitysmaata: Latinalaisesta Amerikasta ja Karibian alueelta Brasilia, Jamaika, Kolumbia ja Meksiko; Afrikan ja Lähi-Idän alueelta Egypti, Etelä-Afrikka, Sambia ja Senegal; Aasiasta Filippiinit, Intia ja Iran. OECD:n kehitysmaaluokituksessa nämä maat sijoittuvat varsin edustavasti eri vaurausasteille.

Tutkimus jakautuu neljään päälukuun: kysymyksenasettelun ja tutkimusaineiston selvittävään johdantoon (1), erillisiin päälukuihin valtioiden määräaikastraporttien (2) ja ihmisoikeusloukkauksia koskevien yksilövalitusten (3) käsittelystä sekä päätöslukuun (4), jossa esitetään ja perustellaan tutkimuksen johtopäätökset ja suositukset.

Yleisenä näkökulmana tutkimuksessa korostetaan, että määräaikauskertomukset ja kehitysmaiden muu vuorovaikutus sopimusvalvontaelinten kanssa tulee nähdä resurssina ja mahdollisuutena eikä ”rangaistuksena” tai ”taakkana” kyseisille valtioille. Ihmisoikeussopimusten kansainvälinen valvonta luo edellytyksiä hallituksen ja kansalaisyhteiskunnan vuoropuhelulle kansallisella tasolla ja mahdollistaa sopimuksella perustetun riippumattoman asiantuntijaelimen kommenttien ja virikkeiden hyödyntämisen tässä vuoropuhelussa ja kansallisen ihmisoikeusstrategian kehittämisessä. Kuvatus näkökulman vuoksi tutkimuksessa pidetään perusteltuna, että

sopimusvalvontajärjestelmää ja sen kehittämistä arvioidaan ennen muuta niiden maiden näkökulmasta, joilla on tahtoa osallistua kyseiseen vuoropuheluun ja muun muassa täyttää raportointivelvoitteensa. YK:n ihmisoikeussektorin poliittiset elimet (lähinnä ihmisoikeustoimikunta) voivat ehkä tehokkaammin kuin sopimusvalvontaelimet kohdistaa huomiotaan niihin maihin, jotka eivät täytä raportointivelvoitteitaan. Silti ihmisoikeussopimusten ratifiointilla on oma merkityksensä niidenkin maiden suhteen, jotka laiminlyövät määräaikaishetkittäisen raportoinnin: muut kansainväliset toimijat, mukaanlukien valtiot ja ihmisoikeustoimikunta, voivat tukeutua asianomaisen valtion oikeudellisiin sitoumuksiin arvostelun ja vaatimusten normatiivisena lähtökohtana.

Tutkimuksen keskeiset johtopäätökset on jaoteltu kolmeen ryhmään seuraavasti:

(1) Valtioiden määräaikaishetkittäisen raportoinnin laatinta ja käsittely

Viiheet kertomusten laadinnassa, julkaisemisessa YK-asiakirjoina ja käsittelyssä sopimuselimityksessä on nähty eräänä nykyisen sopimusvalvonnan suurimmista ongelmista. Tutkimuksessa suositellaan kehitysmaiden hallituksille, että ne pyrkisivät estämään viiveet mm. osoittamalla riittävät voimavarat kertomusten laadintaan, luomalla ministeriöiden välisen yhteistyörakenteen raportointia varten ja kouluttamalla virkamiehiään. YK:n ihmisoikeusvaltuutetun toimiston tulisi kehittää teknistä tukea kertomusten laadinnassa keskittyen niihin maihin, joilla on tahtoa parantaa yhteistyötään sopimuselimityksen kanssa. Raportointia koskevan koulutuksen ei tulisi rajoittua hallituksen virkamiehiin, vaan myös kansalaisjärjestöjen ja toimittajien tietotason tulisi pyrkiä parantamaan. Sopimuselimityksen taas tulisi koordinoita työnsä paremmin mm. porrastamalla saman valtion kertomusten määräajat ja käsittelyajankohdat eri komiteoissa, yhtenäistämällä raportointiohjeitaan sekä siirtymällä yhä enemmän kohdennettuun raportointiin kunkin sopimuksen nojalla.

“Parhaina käytäntöinä” (*best practices*) raportoinnin alalla tutkimuksessa tuodaan esiin Senegalin omaksumat käytännöt raporttien laadinnassa sekä UNICEF:n antama tekninen tuki raportoinnille lapsen oikeuksien sopimuksen nojalla.

(2) Sopimuselinten johtopäätösten täytäntöönpano ja sen seuranta

Tutkimuksessa puolletaan, että kehitysmaat laatisivat kansallisen strategian YK:n kuuden ihmisoikeussopimuksen valvontaelinten johtopäätösten täytäntöönpanosta ja sen seurannasta. Eräänä “parhaana käytäntönä” tuodaan esiin Kolumbiassa säädetty erillinen laki, jonka nojalla yksilövalituksen tekijälle maksetaan valtion varoista vahingonkorvausta kun YK:n sopimuselin on todennut ihmisoikeusloukkauksen.

Kehitysmaiden hallituksille tutkimuksessa suositellaan seuraavanlaista mekanismia: Sopimuselinten johtopäätökset tulee kääntää kansallisille kielille ja levittää tehokkaasti. Raportoinnista vastuullisen ministeriön (useimmiten ulkoministeriö) tulee virallisesti osoittaa kansallinen vastuutaho kullekin sopimusvalvontaelimen johtopäätökselle, ja johtopäätöksille tulee luoda pysyvä seurantamekanismi. Koko raportointiprosessia varten tulee luoda ministeriöiden välinen yhteistyöelin tai –rakenne, joka osallistuu kertomusten laadintaan ja sopimuselinten johtopäätösten toteuttamisen seurantaan. Sopimuselinten johtopäätöksiä tulee käyttää apuna virkamiesten, kansalaisyhteiskunnan toimijoiden ja tuomareiden koulutuksessa.

Eräisiin eteläafrikkalaisiin tuomioratkaisuihin viitaten tutkimuksessa korostetaan, että kansallisella tuomioistuinlaitoksella voi olla tärkeä osuus sopimuselinten johtopäätösten toteuttamisessa ja yleisen ihmisoikeustietoisuuden parantamisessa kehitysmaissa. Samalla kansalliset tuomioistuinratkaisut, joissa viitataan YK:n ihmisoikeuselinten tulkintakannanottoihin, lisäävät kansainvälistä kiinnostusta kehitysmaiden oikeusjärjestyksiä ja tuomioistuinkäytäntöjä kohtaan toimien siten merkittävänä kansainvälisen “*goodwillin*” lähteenä.

Sopimusvalvontaelinten tulisi kehittää strategia johtopäätöstensä seurantaan varten, ja toimintaan tulisi osoittaa riittävät voimavarat. Sopimuselinten tulisi informoida YK:n yleiskokousta ja talous- ja sosiaalineuvostoa tilanteista, joissa jokin maa ei toteuta sopimuselinten johtopäätöksiä. Tutkimuksessa puolletaan sopimuselinten hyväksymien maakohtaisten johtopäätösten kehittämistä suhteellisen suppeina ja kyseisen maan

kannalta keskeisiin kysymyksiin kohdennettuina. Johtopäätösten tulisi selvästi osoittaa, miltä osin on kysymys valtion ratifioiman ihmisoikeussopimuksen oikeudellisesta tulkinnasta ja miltä osin tähän tulkintaan perustuvasta *policy*-luonteisesta suosituksesta.

Kehitysapua antavien valtioiden tulisi sisällyttää bilateraalisiin suhteisiinsa avunsaajien kanssa kysymys asianomaisen maan vuorovaikutuksesta sopimuselinten kanssa ja sopimuselinten johtopäätösten toteuttamisesta. Kehitysyhteistyössä tulisi aiempaa enemmän tukeutua sopimuselinten johtopäätöksiin maatilanteiden arvioinnissa ja avun suuntaamisessa.

Tutkimuksessa korostetaan internetin merkitystä tiedon levittämisessä YK:n ihmisoikeussopimusjärjestelmän toiminnasta. Kehitysmaiden hallituksia tulisi tukea niiden raporttien ja sopimuselinten johtopäätösten julkistamisessa hallituksen internet-sivuilla kansallisilla kielillä. YK:n ihmisoikeusvaltuutetun internetsivuja tulisi puolestaan kehittää kiinnittämällä erityistä huomiota niiden käytettävyyteen kehitysmaissa, mm. parantamalla palvelimen luotettavuutta ja tarjoamalla tekstipohjainen versio hitaiden tietoliikenneyhteyksien varassa oleville käyttäjille. Vaikka internet tavoittaa vain rajallisen osan kehitysmaiden väestöstä, tutkimuksessa korostetaan että sen mahdollisuudet tavoittaa asiasta kiinnostuneet ”loppukäyttäjät” ovat kuitenkin paljon suuremmat kuin YK:n painotuotteiden.

(3) Sopimusvalvontaelinten kehittäminen

Tutkimuksessa suhtaudutaan pidättyvästi sellaisiin muutoksiin sopimusvalvonnassa, jotka edellyttäisivät aikaa vievää ja tuloksiltaan epävarmaa prosessia itse sopimusten muuttamiseksi (esimerkiksi kuuden sopimuselimen yhdistäminen yhdeksi tai kahdeksi toimielimeksi). Tällaisten ratkaisujen sijasta puolletaan sopimuselinten nykyistä parempaa koordinaatiota ja kunkin sopimuselimen keskittymistä oman sopimuksensa kannalta keskeisimpiin kysymyksiin tietyssä maassa.

YK:n ihmisoikeusvalvontajärjestelmän ja tätä valvontaa toteuttavien sopimuselinten kehityksissä nauttiman luottamuksen kannalta nähdään tutkimuksessa ongelmallisena, että useimpien sopimuselinten (poislukien TSS-komitea) valinnassa käytössä oleva vaalimenettely perustuu vahvasti yksittäisen maan kykyyn ja haluun kampanjoida asettamansa ehdokkaan puolesta. Ainakin eräiden sopimuselinten osalta tämä on johtanut kehitysmaiden, erityisesti Afrikan aliedustukseen. Samalla myös naisten osuus sopimuselinten kokoonpanossa on jäänyt alhaiseksi lukuun ottamatta naisten ja lapsen oikeuksien komiteoita. Tutkimuksessa vastustetaan siirtymistä eri maanosien “kiintiöihin” sopimuselinten valinnassa ja puolletaan sen sijaan epävirallisen mekanismin aikaansaamista, jolla kehitysmaita tuetaan pätevien ja riippumattomien ehdokkaiden identifioimisessa ja kampanjoinnissa. Sopimuselinten mahdollisimman tasapainoinen ja monipuolinen kokoonpano olisi omiaan parantamaan sekä yleismaailmallisen ihmisoikeusvalvonnan asiantuntevuutta erilaisista oikeusjärjestyksistä että kehitysmaiden hallitusten ja kansalaisyhteiskuntien luottamusta sopimuselimiä kohtaan.

Edelleen tutkimuksessa arvioidaan niitä etuja ja haittoja, joita liittyy Heynsin tutkimuksessa tehtyyn ehdotukseen, että sopimuselimet määräjain kokoontuisivat eri puolilla maailmaa käsitelläkseen kyseisen maanosan valtioiden kertomuksia. Vaikka ehdotukseen liittyy kiistattomia etuja sopimusvalvonnan toimivuuden, uskottavuuden ja tunnettuisuuden kannalta, siihen liittyy myös huomattavia logistisia ongelmia, joilla taas on omat kustannusvaikutuksensa.

1. INTRODUCTION

The Ministry for Foreign Affairs has identified a need for targeted research in the area of the evolution of international cooperation and international organisation. Answers are sought to questions such as:

- What kind of reforms in the modalities of international organisations and international cooperation would respond to the strife for democracy and correspond to the interest of developing countries?
- What are the positions of developing countries in such matters?
- Where are the obstacles for the implementation of reforms that would further democracy and the interest of developing countries?

Already during several years one specific reform discussion within the United Nations organisation (UN) has been related to the monitoring mechanisms established under six major international human rights treaties: International Covenant on Economic, Social and Cultural Rights (CESCR), International Covenant on Civil and Political Rights (CCPR), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and Convention on the Rights of the Child (CRC). How do these mechanisms function and how should they be developed? The discussion has been conducted both in academia and between governments. Among academic authors, Professor Philip Alston (Australia/European University Institute in Florence), Professor Anne Bayefsky (Canada) and Professor Christof Heyns (South Africa)¹ have been responsible for producing reports to the immediate use of the UN.²

¹ Åbo Akademi University Institute for Human Rights participated in the Professor Heyns's project, being responsible for the study on Finland.

² See the so-called Alston report to the Commission on Human Rights ("Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty Regime", UN Doc. E/CN.4/1997/74, 7 March 1997); Philip Alston & James Crawford, *The Future of UN Human Rights Treaty Monitoring*, Cambridge 2000; Anne Bayefsky, *The UN Human Rights Treaty System in the 21st Century*, Kluwer 2000; Anne F. Bayefsky, *The UN Human Rights Treaty System; Universality at the Crossroads*, Transnational Publishers 2001 and <http://www.yorku.ca/hrights/>; Christof Heyns & Frans Viljoen, *Impact Study of the United Nations Human Rights Treaties in Twenty UN Member States*, Pretoria 2000 (electronic version).

Among others, the governments of Australia, Canada and New Zealand have been active in looking for reform ideas on the political level.³ The treaty bodies themselves have contributed to the debate, both in the form of developing their own working methods within the current normative framework and by participating in the discussion on long-term reforms.⁴

Some of the identified problem areas in the work of the treaty bodies, calling for reform are:

- Non-submission of periodic reports by States, or long delays in submission.
- Further delays in the consideration of submitted reports, partly due to the editing and translation of the report before it is issued as a UN document, partly due to a backlog in the work of the treaty bodies themselves. The situation differs in relation from treaty body to another so that, for instance, an average backlog of approximately two years has been mentioned.⁵ From the point of view of State parties it is frustrating that the treaty bodies cannot consider their reports within a reasonable period of time after the submission.⁶
- Duplication of work due to overlapping provisions in the six treaties: duplication in reporting by States and duplication in the work of the treaty bodies.
- The problem of “a reporting burden” as experienced by many governments: governments of small countries, governments of poor countries and governments of federal States. Over the past ten years since the sixth treaty body (the Committee on the Rights of the Child) came into operation, States have produced reports on average every 1.1 years, and have had reports considered every 1.2 years.⁷ It may be noted that delay in the consideration of submitted reports

³ See e.g. an article written by Daryl Williams, the Commonwealth of Australia Attorney-General and Minister of Justice, in Australian Human Rights Journal in 1999, “Reforming human rights treaty bodies”. <http://www.austlii.edu.au/au/journals/AJHR/1999/30.html>

⁴ For instance, the Human Rights Committee (HRC) acting under the CCPR has constantly developed its own procedures, and it organised in October 2000 a separate meeting to hear the opinions of States parties. The annual meetings of Chairpersons of treaty bodies have served as a forum for inter-committee discussions on treaty body reform.

⁵ Bayefsky 2001, p. 16.

⁶ Ibid.

⁷ Id. Annex 1, Tables 23 (pp. 217-220) and 39 (pp. 240-243).

- necessitates updated reports, which adds to the reporting burden and diminishes incentive for States to honour deadlines.⁸
- Problems resulting from the geographical distance between the State parties and the venue of the treaty body sessions (Geneva or New York).
 - The absence of a proper follow-up procedure in relation to the findings (concluding observations) issued at the end of the consideration of a report.
 - Inefficiency of the optional complaints procedures under the CCPR, CAT, CERD and CEDAW: long delays due to a backlog,⁹ and the absence of an efficient follow-up procedure.
 - Problems in the interaction between non-governmental organisations (NGO) and the treaty bodies, partly resulting from the geographical distance between the countries under consideration and the venue of the treaty body session (Geneva or New York).

The background to these problems lies in the fact that participation in the treaty system has expanded enormously from the early days of the system in terms of ratifications, acceptance of optional complaints procedures, the numbers of state reports produced and considered, the individual communications submitted under the complaints mechanisms, as well as the meeting time of six different treaty bodies.¹⁰ Moreover, the existing implementation schemes were drafted during “a period of time when effective international monitoring was neither intended nor achievable”.¹¹ Treaty bodies were established on a case-by-case basis, without a relationship to each other or to the UN

⁸ Id. p. 16.

⁹ The HRC has received the greatest number of individual communications. The average time between the submission of a complaint and the final views for the HRC is four years (Bayefsky 2001, Annex 1, Graph 105, p. 520). The average time between initial submission and a decision of inadmissibility is 2.5 years. (id. Annex 1, Graph 104, p. 519).

¹⁰ Id. p. 4. Every UN Member State is now a party to one or more of the six major human rights treaties. In fact, 80% of States have ratified four treaties or more (id. p. 2). Citing Philip Alston, “If the system is in difficulty, this is to a large degree a product of its own success in attracting the participation and involvement of states and other bodies.” See Alston 2000a, p. 3.

¹¹ Bayefsky 2001, p. 2.

High Commissioner for Human Rights (UNHCHR), a post that was created decades after most of the treaties were adopted.¹²

So far the perspective of the UN and/or the governments in developed Western countries has been predominant in the discussion on treaty body reform. The “Domestic Impact Study” coordinated by Professor Christof Heyns is an exception in this respect, as developing countries constitute eleven of the twenty countries taken as case studies, and as the perspective of developing countries clearly affects the reform proposals resulting from the study.

It is likely that international discussions related to the reform of human rights treaty monitoring will continue for several years. The recent entry into force of the Optional Protocol to the CEDAW on a complaints procedure (CEDAW-OP),¹³ and the approaching entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the UN Migrant Workers Convention)¹⁴ will cause additional challenges to the operation of the treaty body system. The forthcoming entry into force of the Statute of the International Criminal Court on 1 July 2002 that will deal with questions of individual criminal responsibility will most likely trigger off a new discussion on the need to establish a world human rights court competent to decide, with legally binding force, on issues of State responsibility in the field of human rights violations. Such a perspective of a world human rights court forms a long-term goal against which reform ideas related to the existing treaty bodies should be looked at.

This research report will deal, *inter alia*, with the following concrete questions:

- How to minimise delays in the preparation and submission of periodic reports by developing countries?

¹² Bayefsky 2001, p. 3. The first treaty body, the Committee on the Elimination of Racial Discrimination first met in January 1970, and the UNHCHR was established in 1994 (see e.g. Alston 2000a, p. 3).

¹³ This protocol entered into force on 22 December 2000 after having been ratified by ten States.

¹⁴ As of 13 May 2002, the Convention had 19 State parties and 11 signatories. A total of 20 ratifications are required for its entry into force.

- How to organise technical assistance for the preparation of periodic reports in order to optimally promote the realisation of human rights?
- What kinds of existing best practices can be identified to assist developing countries in the preparation of their periodic reports, in consulting NGOs and other civil society actors and in the implementation of the findings by the treaty monitoring bodies?
- How should the form and contents of the findings by the treaty bodies (concluding observations issued at the end of the consideration of a report, final views resulting from the complaints procedures) be developed in order to make their implementation easier in developing countries? Should more emphasis be placed on legal analysis and argumentation, or on policy recommendations?
- How should the website of the Office of the High Commissioner for Human Rights (OHCHR) be developed so that governments, courts, legislative bodies, national human rights institutions and NGOs in developing countries could make better use of material produced in the course of the monitoring mechanisms under UN human rights treaties?
- Should the treaty bodies schedule sessions to take place in various parts of the world in order to obtain better visibility and influence of their work?
- Should the method of electing treaty body members be developed in order to obtain higher representativeness in terms of geographical region and of gender, but without endangering the nature of the treaty bodies as independent expert bodies?

In order to draw conclusions on how the UN human rights treaty body system could be reformed in order to better respond to the needs of developing countries, this report will examine the interaction between developing countries and the UN treaty bodies. What kind of problems and best practices can be identified? The developing countries examined in this study are Brazil, Colombia, Egypt, India, Iran, Jamaica, Mexico, Philippines, Senegal, South Africa and Zambia. All of them have been part of the UN human rights treaty system long enough for it to have an opportunity to effect a change at

the national level.¹⁵ This is one reason for these countries being chosen for the above-mentioned Heyns study. The availability of first-hand and top-quality material through the Heyns study has, in turn, been a major reason for focusing at the same countries as examples in this report. In addition, Martin Scheinin paid a visit to Iran during the project and participated in an expert seminar on the experiences of Iran from its interaction with the United Nations human rights treaty bodies.

The chosen countries can be categorised in the following way:

a) Geographical group:

Latin America and the Caribbean:	Brazil, Colombia, Jamaica, Mexico
Africa and the Middle East:	Egypt, Senegal, South Africa, Zambia
Asia:	India, Iran, Philippines

b) Status in the DAC List of Aid Recipients and more specifically in its Part 1, Developing Countries and Territories (Official Development Assistance):¹⁶

Least developed countries:	Zambia
Other low income countries:	India, Senegal
Lower middle income countries:	Colombia, Egypt, Iran, Jamaica, Philippines, South Africa
Upper middle income countries:	Brazil, Mexico

¹⁵ Heyns & Viljoen 2000, p. 2.

¹⁶ <http://www.oecd.org/EN/document/0,,EN-document-57-2-no-1-13178-0,00.html>

2. DEVELOPING COUNTRIES' EXPERIENCES FROM THE REPORTING PROCESS

2.1. General remarks

Reporting is an obligation every State automatically accepts upon the ratification of the CCPR, CESCR, CERD, CAT, CEDAW or CRC. It is a process that is intended to “generate a dialogue within civil society about the requirements of the treaty, the application of its standards to local conditions, the shortfalls in compliance, priorities for redress, and the design of a plan of action”.¹⁷ Furthermore, the periodic submission of state reports is supposed to create “[a] cycle of pre-report consultation followed by post-report planning at the national level.”¹⁸ Thus, preparation and submission of state reports should not be an isolated exercise carried out only with a view of fulfilling the formal requirements of the treaty. In contrast, reporting should be seen as a process, a continuing effort, rather than being perceived as an *ad hoc* activity or a nuisance. Concluding observations issued by the treaty bodies after the consideration of a state report play a crucial part in the reporting process. They are its “key outcome”.¹⁹ Concluding observations could be understood as a vehicle through which the preparation of reports is transformed into policy-making and implementation. However, the first step is to take a closer look at the preparation and submission of periodic state reports.

When assessing countries' performance in respect of reporting, timely submission of state reports is an important indicator. Non-submission of reports or long delays in submission is a problem of significant proportions. It should be noted at the outset that although developing countries top the list of States with the largest number of overdue reports,²⁰ late reporting is not a problem for developing countries only. An average of 70% of

¹⁷ Bayefsky 2001. p. 12.

¹⁸ Ibid.

¹⁹ Id. p. 61. It may be noted that there were initially no concluding observations, the dialogue between the State party and the Committee being the central feature of the reporting process. Individual committee members made critical or constructive comments that may have been recorded in the annual report summaries of the dialogue (ibid.).

²⁰ See id. Annex 1, Table 79 (pp. 488-495).

States parties to every treaty have overdue reports.²¹ In this chapter an attempt is made to look beyond the statistics in order to understand the reasons for late reporting among developing countries. In doing this, a number of factors were taken into consideration:

- degree of cooperation between various government agencies,
- availability of personnel trained in report writing,
- existence of inter-departmental institutions that coordinate report writing,
- participation of national human rights institutions if such institutions exist,
- use of consultants (from outside the government), and
- involvement of civil society and the media, including the role of shadow reports submitted to treaty bodies by national NGOs.

Among the selection of eleven developing countries, the following broad categories of national arrangements concerning the preparation and submission of state reports could be found:

- preparation of state reports as a governmental process,
- preparation of state reports as a governmental process where civil society is consulted, and
- ad hoc arrangements.

2.2. Preparation and submission of periodic state reports

2.2.1. Preparation of state reports as a governmental exercise

In Colombia, Egypt, Iran, Jamaica and Mexico, the most notable shortcoming in the preparation of state reports is the fact that civil society actors are not consulted.

In *Egypt*, the body responsible for reporting is in general the Department of Human Rights in the Ministry of Foreign Affairs²² in cooperation with the governmental

²¹ Id. Annex 1, Table 62, p. 471. For more information of the dimensions of this problem, see id. pp. 8-9.

²² The Department of Human Rights serves as a focal point of government departments concerned with human rights issues (id. p. 230). It is in charge of coordinating contacts with international organisations, in particular those within the UN system that are active in the field of human rights, whereas responsibility to implement the UN human rights treaties lies with concerned ministries (id. p. 232).

members of the Permanent Human Rights Commission.²³ However, a semi-governmental body, the National Council for Motherhood and Childhood, conducted the preparation of recent reports under the CRC and the CEDAW.²⁴ All reports are finally approved by the Permanent Human Rights Commission.²⁵

In *Mexico*, the Ministry of Foreign Affairs carries the main responsibility for reporting.²⁶ Since 1997, the Interdepartmental Commission has participated directly in the drafting of periodic reports.²⁷ It is a coordinating body that can prepare state reports as well as revise reports drafted elsewhere within the government. The Commission also approves all state reports.²⁸

In *Colombia*, the Ministry of Foreign Relations coordinates and executes the actual reporting process.²⁹ It receives input from other government agencies.³⁰ State human rights institutions have also provided information to various reports.³¹ NGOs or other individuals outside the government are not consulted,³² an exception being the

²³ Id. p. 241. The Permanent Human Rights Commission is an interministerial organ established in 1997. It consists of the representatives of the Ministry of Justice, the Ministry of Interior and the Socialist Prosecutor's Office (id. p. 230). The mandate of the Commission is to follow up the work of UN human rights organs in so far as Egypt is concerned, and to facilitate coordination among such government departments that have some competence in the field of human rights (ibid.).

²⁴ Id. p. 241. The National Council for Motherhood and Childhood was established in 1988 to promote the rights of children and to formulate national policies related to children. Its members include the Ministries of Social Affairs, of Education, Health, Youth and Information and a number of experts and public figures interested in children's affairs (id. p. 231).

²⁵ Id. p. 242

²⁶ Id. p. 439.

²⁷ Id. pp. 427, 439-440. The Interdepartmental Commission was created in 1997, and exists within the Ministry of Foreign Affairs. The Commission coordinates the different government departments responsible for implementing treaties and discusses treaty reports and recommendations made by the monitoring bodies (id. p. 427).

²⁸ See id. pp. 439-440.

²⁹ Id. p. 179.

³⁰ Id. p. 180.

³¹ Id. pp. 181-182. The Offices of the Procurator-General and of the Ombudsman (*Defensor del Pueblo*) are examples of such institutions (see id. pp. 168, 181-182).

³² As recently as in October 2000, i.e. during the consideration of Colombia's second report under the CRC, the Colombian representative admitted that the report had been submitted without consultation of the NGOs. He added, however, that "there had been broad - although by no means methodical - consultation for the preparation of the written replies to the questions on the list of issues", undertaken on the recommendation of the CRC Committee. See UN Doc. CRC/C/SR. 655, para. 38.

preparation of the fourth CEDAW report³³ and its supplement in the context of which outside consultants were employed.³⁴

In relation to their exclusion from the reporting process, it is interesting to note that Egyptian,³⁵ Mexican³⁶ and Colombian³⁷ NGOs have submitted shadow reports to the UN treaty bodies. It may not be much of a surprise to find that in these three countries there is a strong NGO sector with several organisations active in the field of human rights.³⁸

In *Jamaica*, the Ministry of Foreign Affairs has the overall responsibility for coordinating the preparation and submission of periodic reports.³⁹ *Iran's* periodic reports are in general prepared by the Department of Human Rights in the Ministry of Foreign Affairs with the cooperation and coordination of the Ministry of Justice. Relevant other ministries are consulted during the drafting process.⁴⁰ The initial CRC report was prepared by the Department of International Social Affairs in the Ministry of Foreign Affairs and a working group composed of representatives from relevant ministries and departments.⁴¹

³³ This report was due in 1995 and submitted in 1997. See <http://www.unhchr.ch/tbs/doc.nsf>

³⁴ See Heyns & Viljoen 2000, p. 181. Various NGOs were involved in the preparation of the fourth CEDAW report.

³⁵ Egyptian NGOs have submitted a few shadow reports (id. p. 242).

³⁶ The Mexican NGOs have very recently started to utilise UN human rights treaties, and the presentation of shadow reports is a relatively recent phenomenon (id. 434, 441, 447). As of today, NGOs have submitted such reports in respect of each of the six treaties (id. p. 441).

³⁷ Colombian NGOs have since the middle of the 1990s been increasing their participation in the UN treaty body system. They have submitted one or more shadow reports in respect of each of the six treaties to which Colombia is a party, in particular in connection with Colombia's fourth periodic report under the CCPR, which was submitted to the HRC in 1996. Id. pp. 173, 182-183.

³⁸ See id. p. 168 (Colombia), p. 231 (Egypt) and p. 426 (Mexico).

³⁹ Id. p. 365. In the case of CEDAW, the body responsible is the Bureau for Women's Affairs, and in the case of CRC a special Ambassador for children's affairs would normally be expected to see to the preparation of the reports. Jamaica has not ratified the CAT (see Annex to this report).

⁴⁰ Id. pp. 345-346. For example, the judiciary, Ministries of Labour and Social Affairs, Health, Culture and Islamic Guidance and Education (id. p. 346). Iran has ratified neither the CAT nor the CEDAW (see Annex to this report).

⁴¹ Id. p. 346. There were representatives from the Ministry of Education, the Ministry of Labour and Social Affairs, the Women's Cultural and Social Council, the Welfare Organization, the President's Office on Women's Affairs and the Ministry of Foreign Affairs (ibid.).

The absence of civil society input in the drafting process indicates that the governments do not take the reporting system seriously enough and tend to see it as an administrative task, thus isolating the reporting process from the actual implementation of the relevant treaty.⁴² One may also observe that the absence of consultation affects the quality of state reports, which in these five countries tends to be rather poor.⁴³ Iran is an exception in this respect. The substance of its periodic reports has been considered to be rather good: they tend to deal with substantive issues and problems encountered during the implementation of treaties. Iran's reports have also been factual and up to date, although not entirely frank.⁴⁴ In contrast, Jamaica's reports have on the whole been written in general terms and seek to give an optimistic and favourable picture of the Jamaican situation.⁴⁵ In some cases they are defensive and even misleading.⁴⁶ Nevertheless, there is an exception: the second, third and fourth reports under the CEDAW were full, fair and informative, probably because of the indirect influence exercised by strong women's NGOs.⁴⁷ As to Colombia, its recent reports seem to be formalistic, descriptive and superficial rather than substantive, analytical or critical, with the exception of the above-mentioned fourth report under the CEDAW in the drafting of which NGOs were involved.⁴⁸ It may be noted that the HRC and the CRC Committee have heavily criticised Colombia's performance.⁴⁹ In Egypt the quality of reports has been improving, i.e. they are becoming more factual.⁵⁰

Overall, NGO involvement in the drafting process would make it more transparent and increase public awareness of the contents and mechanisms of the treaties,⁵¹ in particular since the availability of state reports to the general public is currently rather poor.⁵²

⁴² Cf. Heyns & Viljoen 2000, p. 350 (Iran) and p. 172 (Colombia).

⁴³ For example, most of Mexico's state reports have not been critical and they often contain insufficient information (id. pp. 444-445).

⁴⁴ See Heyns & Viljoen 2000, p. 347.

⁴⁵ Id. p. 367.

⁴⁶ Ibid.

⁴⁷ Id. p. 370.

⁴⁸ Id. pp. 185-186. See also the concluding comments of the CEDAW Committee in which it characterised Colombia's fourth report as "comprehensive, candid and critical" (UN Doc. A/54/38, paras.337-401, para. 348).

⁴⁹ Id. p. 186. The criticism was directed to the fourth report under the CCPR and the initial CRC report. The CRC Committee required a supplementary report in response to its list of issues.

⁵⁰ Id. p. 243.

⁵¹ Id. p. 350.

2.2.2. Participation of civil society in the preparation of state reports

In India, South Africa and the Philippines, civil society actors are consulted during the preparation of state reports, but this consultation seems to be rather selective and is arranged more on an *ad hoc* basis than being conducted in a systematic and organised (or institutionalised) manner.

In *India*,⁵³ the UN Division of the Ministry of External Affairs supervises the implementation of procedural treaty obligations at the international level,⁵⁴ whereas the concerned government department coordinates the preparation of reports and engages in consultations with other departments. A draft report is then circulated among the different departments and information is solicited from different agencies, including selected NGOs.⁵⁵ Participation of Indian NGOs in the drafting of India's initial report under the CRC was somewhat more extensive than usually. A three-day National Consultation Workshop was organised by the Indian Council of Child Welfare in collaboration with the Department of Women and Child Development and UNICEF in Delhi in November 1994.⁵⁶ NGOs, activists, academics and professionals were represented in the workshop and their input was taken into consideration when writing the report. In the report itself it was stated that the preparation of the country report had been an important step in the implementation and dissemination of the Convention.⁵⁷ This is a positive development, as it shows that the drafting process has not been perceived merely as an administrative effort in order to fulfil the procedural requirements of the CRC. Furthermore, NGOs were

⁵² It seems that in Mexico reports can be obtained on request only (id. p. 440). In Egypt, it is difficult to access state reports the only official channel being the UN depositary library (id. p. 242). In Iran, the reports are available in the Official Gazette only (id. p. 343). In Colombia, the Ministry of Foreign Relations rarely makes these reports public or distributes them to NGOs (id. p. 180). An exception was made in the case of the fourth report under the CEDAW (p. 182). Jamaican state reports are not made available to the general public (id. p. 365).

⁵³ India signed the CAT in 1997 but has not ratified it.

⁵⁴ Heyns & Viljoen 2000, p. 304.

⁵⁵ Id. p. 324. Heyns & Viljoen point out that no formal training has been arranged to government officials on the preparation of reports (id. p. 310). The National Human Rights Commission does not participate in the reporting process (id. p. 324). It was created in 1993 and it monitors the implementation of substantive human rights treaty obligations at the domestic level (id. pp. 302, 304).

⁵⁶ UN Doc. CRC/C/28/Add.10, para. 33. UNICEF supported the writing of the report (UN Doc. CRC/C/SR.589, para. 13).

⁵⁷ *Ibid.*

also consulted when the government drafted its reply to the CRC Committee's list of issues.⁵⁸ One reason behind the more inclusive drafting process behind the initial CRC report may be that a four-member team of the CRC Committee paid a four-day visit to India in October 1995,⁵⁹ i.e. prior to the submission of the said report.⁶⁰

However, in its concluding observations the CRC Committee noted that "cooperation with non-governmental organisations in the implementation of the Convention, including preparation of the report, remains limited" and it encouraged India "to consider a systematic approach to involve NGOs and civil society in general throughout all stages of the implementation of the Convention, including policy-making".⁶¹ Similarly, Heyns & Viljoen characterise the role of NGOs in the reporting process as being very constructive but highly selective.⁶²

In contrast to other countries cited in this study, *South Africa's* accession to UN human rights conventions is a fairly recent phenomenon.⁶³ So far it has submitted initial state reports under the CEDAW and the CRC,⁶⁴ and a total of five reports are currently overdue.⁶⁵ The Cabinet has assigned the different treaties as an overall responsibility of particular government departments.⁶⁶ In the case of the two reports already submitted, the lead department established a drafting committee that consisted of representatives of various government departments and civil society.⁶⁷ In addition, the South African Human Rights Commission takes a major responsibility in reporting, but it is not willing

⁵⁸ Id. para. 7. The list of issues in question: UN Doc. CRC/C/Q/IND/1.

⁵⁹ See Heyns & Viljoen 2000, p. 311.

⁶⁰ The initial CRC report was due in January 1995 and it was submitted in March 1997.

⁶¹ UN Doc. CRC/C/15/Add.115, para.22.

⁶² Heyns & Viljoen 2000, p. 330.

⁶³ South Africa has not ratified the CESC, which it signed in 1994.

⁶⁴ The initial CEDAW report was due in January 1997 and submitted in February 1998. The initial CRC report was due in July 1997 and submitted in December 1997. See <http://www.unhchr.ch/tbs/doc.nsf>

⁶⁵ The initial and second CERD reports (due in January 1999 and 2001 respectively), the initial CCPR report (due in March 2000), the second CEDAW report (due in January 2001) and the initial CAT report (due in January 2000). See id.

⁶⁶ Heyns & Viljoen 2000, p. 546.

⁶⁷ However, the involvement of the civil society, including NGOs, was more limited in respect of the initial CEDAW report (id. p. 569).

to write entire reports on behalf of the government.⁶⁸ A National Consultative Forum on Human Rights has also been formed to coordinate, *inter alia*, the writing of reports to UN treaty bodies.⁶⁹

The Philippines changed its reporting structure in 1997 through the creation of the Co-ordinating Committee on Human Rights (CCHR).⁷⁰ Prior to its establishment there were no real consultations between the Department of Foreign Affairs (the agency charged with the preparation of reports) and other government agencies, and even less with NGOs,⁷¹ which, however, submitted a few shadow reports.⁷² The new CCHR should consult with NGOs, sectoral groups and other private sector institutions prior to the preparation of reports.⁷³

In the case of South Africa and the Philippines it is difficult to draw conclusions on the preparation of reports, since South Africa has so far presented only a few reports and the Philippines' new reporting structure has not been functioning for very long. However, it is safe to say that the governments of India, Philippines and South Africa should pay

⁶⁸ Heyns & Viljoen 2000, p. 569. For the mandate of this Commission, see the Constitution of the Republic of South Africa, section 184 (see <http://www.polity.org.za/govdocs/constitution/saconst.html>).

⁶⁹ Heyns & Viljoen 2000, p. 569.

⁷⁰ The Co-ordinating Committee on Human Rights is an inter-agency body, composed of representatives from government departments, agencies or national commissions and chaired by the representative of the Department of Foreign Affairs. NGOs are not represented. CCHR is divided into two working groups: a working group on civil and political rights and a working group on economic, social and cultural rights. The CCHR has the following functions:

- (a) "to respond to urgent requests for information from UN human rights bodies, domestic and international non-governmental organisations and private individuals concerning human rights violations allegedly perpetrated upon individuals or groups in the country; and
- (b) to prepare the periodic reports submitted to UN human rights bodies in accordance with international human rights covenants and, after consultations with non-governmental organisations, sectoral groups and other private sector institutions, to submit these reports in time for the treaty-required due dates."

Heyns & Viljoen 2000, p. 453. There are a few shortcomings in the structure of the CCHR: no clear guidelines exist on the basis of which the members of the Committee are chosen, and representatives from the legislative and judicial branches are not included in the process (id. p. 468).

⁷¹ Id. p. 465.

⁷² There have been a total of three NGO shadow reports submitted in respect of the initial CESCR report, the 4th CEDAW report and the initial CRC report (id. pp. 466-467).

⁷³ Id. p. 465. At the time of the writing of the "Domestic Impact Study", there was no information available to determine the extent of participation, consultation and inclusion of NGO inputs in the preparation of reports by the CCHR (id. p. 466).

more attention to NGO participation.⁷⁴ The extent of current consultation with civil society actors has not been sufficient, which is reflected in the uncritical nature of the state reports.⁷⁵ Another indication of this is the fact that despite the above-described consultation arrangements, both South African and Indian NGOs have felt that there is a need to submit alternative reports.⁷⁶ On the other hand, NGOs themselves should become more aware of the opportunities offered by the reporting process and become more active and organised to use these opportunities.⁷⁷

In *Senegal*,⁷⁸ the consultation with civil society is conducted in a systematic and organised (institutionalised) manner. The responsible ministry prepares draft reports with inputs from other departments.⁷⁹ The report is then tabled and discussed by the Senegalese Human Rights Committee,⁸⁰ where its NGO members can raise their views, which are incorporated in the draft report (for example, in the case of the first CEDAW report), or their contributions are taken note of in redrafting the report.⁸¹ The report is finalised by the responsible ministry and in the end submitted to the Inter-Ministerial Committee on Human Rights and Humanitarian Law⁸² for a final approval.⁸³

⁷⁴ Cf. *id.* p. 574 (in relation to South Africa).

⁷⁵ *Id.* p. 326 (India), p. 468 (Philippines).

⁷⁶ South Africa has a strong NGO sector that includes numerous human rights organisations, in particular in the field of women's and children's rights (*id.* p. 544). NGOs submitted two shadow reports to the initial CEDAW report (*id.* p. 570). In India NGOs have submitted shadow reports in respect of the CERD, CCPR and in particular the CRC (*id.* p. 324).

⁷⁷ Cf. *id.* p. 574 (in relation to South Africa).

⁷⁸ Senegal and India belong to the category of other low income countries, whereas Philippines and South Africa are lower middle income countries.

⁷⁹ Heyns & Viljoen 2000, p. 532.

⁸⁰ The Senegalese Human Rights Committee was established in 1970 (Heyns & Viljoen 2000, p. 524), and Senegal was one of the first countries to create such an institution (*id.* p. 539). In 1997 it was transformed to a national human rights institution and charged with giving its opinion on all reports that are to be submitted to the UN human rights treaty-monitoring bodies (*id.* p. 524). The Committee enjoys broad NGO participation: eight of the most important NGOs are represented in it (*ibid.*). Thus, the Committee is an independent consultative forum in which government is also represented (*ibid.*).

⁸¹ *Id.* p. 532. The first CEDAW report was due in March 1986 and submitted in November 1986.

⁸² The Inter-Ministerial Committee on Human Rights and Humanitarian Law was created in 1997. It is a government institution that coordinates human rights matters within government departments. Its mandate includes state-reporting activities, follow-up of concluding observations and the harmonisation of domestic law with international standards. There is some duplication in the functioning of this Committee and the Senegalese Human Rights Committee. See Heyns & Viljoen 2000, p. 524.

⁸³ *Id.* p. 532.

Prior to the year 1997 the role of the Senegalese Human Rights Committee was more limited, and the Inter-Ministerial Committee did not exist. The preparation of reports was almost exclusively the responsibility of the Ministry of Justice and the Ministry of Foreign Affairs, and the process as a whole was more centralised and less participatory, the role of NGOs being non-existent.⁸⁴ However, NGOs did present shadow reports to both the HRC and the CAT Committee.⁸⁵ The current participation of NGOs in the drafting process within the Senegalese Human Rights Committee has resulted in a situation where NGOs do no longer consider it necessary to submit shadow reports.⁸⁶ Although it is clear that this new internal reporting system is a major improvement, it is interesting to note that this transition resulted in deterioration in the quality of reports, as new expertise has had to be developed.⁸⁷

Finally, a few words can be said about the progress made in the dissemination of periodic reports in Senegal, South Africa and India. The establishment of the Senegalese Human Rights Committee has contributed to a better access to and dissemination of state reports. Prior to 1997 such reports were not made available to NGOs, but now the eight NGO members of the Committee have automatically access to both draft and final reports.⁸⁸ In South Africa the dissemination of state reports has been conducted well. The Internet was used when disseminating the initial report to CEDAW to the general public.⁸⁹ Moreover, UNICEF provided financial assistance to printing 50.000 copies of the initial CRC report, which could be obtained free of charge.⁹⁰ There are also some signs indicating that the use of the Internet in the reporting process is starting to take place in India.⁹¹ One NGO has placed on its website its alternative report in response to India's third periodic report

⁸⁴ Ibid.

⁸⁵ Id. pp. 532-533.

⁸⁶ Id. p. 533. There is a strong NGO community in Senegal with about a hundred NGOs working on human rights-related issues (id. p. 523). This sector has developed in the 1990s (id. p. 526).

⁸⁷ Id. p. 534 (this observation was made in the context of reports submitted to the HRC). In general, Senegal's reports have been comprehensive and in compliance with the reporting guidelines, although members of the various committees have been concerned about the lack of information on implementation of treaties in practice (ibid.).

⁸⁸ Id. p. 533.

⁸⁹ Id. p. 569. See <http://www.polity.org.za/govdocs/reports/cedaw1.html>. Access to the Internet is developing very fast in South Africa (Heyns & Viljoen 2000, p. 543).

⁹⁰ Id. p. 570. Later, in 1998, a further 30.000 copies were printed.

⁹¹ However, access to the Internet is only around one percent (id. p. 301).

under the CCPR.⁹² Furthermore, during the consideration of India's initial report under the CRC in January 2000, India's representative informed the Committee that the report had been publicized through the Internet.⁹³

2.2.3. Ad hoc arrangements

Zambia's reports have mainly been prepared by lawyers in the Ministry of Legal Affairs, who have not in general received training in the preparation of reports.⁹⁴ No consultation with stakeholders, such as NGOs, was undertaken,⁹⁵ and the quality of reports was poor.⁹⁶ However, the preparation of Zambia's combined third and fourth reports on the CEDAW was entrusted to two consultants, who had received training in reporting.⁹⁷ They undertook wide consultations with various stakeholders, including women's NGOs, around the country, e.g. in the form of seminars and workshops.⁹⁸ Also the preparation of Zambia's initial report under the CRC was entrusted to an outside expert, but it has not yet been completed because the consultant left before the report was done.⁹⁹ Wide consultations were conducted, e.g. in the form of a series of national workshops, where the participation of NGOs was comprehensive.¹⁰⁰ The project was funded by UNICEF.¹⁰¹ The quality of these reports is considerably better than that of previous reports; they deal extensively with substantial issues and are critical.¹⁰² In other words, more consultation with civil society resulted in the improvement in the quality of reports. Finally, preparation of Zambia's initial CAT report followed a third type of procedure: the task

⁹² Id. p. 324. The NGO in question is the South Asian Human Rights Documentation Centre. See "Alternate Report and Commentary to the U.N. Human Rights Committee on India's 3rd Periodic Report under Article 40 of the International Covenant on Civil and Political Rights" (July 1997), <http://www.hri.ca/partners/sahrdc/resources.shtml>

⁹³ UN Doc. CRC/C/SR.589, para. 33. Normally, country reports are made available to selected individuals and NGOs after the submission (Heyns & Viljoen 2000, p. 324).

⁹⁴ So far this is true of all reports under CERD, CESCRC and CCPR (id. p. 629).

⁹⁵ Id. pp. 629, 639.

⁹⁶ Id. p. 633.

⁹⁷ Id. p. 629.

⁹⁸ Id. p. 630. Input from stakeholders was also sought in respect of the first and second draft report. Lawyers in the Ministry of Legal Affairs edited the report before it was submitted to the CEDAW Committee in mid-1999 (ibid.).

⁹⁹ Id. pp. 630, 631.

¹⁰⁰ Id. p. 630.

¹⁰¹ Ibid. It may be noted that Zambia belongs to the category of least developed countries.

¹⁰² Id. p. 633.

was entrusted to an interministerial committee, the project being funded by the Swedish government.¹⁰³

In *Brazil*¹⁰⁴ the preparation of reports under the six UN human rights conventions has been entrusted to a research institution or an NGO.¹⁰⁵ National institutions with a human rights mandate do not participate in the preparation of Brazilian reports, except for the National Secretariat on Human Rights within the Department of Justice, which is involved in the approval of reports and the presentation before the relevant treaty organs.¹⁰⁶ In respect of the initial report under the CRC, a different arrangement was adopted. A working group within the Ministry for Foreign Affairs prepared a working draft after consultation with several people within the Ministry and with NGOs that work on children's rights.¹⁰⁷ Heyns & Viljoen have observed that although Brazil's reports have gotten better as "a handful of elite NGOs" have helped to prepare them,¹⁰⁸ it would be important to engage a larger number of NGOs in the drafting process.¹⁰⁹ This would also strengthen the public debate on human rights issues.¹¹⁰ During the consideration of its initial CAT report in May 2001 the Brazilian government acknowledged that it did not have an expert group responsible for the preparation of state reports, and that it could probably benefit from the courses provided by international organisations on the preparation of such reports. It was also promised that the government would seriously consider the suggestion that formal consultations be held with appropriate NGOs when preparing the reports.¹¹¹

¹⁰³ Id. p. 630.

¹⁰⁴ Brazil is an upper middle income country.

¹⁰⁵ Heyns & Viljoen 2000, pp. 110-111. For example, the CERD and CCPR reports have been prepared by NEV - Centre for the Study of Violence at the University of São Paulo (id. p. 110). During the years of military rule, the Brazilian reports were prepared by government officials (ibid.).

¹⁰⁶ Id. p. 111.

¹⁰⁷ Heyns & Viljoen 2000, p. 111. No report has yet been submitted.

¹⁰⁸ In fact, in respect of the initial CAT report submitted in May 2000 (due in October 1990), the CAT Committee stated in its concluding observations that the report was prepared in complete conformity with the Committees guidelines and had remarkably frank and self-critical character. See UN Doc. A/56/44/paras.1156-120, para. 117.

¹⁰⁹ Heyns & Viljoen 2000, p. 114.

¹¹⁰ Ibid.

¹¹¹ UN Doc. CAT/C/SR.471, para. 30.

Whereas shadow reports are starting to play a meaningful role in the Brazilian human rights community,¹¹² Zambian NGOs have not submitted virtually any alternative reports.¹¹³ In respect of the above-mentioned CEDAW and CRC reports the reason for this is said to be that the NGOs were satisfied with the consultation process.¹¹⁴ The dissemination of state reports in both Brazil and Zambia is rather poor.¹¹⁵ According to Heyns & Viljoen, reporting in Zambia is to a great extent a secret exercise.¹¹⁶

2.2.4. Submission of state reports

One might expect that when the preparation of state reports is entirely a governmental exercise, absence of a time-consuming consultation process would diminish delay in the submission of reports. This seems to be the case in Mexico, but not in Colombia, Egypt, Iran or Jamaica.

Mexico is a party to the six major UN human rights conventions,¹¹⁷ and it has an excellent reporting record that can be attributed to an effort by the Mexican government to display a positive image within the international community in respect of human rights.¹¹⁸ Mexico has submitted a total of 30 reports, and as of 1999 the average delay in the submission of reports had been nine months.¹¹⁹ At the moment there are four overdue

¹¹² Id. p. 111.

¹¹³ One Zambian NGO submitted a shadow report in respect of the second CCPR report, and an international NGO called Article 19 submitted one in respect of the initial report under the CCPR (id. p. 631).

¹¹⁴ Ibid.

¹¹⁵ In Brazil a few state reports have been made available in published, book-length format (id. p. 111). In Zambia state reports have not generally been readily available, but in respect of the latest CEDAW and CRC reports NGOs have had better access to them through various seminars and workshops (id. p. 631),

¹¹⁶ Id. pp. 631, 633, 639.

¹¹⁷ It may be noted that Mexico has also ratified the UN Migrant Workers Convention. See <http://www.unhchr.ch/pdf/report.pdf>

¹¹⁸ Heyns & Viljoen 2000, p. 444. For example, the HRC commended in 1999 the timely submission of the fourth periodical report of Mexico and its quality (UN Doc. CCPR/C/79/Add.109, para. 2).

¹¹⁹ Heyns & Viljoen 2000, p. 436.

reports.¹²⁰ It may be noted that being classified as an upper middle income country, Mexico is also one of the richest countries in this group of developing countries.

Jamaica has not ratified the CAT, but it is a party to the other five major UN human rights treaties. *Jamaica* has submitted 16 state reports, and the average delay in their submission has been four years and six months.¹²¹ This is a particularly poor record among the countries examined in this report. At the moment there are two overdue reports.¹²² *Iran's* record is not much better. It has ratified only four of the six UN human rights conventions,¹²³ and has been on average three years and seven months late with the submission of its periodic reports.¹²⁴ As of today, it has submitted 16 reports and the number of overdue reports is seven.¹²⁵

Egypt and *Colombia* have both ratified the six UN human rights conventions.¹²⁶ *Egypt* has submitted 24 and *Colombia* 28 periodic reports with the average delay of submission being two years and eleven months and one year and seven months respectively.¹²⁷ At the moment *Egypt* has three and *Colombia* four overdue reports.¹²⁸

¹²⁰ The 12th – 14th CERD reports (due in March 1998, 2000 and 2002), and the 4th CAT report (due in June 2002). See <http://www.unhchr.ch/tbs/doc.nsf> (the numbers of overdue and submitted reports cited in this chapter in respect of each country are all taken from this source).

¹²¹ Heyns & Viljoen 2000, p. 363. This figure dates from the year 1999.

¹²² The third CCPR report and the 5th CEDAW report, both due in November 2001.

¹²³ *Iran* has not ratified the CEDAW or CAT, reason for this being their incompatibility with domestic law as well as *Iran's* experiences from the ratification of the CRC in 1994 in the context of which *Iran's* sweeping reservation to this convention was heavily criticised (Heyns & Viljoen 2000, p. 338). All but the CRC were inherited from the previous regime.

¹²⁴ *Id.* pp. 344, 176. This figure dates from the year 1999.

¹²⁵ The 16th and 17th CERD reports (due in January 2000 and 2002 respectively), the 2nd and 3rd CESC reports (due in June 1995 and 2000 respectively), the 3rd and 4th CCPR reports (due on December 1994 and 1999 respectively), and the 2nd CRC report (due in August 2001). As to reports under the CCPR, the HRC itself considers that only one report per country can be overdue, since the due date for the next one is decided when a report is (finally) submitted.

¹²⁶ Both States have also ratified the Migrant Workers Convention. See <http://www.unhchr.ch/pdf/report.pdf>

¹²⁷ Heyns & Viljoen 2000, p. 238. This figure dates from the year 1999.

¹²⁸ *Egypt's* second and third CESC reports were due in June 1995 and 2000, and its 17th CERD report in January 2002. *Colombia's* overdue reports: the 10th CERD report (due in October 2000), the 5th CCPR report (due in August 2000), the initial CEDAW report (due in February 1999) and the 4th CAT report (due in January 2000).

In comparison with the previous group, South Africa, India and the Philippines have put more effort on the inclusiveness of the drafting process, and the delays in submission are considerable. As of 1999, *India* had been on average two years and five months late with the submission of its reports.¹²⁹ Now there are eight overdue reports.¹³⁰ The average delay in the submission of reports in *the Philippines* was two years and three months,¹³¹ its reporting record deteriorating in the 1990s.¹³² Currently there are a total of 12 overdue reports.¹³³ Lack of a specific government agency entrusted with the preparation of reports has been cited as one reason for the delay in report submission by the Philippines.¹³⁴ Subsequently, the Co-ordinating Committee on Human Rights was created, but did it improve the timeliness and quality of the reports? In view of the fact that the country has not submitted any new periodic reports since 1999, this does not yet seem to be the case.¹³⁵

Of all the developing countries examined in this report, *Senegal* has the most systematic and organised reporting procedure. It is party to all six UN human rights conventions, which it ratified at an early stage.¹³⁶ Senegal has submitted 21 reports, and there are six reports that are overdue.¹³⁷ The average delay in submission has been two years.¹³⁸ In

¹²⁹ Heyns & Viljoen 2000, p. 321.

¹³⁰ The 2nd CEDAW report (due in August 1998), the 15th - 17th CERD reports (due in January 1998, 2000 and 2002), the 2nd - 4th CESC reports (due in June 1991, 1996 and 2001), and the 4th CCPR report (due in December 2001). India has submitted 18 periodic reports under five treaties.

¹³¹ Heyns & Viljoen 2000, p. 462.

¹³² See e.g. id. pp. 462-465.

¹³³ The 2nd - 4th CAT reports (due in June 1992, 1996 and 2000), the 2nd and 3rd CCPR reports (due in January 1993 and 1998), the 5th CEDAW report (due in September 1998), the 15th - 17th CERD reports (due in January 1998, 2000 and 2002), the 2nd and 3rd CESC reports (due in June 1995 and 2000) and the 2nd CRC report (due in September 1997). As to reports under the CCPR, the HRC itself considers that only one report per country can be overdue, since the due date for the next one is decided when a report is (finally) submitted. The Philippines has so far submitted 22 periodic reports under six treaties.

¹³⁴ Heyns & Viljoen 2000, p. 467.

¹³⁵ Ibid. In respect of the CEDAW and CRC there are specialised agencies with primary responsibility for reporting (id. p. 465). Heyns & Viljoen observe that "the existence of specific government agencies to prepare the country reports due under CEDAW and CRC failed to ensure the submission of reports in time" (id. p. 467).

¹³⁶ Senegal has also ratified the Migrant Workers Convention. See <http://www.unhchr.ch/pdf/report.pdf>

¹³⁷ The 3rd and 4th CEDAW reports (due in March 1994 and 1998 respectively), the 3rd and 4th CAT reports (due in June 1996 and 2000 respectively), the 2nd CRC report (due in September 1997) and the 5th CCPR report (due in April 2000).

¹³⁸ Heyns & Viljoen 2000, p. 529.

contrast, the situation in *Brazil* and *Zambia*¹³⁹ seems to be that no clear reporting structure or procedure exists. Instead, the government is setting up *ad hoc* arrangements, which in particular in Brazil suffer from poor coordination between the government and civil society consultants.¹⁴⁰ Participation of NGOs in the preparation of periodic reports is also arranged on an *ad hoc* basis. Both countries have had problems in submitting reports – the average delay has been over three years.¹⁴¹ It seems that the hiring of outside consultants has not proven to be such a good strategy. The governments should take more responsibility for reporting.

2.2.5. Concluding remarks

In almost all the countries examined, reporting is a collective effort by various government agencies, usually supervised by the Ministry of Foreign Affairs. Only Brazil and Zambia have opted for *ad hoc* arrangements that are often based on the use of outside consultants. Difficulty or lack of coordination and cooperation between the government bodies concerned, for example in the collection and classification of the required data, is a common problem,¹⁴² which leads to late reporting. There clearly is a need for a better coordination between the various government departments and state human rights institutions participating in the preparation of reports. It would certainly be of help if the governments concerned developed and implemented concrete mechanisms to prepare their reports.¹⁴³

¹³⁹ In Colombia, where the preparation of state reports is otherwise a purely governmental process, outside consultants were employed in the context of the fourth CEDAW report and its supplement. See id. p. 181.

¹⁴⁰ See id. pp. 110-111.

¹⁴¹ As of 1999, *Zambia* had been on average three years and seven months late with the submission of its reports (id. p. 627). So far it has submitted 11 state reports and the number of overdue reports amounts to 10. *Zambia* has not submitted any reports under the CESCRC (due in June 1990, 1995 and 2000) and the CRC (due in January 1994 and 1999). In the 1990s it submitted only 3 reports. *Brazil* has submitted 11 reports and has a total of 15 overdue reports. It has not reported at all under the CEDAW and the CRC, which it ratified in 1984 and 1990 respectively. The CEDAW reports were due in March 1985, 1989, 1993, 1997 and 2001, and the CRC reports were due in October 1992 and 1997. The average delay in submission has been three years and six months (Heyns & Viljoen 2000, p. 108). No reports were considered between 1988 and 1996 (Bayefsky 2001, p. 277).

¹⁴² See e.g. Heyns & Viljoen 2000, p. 242 (Egypt), p. 326 (India), p. 347 (Iran), p. 467 (Philippines).

¹⁴³ Heyns & Viljoen 2000, p. 447. Heyns & Viljoen made this recommendation in the context of Mexico, which, in fact, has a more organized reporting system than many other countries in this group of States. Heyns & Viljoen also observed that in countries where there are national human rights institutions,

In fact, there is a trend towards greater coordination in the preparation of reports as evidenced by the creation of interdepartmental institutions in Egypt, Mexico, Philippines, Senegal and South Africa.¹⁴⁴ On the other hand, creation of a specific government agency entrusted with the coordination of report writing does not automatically lead to immediate improvements as evidenced by the case of the Philippines. Similarly, one reason for late submission and non-submission of Senegal's latest reports lies in the creation of the Inter-Ministerial Committee, the main institution charged with the preparation of state reports. It has contributed to delays, since such a body, consisting of numerous members, is not always the most efficient.¹⁴⁵ Furthermore, if the government machinery is inefficient, as is the case in India,¹⁴⁶ more far-reaching and fundamental reforms are required. Other factors that sometimes cause extended delay are structural problems during the transition to democracy,¹⁴⁷ elections and a change of administration.¹⁴⁸

These structural problems are usually interlinked with resource-related problems such as lack of a sufficient number of government officials who are knowledgeable about ways of drafting such reports.¹⁴⁹ Lack of sufficient funds and absence of continuity of personnel is closely related to this problem.¹⁵⁰ For example, in Colombia, logistical difficulties in coordinating the gathering of information from multiple sources are exacerbated by a frequent turnover of the persons responsible for producing this information.¹⁵¹ It may be pointed out that compilation and analysis of data and evidence in accordance with the Committees' guidelines is a laborious task and requires qualified personnel – a fact mentioned as one of the reasons for late reporting.¹⁵² In addition to structural and resource-related problems there are technical problems that cause delay,

different approaches are followed: they may (Senegal, South Africa) or may not (India, Zambia, in practice also Colombia) participate in the report writing (id. p. 23).

¹⁴⁴ Cf. id. p. 23.

¹⁴⁵ Id. p. 534.

¹⁴⁶ Id. p. 326

¹⁴⁷ See e.g. Brazil, p. 112.

¹⁴⁸ Id. p. 443 (Mexico).

¹⁴⁹ See id. p. 242 (Egypt), p. 325, 326 (India), p. 366 (Jamaica), p. 632 (Zambia).

¹⁵⁰ See id. p. 467 (Philippines), also p. 366 (Jamaica).

¹⁵¹ Id. p. 185.

¹⁵² Id. p. 366 (Jamaica).

such as unavailability of official statistics on a timely basis,¹⁵³ and translation to one of the UN's official languages.¹⁵⁴ In other words, late reporting does not necessarily reflect non-commitment to the UN human rights treaty system.¹⁵⁵

Technical assistance by the UN, including training in report writing, could constitute a partial remedy to late reporting and problems relating to the quality of reports. On the other hand, in many countries the lack of continuity of personnel and thus of institutional memory would reduce the positive impact of the training offered.¹⁵⁶ Moreover, if a government is not committed to the treaty body system there is not much that can be done. For example, in Iran and Jamaica there is a low level of awareness of and commitment to the UN human rights treaties and the UN treaty body system.¹⁵⁷ The Iranian government tends to view the international human rights system in a negative light, which leads to unwillingness to co-operate with the relevant UN bodies.¹⁵⁸ In government circles the belief exists that that the UN and other international bodies use human rights as an instrument to exert political pressure on third world countries such as Iran.¹⁵⁹ Relevant authorities can also believe that delayed submission is a normal practice.¹⁶⁰ Similarly, many Jamaican government officials regard the treaty system as a form of external influence on the Jamaican conditions,¹⁶¹ and urgency is accorded to other duties of the officials concerned.¹⁶² Moreover, a government can deliberately withhold its periodic reports when legislative or policy initiatives are under way and wait for their official approval, since these initiatives might have an impact on the report.¹⁶³

¹⁵³ See e.g. Jamaica, id. p. 366.

¹⁵⁴ Id. p. 347 (Iran).

¹⁵⁵ Cf. id. p. 26.

¹⁵⁶ This is the case e.g. in Colombia. It may be noted, however, that some training of officials was provided by the UN Centre for Human Rights in 1989, 1990 and 1996 (Heyns & Viljoen 2000, p. 172)

¹⁵⁷ Id. pp. 340, 347 (Iran) and pp. 359-360 (Jamaica).

¹⁵⁸ Id. pp. 340, 347.

¹⁵⁹ Id. p. 340.

¹⁶⁰ Id. p. 347 (Iran)

¹⁶¹ Id. p. 366.

¹⁶² Id. pp. 382-383.

¹⁶³ Id. p. 185 (Colombia) and p. 366 (Jamaica).

Other countries where accurate and thorough reporting is accorded a low priority are Brazil, India and Zambia.¹⁶⁴ In Zambia, the government has an overall negative attitude towards human rights issues,¹⁶⁵ and in Brazil the delay is attributed to a combination of factors which include recent history of military dictatorship that emphasised national sovereignty at the expense of participation in international organisations; the lack of a human rights movement informed about international human rights treaties; and the lack of a vigorous, well-informed press.¹⁶⁶ In contrast, in Mexico reporting is accorded a high priority, due to an effort by the Mexican government to display a positive image within the international community in respect of human rights.¹⁶⁷ Not surprisingly, Mexico has an excellent reporting record.

Senegal's performance can be regarded as one of the best in this study, in particular when taking into consideration the fact that the country is also among the poorest. Its reporting has been rather timely, the substance of reports rather good, and the current reporting system involves NGOs in a systematic manner – an arrangement which has also improved the dissemination of state reports. The UN and other institutions have also organised training for government officials on numerous occasions.¹⁶⁸ Senegal is an active UN member,¹⁶⁹ and international relations have been of great importance to it since it gained independence in 1960, not least because of its dependence of development aid.¹⁷⁰ In general, Senegal takes the international human rights system seriously,¹⁷¹ although it has been criticised of having a somewhat declaratory view of human rights.¹⁷²

It may be added that delays in submission may vary according to the importance given to the treaty in question. A good example is Senegal where reporting under the CCPR has been better than in respect of the other five treaties. The HRC has repeatedly commanded

¹⁶⁴ Id. p. 113 (Brazil), p. 326 (India), p. 632 (Zambia). Cf. also id. p. 25.

¹⁶⁵ Id. p. 632.

¹⁶⁶ Id. p. 113.

¹⁶⁷ Id. p. 444.

¹⁶⁸ Id. p. 532.

¹⁶⁹ Id. pp. 521, 525.

¹⁷⁰ Id. p. 539.

¹⁷¹ Ibid.

¹⁷² Id. p. 540.

Senegal for its punctual submission of reports and constructive engagement with the HRC.¹⁷³ This may be explained by the fact that the CCPR is probably the most popular human rights treaty in Senegal.¹⁷⁴ In addition, Senegal has twice successfully nominated candidates to the HRC,¹⁷⁵ which may have further strengthened its relationship to this treaty. In contrast, Senegal's reporting record in respect of the CERD has been particularly problematic. The importance attached to the CERD seems to have diminished after the dismantling of apartheid in South Africa, which illustrates Senegal's attitude towards this treaty, namely that it regards it as dealing with racial, rather than ethnic, issues.¹⁷⁶ Because Senegal had not submitted any periodic reports under the CERD since 1992, the CERD Committee scheduled a "Review of Implementation" in respect of Senegal for August 1999.¹⁷⁷ However, Senegal submitted its combined eleventh, twelfth, thirteenth, fourteenth and fifteenth periodic reports in May 2001, i.e. prior to the fifty-eighth session of the CERD Committee during which the Committee had decided to examine the situation in Senegal under the review procedure. The Committee decided to cancel the consideration of this item and to take up Senegal's periodic report at its next session.¹⁷⁸ As in the case of India and the CRC,¹⁷⁹ the "pressure" exerted by the relevant treaty body may yield positive results in terms of submission of reports.

Finally, the cause of delay can be related to the reporting system itself. In particular, the two-year reporting cycle under the CERD is considered too short.¹⁸⁰ Moreover, multiplicity of papers and reports that have to be prepared for various international, national and regional agencies is regarded burdensome.¹⁸¹ Various reform proposals, for instance focussed reporting, consolidated reports, or consolidation of treaty bodies, have

¹⁷³ Id. p. 529. On the other hand, the HRC has regretted the lack of information in the state reports on implementation of the provisions of the Covenant in practice. See e.g. UN Doc. CCPR/C/79/Add.82, para. 2.

¹⁷⁴ Id. p. 540.

¹⁷⁵ Id. p. 529.

¹⁷⁶ Id. p. 534.

¹⁷⁷ Id. p. 533. Senegal has never nominated members to the CERD Committee (cf. id. p. 529).

¹⁷⁸ UN Doc. CERD/C/SR.1452, paras. 21-22.

¹⁷⁹ See above note 59.

¹⁸⁰ Heyns & Viljoen 2000, p. 185 (Colombia) and p. 366 (Jamaica). In general, when examining the reporting records of various developing countries, the recurring pattern is that there are several overdue CERD reports.

¹⁸¹ Id. p. 366 (Jamaica)

been offered as a solution to this problem.¹⁸² Less “radical” reform proposals include more standardisation of the reporting format and the re-examination of the frequency with which periodic reports are required, bearing in mind that there are several different reporting systems.¹⁸³

On the basis of the findings in this chapter, one can conclude that the amount of attention that a government pays to NGO involvement in the preparation of reports indicates the degree of priority given to accurate, thorough and transparent reporting. It is safe to say that in all eleven countries the governments should pay more attention to NGO participation. In fact, there seems to be a trend towards increasing use of consultation with NGOs and civil society.¹⁸⁴ On the other hand, the alertness of civil society as a whole plays an important role in the reporting process. For example, if NGOs or the media do not react to the late submission of reports, it is easier for the government to ignore its treaty obligations. This kind of passivity is a common phenomenon and it has its origin in the ignorance on the part of the media and NGOs who are not familiar with the nature and importance of reporting under the treaties.¹⁸⁵ Thus, training in the reporting procedures and in the international human rights system in general should not be confined to government officials only. Local NGOs should be informed of the treaties and of the opportunities offered by the reporting process. In many cases NGOs should also be encouraged to become more organised when using the opportunities offered by the reporting process: they should for instance be encouraged to submit common shadow reports instead of separate ones.¹⁸⁶ In this respect the role of international NGOs in

¹⁸² Id. p. 383 (Jamaica), p. 638 (Zambia). According to Heyns & Viljoen, the consolidation of the treaty bodies or of the reporting system would emphasize the indivisibility of human rights and minimize the duplication in the reporting requirements. See also Bayefsky 2001, pp. 131-136.

¹⁸³ Ibid.

¹⁸⁴ Cf. id. p. 23.

¹⁸⁵ Cf. id. p. 632 (Zambia).

¹⁸⁶ Cf. id. p. 574 (South Africa). The practice of submitting shadow reports is rather recent in most countries surveyed. According to Bayefsky, NGO information has been most helpful to the treaty bodies, if their input has been coordinated at the national level and they have followed guidelines for the preparation of shadow reports (Bayefsky 2001, pp. 44-45). See also Heyns & Viljoen p. 247. For positive experiences of national and international NGOs with the reporting procedures (the HRC and the CAT Committee) see Clapham 2000, pp.176-187.

familiarizing and engaging national NGOs in the treaty body processes should be emphasized.¹⁸⁷

Other indicators of a governments' genuine commitment to the reporting process are the availability and quality of state reports. As to the access to and dissemination of state reports, governments of the countries examined generally do not disseminate them widely to NGOs or civil society, either before or after submission. Increased NGO involvement in the drafting process would make the whole process more transparent and raise public awareness of the contents and mechanisms of the treaties. Some countries are moving towards greater openness (India, Senegal, South Africa), a trend that is facilitated by the Internet.¹⁸⁸

As to the quality of reporting, country reports tend to be descriptive, formalistic and legalistic, rather than critical, frank, reflective and focused on practical realities and problems encountered.¹⁸⁹ As was the case with overdue reports, this is by no means a problem that concerns developing countries only. More consultation with civil society would improve the quality of reports, as evidenced by the UNICEF-funded consultations in India and Zambia during the preparation of their initial CRC reports. Facilitating wide consultations between government and civil society could constitute one form of UN assistance to developing countries.

¹⁸⁷ Cf. Bayefsky 2001, p. 44.

¹⁸⁸ Cf. Heyns & Viljoen 2000, p. 24. During the consideration of Mexico's second report under the CRC in September 1999, the Mexican representative said that the United Nations Website address was already given out to interested persons or organisations with access to the Internet. He also envisaged the possibility of disseminating the report by incorporating it into the Mexican Government's human rights website. See UN Doc. CRC/C/SR.568, para. 34.

¹⁸⁹ Heyns & Viljoen 2000, p. 27, Bayefsky 2001, p. 21.

2.3. Implementation and follow-up of concluding observations

2.3.1. Dissemination of concluding observations

Governments should implement the concluding observations issued by the Committees, starting with the duty to publicise and disseminate them internally and to the general public. This would enable the media and civil society to better monitor governments' response to these observations thereby putting these governments under pressure to comply with them. In general, the availability of concluding observations (as well as other documents relating to the reporting process) in the developing countries examined tends to be rather poor. Concluding observations are not often distributed outside the government,¹⁹⁰ and not necessarily within the government either.¹⁹¹ This results in a low awareness of their contents and existence, and diminishes the impact of the reporting system on the country concerned.

The treaty bodies usually recommend in their concluding observations that governments translate and disseminate concluding observations along with the report itself.¹⁹² Recommendations have been made to the effect that the treaty bodies themselves would send copies of their observations not only to State parties but also to local and

¹⁹⁰ See e.g. Brazil (p. 113), Colombia (p. 186), India (pp. 326-327), Iran (id. p. 347), Jamaica (p. 370), Mexico (p. 445), the Philippines (pp. 466, 468) and Senegal (id. p. 534).

¹⁹¹ See Zambia (id. p. 633), and Colombia (p. 186).

¹⁹² See e.g. the CEDAW Committee: UN Doc. A/54/38, paras.337-401, para. 401 (Colombia); UN Doc. A/56/38, paras.312-358, para.358 (Egypt); UN Doc. A/55/38, paras.30-90, para. 90 (India); UN Doc. A/56/38, paras.195-233, para.233 (Jamaica); UN Doc. A/53/38/Rev.1, paras.100-137, para. 137 (South Africa).

The CERD Committee: UN Doc. CERD/C/304/Add.11, para.23 (Brazil); UN Doc. A/56/18, paras.278-297, para. 296 (Egypt); UN Doc. CERD/C/304/Add.13, para. 33 (India); UN Doc. CERD/C/304/add. 83, para.17 (Iran); UN Doc. CERD/C/60/Misc.35/Rev.s, para. 14 (Jamaica); UN Doc. CERD/C/304/Add.34, para. 27 (Philippines).

The CRC Committee: UN Doc. CRC/C/15/Add.112, para. 34 (Mexico); UN Doc. CRC/C/15/Add.30, para. 25 (Colombia); UN Doc. CRC/C/15/Add.137, para. 74 (Colombia), UN Doc. CRC/C/15/Add.115, paras. 25 and 83 (India), UN Doc. CRC/C/15/Add.123, para. 55 (Iran); UN Doc. CRC/C/15/Add.29, para. 28 (Philippines); UN Doc. CRC/C/15/Add.122, para. 43 (South Africa).

The CESCR Committee: UN Doc. E/C.12/1/Add.74, para. 51 (Colombia); UN Doc. E/C.12/1/Add.44, para. 43 (Egypt); UN Doc. E/C.12/1/Add.75, para. 33 (Jamaica); UN Doc. E/C.12/1/Add.41, para. 47 (Mexico); UN Doc. E/C.12/1/Add.62, para. 64 (Senegal).

The HRC: UN Doc. CCPR/C/79/Add. 76, para. 45 (Colombia); UN Doc. CCPR/C/79/Add.81, para. 35 (India); UN Doc. CCPR/C/79/Add.83, para. 21 (Jamaica); UN Doc. CCPR/C/79/Add.109, para. 21 (Mexico); UN Doc. CCPR/C/79/Add.82, para. 19 (Senegal).

international NGOs and the press in the country concerned.¹⁹³ Moreover, Heyns & Viljoen suggest that if the concluding observations were circulated among the different UN human rights mechanisms (OHCHR, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Special Rapporteurs and Working Groups) they would be more influential.¹⁹⁴ In this respect it is to be noted that concluding observations are immediately available on the Internet, which solves part of the problem. Rather than increasing the amount of paper circulated by the treaty bodies, the focus should be on increasing the awareness of the OHCHR website. Although there are problems as to Internet access in developing countries, there is no guarantee that hard copies of United Nations documents would be more easily accessible to various civil society actors in need of them.

It is clear that the governments carry the main responsibility for translating and disseminating the concluding observations to the public e.g. through the electronic and print media, seminars and workshops.¹⁹⁵ In particular, international human rights instruments as well as treaty bodies' general comments, decisions (views) and concluding observations should be made available to judges and lawyers, and to journalists.¹⁹⁶ Representatives of the local press could also be supported financially to enable them to attend meetings of treaty bodies.¹⁹⁷ In this context the role of the Internet should again be emphasised. Various documents related to the reporting process (periodic reports, lists of issues, summary records, concluding observations, views etc.) are already published on the OHCHR website. However, if the governments published their own reports and the concluding observations issued in respect of these reports on their own website, the impact of the Internet on the awareness of the treaty body system would be even greater. Placing information on the government's human rights performance on the government's

¹⁹³ Heyns & Viljoen 2000, pp. 248, 639. Cf. Bayefsky who writes that concluding observations should be sent to all parties submitting information for the consideration of a state report (Bayefsky 2001, p. 66).

¹⁹⁴ *Id.* p. 447.

¹⁹⁵ Cf. Heyns & Viljoen 2000, p. 447, 640.

¹⁹⁶ *Ibid.* For example, in the Philippines a press conference was held on the CEDAW concluding comments (*id.* pp. 468-469). These concluding observations were made in respect of the third and fourth periodic reports.

¹⁹⁷ Cf. *id.* p. 541 (Senegal).

own website in citizens' mother language(s) would render it more accessible, since obtaining it would not require a high degree of knowledge of the UN system.

When there is no dissemination of concluding observations by the government, this task is often taken up by NGOs as in Mexico where they have disseminated concluding observations that relate to more recent state reports.¹⁹⁸ Local NGOs have also produced a compilation of reports in which the final observations of the CEDAW Committee are reproduced and analysed.¹⁹⁹ Similarly, international and Colombian NGOs have distributed concluding observations widely in Colombia.²⁰⁰ This is done, in particular, by the Colombian Commission of Jurists.²⁰¹ Moreover, the Ombudsman (*Defensor del Pueblo*) and the Colombian Commission of Jurists have prepared a joint publication that compiles recommendations of the UN and the Organization of American States (OAS) for the protection of human rights in Colombia between 1980-1997.²⁰² As a result of these initiatives, concluding observations are readily accessible in Colombia despite inactivity on the part of the government, and these observations are also actively used by the various NGOs.²⁰³

2.3.2. Mechanisms for implementation and follow-up

In addition to disseminating the concluding observations, the government should study them carefully and use them as the basis for improving human rights legislation and practices.²⁰⁴ In order to achieve concrete results some sort of strategy or mechanism for implementation and follow-up should be established. However, it seems that

¹⁹⁸ Id. p. 445.

¹⁹⁹ Id. p. 435 (a report presented to the Inter-American Commission of Human Rights by Mexican NGOs, October 1998).

²⁰⁰ Id. p. 187.

²⁰¹ See id. pp. 187-188.

²⁰² Id. p. 187.

²⁰³ For example, the concluding observations to the fourth periodic report under the CCPR were disseminated rapidly and widely, were actively used by NGOs, and were very influential (pp. 187-188). In particular, they have served as the principal framework for action by the OHCHR in Bogota in its efforts since 1997 to promote greater compliance by Colombia with its international human rights obligations (id. p. 188).

²⁰⁴ Cf. Heyns & Viljoen 2000, p. 331.

governments examined in this report have not created any such strategies or mechanisms.²⁰⁵

In its first concluding observations in respect of Colombia in 1995, the CRC Committee suggested that the government “take steps to ensure the effective coordination between the existing institutions involved in the areas of human rights and children's rights with a view to establishing a monitoring mechanism for the implementation of the Convention at the national, regional and local levels”.²⁰⁶ The Committee also suggested that quantitative and qualitative data be systematically collected and analysed to evaluate progress in the realisation of the rights of the child.²⁰⁷ In fact, there was a modest attempt in Colombia to that effect, but the mechanism is no longer operative.²⁰⁸ The CRC Committee reiterated these recommendations in its concluding observations in 2000 with an added emphasis on closer cooperation with NGOs.²⁰⁹ It can be argued that the observations of the CRC Committee are applicable to a number of other (developing) countries as well.

Lack of a specific implementation strategy or mechanism is clearly reflected in the achievements of the governments: in most cases only a limited number of concluding observations have been implemented.²¹⁰ The focus is more on reporting than on the implementation of treaty body findings.²¹¹ Moreover, there are countries, such as Jamaica, where no example of implementation of the concluding observations could be

²⁰⁵ However, in Mexico the Interdepartmental Commission discusses treaty reports and recommendations made by the monitoring bodies (see above note 27). Also the Senegalese Inter-Ministerial Committee on Human Rights and Humanitarian Law is engaged in the follow-up of concluding observations (see above note 82).

²⁰⁶ UN Doc. CRC/C/15/Add.30, para. 14

²⁰⁷ Id. para. 15. See also Heyns & Viljoen 2000, p. 190.

²⁰⁸ During the Samper administration (1994-1998) the process of implementation was driven by the Office of the Presidential Advisor for Human Rights. An executive decree, Decree 1290 of 1995 created a special commission, called the “1290 Commission” with the task of studying and promoting the recommendations formulated by international human rights bodies (UN, OAS) within government. Under the Pastrana administration (1998-) the already limited role of the “1290 Commission” has been scaled down significantly, to the point where it is no longer operative. See Heyns & Viljoen 2000, p. 169.

²⁰⁹ UN Doc. CRC/C/15/Add.137, paras. 17, 24 and 25.

²¹⁰ See e.g. Brazil (Heyns & Viljoen 2000, p. 113), Colombia (id. pp. 188-191), Egypt (pp. 243-244), India (p. 327), Mexico (pp. 445-446), Zambia (pp. 633-634).

²¹¹ Id. p. 572 (South Africa).

found.²¹² In Iran only one instance of implementation has been recorded.²¹³ These extreme cases are to a great extent explained by the negative attitude of the governments concerned to the treaty body system and the international human rights system in general. In contrast, the government of Senegal has generally taken the concluding observations seriously.²¹⁴ During the consideration of Senegal's third periodic report under the CCPR, a member of the HRC, Mr Lallah, remarked that Senegal was one of the first countries to enact legislation giving effect to the recommendations of the Committee in a number of fields.²¹⁵

Participation of civil society in the implementation of concluding observations is fundamental. There is a need for an NGO community that is knowledgeable of treaty processes, aware of concluding observations and ready to pressure the government and demand that it comply with the observations.²¹⁶ NGOs should also sensitise the public as to their contents.²¹⁷ These considerations apply to the media as well. Although the media covers human rights issues in a number of countries, it usually pays little attention to the treaty body system as such.²¹⁸ One explanation to the invisibility of the work of the treaty bodies is the journalists' lack of awareness of or interest in the treaties and the treaty system as a whole.²¹⁹

Demands made by NGOs for the implementation of concluding observations should take place in different settings, for example, in Parliament where new laws are adopted, and in judicial proceedings where laws are enforced.²²⁰ Apart from pressuring the government to implement the concluding observations and reporting about the government's performance in this respect, NGOs should, where necessary, collaborate with the

²¹² See *id.* pp. 370-371

²¹³ *Id.* p. 348. It was in respect of the CERD.

²¹⁴ See *id.* pp. 535-537.

²¹⁵ UN Doc. CCPR/C/SR.1181, para. 50.

²¹⁶ See Heyns & Viljoen 2000, p. 248 (Egypt), 448 (Mexico), p. 469 (Philippines).

²¹⁷ See *id.* p. 331 (India), p. 350 (Iran), p. 640 (Zambia).

²¹⁸ See e.g. Brazil (*id.* pp. 102-103), Colombia (*id.* p. 173), Egypt (*id.* pp. 235-236), Iran (*id.* pp. 340-341), and Senegal (*id.* p. 526)

²¹⁹ See e.g. Mexico (*id.* p. 431), South Africa (*id.* pp. 553-554) and Jamaica (*id.* pp. 359-360). In Jamaica, however, interest in the treaties rose when the government denounced the OP1.

²²⁰ See *id.* p. 331 (India), p. 350 (Iran), p. 640 (Zambia).

government in order to implement the recommendations.²²¹ In fact, one important function of the reporting process is to generate constructive dialogue between the government and civil society.

2.3.3. Role played by the contents of concluding observations

It is not only the dissemination and the degree of awareness of the concluding observations, the existence of a national implementation strategy or mechanism, the attitude of the government and the judiciary, or the activity of NGOs and the media that affect the implementation of concluding observations. The contents of the concluding observations also play a role. According to Bayefsky, the success of concluding observations depends on two elements: “(a) their accuracy, as rigorous assessments of human rights conditions, and (b) their functionality, as perceptive evaluations of needs and priorities”.²²² It has been maintained that the treaty bodies’ recommendations are often too broad, too vague or too farfetched to implement.²²³ Where applicable, these characteristics also make it difficult to determine whether the appropriate steps toward implementation are being carried out, and compliance with convention obligations achieved.²²⁴ How, then, should the form and contents of the concluding observations be developed in order to make their implementation easier in developing countries? Should more emphasis be given for legal analysis and argumentation, or for policy recommendations?

Heyns & Viljoen emphasize that criticism of domestic policies in concluding observations is likely to have a meaningful impact, if observations and statements are of such a nature that a country’s compliance can be evaluated clearly.²²⁵ Concluding observations should offer “yardsticks” to assess government compliance and

²²¹ See *ibid.* and p. 574 (South Africa).

²²² Bayefsky 2001, p. 62.

²²³ Heyns & Viljoen 2000, p. 197 (the Colombian government), also Bayefsky 2001, p. 62.

²²⁴ *Ibid.*

²²⁵ Heyns & Viljoen 2000, p. 574 (South Africa) and p. 197 (Colombia). According to the Mexican experience, “[i]f the observations were critical and profound enough, they would be much more useful in solving the situations concerned. In recent years, the observations [in respect of Mexico] have been much tougher, and this has contributed to a greater knowledge about them in the country.” *Id.* p. 448.

performance, not only for the UN human rights bodies themselves but for the governments and NGOs as well.²²⁶ Moreover, these yardsticks should be supported by substantive reasoning to explain clearly why the treaty body arrived at its conclusions.²²⁷ Heyns & Viljoen would also prefer as specific and action-oriented comments as possible, rather than verdicts on government's performance in the field of human rights.²²⁸ In their view, concluding observations should contain more recommendations on what the State should do in order to improve the promotion and protection of human rights, including realistic advice on how to deal with urgent questions, as well as target dates by which the state parties must take the recommended measures.²²⁹ The committees could also provide proposals and ideas of implementation based on the achievements and experiences of other countries.²³⁰ Here one can take the HRC as an example of "best practice": each paragraph in its concluding observations includes brief but legal reasoning as to the interpretation of a CCPR provision, in most cases including an explicit reference to a specific provision. Thereafter, a recommendation follows combining a legal treaty obligation with a policy recommendation.

Furthermore, Heyns & Viljoen argue that concluding observations should contain more detailed analysis of the state reports,²³¹ including divergences between the government's obligations arisen from the relevant treaty and the progress that has been achieved and the difficulties encountered.²³² In this context the treaty body could give its comments as to whether the government's actions taken pursuant to previous observations have been satisfactory or not, and on the extent to which the government is trying to involve NGOs and the general public in its efforts to implement the treaty concerned.²³³ The committees could also include in their general observations and recommendations a point-by-point listing of the observations stated in previous reports with which there has not been

²²⁶ Id. p. 574 (South Africa) and p. 197 (Colombia).

²²⁷ Ibid and id. p. 448 (Mexico).

²²⁸ Id. p. 248 (Egypt).

²²⁹ Id. p. 197 (Colombia), p. 331 (India), p. 541 (Senegal), p. 639 (Zambia) and p. 248 (Egypt).

²³⁰ Id. p. 448 (Mexico).

²³¹ Id. p. 639 (Zambia).

²³² Id. p. 350 (Iran) and p. 248 (Egypt).

²³³ Id. p. 350 (Iran).

compliance.²³⁴ On the other hand, Tistounet observes: "...overly-detailed observations may be criticised if they fail to emphasise important issues. Additionally, they run the risk of containing technical or legal considerations which may not accurately reflect the legal or practical situation in the state concerned, thus providing the government with grounds for attacking the report."²³⁵ The approach advocated by Heyns & Viljoen can also be criticised on the ground that it would result in longer concluding observations, which is hardly desirable or practical. The treaty bodies usually adopt their concluding observations by consensus, which means that longer documents are likely to require more meeting time, ultimately resulting in a lower number of reports being considered per session. More focused concluding observations would be a better direction.

Bayefsky points out that in order to fulfil the conditions of accuracy and functionality, treaty bodies should have access to "reliable and knowledgeable sources of information" and their members should be independent and experienced.²³⁶ To date, the quality of concluding observations has according to her been negatively affected, in particular, by "barriers to the submission of information, lack of human resources to sift and analyse information, impediments to an effective dialogue, and the lack of independence or expertise of significant numbers of treaty body members".²³⁷ Indeed, any bias of treaty body members or their limited knowledge of country situations would be a problem, and such allegations have in the past brought negative publicity for the work of the Committees. When the States criticise the quality of concluding observations, they should remember that if they fail to elect truly independent experts to the Committees, they are directly responsible for this problem. Similarly, severe limitations on resources available to the treaty body system, a matter largely controlled by the States through the budgetary powers of the General Assembly, have a direct impact on the output of the treaty bodies.²³⁸

²³⁴ Id. p. 448 (Mexico).

²³⁵ Tistounet 2000, p. 393.

²³⁶ Bayefsky 2001, p. 62.

²³⁷ Ibid.

²³⁸ Cf. id. p. 64.

3. DEVELOPING COUNTRIES AND THE INDIVIDUAL COMPLAINTS MECHANISMS

3.1. Impact of the individual complaints mechanisms

In contrast to the reporting procedure, the six UN human rights conventions do not all include a mechanism for the submission and consideration of individual communications. The Optional Protocol to the CCPR (OP1), article 22 of the CAT, article 14 of the CERD as well as the new Optional Protocol to the CEDAW (CEDAW-OP)²³⁹ offer this possibility. Individual complaints mechanisms play an important role in the interpretation of treaty provisions.

Colombia, Philippines, Senegal, South Africa and Zambia are parties to one or several individual complaints procedures.²⁴⁰ However, the use of these mechanisms remains rather limited. For example, *Senegal* has accepted all individual complaints mechanisms²⁴¹ but since an insignificant number of cases have been brought under these procedures, they have hardly played a role.²⁴² The only case involving Senegal was decided by the HRC in October 1994.²⁴³ In this case the HRC's recommendation that compensation with interest be paid for unduly prolonged preliminary detention was implemented after an agreement resulting from negotiations between the victim and the government, but the payment was not made until in 1997.²⁴⁴ In addition, HRC's views led to a legislative amendment of the Criminal Code.²⁴⁵

²³⁹ The Optional Protocol to the CEDAW entered into force rather recently, on 22 December 2000.

²⁴⁰ See Annex to this report.

²⁴¹ Senegal is also subjected to the individual complaints procedure of the African Charter.

²⁴² Heyns & Viljoen 2000, pp. 527, 537.

²⁴³ *Famara Koné v Senegal*, Communication No. 386/1989, CCPR/C/52/D/386/1989 (27 October 1994). As of 17 April 2002, there were no registered cases pending against Senegal (see <http://www.unhchr.ch/html/menu2/8/stat2.htm>).

²⁴⁴ Heyns & Viljoen 2000, p. 538. At the presentation of its fourth report, the Senegalese delegation reported on the implementation of the decision – see UN Doc. CCPR/C/SR.1619, para. 35.

²⁴⁵ Heyns & Viljoen 2000, p. 538

Zambia has accepted only the OP1. Five cases against Zambia have been finalised by the HRC and in all of them the State party was found to have violated the Covenant.²⁴⁶ One case has been discontinued.²⁴⁷ In all five cases the government failed to report to the HRC within 90 days on the implementation of the decision.²⁴⁸ Although the impact of OP1 has been limited in Zambia, the system does help – a number of complainants have got some relief.²⁴⁹ As of April 2002, there were five more cases against Zambia waiting for the Committee’s admissibility decision.²⁵⁰ Heyns & Viljoen emphasise that “[g]iven the fact that the judiciary in Zambia has not demonstrated a large measure of independence, especially in politically sensitive cases, it is important that there is an outside body falling beyond the control of the government, which entertains communications from victims.”²⁵¹

The Philippines has accepted the OP1 and signed the CEDAW-OP. The HRC has given its views²⁵² in two cases, *Piandiong et al. v. the Philippines*²⁵³ and *Gagas et al. v the Philippines*.²⁵⁴ In *Piandiong* the HRC stated that the Philippines committed a grave breach of its obligations under the OP1 by failing to respect the HRC request for interim measures (in this case, non-execution of three persons) and putting the alleged victims to death before the HRC had concluded its consideration of the communication.²⁵⁵ In addition, during the consideration of the communication the Philippine government made some worrying statements concerning the right to submit communications to the HRC.²⁵⁶ In *Gagas*, the Philippines was found guilty of violating articles 9(3), 14(2) and 14(3) (c)

²⁴⁶ *Bwalya v Zambia* (Communication 314/1988), *Kalenga v Zambia* (Communication 326/1988), *Lubuto v Zambia* (Communication 390/1990), *Mukunto v Zambia* (Communication 768/1997), and *Chongwe v Zambia* (Communication 821/1998). In the three first cases the individuals concerned were granted redress (Heyns & Viljoen 2000, pp. 635-640). In respect of Mukunto and Chongwe Zambia had not taken any follow-up measures as of March 2001 (UN Doc. CCPR/C/71/R.13, pp. 174-175).

²⁴⁷ <http://www.unhchr.ch/html/menu2/8/stat2.htm>

²⁴⁸ See Heyns & Viljoen 2000, p. 635 and UN Doc. CCPR/C/71/R.13, pp. 174-175.

²⁴⁹ Heyns & Viljoen 2000, p. 639.

²⁵⁰ <http://www.unhchr.ch/html/menu2/8/stat2.htm>

²⁵¹ Heyns & Viljoen 2000, p. 639.

²⁵² One case has been discontinued. See <http://www.unhchr.ch/html/menu2/8/stat2.htm>

²⁵³ Communication No. 869/1999.

²⁵⁴ Communication No. 788/1997.

²⁵⁵ Communication No. 869/1999, paras. 5.1-5.4, 7.4. Subsequent to the execution of the complainants the HRC found the communication admissible (para. 6.2) but it did not establish a violation of the CCPR (paras. 7.2-7.4). However, there were several dissenting opinions.

²⁵⁶ *Id.* paras. 3.1, 3.5 and 5.3.

of the Covenant on the grounds that the authors of the communication had been detained without a trial for a period in excess of nine years.²⁵⁷ As of April 2002, there were two more cases against the Philippines at the pre-admissibility stage.²⁵⁸

Several reasons for the invisibility of the UN complaints mechanisms in developing countries have been identified. Firstly, reference has been made to domestic factors such as traditional African reluctance to engage in confrontational litigation,²⁵⁹ high illiteracy that results in a lack of information,²⁶⁰ lack of financial means²⁶¹ resulting, *inter alia*, in unavailability of legal aid to assist victims to file communications with the relevant treaty bodies²⁶² and unawareness, also among lawyers, of the potential of the UN system.²⁶³ Secondly, there are factors relating to the treaty body system itself such as its remote nature,²⁶⁴ and the requirement that local remedies have to be exhausted.²⁶⁵ Although the latter reflects a general principle in international law, it is perceived as a great obstacle due to its costly nature and the length of the process.²⁶⁶

In the case of *South Africa*²⁶⁷ it is estimated that one reason for the non-submission of individual communications under the CAT and CERD conventions is the litigants' focus on the South African Bill of Rights, which is a progressive document and provides a higher level of protection than most international instruments.²⁶⁸ Other explanations include the recent acceptance of these procedures²⁶⁹ as well the low level of awareness of their existence and the possibilities they offer even among lawyers,²⁷⁰ a contributing

²⁵⁷ Communication No. 788/1997, paras. 7.4-8.

²⁵⁸ <http://www.unhchr.ch/html/menu2/8/stat2.htm>

²⁵⁹ Heyns & Viljoen 2000, pp. 537-538 (Senegal).

²⁶⁰ Id. p. 538. For example, adult literacy rate in Senegal is 38% (id. p. 522).

²⁶¹ Id. p. 538.

²⁶² Id. p. 639 (Zambia).

²⁶³ Id. pp. 537, 538 (Senegal) and pp. 635, 639 (Zambia).

²⁶⁴ Id. p. 538.

²⁶⁵ Ibid.

²⁶⁶ Ibid and p. 639 (Zambia).

²⁶⁷ South Africa has accepted the individual complaints mechanisms under the CERD and the CAT, but not under the CCPR or the CEDAW. According to the OHCHR website no cases have been finalized in respect of South Africa as of today, so these mechanisms have not yet had any impact. See <http://www.unhchr.ch/tbs/doc.nsf>

²⁶⁸ Heyns & Viljoen 2000, p. 572.

²⁶⁹ Ibid.

²⁷⁰ Id. p. 573.

factor that was already cited above. Since the local mechanisms and the Bill of Rights have been effective and widely used, the role of the international individual communications procedures is likely to be “more along the lines of fine-tuning and support for the national system, than an attempt at an incisive intervention from the outside”.²⁷¹ A feature common to Senegal, South Africa and Zambia is that no effective remedy has been created to give effect to a decision by any of the treaty bodies.²⁷² For instance, in Senegal the finding of the HRC was implemented on an *ad hoc* basis, and there is a lacuna in the legal system, as no clear provision exists about the domestic implementation of treaty body decisions.²⁷³

In *Colombia*,²⁷⁴ the OPI mechanism has been used to a greater extent than in Senegal or Zambia, but the overall effect of the individual complaints system has so far been very limited.²⁷⁵ As of April 2002, a total of 22 complaints had been processed by the HRC of which a total of ten cases were the object of HRC views (two were still in a pre-admission phase, two under review, three declared inadmissible and five discontinued). In all ten final views the HRC found against the Colombian government.²⁷⁶ Nevertheless, in one respect the situation in *Colombia* is different from that of the other countries cited in this chapter. It has a unique way of enforcing the views of treaty bodies in response to individual communications. In accordance with Law 288 of 1996, signed into effect on 5 July 1996, the government shall compensate in the form of monetary compensation the harm resulting from human rights violations recognised by the Inter-American Commission of Human Rights (IACHR) and the HRC to the victims and their families once a special procedure established for this purpose has been followed at the national level.²⁷⁷ This mechanism has yielded concrete results in several cases.²⁷⁸ In fact, the

²⁷¹ Id. p. 574.

²⁷² Id. pp. 537 (Senegal), 573 (South Africa) and 635 (Zambia).

²⁷³ Id. p. 537.

²⁷⁴ Colombia has not accepted any other UN complaints procedures, but it has signed the CEDAW-OP.

²⁷⁵ Heyns & Viljoen 2000, p. 193.

²⁷⁶ <http://www.unhchr.ch/html/menu2/8/stat2.htm>

²⁷⁷ Heyns & Viljoen 2000, p. 191. “For all practical purposes a favourable decision by the Committee of Ministers, consisting of a number of cabinet ministers, will lead to judicial effect being given under Colombian law to a finding of the IACHR or the HRC, when it determines that there has been a violation and a need for compensation to be paid.” Ibid.

Colombian experience is that individual complaints can be worthwhile, provided that mechanisms exist at the national level to give credence and judicial effect to committee decisions.²⁷⁹ The OHCHR and the treaty bodies should promote the adoption of such measures.²⁸⁰

Why, then, is the use of OP1 mechanism in Colombia so limited? According to Heyns & Viljoen, most obstacles to its use are linked to the perceived lack of utility, practicality and impact of the UN treaty bodies as a whole.²⁸¹ Colombian NGOs earlier ignored the UN mechanisms out of the belief that they were biased in favour of governments and that they were too slow or ineffective to have any real impact on the critical human rights situation in the country.²⁸² NGOs preferred the Inter-American mechanisms because a) the IACHR is closer to Colombia and easier to access than the UN system, b) the IACHR complaints procedures are simpler and perceived as much more receptive to information from non-governmental sources, c) the commissioners' on-site visits to Colombia have lent credibility and efficiency to the study of individual cases, and d) the IACHR's general expertise on the human rights situation in Colombia and its proven capacity to find in favour of victims in confronting the government of Colombia in controversial cases and to take these cases to the Inter-American Court of Human Rights make it the preferred forum for individual complaints.²⁸³ The extensive use of the Spanish language is also a factor that contributes to the popularity of the Inter-American mechanisms.²⁸⁴

Within the UN human rights system, Colombian NGOs' lobbying efforts have been aimed at governments, directly or through UN Commission on Human Rights. Instead of

²⁷⁸ The Committee of Ministers reviewed eight cases in September 1996. A favourable view was issued in four – in other cases the HRC had not recommended that compensation be paid. A ninth case was subsequently reviewed and compensation granted to some but not all of the victims. See Heyns & Viljoen 2000, p. 192. Subsequently, the HRC has processed yet another case against Colombia (Communication No. 687/1996, *Rafael Armando Rojas Garcia v. Colombia*). The HRC found that Colombia had violated the CCPR and stated that an effective remedy, which must include reparation, should be provided to Rafael A. Rojas Garcia and his family (para. 12).

²⁷⁹ Heyns & Viljoen 2000, p. 197.

²⁸⁰ *Ibid.*

²⁸¹ *Id.* p. 192.

²⁸² *Ibid.*

²⁸³ *Id.* pp. 192-193. On the fact-finding exercises undertaken by the IACHR and the petitioning system under the American Convention on Human Rights, see e.g. Cançado Trindade 2000, pp. 342-344.

individual complaint procedures, priority is given to communications sent to the special rapporteurs and the other special procedures in place under the auspices of the Commission on Human Rights.²⁸⁵ Because of their relative dynamism and the capacity to criticise and confront the Colombian government in public, these mechanisms are well known and appreciated in Colombia among governmental, non-governmental and even private actors like the media.²⁸⁶

3.2. Use by the judiciary of treaty body findings

The judiciary plays an important role in the implementation of treaty body findings i.e. views, general comments and concluding observations. The “Domestic Impact Study” took into account all court cases in which provisions of the treaties alone were invoked by national courts and tribunals. However, in the context of this report only references to the treaty body output are relevant. An excellent source of such information is a comparative study on the domestic follow-up mechanisms for findings by UN human rights treaty bodies called “Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals”. This report is prepared by the Committee on International Human Rights Law and Practice of the International Law Association for the New Delhi Conference 2002 of the ILA,²⁸⁷ and was presented in the ILA Conference in India in April 2002. The work will be finalised in the form of a final report in 2004.

A few examples of the use by the judiciary of views and general comments could be found in the developing countries examined in the ILA interim report. In its jurisprudence, the South African Constitutional Court has twice referred to the HRC’s views under the OP1,²⁸⁸ twice to a general comment of the HRC,²⁸⁹ once to a general

²⁸⁴ Heyns & Viljoen 2000, p. 193.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ http://www.ila-hq.org/html/layout_committee.htm. This report is based on a draft prepared by one of the Co-Rapporteurs of the Committee, Professor Andrew Byrnes, as well as on information and material provided by members of the Committee and others.

²⁸⁸ ILA Interim Report 2002, para. 50 (p. 17).

²⁸⁹ Id. para. 55a (p. 21).

recommendation of the CEDAW Committee,²⁹⁰ and once to a general comment of the Committee on Economic, Social and Cultural Rights.²⁹¹ One explanation to the responsiveness of South African judiciary to treaty body findings is the fact the Constitution expressly instructs courts to have regard to international human rights law in their interpretation of the Bill of Rights.²⁹² In India, the Supreme Court drew in one of its cases extensively on the wording of a general recommendation formulated by the CEDAW Committee.²⁹³ No references to concluding observations were found. Other developing countries where the courts have taken treaty body findings into consideration are Namibia, Uganda and Zimbabwe (reference to the HRC's views under the OP1),²⁹⁴ Malawi (reference to the HRC's general comment),²⁹⁵ and Argentina (reference to the concluding observations adopted by the Committee on Economic, Social and Cultural Rights).²⁹⁶

In general, i.e. when taking into consideration the courts in developed countries as well, national courts and tribunals have made a number of references to the case law of the Committees under the individual communications procedures²⁹⁷ as well as to their general comments/recommendations.²⁹⁸ The majority of them appear to have been to the work of the HRC. In addition, some references have been made to concluding observations/comments adopted by the treaty bodies in respect of individual countries,²⁹⁹ and to state reports submitted to treaty bodies.³⁰⁰ Finally, there was one reference to a report of inquiry by the CAT Committee.³⁰¹ Courts in New Zealand, Hong Kong,

²⁹⁰ Id. para. 55b.

²⁹¹ Id. para. 55c.

²⁹² See Dugard 2000, pp. 277, 283-285..

²⁹³ ILA Interim Report, para. 55b.

²⁹⁴ Id. para. 50a (p. 16).

²⁹⁵ Id. para. 55a (pp. 21-22)

²⁹⁶ Id. para. 56.

²⁹⁷ Id. paras. 49-54 (pp. 16-20),

²⁹⁸ Id. paras. 55 (pp. 20-24).

²⁹⁹ Id. paras. 56-59.

³⁰⁰ Id. p. 26.

³⁰¹ Id. p. 24 (inquiry under article 20 of the CAT into the situation in Egypt). The inquiry procedure under article 20 of the CAT has been used on three occasions, in respect of Turkey, Egypt and Peru (see <http://www.unhchr.ch/tbs/doc.nsf>). As to Egypt, the confidential inquiry was undertaken between 1991 and 1994. The government of Egypt did not refuse the Committee's visit, but it used delaying tactics, and the CAT Committee never visited Egypt. The Committee based its report on reliable information received from

Switzerland, Japan, Australia, Canada, and the Judicial Committee of the Privy Council are well represented in the ILA report.

In the ILA interim report one may observe a clear difference between the use, on one hand, of views and general comments, and of concluding observations on the other. The abstract nature and style as policy recommendations diminishes the impact of concluding observations on the judiciary, whereas the use by the judiciary and other legal bodies of the case law is currently more than marginal, due to its concrete nature and its style of legal interpretation of treaty obligations.

The evidence suggests that the awareness of the work of the treaty bodies is rising at the national level, and that national courts have started to refer to treaty body output in an increasing number of occasions, albeit often in a rather superficial manner as part of a lengthy listing of other international sources and comparative national case law.³⁰² With the continuing development and improvement of the treaty body output, and the growing knowledge of these documents among lawyers and courts, there is every chance that these materials will become an increasingly important source of assistance for national courts and tribunals.³⁰³ Such a development would of course be greatly enhanced by any measures that would result in greater consistency, quality control and persuasive force of argumentation in the views. Although a petitions team has been recently established within the OHCHR to deal with communications under OP1, CAT and CERD, it remains seriously understaffed in comparison to the vast number of jurisdictions from which cases come to the Committees. Compared to, for instance, regional human rights courts or national constitutional courts, the complaints procedures under UN human rights treaties are serviced by very few and often relatively junior lawyers. Combined with the non-representation of many languages within the relevant secretariat units, this results in a risk of factual errors creeping into views. Any discrepancies or errors could have, despite

a great number of NGOs. The conclusion was that torture was “systematically practiced by the security forces in Egypt” (UN Doc. A/51/44, paras.180-222, para. 220). See Heyns & Viljoen 2000, p. 244.

³⁰² ILA Interim Report, para. 62.

³⁰³ Id. para. 63.

of being unavoidable in the circumstances, seriously detrimental consequences for the influence of treaty bodies on the work of national courts and judges.

3.3. Reasons for non-accession to individual complaints mechanisms

Brazil, Egypt, India and *Iran* have not accepted any of the UN individual complaints mechanisms.³⁰⁴ *Iran* is amongst the countries that are most often subject, before the United Nations bodies, to allegations regarding human rights violations. It seems that Iranian authorities are not willing to accept a procedure whereby cases may be brought against the country, possibly creating difficulties that by the authorities are seen to be of a political nature.³⁰⁵ Moreover, it is believed that such procedures would compromise the sovereignty of *Iran*.³⁰⁶ In *Egypt* there is no official statement to explain its non-accession to the individual complaints mechanisms, but the government may think that these procedures would constitute a breach of its sovereignty and cast doubt on its ability and willingness to guarantee its citizens full respect of human rights.³⁰⁷ Acceptance of the right of individual communication has not figured prominently on the agenda of local human rights NGOs either,³⁰⁸ which may be regarded as a contributing factor to non-accession. In this respect one may refer to the case of South Africa where the decision of the government not to accede to the Optional Protocol to the CCPR was not criticised by any NGO, probably because there is low awareness of the OPI and of the possibilities it offers.³⁰⁹ In contrast, as result of pressure from NGOs, the HRC and the CAT Committee, Senegal accepted the individual complains mechanism under the CAT.³¹⁰

However, Heyns & Viljoen bluntly observe that in a country like Egypt an individual complaints mechanism might be rendered virtually ineffective.³¹¹ Very few people whose

³⁰⁴ However, Brazil is signatory to the CEDAW-OP.

³⁰⁵ Heyns & Viljoen 2000, pp. 337-338, 350.

³⁰⁶ Id. p. 338.

³⁰⁷ Id. p. 234.

³⁰⁸ Ibid.

³⁰⁹ Id. p. 553.

³¹⁰ Id. p. 525. In the case of the CERD and the CCPR, Senegal had accepted the individual complaints mechanism simultaneously with ratification (ibid.).

³¹¹ Id. p. 247.

rights have been violated would resort to individual complaints, because they are not aware of the possibilities offered by this system or of its existence.³¹² Local human rights NGOs would hardly try to guide people who approach them to file complaints to the UN, the main reason for this being that the NGOs realise that this system can only be effective in democratic regimes – which according to Heyns & Viljoen is not the case in Egypt.³¹³ One may with good grounds argue that the same applies to Iran as well.

India has a policy not to accept individual complaints procedures at the international level - it is one of the advocates of the doctrine of domestic jurisdiction.³¹⁴ India believes that “international institutions should not play an interventionist role in human rights matters; that states need support, not accusation, from these institutions; and that the imposition of external morality is not only illegal but also counter-productive”.³¹⁵ In respect of the OP1, the following reasons have been given for India’s non-accession: a) fear of exposure of its human rights violations, b) fear of overwork of its administrative machinery, c) fear of abuse of the procedure by disgruntled elements, and d) lack of resources to administer the remedies (compensation etc.) to be granted by the HRC in cases of human rights violations.³¹⁶ There seems to be no domestic consensus on the question whether India should join the OP1 regime.³¹⁷ Moreover, the individual complaints mechanism, even if accepted, would likely be of limited use due to mass illiteracy, unfamiliarity of human rights law and economic constraints.³¹⁸

Mexico has very recently ratified the OP1, and it will enter into force on 15 June 2002.³¹⁹ Reasons for not doing that earlier were much the same as in India i.e. fear of overwork of its administrative machinery³²⁰ and the belief that this procedure amounts to international

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Id. pp. 305, 306.

³¹⁵ Id. pp. 305-306.

³¹⁶ Id. p. 305.

³¹⁷ Id. p. 306.

³¹⁸ Id. p. 330. Cf. Chapter 3.1 on the impact of these mechanisms.

³¹⁹ <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>

³²⁰ Fear that accession to additional complaints mechanisms might result in a great number of new complaints that would burden state resources has also been cited as a reason for Colombia’s non-acceptance of the CERD and CAT mechanisms (id. p. 171).

interference in the domestic affairs.³²¹ It may be noted that Mexico is subject to the jurisdiction of the Inter-American Court of Human Rights,³²² and that the OAS individual complaints system has proven to be a useful tool in terms of improvement of laws and strengthening of the legal system with regard to human rights issues.³²³

According to Heyns & Viljoen, *Brazil's* non-acceptance of the complaints mechanisms is largely a result of the general low level of awareness concerning international human rights obligations and mechanisms of enforcement.³²⁴ In addition, the policy of the Ministry of Foreign Affairs with regard to the UN system is that it would be redundant to recognise the individual complaints mechanisms because Brazil already recognises the competence of the Inter-American Commission and the Inter-American Court.³²⁵ However, Brazil has signed the new Optional Protocol to the CEDAW.³²⁶ The abundance of various human rights mechanisms is also one of the reasons why *Colombia* has not considered it necessary or practical to accept other individual complaints mechanisms than the OPI. Officials have argued that e.g. the special procedures of the UN Commission for Human Rights, especially the thematic rapporteurs, fulfil similar functions.³²⁷

The case of *Jamaica* is exceptional. In 1997 Jamaica submitted a denunciation of the OPI so that with effect from 23 January 1998, individual petitions from Jamaica to the HRC can no longer be made.³²⁸ Jamaica made this move following a decision by the Judicial Committee of the Privy Council where it was found that delayed execution of those

³²¹ Id. p. 429.

³²² Since December 1998 (ibid.).

³²³ Id. p. 447.

³²⁴ Id. p. 99.

³²⁵ Id. p. 114 The Inter-American system has been used regularly (ibid.). Similarly, Colombia that has accepted only one complaints mechanism, the OPI, is reluctant to engage additional obligations or mechanisms relating to protection of human rights (id. p. 170).

³²⁶ See Annex to this report.

³²⁷ Heyns & Viljoen 2000, p. 170.

³²⁸ <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>. However, the cases relating to Jamaica that were still under consideration at the time the denunciation became effective, are still to be considered by the Committee. Jamaica is a member of the OAS but it is not subject to the jurisdiction of the Inter-American Court for Human Rights. However, there have been several Jamaican petitions to the Inter-American Human Rights Commission, principally by persons sentenced to death after conviction for murder. See Heyns & Viljoen 2000, p. 352.

sentenced to death for more than five years may be regarded as inhumane treatment (*Pratt and Morgan v The Attorney-General*).³²⁹ Jamaica argued that as the hearing of the petitions by the HRC consumes too much time (in particular since the regional and global mechanisms have to be seized in sequence) and prevents the carrying out of the executions, it results in inhumane treatment of the prisoners.³³⁰ It is true that the complaints process is a slow one, but it has also been argued that Jamaica used the Privy Council decision as an excuse to withdraw from the OP1 in order to relinquish its international accountability for human rights violations.³³¹

It is worth mentioning that of all parties to the OP1, Jamaica has been involved in the highest number of cases.³³² As of April 2002, a total of 177 complaints had been processed by the HRC of which a total of 114 cases were the object of HRC views (8 were still in a pre-admission phase, 2 under review, 39 declared inadmissible and 14 discontinued after admission). In 95 cases the HRC found against and 19 in favour of the Jamaican government.³³³ On the other hand, the OP1 was not generally used in Jamaica in the sense that almost all cases dealt with the death penalty. As to the implementation of views, the domestic legal system did not provide a remedy to give effect to the views of the HRC.³³⁴ In fact, the government agencies generally did not accept the remedy recommended by the HRC, i.e. release of the author of the communication.³³⁵ However, Jamaica never executed a person while the case was pending or after the HRC had given its views.³³⁶ In other words, the OP1 had some impact on the national level and was of

³²⁹ Id. pp. 357-358.

³³⁰ Id. p. 358.

³³¹ Ibid. The time limit of five years imposed by the Judicial Committee of the Privy Council applied to the whole legal process, including the consideration of complaints by an international body. In some cases this would have left no time at all to the HRC to deal with a complaint. The HRC was willing to expedite its work, but was not in a position to guarantee a shorter consideration than one year (there are only three committee sessions per year).

³³² <http://www.unhchr.ch/html/menu2/8/stat2.htm>

³³³ Ibid.

³³⁴ Heyns & Viljoen 2000, id. p. 371.

³³⁵ See UN Doc. CCPR/C/71/R.3, pp. 31-120.

³³⁶ Cf. *Piandiong et al. v. the Philippines* (Communication No. 869/1999) where the Philippines failed to respect the HRC request for interim measures and put the alleged victims to death before the HRC had concluded its consideration of the communication.

help to the individuals concerned. The fact that Jamaica withdrew from the OP1 points to the same conclusion.³³⁷

3.4. Concluding remarks

The same problems of low profile, lack of a proper implementation mechanism and limited impact that affect reporting and implementation of concluding observations in general also come into play with respect to individual communications. More visibility, especially in the countries from which the complaints derive, is critical to improving their impact.³³⁸ Training of NGOs, lawyers, judges and journalists as well as general education about the treaty system and the existence of individual complaints mechanisms would contribute to increased visibility and use of these procedures.

On the other hand, there are factors that have enhanced submission of communications to the UN system. For example, in the case of Jamaica and Zambia, the example of a successful case or cases helped to “jump-start” the process,³³⁹ in particular if combined with media coverage. Moreover, a concerted international NGO effort in respect of a certain country, in this case Jamaica and its use of the death penalty, can set the system into motion (but it can also lead to the country’s withdrawal of the mechanism).³⁴⁰ Nevertheless, statistics show that countries and regions with a strong domestic culture of human rights are more likely to become the target of individual communications.³⁴¹

As to the implementation of the views, the reactions of States may be categorised in the following way: a) institutional changes were effected (Senegal), redress was afforded to the author of the communication (Colombia, Senegal, Zambia), and c) nothing was done/settlement still outstanding (a part of the Jamaican cases).³⁴² The principal reasons for non-implementation seem to be domestic inconvenience and/or governments’

³³⁷ Cf. Heyns & Viljoen 2000, p. 383.

³³⁸ Id. p. 197 (Colombia).

³³⁹ Id. p. 32.

³⁴⁰ Ibid.

³⁴¹ Cf. *ibid.* and see documents on the jurisprudence of the HRC and the CAT and CERD Committees at <http://www.unhchr.ch/tbs/doc.nsf/FramePage/TypeJurisprudence?OpenDocument>

emphasis on domestic jurisdiction and notions of sovereignty.³⁴³ Even when a government is willing to give effect to the views, their effectiveness suffers from the lack of a proper implementation procedure.³⁴⁴

In respect of countries that have not accepted any of the individual complaints mechanisms, political embarrassment created by cases decided against the government, notions of sovereignty, fear of abuse of the system, lack of administrative and financial resources, existence of other UN as well as regional human rights mechanisms, as well as low awareness of the existence of these procedures have been cited as reasons for non-acceptance. It has been observed that until governments recognise the individual complaints procedures under the CAT, the CERD, the CCPR, and the CEDAW it is unlikely that civil society will make full use of these treaties in the same way as e.g. Brazilian NGOs have done with the human rights treaties of the Inter-American system.³⁴⁵ Furthermore, non-accession to these procedures maintains the international impotence of domestic NGOs.³⁴⁶ NGOs should be active and coordinate a campaign to pressure the government to accept the individual complaints mechanisms.³⁴⁷ However, in the case of Iran it has been argued that insisting on the acceptance of such a system will only make the authorities sensitive about the motives behind such a move.³⁴⁸

³⁴² Cf. Heyns & Viljoen 2000, p. 33.

³⁴³ It may be noted that according to some estimates in only 20% of individual cases disclosing a violation, have States parties provided a remedy (Bayefsky 2001, p. 7).

³⁴⁴ N.B that among the 20 countries surveyed in the “Domestic Impact Study”, only Colombia, Finland and Spain have in place specific procedures for domestic implementation of the views of the treaty bodies (Heyns & Viljoen 2000, p. 33-34).

³⁴⁵ Id. p. 114.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Id. p. 350.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. Preparation and submission of periodic state reports

A) How to minimise delays in the preparation and submission of periodic reports by developing countries?

Delay in the preparation and submission of periodic state reports is a common problem for developing countries. It is a result of several factors such as:

- reporting is accorded a low priority;
- difficulty or lack of coordination and cooperation between various government departments/agencies or levels of government, and state human rights institutions participating in the preparation of reports;
- lack of concrete mechanisms to prepare state reports;
- technical, financial and administrative constraints, such as lack of qualified personnel and absence of the continuity of personnel, problems in the collection, classification and analysis of the required data, lack of sufficient funds, and translation of reports to one of the UN's official languages; and
- passivity of NGOs and the media in respect of the late submission of reports, which makes it easier for the government to ignore its treaty obligations.

In order to solve these problems, governments themselves should:

- take reporting more seriously and commit adequate resources to the reporting exercise;
- implement concrete mechanisms to prepare their reports, e.g. by setting up an effective interministerial team to coordinate the reporting process (this may in the beginning increase the delay in the submission of reports, since new expertise has to be created); and
- train their officials in report writing and try to find a ways to combat the frequent turnover of persons so trained.

Technical assistance from e.g. the OHCHR could help governments to improve their reporting record, provided that the government in question is willing to co-operate. For example, in countries such as Iran and Jamaica where the attitude to reporting and to the treaty system as a whole is said to be negative, international assistance would hardly make a difference. Technical assistance offered to States parties should stress, in particular, a) the development of national strategies for drafting reports (for example, the kinds of governmental structure, or committees, and cooperation required; relationships with NGOs), b) technical advice or assistance on collecting statistics, and c) guidance in identifying legislation, policies, and judicial decisions which should be monitored.³⁴⁹

The treaty bodies themselves should coordinate their work so that they would at least be aware of the reporting deadlines and submitted reports under the other treaties. This would help to avoid situations where several reports by one and the same country should be prepared at the same time or considered by the treaty bodies very close to each other. This kind of logistical coordination would already assist developing countries in timely reporting. Of course, further advantages could be obtained by coordinating the reporting guidelines and moving in them towards focused reporting deliberately avoiding unnecessary overlap between reporting under different treaties. Moreover, treaty body pressure could also improve the timeliness of reporting. For example, at least in India and Senegal, the “pressure” exerted by a treaty body has in some cases yielded positive results in terms of timely reporting. Bayefsky recommends that the treaty bodies and the OHCHR increase pressure upon the States parties by highlighting in various ways their failure to report, including inviting certain governments to appear before the relevant Committee in public session for the purpose of discussing the failure to report,³⁵⁰ and consideration of a State party’s record in the absence of a report.³⁵¹ The problem of this approach is that it regards reporting as a “burden” and not as a positive opportunity for the governments concerned.³⁵²

³⁴⁹ Bayefsky 2001, p. 11.

³⁵⁰ Id. pp. 10-11.

³⁵¹ Id. p. 12. Bayefsky emphasises equal treatment of States parties, i.e. the system should not reward “flagrant” disregard of treaty obligations (id. p. 16).

³⁵² According to Bayefsky, the HRC and the Committee on Economic, Social and Cultural Rights are at the initial stages of this approach whereas the CERD Committee has been doing it for many years (id. p. 12).

On the national level, NGOs should find out when reports are due and put pressure on the government to prepare and submit reports on time. They should also try to raise public consciousness about the reporting process in order to get the public actively involved in it. In many countries passivity of NGOs and the media in respect of the late submission of reports has its origin in their ignorance, i.e. they are not familiar with the nature and importance of reporting under the treaties. Thus, training in the reporting procedures and in the international human rights system in general, whether arranged by the government, the UN or international non-governmental organisations, should be extended from government officials to NGOs and journalists. Naturally, given its resources and expertise, the UN and its organs could here play an invaluable role.

B) How to organise technical assistance for the preparation of periodic reports in order to optimally promote the realisation of human rights?

The need for technical assistance in the report writing (government officials) and in respect of the creation of concrete mechanisms to prepare state reports, as well as the need for training in the reporting procedures (NGOs and the media) was already identified. These measures aim to improve the timeliness of reporting, which is one indicator of a government's genuine commitment to the reporting process, and, ultimately, to the protection and promotion of human rights and fundamental freedoms in general. Other indicators are, *inter alia*, the availability and quality of state reports, which tend to be rather poor in most countries examined in this report. In order to remedy this situation, governments should engage in formal consultations with NGOs during the preparation of reports. These consultations should be wide – it is not sufficient that a few selected NGOs participate in the drafting process. Such consultations would increase the availability of state reports to civil society, since the NGOs participating in the process would have better access to state reports and would be in a position to disseminate them further. At the same time, NGO input in the drafting process would improve the quality of reports making them more critical and giving them a more practical orientation. It is true that increased consultation may first increase the delay in the submission of reports,

The Human Rights Committee has in 2002, for the first time, scheduled certain countries (Gambia and Surinam) for consideration in the absence of a long overdue report.

but since it would make the whole process more transparent and increase public awareness of the contents and mechanisms of the treaties, the end result would most likely be more pressure upon the government and an incentive for it to minimise delays in the submission of reports. NGO participation is thus an aspect that has to be taken into account when technical assistance is provided for the creation of concrete mechanisms to prepare periodic reports. Overall, civil society, in particular NGOs, should play an active role in the reporting process by submitting information to the government and preparing shadow reports in cases where the government does not seek their input, as done by Egyptian, Mexican and Colombian NGOs.

It was mentioned earlier in this report that UNICEF has funded consultations between governments and NGOs in respect of the CRC reports in both Zambia and India. This forms part of a larger UNICEF strategy in respect of the implementation of treaty standards. According to Bayefsky, UNICEF, which has field offices in 131 States, does the following with respect to the CRC:³⁵³

- presses governments to submit reports,
- encourages workshops with civil society actors to begin the process of report writing,
- provides financial and other assistance to help with report writing, and
- supports NGOs writing shadow reports.

In addition, UNICEF also:³⁵⁴

- solicits information from the field that it sends to the Committee on the Rights of the Child,
- usually sends someone from the field to pre-sessional meetings to meet directly with treaty body members,
- half the time sends someone from the field again for the dialogue itself,

³⁵³ Bayefsky 2001, p. 50.

³⁵⁴ Ibid.

- helps the CRC Committee with its work (assists in improving coordination among members to avoid repetition in questioning States parties, agree on priorities, and work together as a team; provides assistance in identifying the list of issues),
- engages in follow-up at the field level,
- translates concluding observations into local languages,
- distributes the concluding observations locally,³⁵⁵ and
- uses the CRC at the field level to do programming.

In fact, in its concluding observations the CRC Committee routinely encourages States to seek technical assistance from UNICEF and international non-governmental organisations.³⁵⁶ There are also other major UN agencies or programmes, such as UNIFEM and UNDP, which are represented in developing countries, or at least in the region, and are in a position to help developing countries overcome problems in the reporting process.³⁵⁷

A call has also been made for the UN, human rights NGOs and funders to join forces and set up treaty support units to train governments on the treaty system and provide technical assistance in the preparation of reports.³⁵⁸ These units could also train NGOs on reporting and individual complaints, and encourage them to use the system.³⁵⁹ To ensure its local legitimacy and to facilitate continuity, such a unit should preferably be based in the region, and draw on local experts.³⁶⁰ It has also been submitted that the UN should provide technical assistance to developing countries for the creation of a central database related to all their reporting obligations under the UN system, including the treaty bodies, the ILO etc., and under applicable regional systems, which should be kept up to date at all times.³⁶¹

³⁵⁵ UNICEF has also funded dissemination of state reports e.g. in South Africa.

³⁵⁶ See e.g. UN Doc. CRC/C/15/Add.115 (India), UN Doc. CRC/C/15/Add.123 (Iran), UN Doc. CRC/C/15/Add.112 (Mexico), UN Doc. CRC/C/15/Add.122 (South Africa).

³⁵⁷ Bayefsky 2001, p. 51.

³⁵⁸ Heyns & Viljoen 2000, p. 50.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Id. p. 44.

C) What kind of existing best practices can be identified to assist developing countries in the preparation of their periodic reports and in consulting NGOs and other civil society actors?

The above-mentioned activities of UNICEF can be considered a best practice. As to the developing countries examined in this study, Senegal's performance can be regarded as one of the best, in particular when taking into consideration the fact that the country is also among the poorest. Its reporting has been rather timely, the substance of its reports rather good, and it has created an interministerial committee to coordinate the reporting process and to follow-up of concluding observations. Moreover, Senegal's current reporting system involves NGOs in a systematic manner through the Senegalese Human Rights Committee, which also has improved the dissemination of state reports. It may be noted that the UN and other institutions have in the past organised training for government officials on several occasions.

4.2. Implementation and follow-up of treaty body findings

Governments should develop a national strategy for implementation and follow-up of treaty body findings. On the basis of the findings in Chapter 2.3 and recommendations directed to developing countries in the Domestic Impact Study, the following model for the implementation of treaty body findings can be outlined:

- 1) Treaty body findings should be translated into local language(s) and disseminated widely.
- 2) In respect of concluding observations, the responsible government department should distil aspects of relevance for each of the other relevant departments and communicate them through an official channel.³⁶²
- 3) Concluding observations, views and general comments should be used as the basis for improving human rights legislation and practices.
- 4) Implementation of concluding observations and views should be continually followed up.

³⁶² See id. pp. 574, 448.

- 5) An interministerial or interdepartmental body should be created to deal with the entire reporting process. It should coordinate report writing, and receive and consider concluding observations and views of the Committees under the individual complaints procedures. This body should also be involved in the implementation and follow-up of views and concluding observations. Its membership should include relevant state organs, including representatives from the legislative and judicial branches, as well as civil society actors.³⁶³
- 6) National human rights institutions should also play a role in monitoring and reporting on government compliance on a continuous basis.³⁶⁴
- 7) Treaty body findings should also be used in training programmes directed to government officials, civil society actors, journalists and the judiciary.
- 8) If there exists a National Development Programme or a National Human Rights Programme etc., concluding observations and the follow-up should be included in it.³⁶⁵
- 9) When reporting to the treaty bodies, the government should provide information about the way in which it plans to implement the views and concluding observations (or why it is not implementing them).³⁶⁶

This would obviously require an increase in the share of budget directed toward implementing the treaty body findings.

Both Mexico and Senegal have created an interministerial committee that not only participates in the process of writing state reports but also engages in the follow-up of concluding observations. This kind of arrangement, although not sufficient, is a step to the right direction and constitutes a form of best practice among the countries examined in this study.³⁶⁷ As to the implementation of the views of the treaty bodies, in most

³⁶³ See *id.* pp. 44 and 574.

³⁶⁴ *Id.* p. 574.

³⁶⁵ Cf. *id.* p. 448. Bayefsky suggests that the OHCHR should develop and promote a standard model national human rights action plan (Bayefsky 2001, p. xv).

³⁶⁶ Cf. Heyns & Viljoen 2000, p. 448.

³⁶⁷ It may be observed that in its list of best practices, Heyns & Viljoen take up only the case of Mexico (*id.* p. 41). On the other hand, they point out elsewhere that the fact that the state-level authorities (Mexico is a federal State), the judiciary and the legislature do not participate in the Interdepartmental Commission

countries there does not exist any specific mechanism to give effect to these decisions. Colombia is an exception. It has a unique way of enforcing the views of treaty bodies in response to individual communications, in force since July 1996. This procedure has already yielded concrete results by allowing to the victims and their families monetary compensation for the harm resulting from human rights violations. The OHCHR and treaty bodies should promote adoption of such measures.

In respect of the treaty bodies, one can observe that there is a lack of a follow-up strategy, and funds, on their part. The Committees should put more emphasis on the follow-up of concluding observations within the countries concerned.³⁶⁸ In addition, in cases when a country fails to comply with the observations made by these different mechanisms, the UNGA as well as ECOSOC should know of the lack of compliance.³⁶⁹ Other member states may also be encouraged to raise the question of follow-up of the concluding observations in their bilateral relations with the states concerned.³⁷⁰ Bilateral human rights dialogues between developed and developing countries should include discussion and exchange of experiences related to the countries' interaction with the treaty bodies and the implementation of the findings and recommendations by treaty bodies.³⁷¹ Furthermore, donor countries could make more use of treaty body findings in the assessment of country situations and in planning their development cooperation.³⁷²

Integrating the treaty body processes and output into the work of major operational agencies or programmes such as UNICEF and UNDP would help both developing countries and treaty bodies considerably. It would have potential to make a huge difference to the efficacy of the treaty bodies and the implementation of treaty standards.³⁷³ Moreover, UN offices and UN agencies should disseminate information on

hinders the implementation of treaties (id. p. 447). It should also be noted that NGOs are not represented in the Interdepartmental Commission.

³⁶⁸ Heyns & Viljoen 2000, p. 350.

³⁶⁹ Id. p. 448.

³⁷⁰ Ibid.

³⁷¹ For instance, in the third Finnish-Iranian Expert Seminar on Human Rights, held in Tehran in April 2002, such a theme was included as one out of four items.

³⁷² A valuable tool for such an approach is provided by Earle & Frankovits, *The Rights Way to Development: Manual for A Human Rights Approach to Development Assistance* (1998).

³⁷³ Bayefsky 2001, p. 50.

the treaty body system, and see to it that NGOs and the media in particular take note of concluding observations.³⁷⁴ To be effective, the reporting system needs publicity. Treaty bodies should consider appointing, either for each country considered or for each session, a spokesperson from among their members or the secretariat, to inform the media and the general public of the findings of the committee.

In this context the role of the Internet should be emphasized. Various documents related to the reporting process (periodic reports, lists of issues, summary records, concluding observations, views etc.) are already published on the OHCHR website. However, if the governments published both reports and concluding observations on their own website, the impact of the Internet on the awareness of the treaty body system would be even greater. Placing information on the government's human rights performance on the government's own website in citizens' mother language(s) would render it more accessible, since obtaining it would not require a high degree of knowledge of the UN system. Although access to the Internet may be relatively scarce in many developing countries, it nevertheless usually is the most effective way to secure to local and national NGOs direct access to treaty body output, for instance compared to Annual Reports of the treaty bodies or other United Nations documents issued by them.

As to the specific proposals on how the website of the OHCHR should be developed so that governments, courts, legislative bodies, national human rights institutions and NGOs in developing countries could make better use of material produced in the course of the monitoring mechanisms under UN human rights treaties, special emphasis should be given to securing that the OHCHR website is made easily accessible for users in developing countries. This includes improving the reliability of the server, securing access for users without most advanced computers or modems (e.g. by providing a text-only version), providing documents in several language versions, and improving the search tools.

³⁷⁴ Heyns & Viljoen 2000, p. 49. It may be noted that the UN Information Centre in New Delhi disseminated the HRC's concluding observations on India's third periodic report in English (id. p. 327).

As to the NGOs and the media, they should contribute to the implementation of concluding observations by monitoring the government's response to them, pressuring the government to comply with them, and by sensitising the public as to their contents. If the government does not disseminate the concluding observations, NGOs can take up this task, as done by the Mexican and Colombian NGOs. NGOs should be encouraged and assisted to develop an integrated approach to implementing human rights treaties, aimed both at maximising national input at the international level, and at using international standards at the national level in policy and legal advocacy.³⁷⁵ In this respect, cooperation between national and international NGOs has proved to be useful. It would facilitate the work of NGOs if they were allowed to play a greater role in the consideration of country reports by the various treaty bodies. Links between treaty bodies and NGOs vary amongst the Committees,³⁷⁶ and there are several procedural impediments to NGO participation.³⁷⁷ Various suggestions have been made to improve this situation, including creation of a fund to assist NGOs from developing countries to send representatives to these meetings.³⁷⁸

A good example of cooperation between a treaty body and NGOs is the consideration of Colombia's fourth report under the CCPR. To begin with, a special meeting of the HRC's pre-sessional working group charged with preparing the list of issues was convened especially to receive NGO input. After the working group session the NGO representatives presented a draft list of issues to the rapporteur (at his request). Prior to the public presentation and review of the report, several international NGOs organised an informal session where both Colombian and international NGO representatives met with the full Committee (save for the Colombian expert who recused herself) in order to discuss the issues deemed a priority by the NGOs and to respond to questions posed by the experts. This process contributed significantly to the framing to the final list of issues,

³⁷⁵ Bayefsky 2001, p. xvi.

³⁷⁶ Id. p. 43.

³⁷⁷ Id. p. 44.

³⁷⁸ Heyns & Viljoen 2000, p. 639.

which, in turn, shaped the debate during the presentation of the periodic report and the concluding observations as well.³⁷⁹

The role of the judiciary in the implementation of treaty body findings should not be forgotten. Training in the reporting procedures and in the international human rights system in general, whether arranged by the government, the UN, the academia or international non-governmental organisations, should be extended to the judiciary as well, starting with judges in the highest courts. If judges have no or little knowledge of international human rights law, it is not very likely that treaty body findings will find their way in judgements of the lower courts. Even in South Africa where treaty body findings have been referred to in several cases of the Supreme Court, the courts often refer to treaties themselves whereas the Committees' jurisprudence (general comments, views) has not yet received as much judicial attention, largely due to a lack of awareness.³⁸⁰ Broader use of treaty body findings (views, concluding observations, general comments) in the decision-making and reasoning of national courts would give much goodwill to the legal systems of developing countries in the eyes of the international community. For instance, the ruling by the South African Constitutional Court to outlaw capital punishment has raised much enthusiasm about the capacity of the courts of developing countries to show a good example to judges in other countries.³⁸¹

Finally, how should the form and contents of the findings by the treaty bodies (concluding observations issued at the end of the consideration of a report, final views resulting from the complaints procedures) be developed in order to make their implementation easier in developing countries? Should more emphasis be given for legal analysis and argumentation, or for policy recommendations?

Concluding observations should be of such a nature that a country's compliance and performance can be evaluated clearly. Then it is both easier for the government to

³⁷⁹ Id. p. 184.

³⁸⁰ Id. p. 575.

implement them and easier for NGOs, the media and the treaty bodies themselves to monitor their implementation. Too broad or too vague recommendations are neither useful nor practical. Legal analysis and argumentation and policy recommendations are both needed: legal reasoning as to the interpretation of a treaty provision should be followed by a recommendation combining a legal treaty obligation with a policy recommendation. Legal analysis and argumentation are also likely to increase the value of concluding observations in the eyes of the judiciary and help the judges to interpret the treaty in question. Furthermore, concluding observations should be focused, which means that they should not be too long or too detailed. As the treaty bodies usually adopt their concluding observations by consensus, long documents are likely to require more meeting time, ultimately resulting in a lower number of reports being considered per session. Moreover, long concluding observations would hardly be practical for the purposes of implementation. Overly detailed observations again run a higher risk of being inaccurate at the factual or terminological level, thereby exposing the treaty bodies to criticism from the States or other actors seeking to question their authority.

It may be mentioned that the fact there are six different treaty bodies that all issue concluding observations may lead to a situation where their assessment of the situation in the country concerned and recommendations differ from each other.³⁸² Although there is no perfect solution to this problem, which partly results from the fact that the different treaty bodies often look at the same issues from the perspective of the human rights of persons in a different role on the domestic scene,³⁸³ each treaty body should seek to avoid unnecessary conflicting interpretations or recommendations by restraining themselves to the scope of their respective treaty and by improving their awareness of the positions taken by the other treaty bodies. As to the final views issued by the treaty bodies under the individual complaints mechanisms, any measures that would result in greater

³⁸¹ The State v. Makwanyane and Mchunu, Case no. CCT/3/94, judgment of 6 June 1995, Human Rights Law Journal 16, no. 4–6 (1995): 154–208. See also William A. Schabas, "South Africa's New Constitutional Court Abolishes the Death Penalty", Human Rights Law Journal 16, no. 4–6 (1995): 133–48.

³⁸² See e.g. Tistounet 2000, pp. 389-394, and Bayefsky 2001, p. 64.

³⁸³ E.g. victims of family violence vs. defendants in a criminal trial, victims of stereotyping in the media vs. journalists.

consistency, quality control and persuasive force of argumentation would enhance their usefulness for national courts and tribunals.

4.3. Role of the treaty bodies

Various recommendations have been made in order to make the functioning of the treaty bodies more efficient,³⁸⁴ including streamlining and simplification of treaty body procedures, increasing the use of pre-sessional working groups, better coordination of work between the treaty bodies, granting more financial and human resources to the OHCHR to assist the Committees in their work; creation of a proper follow-up mechanism in relation to the findings made by the treaty bodies; and improving the cooperation and coordination between treaty bodies and national and international NGOs, UN agencies, bodies and programmes.³⁸⁵ In addition, radical proposals about the consolidation of the six treaty bodies into one or two bodies have been made. Proposals that would require amendments to the treaties or other very detailed and technical reform proposals will not be discussed here. Nevertheless, it should be noted that apart from the factors summarised in chapter 4.1, there are features in the reporting system itself that have been cited as a cause for late reporting, since they increase the States' difficulties in complying with their reporting obligations. Examples of such features are the two-year reporting cycle under the CERD, which is widely regarded as too short, multiplicity of reporting regimes, and duplication in reporting by States due to overlapping provisions in the six treaties. According to Bayefsky, "six different working methods, documents, practices, rules of procedure, and reporting guidelines do not serve users. There is substantive overlap of treaty rights and freedoms, and inevitable overlap of reporting and dialogue."³⁸⁶ Focussed reports, more standardisation of the reporting format, formally or at least informally consolidated reports, or, as was mentioned above as a more radical proposal, consolidation of the treaty bodies into one or two bodies have all been offered as a solution to this problem. Such changes would, among other things, reduce the

³⁸⁴ See a list of problem areas in the work of the treaty bodies, calling for reform, in the introduction of this report.

³⁸⁵ See e.g. Bayefsky 2001, the so-called Alston report to the Commission on Human Rights (1997), Evatt 2000, and Schmidt 2000.

duplication in reporting requirements.³⁸⁷ It has also been suggested that the frequency with which the reports are required should be re-examined in order to bring relief to the resource constraint faced by many developing countries.³⁸⁸

As to the implementation of treaty body findings, it has been said that they would have more impact in developing countries, if the treaty system had higher profile and greater legitimacy. According to Heyns & Viljoen, lack of profile is one of the treaty body system's most debilitating weaknesses.³⁸⁹ They argue that greater presence both locally and internationally would be required on the part of this system during the entire reporting process.³⁹⁰ Since this report focuses specifically on the needs of developing countries, two questions related to the visibility and geographical representativeness of treaty bodies will be discussed:

- Should the method of electing treaty body members be developed in order to obtain higher representativeness in terms of geographic region and gender but without endangering the nature of the treaty bodies as independent expert bodies?
- Should the treaty bodies schedule sessions to take place in various parts of the world in order to obtain better visibility and influence of their work?

On the basis of the experiences in Brazil, Colombia, Egypt, Mexico and South Africa one could draw the conclusion that the impact of the presence of nationals in the Committees does not in itself raise awareness of the treaty body system and its output.³⁹¹ However, in Senegal the presence of its nationals in the HRC and the CAT Committee appears to have made some difference, as the CCPR and the CAT are two of the best-known treaties in

³⁸⁶ Bayefsky 2001, p. xiv.

³⁸⁷ See e.g. Bayefsky 2001, Heyns & Viljoen 2000, and the so-called Alston report to the Commission on Human Rights (1997). Consolidated reports or consolidation of treaty bodies would require formal amendments to the treaties – a procedure which is time-consuming and cumbersome.

³⁸⁸ Heyns & Viljoen 2000, pp. 48, 639.

³⁸⁹ *Id.* p. 197.

³⁹⁰ *Ibid.*

³⁹¹ See *id.* pp. 108 (Brazil), p. 176 (Colombia), p. 238 (Egypt) p. 436 (Mexico), p. 568 (South Africa). Iran and Zambia have never nominated anyone as a member of any of the six treaty bodies (*id.* pp. 343, 627). Current members in the treaty bodies include persons from: Brazil – the CERD and CRC Committees, Colombia – the HRC, Egypt – all six Committees, Mexico – the Committee of Economic, Social and Cultural rights and the CEDAW Committee, and South Africa – the CEDAW and CERD Committees. For current members of the treaty bodies see <http://www.unhchr.ch/tbs/doc.nsf/Committeefrset?OpenFrameSet>.

this country.³⁹² Reporting under the CCPR has also better than in respect of the other treaties, as exemplified by the repeated comments from the HRC about Senegal's punctual submission of reports and constructive engagement with the HRC.³⁹³ Furthermore, it seems that the membership of Indian nationals in the HRC and the CERD Committee has made these treaty bodies slightly better known in India,³⁹⁴ even if it has had a negligible influence on the awareness of the treaties as a whole.³⁹⁵ India maintains cordial relations with the HRC, and by having one of its nationals on the HRC, India has underlined its importance.³⁹⁶ Furthermore, strong presence of Philippine experts in the CEDAW Committee has led to the development and proliferation of legislation relating to women's rights in the Philippines.³⁹⁷

Equitable geographical and gender composition serves the interest of higher credibility of the treaty body system. Craig Scott maintains that one of the benefits of the current pluralistic structure – six treaty bodies for six treaties – is the diversity of knowledge it brings to the scrutiny of any State's human rights performance.³⁹⁸ Composition of the Committees must be diverse, "given that one of the central normative functions of international human rights supervision is to understand, reveal and help counteract exercises of power that produce oppression for dominated social groups".³⁹⁹ Scott argues that there is reason to be concerned about the current degree of diversity of knowledge, both experiential and disciplinary.⁴⁰⁰ In the context of this report, it is important to notice

³⁹² Heyns & Viljoen 2000, p. 529. Senegal has successfully nominated members to three treaty bodies: twice to HRC, once to the Committee on Economic, Social and Cultural Rights, and twice to CAT (ibid.). At the moment there is a Senegalese member in the CAT Committee.

³⁹³ Heyns & Viljoen 2000, p. 529.

³⁹⁴ Id. p. 321. At the moment *Indian* citizens serve in the HRC and the CERD Committee. They are the second and third Indian nationals in their respective Committees (id. pp. 320-321).

³⁹⁵ Id. p. 320.

³⁹⁶ Id. p. 329. It may be noted, however, that India has not been happy with what it regards as a lack of appreciation of some HRC members of its difficulties in handling the issue of terrorism and insurgency (ibid.).

³⁹⁷ Id. p. 462.

³⁹⁸ Scott 2000, p. 404. Scott cuts this notion in three parts: diversity of expertise (the range of professional disciplines that can be relevant to the interpretation of human rights), diversity of experience (diverse lived experience of different social groups) and diversity of normative focus ('different concerns' associated with various categories of rights). See id. pp. 404-405. Scott's central thesis is that in the event of consolidation of treaty bodies, the diversity of knowledge must be guaranteed.

³⁹⁹ Id. p. 411.

⁴⁰⁰ Ibid.

that geographic imbalances are not uncommon. The under-representation of, for instance, African and Eastern European experts on some of the treaty bodies might have contributed towards a certain legitimacy gap in the eyes of the governments appearing before the Committees. For instance, already for some time there has been a disproportionate number of experts from “Western” countries on the Human Rights Committee,⁴⁰¹ partly resulting from the highly competitive nature of the elections to that body and the ability of developed countries to allocate more resources to the promotion of their candidates. Of course, this real or potential problem must not be remedied in a way that would compromise the independence of treaty bodies. Therefore, official geographical quotas in the composition of treaty bodies would probably not result in an overall improvement.⁴⁰² Rather, informal mechanisms should be created to identify and promote independent and qualified candidates from those regions that appear to be underrepresented.

Another way of raising the legitimacy and profile of the treaty body system in developing countries would be to organise treaty body meetings within the region, where the treaty

⁴⁰¹ Since the mid 1980’s the Western European and Other States Group (WEOG) has been clearly over-represented in the HRC, and is so even today as nationals of countries in that region represent 50% of its membership (Scott 2000, p. 416). There are 18 members in the HRC of which four from Africa (Benin, Egypt, Mauritius, Tunisia), three from Latin America (Argentina, Chile, Colombia), two from Asia (India, Japan), and eight from WEOG (Australia, Canada, Finland, France, Germany, Malta, UK, USA) plus one member from Israel. See <http://www.unhchr.ch/tbs/doc.nsf/Committeefrset?OpenFrameSet>

⁴⁰² It is to be noted that the Committee on Economic, Social and Cultural Rights forms an exception in the sense that as a subsidiary body of the ECOSOC its composition is based on geographical quotas. It has 18 members, and the current composition is as follows: four members from Africa (Cameroon, Egypt, Mauritius, Tunisia), four from Latin America (Costa Rica, Ecuador, Jamaica, Mexico), three from Asia (Jordan, Nepal, Philippines), three from Eastern Europe, (Belarus, Romania, Russia), and three from WEOG (France, Germany, New Zealand) and Switzerland. The CAT Committee: Ten members of which two from Africa (Egypt, Senegal), one from Latin America (Chile), two from the Asian group (China, Cyprus), one from Eastern Europe (Russia) and four from WEOG (Canada, Denmark, Spain, USA)

Composition of the CEDAW Committee: 23 members (one place is empty at the moment) of which five from Africa (Egypt, Ghana, Nigeria, South Africa, Tunisia), four from Latin America and the Caribbean (Argentina, Cuba, Mexico, Saint Kitts and Nevis), six from Asia (China, Indonesia, Japan, Philippines, Republic of Korea, Sri Lanka), and six from WEOG (France, Germany, Italy, Portugal, Sweden, Turkey), plus one member from Israel.

The CERD Committee: 18 members of which four from Africa (Algeria, Egypt, Guinea, South Africa), three from Latin America (Argentina, Brazil, Ecuador), three from Asia (China, India, Pakistan), two from Eastern Europe (Romania, Russia), and six from Western Europe (Austria, Belgium, Denmark, France, Greece, UK).

The CRC Committee: 10 members of which two from Africa (Burkina Faso, Egypt), one from Latin America (Brazil), three from Asia (Qatar, Saudi Arabia, Thailand), and three from WEOG (Finland, Italy, Netherlands), plus one member from Israel.

body would examine state reports coming from the region in question. Heyns & Viljoen are strongly of the opinion that such regional treaty body meetings would make a difference. They suggest that the treaty bodies should have meetings outside Geneva or New York at least once a year to consider country reports from States in a particular region, and that a few pilot projects should be initiated in order to test the viability of such meetings.⁴⁰³ The logic behind their proposal goes as follows. Treaty bodies are currently perceived as remote, a factor that limits their impact.⁴⁰⁴ Regional meetings would make them more “real” and increase the attention focused on them and the relevant treaties, thereby ensuring that a large number of people get to learn of their existence, functions and the relevant category of rights. Furthermore, local NGOs, which, because of financial constraints, are unable to go to Geneva or New York, would get an opportunity to lobby the committee members on issues they consider important as well as to present alternative reports to the treaty body members. In addition, the government would be under pressure to impress the treaty body, international NGOs and the international media that would come to cover the event by undertaking actions promoting respect of human rights.⁴⁰⁵ On the other hand, contacts between members of the treaty body and local officials and NGOs would improve the experts’ understanding of the human rights situation in the country concerned.⁴⁰⁶ Regional meetings would also offer the opportunity for networking among national, regional and international NGOs that could lead to a continued cooperation on matters related to the right(s) in question as well as other matters of concern to them.⁴⁰⁷ Heyns & Viljoen acknowledge that regional meetings are expensive, but emphasize the positive effect they would have on the domestic level compared with “the splendid isolation” of Geneva.⁴⁰⁸

⁴⁰³ Heyns & Viljoen 2000, pp. 47, 48.

⁴⁰⁴ See e.g. id. p. 327 (India).

⁴⁰⁵ Id. pp. 43, 47-48, p. 640 (Zambia), p. 331 (India), p. 575 (South Africa), p. 115 (Brazil), p. 449 (Mexico), p. 384 (Jamaica), p. 249 (Egypt), p. 198 (Colombia). Iranian authorities seem to be interested in participating in human rights discussions on a regional basis. To this end, the Organization of the Islamic Conference (OIC) would appear to be the most appropriate forum. If the treaty body arranges to meet in the region in the framework of a cooperation between the UN and the OIC, the Iranian government will not be in a position to deny its human rights obligations solely on the basis of Islamic laws and principles (p. 351).

⁴⁰⁶ Cf. id. p. 575 (South Africa), p. 449 (Mexico), p. 249 (Egypt).

⁴⁰⁷ Id. p. 249 (Egypt).

Although the proposal about treaty bodies meeting in various regions has its clear merits, it would be logistically difficult to implement. It would be difficult to recruit locally personnel for conference services and interpretation, translation staff and press officers, as the work of the treaty bodies is somewhat technical for persons not familiar with UN meetings. Sending all supporting personnel from Geneva or New York to the region would not only be expensive as such but would also affect the scheduling of other UN meetings.

4.4. Conclusion

Reporting makes a government accountable for its human rights policies before an international body. This puts some sort of moral pressure on the government in question to fulfil its treaty obligations. Since the preparation of a state report requires intergovernmental contacts between the concerned ministries, it widens the circle of government bodies concerned on ways of improving the human rights situation in the country to reduce the chance of embarrassing questioning of government practices in international fora.⁴⁰⁹ In addition, publicity given to the reporting process at its various stages helps to increase awareness of human rights and encourages the public to exercise some pressure on the government if the report shows any violations of human rights. Nevertheless, in order for reporting to make a real difference it should be linked to policy-making and implementation. According to Heyns & Viljoen, “[a]s long as the reporting authority maintains an isolated posture and a formalistic approach to the process, little positive impact on other national authorities in the executive, legislative and judicial branches can be expected.”⁴¹⁰ If the government and the civil society take the process of reporting and human rights norms seriously, the reporting system has a strong potential to enhance the impact of treaties. As to the individual complaints mechanisms, their acceptance by the government enhances the impact of the treaties in respect of which they apply. Moreover, the potential impact of a treaty increases when case law is

⁴⁰⁸ Id. pp. 47-48. On the origins of this phrase, apparently originally attributable to Sir George Foster (1828-1904), see Clapham 2000, p. 175 (note 2).

⁴⁰⁹ Cf. Heyns & Viljoen 2000, p. 246.

⁴¹⁰ Id. p. 197.

developed around it and when there exists a mechanism to enforce the views of the treaty bodies.⁴¹¹

It is true that developing countries are having problems complying with the reporting deadlines, guidelines concerning the quality of reports and the implementation of treaty body findings. The reporting process does not always function in the way it was intended, but that is hardly the case in developing countries only. However, one should not draw the conclusion that developing countries are not committed to the realisation of human rights and to the treaty body system. Citing Philip Alston, “[I]t is one thing to insist that respect for basic human rights cannot be contingent upon per capita gross national product (GNP, or any other comparable economic indicator); it is quite another to demand that poor countries will be able of willing to devote the same level of resources to reporting and complaints procedures as some developed states with strong internal human rights constituencies”.⁴¹²

In fact, it seems that in most developing countries examined in study, the quality of reports is improving as is the organisation and inclusiveness of the reporting process. The lack of implementation mechanism in respect of both concluding observations and views is a major problem, but progress has been achieved also in this field. The treaty body system has already had impact on the national level and has much more to offer. The reporting process is all about dialogue: dialogue between the State party and the treaty bodies but also dialogue between the government and civil society. In particular, the reporting process offers a channel to civil society actors, in particular national NGOs, to voice their concerns at the international level, be it in cooperation with the government during the preparation of reports or through the submission of shadow reports or other information directly to the Committees. The reporting process is also an excellent way to form links between national and international NGOs and to strengthen civil society in developing countries where its development often is in its early stages. Individual complaints procedures again allow individuals to seek redress against their own

⁴¹¹ Cf. id. p. 40.

⁴¹² Alston 2000b, p. 520.

government if national remedies have failed them – a consideration that is especially valid in countries where the administration of justice is in crisis or the judiciary lacks independence.

Thus, interaction with the treaty bodies should be seen as a resource and opportunity for the countries concerned, not as a burden or punishment. It is clear that the contribution of independent expert bodies is at its best with States that recognise the value of dialogue and feedback, whereas the political arm of the UN human rights machinery (the Commission on Human Rights) might be better suited for dealing with the worst human rights violators. Nevertheless, against the background of the universal nature of human rights, it is important that all ratifying States continue to be bound by the treaties themselves and reminded of their reporting obligations. Even where the actual interaction with the treaty bodies is put on hold by a government and the role of the treaty bodies consequently diminishes, the legal treaty obligations of the country concerned can be used as a normative standard by other actors, including other States and the Commission on Human Rights.⁴¹³

In conclusion, from the perspective of developing countries it is not so much the reform of the treaty body system that matters (although streamlining and simplifying the treaty body procedures would certainly help developing countries to comply with the reporting requirements). What is needed is encouragement and assistance from the international community to make full use of the treaty body system, preferably in the form of technical assistance, combined with the efforts of the treaty bodies themselves to constantly develop the quality and depth of their analyses and conclusions and to improve their working methods.

⁴¹³ Cf. Alston 2000b, p. 524.

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Concluded: 16 December 1966, entered into force: 23 March 1976. 999 UNTS 171.

Optional Protocol to the International Covenant on Civil and Political Rights.
Concluded: 16 December 1966, entered into force 23 March 1976. 999 UNTS 302.

Convention on the Elimination of All Forms of Discrimination against Women.
Concluded: 18 December 1979, entered into force: 3 September 1981. 1249 UNTS 13.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
Concluded: 10 December 1984, entered into force: 26 June 1987. 1465 UNTS 85.

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ANNEX

Ratification by Brazil, Colombia, Egypt, India, Iran, Jamaica, Mexico, Philippines, Senegal, South Africa and Zambia of the six major international human rights treaties, including relevant optional protocols

	CESCR	CCPR	OP1	CERD	CEDAW	CEDAW-OP	CAT	CRC
Brazil	24.1.1992	24.1.1992	-	27.3.1968	1.2.1984	signed 13.3.2001	28.9.1989	25.9.1990
Colombia	29.10.1969	29.10.1969	29.10.1969	29.1981	19.1.1982	signed 10.12.1999	8.12.1987	28.1.1991
Egypt	14.1.1982	14.1.1982	-	1.5.1967	18.9.1981	-	25.6.1986	6.7.1990
India	10.4.1979	10.4.1979	-	3.12.1968	9.7.1993	-	signed 14.10.1997	11.12.1992
Iran	24.6.1975	24.6.1975	-	29.8.1968	-	-	-	13.7.1994
Jamaica	3.10.1975	3.10.1975	-	4.6.1971	19.10.1984	-	-	14.5.1991
Mexico	23.3.1981	23.3.1981	15.3.2002	20.2.1975	23.3.1981	-	23.1.1986	21.9.1990
Philippines	7.6.1974	23.10.1986	22.8.1989	15.9.1967	5.8.1981	signed 21.3.2000	18.6.1986	21.8.1990
Senegal	13.2.1978	13.2.1978	13.2.1978	19.4.1972*	5.2.1985	26.5.2000	21.8.1986*	1.8.1990
South Africa	signed 3.10.1994	10.12.1998	-	10.12.1998*	15.12.1995	-	10.12.1998*	16.6.1995
Zambia	10.4.1984	10.4.1984	10.4.1984	4.2.1972	21.6.1985	-	7.10.1998	6.12.1991

* Indication that the State party has recognised the competence to receive and process individual communications of the Committee of the Elimination of Racial Discrimination under article 14 of the CERD and of the Committee against Torture under article 22 of the CAT.

Source: Status of ratifications of the principal international human rights treaties as of 13 May 2002 (<http://www.unhcr.ch/pdf/report.pdf>)