

HUMAN RIGHTS TREATY BODY REFORM AND STRENGTHENING  
*Some Concerns of Civil Society*

Submitted to the Office of the High Commissioner for Human Rights, June 2012.

Alliance Defense Fund  
Catholic Family and Human Rights Institute  
Focus on the Family

## HUMAN RIGHTS TREATY BODY REFORM AND STRENGTHENING

### *Some Concerns of Civil Society*

This submission has been prepared by Civil Society Organizations for the Office of the High Commissioner for Human Rights and other interested stakeholders to propose that the effort to make the treaty bodies more effective and efficient not overlook the serious matter of their working methods and substantive output.

1. The Organizations making this submission are engaged in the social policy debate at the United Nations (“UN”) and other international institutions and regularly interact with diplomats, policy makers, academics, activists and office holders from around the world on these issues. The concerns put forward in this submission are of the first order and regard the role of treaty bodies in light of the mandate of treaty bodies outlined in the treaties that establish them.
2. The human rights treaty bodies perform the important function of developing consensus among state parties to the treaties on fundamental human rights issues. Their role in the promotion and strengthening of human rights through dialogue with state parties is hindered by the treaty bodies themselves, which all too often act beyond the scope of their mandates, as defined in the treaties that establish them. When treaty bodies act *ultra vires*, they can cause acrimony among state parties instead of facilitating dialogue, and become an obstacle to the development of consensus among sovereign States Parties that embody diverse political, religious, and cultural traditions.
3. We support the open-ended inter-governmental process for treaty body reform and strengthening initiated by UN member states through General Assembly Resolution A/RES/66/254. Any reform or strengthening of the human rights treaty bodies should be directly overseen by UN member states, and signatories of the treaties that establish the treaty bodies. The inter-governmental process gives the treaty bodies legitimacy and will facilitate the strengthening and promotion of human rights throughout the UN human rights framework.
4. The proper scope of treaty body action is governed by international law.<sup>1</sup> Each treaty body is established through a treaty negotiated and ratified by sovereign states. The scope of the mandate of each treaty body is defined in the relevant treaty. Customary International Law and the Vienna Convention on the Law of Treaties (“VCLT”)<sup>2</sup> recognize that treaties derive their authority from the consent of the states that frame and ratify them.<sup>3</sup> Accordingly, it is the sovereign states that are parties to the treaties who have final authority to interpret treaties. The guiding principle of the interpretation of treaties is that they should be read in “good faith” and “in accordance with the ordinary

meaning” of the terms contained in the treaty.<sup>4</sup> The creation of treaty bodies did not displace this basic framework for interpreting international treaties.<sup>5</sup>

5. A textual reading of the human rights treaties that establish bodies to monitor compliance with those treaties, in accordance with customary international law and VCLT directive in paragraph 31, reveals that treaty bodies were given a limited mandate when they were established. This mandate includes:

- Monitoring periodic reports of States Parties.
- Honoring States Parties’ requests to send delegations during the consideration of their periodic report.
- Issuing summaries of States Parties’ compliance in treaty body annual reports.
- Issuing collective, non-binding, and a-critical comments, suggestions, and recommendations on States Parties’ periodic reports.

This textual reading of the human rights treaties is confirmed by the intention of the State Parties’ when the treaties were framed and ratified, and confirmed by the praxis of the treaty bodies. Until the mid-1990s, the treaty bodies were wary of overstepping their mandates.<sup>6</sup>

6. Since the 1990s treaty bodies have engaged in practices that substantially exceed their mandates, as outlined in the treaties that establish them, in several ways. These practices include:

- Issuing purportedly authoritative abstract legal interpretations of the treaties they are charged with monitoring through general comments.<sup>7</sup>
- Issuing purportedly authoritative state specific suggestions, recommendations and concluding observations that are quasi-judicial in character.<sup>8</sup>
- Attempting to impose new and unfounded obligations on state parties through expansive interpretations of the treaties they are charged with monitoring without regard for the ordinary meaning of the words contained in the treaties.<sup>9</sup>
- Attempting to elevate non-binding “Views” issued pursuant to proceedings under various optional protocols to quasi-judicial status akin to orders.<sup>10</sup>
- Requiring States Parties to appear before the treaty bodies during periodic reporting.<sup>11</sup>
- Pressuring States Parties to change their national legislation, even in areas not covered by the treaty they are charged with monitoring<sup>12</sup>.
- Enforcing and monitoring compliance of states with other treaties, distinct from the treaty they are charged with monitoring, or even non-binding conferences and resolutions.<sup>13</sup>

7. We are concerned by the failure of human rights treaty bodies to take heed of the repeated complaints about overreaching voiced by UN member states in the course of the consideration of periodic reports of States Parties.

The legitimacy and effectiveness of the UN human rights framework derives from the consent of States Parties. The treaties and treaty bodies are the result of many years of negotiations and consensus building among states. Failing to take heed to the parties who are the principal stakeholders in the United Nations human rights framework hinders the legitimacy and effectiveness of treaty bodies. This mode of operation can lead to acrimony rather than dialogue.

Moreover, there is growing concern among stakeholders that these excesses are the result of the treaty bodies being captured by special interest groups, causing them to promote controversial social agendas that include, amongst other things, abortion on demand.<sup>14</sup>

8. A plain reading of the human rights treaties reveals that the framers did not intend to establish quasi-judicial bodies. The allocation of resources to the treaty bodies also makes it clear that they are not equipped to act as quasi-judicial forums. The pretention of acting in a quasi-judicial capacity can lead to frustration among States Parties, undermine the United Nations human rights framework, and put further strain on the limited resources of the treaty bodies.

We urge the Office of the High Commissioner for Human Rights to include in its June report the concerns of member states regarding overreach by treaty bodies that have emerged during the consultations held by the OHCHR, as well as during the treaty bodies' consideration of reports of States Parties.

We also invite States Parties to the human rights treaties to review the working methods and substantive output of the treaty bodies in light of their mandates as outlined in the treaties that establish them.

Submitted to the Office of the High Commissioner for Human Rights, June, 2012.

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<sup>1</sup> The following considerations and footnotes rely on the research and insights of Andrew Kloster and Joanne Pedone, UN Human Rights Treaty Body Reform: Friend or Foe to New Rights?, J. TRANSNAT'L L. & POL'Y (Journal of Transnational Law and Policy), *forthcoming* (Spring 2013).

<sup>2</sup> Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.@. 331, 8 I.L.M. 679 [hereinafter "VCLT"].

<sup>3</sup> VCLT ¶ 2 (the contractual language used is evidence of this fundamental principle of International Law); VCLT 31 (laying out the principles of interpretation for treaties).

<sup>4</sup> VCLT ¶ 31.

<sup>5</sup> This is reflected in the fact that the nine treaties deposited with the United Nations Secretary General have provisions that reserve the resolution of disputes between states on the meaning of the treaties to arbitration or, or to the International Court of Justice and not to the treaty body established by that treaty. *See, e.g.* The Convention on the Elimination of All Forms of Discrimination against Women (1979), CEDAW ¶ 29.1, "Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

<sup>6</sup> Before the practice of issuing concluding observations developed in the 1990s treaty bodies issued only collective remarks after reviewing all the reports of the States Parties to the treaties. In their deliberations and remarks they sought to "avoid evaluation at all costs." *See* Philip Alston, The Committee on Economic, Social, and Cultural Rights, in *The United Nations and Human Rights: A Critical Appraisal*, (Philip Alston ed., Clarendon Press, Oxford 1992), 473.

<sup>7</sup> There are no treaty provisions that support the practice of issuing general comments that address legal questions in the abstract and are not anchored in the report of States Parties. The treaty provisions authorizing treaty bodies to issue comments, suggestions and recommendations cannot be fairly interpreted as authorizing abstract interpretations of treaty obligations, simply because comments, suggestions and recommendations are always mentioned in reference to reviewing the reports submitted by states party to the treaty.

<sup>8</sup> The term "concluding observations" does not appear in any treaty. The mandate of treaty bodies as originally conceived did not authorize them to pass judgment on specific state practices of particular countries. Treaty bodies were understood to have the authority to issue comments, conclusions and recommendations that are "objective and of a general nature." *See* Philip Alston, *The Historical Origin of General Comments in Human Rights Law*, in *The International Legal System in Quest for Equity and Universality* (Lawrence Boisson de Chazournes and Vera Gowlland-Debbas eds., Kluwer International Law 2001), 763, at 771 (quoting the now-defunct Commission on Human Rights).

<sup>9</sup> Expansive interpretations of treaties include the creation of a so-called right of access to legal abortion, as well as special rights conferred by virtue of individuals' sexual orientation and gender identity. *See* Douglas A. Sylva and Susan Yoshihara, Rights By Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion, available at: <http://www.c-fam.org/research/iorg/whitepapers/rights-by-stealth.html> (on the promotion of abortion as a human right); Michael O'Flaherty and John Fisher, Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles, *Human Rights Law Review* 8:2(2008), 207 – 248 (on the promotion of rights on the basis of sexual orientation and gender identity).

<sup>10</sup> *See, e.g., Karen Noelia Llontoy Huamán v. Peru*, Comm. No. 1153/2003, Oct. 24, 2005, U.N. document CCPR/C/85/D/1153/2003 (dated 22 November 2005), available at <http://www1.umn.edu/humanrts/undocs/1153-2003.html>.

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<sup>11</sup> The CEDAW Committee working methods instruct that the “presence and participation” of state parties are “necessary.” See Note by the Secretariat, *Ways and Means of Expediting the Work of the Committee on the Elimination of Discrimination Against Women*, Annex III ¶10, 44<sup>th</sup> Sess., U.N. Doc. CEDAW/C/2009/II/4 (Jun. 4 2009). This practice is entirely unsupported by the text of CEDAW.

<sup>12</sup> Most egregiously, the CEDAW Committee has instructed countries to change their laws relating to abortion on over ninety occasions, even though the Convention whose implementation it is charged with monitoring never mentions abortion in Article 12, or anywhere else. See *Thomas W. Jacobson*, Focus on the Family United Nations Brief 2010-02, 4 June 2010, available at: [http://www.c-fam.org/docLib/20101022\\_CEDAWAbortionRulings95-2010.pdf](http://www.c-fam.org/docLib/20101022_CEDAWAbortionRulings95-2010.pdf).

<sup>13</sup> For example, in 2010, the Committee Against Torture recommended that Lichtenstein renegotiate a 1982 bilateral treaty with Austria, On Accommodation of Prisoners. See Committee Against Torture, *Concluding Observations of the Committee Against Torture: Liechtenstein*, ¶19, 44<sup>th</sup> Sess., U.N. Doc. CAT/C/LIE/CO/3 (May 25, 2010).

<sup>14</sup> Sylva and Yoshihara, *supra* note 9 (detailing the strategy that is being used by advocacy groups to manipulate the human rights treaty bodies in order to assert new rights that are not contained in the treaties).