

The following article is to be published in: Daniel Moeckli/Helen Keller (eds), *The Human Rights Covenants: Their Past, Present, and Future* (Oxford University Press, 2018).

## **The Institutional Future of the Covenants: A World Court for Human Rights?**

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*Longstanding proposals to strengthen implementation of the international human rights treaties have often focused on procedural reforms such as harmonizing methods of work or consolidating ten treaty monitoring bodies into one. Yet there is a need to focus on substantive issues such as standards of proof and ensuring greater judicial authority to and consistency of the decisions of these bodies. This article considers recent proposals to create stronger individual petition mechanisms—a ‘world court’—as a way of strengthening implementation of the norms in the International Covenants on Human Rights and related UN treaties. After discussing treaty reform proposals made since the 1980s, the author proposes ways to make the system more effective, efficient, and sensible. Noting a dearth of attention to reform of the individual petition procedures, she discusses and rejects the oft-suggested institutional reform proposal to put all petition procedures together in a new ‘world court’ for human rights, noting legal, organizational, logistical, and financial obstacles. Rather than rushing to tear down the current treaty body system, the author offers a proposal for experimenting to determine how consolidation of petition proceedings might affect normative standards, including by conducting studies that review past decisions on individual petitions by the treaty bodies themselves.*

*‘The vision I have grounded in the treaties themselves, is nothing less than the operationalization of the principles of the universality and the indivisibility of human rights as well as the States’ primary responsibility to ensure the implementation of these principles. This requires that States ratify treaties, but, more importantly, implement them.’<sup>1</sup>*

### **I. Introduction**

At a March 2016 panel discussion commemorating the fiftieth anniversary of the two overarching UN human rights Covenants<sup>2</sup> at the United Nations (UN) Human Rights Council, Choi Kyonglim, its President, suggested that ‘ensuring the justiciability’ of all human rights

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\* All views expressed are the author’s and do not represent the Committee against Torture.

<sup>1</sup> Navanethem Pillay, ‘Strengthening the UN Human Rights Treaty Body System’ (June 2012) <[www2.ohchr.org/english/bodies/HRTD/docs/HCRReportTBStrengthening.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/HCRReportTBStrengthening.pdf)> accessed 7 April 2017, 12 (hereafter Pillay, ‘Strengthening’).

<sup>2</sup> The International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and the International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

could strengthen their implementation.<sup>3</sup> Exploration of better ways to implement human rights treaty norms has received attention over the years as an increasing number of human rights treaties have come into force. Yet proposals for institutional reform, such as President Choi's call for consolidation of the two Covenant committees into a single body, or a proposal to create a 'world court of human rights', have rarely addressed the substantive issues involved in such integration, focusing instead on a series of procedural concerns.

'Human rights is the idea of our time,' Professor Louis Henkin reminded us in introducing his 1981 volume on the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> Yet, despite the appeal of the 'rights' idea, it took 18 years for UN diplomats to move from approving the Universal Declaration of Human Rights (UDHR) in 1948<sup>5</sup> to adoption of the Covenants in 1966. A key reason, as Henkin explained, was that none of the negotiating States wanted a Covenant that would later reveal 'their behavior (...) to be wanting.'<sup>6</sup>

Ever since, constructing effective oversight of the implementation of the Covenants has been a focus of attention for policy makers and human rights experts at the UN and its human rights programmes. Some advocates have focused on substance (ie, whether the treaties should have greater judicial authority), while others have focused on procedure (whether the treaty monitoring bodies could do a better job through consolidation, harmonization, or otherwise tinkering with their powers). Some of the ideas proposed have been grand ones, such as the proposal of High Commissioner for Human Rights Louise Arbour to create a single unified standing treaty body.<sup>7</sup> Other proposals have been modest, raising procedural points about consolidating State reports, or aimed at reducing operational costs, such as whether and how to limit document length and the languages into which committee reviews of periodic reports are translated.<sup>8</sup>

Most observers begin with the assumption that the treaty bodies can indeed be effective, reasoning that (1) they supervise binding agreements—authoritative instruments adopted by the members of the UN, a global body; (2) the treaties are ratified freely by States parties, which knowingly incur legal obligations through the ratification processes; and (3) the ratification of

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<sup>3</sup> 'Human Rights Council Holds High-level Panel Discussion Marking the Fiftieth Anniversary of the Two Human Rights Covenants' (1 March 2016) <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17114&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17114&LangID=E)> accessed 7 April 2017 (hereafter 'HRC High-level Panel Discussion').

<sup>4</sup> Louis Henkin, *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 1 (hereafter Henkin, *Bill of Human Rights*).

<sup>5</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>6</sup> *Ibid.*, 9.

<sup>7</sup> See HRI (UN International Human Rights Instruments), 'Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (22 March 2006) UN Doc HRI/MC/2006/2 (hereafter HRI, 'Concept Paper').

<sup>8</sup> See, for example, the reports of the Annual meetings of Chairpersons of the Human Rights Treaty Bodies <[www.ohchr.org/english/icm-mc/documents.htm](http://www.ohchr.org/english/icm-mc/documents.htm)> accessed 4 July 2017 or the first report by Philip Alston prepared for the UN General Assembly (Philip Alston, 'Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights' (8 November 1989) UN Doc A/44/668 (hereafter Alston, '1989 Report')).

instruments by a large number of States parties implies the States themselves will demand proper levels of compliance by their fellow States. However, as pointed out in 2006 by the UN Secretariat, '[t]he system (...) faces challenges because many states accept the human rights treaty system on a formal level, but do not engage with it, or do so in a superficial way, either as a result of lack of capacity or lack of political will.'<sup>9</sup>

Other concerns abound, including (1) issues of duplication (due to the overlap of provisions and competencies in the various treaties), (2) growth of ratifications, reports, complaints, and resource requirements, (3) low public awareness of the treaty bodies, (4) uneven levels of expertise and competence of treaty body members, (5) inadequate coordination among the treaty bodies and the risk of conflicting jurisprudence, (6) inadequacies in the State reports, and insufficient information available to the treaty body members to assess these reports appropriately and prepare concise concluding recommendations to States, (7) substantial backlogs in reviewing reports and complaints, and (8) the absence of adequate follow-up mechanisms regarding concluding observations and decisions on individual cases.<sup>10</sup>

Manfred Nowak and Martin Scheinin, both academics based in Europe who have served as UN special procedure mandate holders in human rights, have proposed a 'world court of human rights' as the solution to the problem of non-enforcement of UN treaty norms by the UN machinery, which they argue is the single most important problem.<sup>11</sup> Manfred Nowak reminds us that the 'weaknesses of this system (...) are well known,' citing delayed reports, slow handling of individual complaints 'leading to non-legally binding' decisions by 'quasi-judicial bodies', and a lack of will by States parties to comply with these decisions.<sup>12</sup> Nowak and Scheinin argue that a 'world court', on the other hand, would ensure an effective remedy for individuals suffering violations of rights.

As this chapter will explain, this proposal is not altogether new. It is merely the latest variation on a longstanding proposal to create a stronger petition mechanism by consolidating all of the optional procedures for individual complaints into a single body. The idea of breaking off individual petitions from the nine relevant treaty bodies has surfaced from time to time as one of the ways of restructuring the system. This proposal has rightfully focused attention on the option of consolidating the treaty bodies into a single entity, but the potential impact of such restructuring has not been fully explicated. Moreover, the focus on non-enforcement may be

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<sup>9</sup> Ibid, para 16.

<sup>10</sup> Ibid, and Michael O'Flaherty, 'The High Commissioner and the Treaty Bodies' in Felice D Gaer and Christen L Broecker (eds), *The United Nations High Commissioner for Human Rights: Conscience for the World* (Brill 2014), 111-112 (hereafter O'Flaherty, 'The High Commissioner').

<sup>11</sup> See Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7 Human Rights L Rev 251, 251–252 (hereafter Nowak, 'World Court') and Martin Scheinin, 'Towards a World Court of Human Rights' (2009) Swiss Initiative to Commemorate the 60th Anniversary of the UDHR <[www.enlazandoalternativas.org/IMG/pdf/hrCourt\\_scheinin0609.pdf](http://www.enlazandoalternativas.org/IMG/pdf/hrCourt_scheinin0609.pdf)> accessed 9 May 2017, 63 (hereafter Scheinin, 'World Court').

<sup>12</sup> Manfred Nowak, 'It's Time for a World Court of Human Rights' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 17, 21 (hereafter Nowak, 'It's Time').

over-emphasized in comparison to other reform efforts needed to maintain compliance with the human rights obligations of the States parties.

Before rushing to adopt something shiny and new, we should carefully consider what has been tried with respect to reform and evaluate how best to ensure that the human rights treaty system effectively upholds the hard-won and well-established rights guaranteed in the treaties themselves.

## II. Human Rights Treaty Implementation and the Covenants

In the dozen years between the drafting of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1954) and their adoption (1966), the shape of a body to monitor implementation of the two treaties became a considerable point of contention, and has remained so ever since.<sup>13</sup> The composition of the committees established to oversee compliance with the Covenants, their functions, as well as the nomination and selection processes were changed multiple times during the drafting process. As finalized, the ICCPR was to be monitored by an independent committee of 18 State-nominated experts authorized to receive reports and to request additional ones, if needed; the ICESCR would be monitored by the members of the UN's Economic and Social Council (ECOSOC), a key UN body composed of State representatives. This meant that, for economic and social rights, serving diplomats, rather than independent experts, were initially designated as the persons to conduct the 'oversight' of compliance. Later, in 1985, ECOSOC would establish a separate 18-member monitoring committee for this purpose, on which persons elected by ECOSOC would serve in their personal capacities. Some have been independent scholars and experts, others have been serving or former diplomats.

Other treaty monitoring mechanisms, on the model of the independent committee, have been established since then. In all, there are now ten treaty bodies monitoring nine core human rights treaties and their optional protocols.<sup>14</sup> This proliferation of normative instruments and

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<sup>13</sup> AH Robertson, 'The Implementation System: International Measures' in Henkin, *Bill of Human Rights* (n 4) 334.

<sup>14</sup> The Covenants were adopted in 1966 and came into force ten years later. By then, the Convention on Elimination of Racial Discrimination had already been adopted in 1965 (Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 7 March 1966, entered into force 4 January 1969) 666 UNTS 195) and there were others in relatively short order: the Women's Convention (Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13), the Convention against Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85), the Convention on the Rights of the Child (Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3), and the Convention on Migrant Workers (International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (opened for signature 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3), totalling seven treaties at the time when Louise Arbour made her proposals for a unified body. These instruments were followed more recently by three others: the Convention against Disappearances (International Convention for the Protection of All Persons from Enforced Disappearance (opened for signature 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3), the

monitoring bodies has drawn attention to whether the system of implementation established is effective, efficient, or sensible. It further encouraged efforts to review and revise the institutional treatment of, and monitoring by, all of these human rights entities.

Institutionally, the UN Secretariat was initially limited to providing meeting rooms and minimal secretariat services (translation etc). Financially, some treaty bodies were to be supported by the treaty-ratifying States, and others by the UN itself; later, as some countries neglected payments, a so-called temporary solution was found—for the funding to come from the UN’s regular budget for all of the treaty monitoring bodies, while formally proposed amendments were circulated to States parties for adoption. (Some of these amendments, such as one for the Committee against Torture, continue in that form until the present.) It was expected, however, that the experts serving as members of the treaty bodies would do the analysis of compliance and raise any questions with States parties.<sup>15</sup>

### III. Past Treaty Reform Efforts

Reform proposals—and criticism of the committee implementation model—have grown over the years. In 1984, in response to a request by the UN General Assembly (UNGA)<sup>16</sup>, the UN’s Human Rights Office began to facilitate meetings of the chairs of the different human rights treaty bodies to help improve coordination. In 1988, the UNGA asked for an independent expert to advise on long-term approaches to the supervision of new instruments. Australian professor Philip Alston was appointed and later submitted three reports between 1988 and 1997.<sup>17</sup> During and after this, numerous academic meetings and publications addressed the treaty reform issue. The UN Secretary General expressed his views on the need for reform, and two High Commissioners for Human Rights offered ideas for specific changes.<sup>18</sup>

A review of the literature on human rights treaties suggests that scholars and diplomats have spent a huge amount of time and space discussing how to reform or strengthen the treaty monitoring bodies. To observers, it may seem that they have spent less effort working to assess the substantive impact of the actual reviews examining compliance by specific countries with the

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Convention on Rights of People with Disabilities (Convention on the Rights of Persons with Disabilities (opened for signature 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3), and the Optional Protocol establishing the Subcommittee on Prevention of Torture (Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237), for a total of ten ‘core’ human rights treaty bodies.

<sup>15</sup> See O’Flaherty, ‘The High Commissioner’ (n 10), 101, for a reflection on what was and was not considered appropriate for UN secretariat servicing of the treaty body members, and how this has changed.

<sup>16</sup> UNGA Res 38/117 (16 December 1983) UN Doc A/RES/38/117.

<sup>17</sup> Philip Alston wrote three reports for the UNGA between 1989 and 1996: Alston, ‘1989 Report’ (n 8); ‘Interim Report on Updated Study by Mr. Philip Alston’ (22 April 1993) UN Doc A/Conf.157/PC/62/Add.11/Rev.1; and ‘Effective Functioning of Bodies Established Pursuant to UN Human Rights System: Final Report on Enhancing the Long-term Effectiveness of the UN Human Rights Treaty System’ (27 March 1996) UN Doc E/CN.4/1997/74 (hereafter Alston, ‘1996 Report’).

<sup>18</sup> UNGA, ‘Strengthening of the United Nations: An Agenda for Further Change—Report of the Secretary-General’ (9 September 2002) UN Doc A/57/387, paras 52–54.

treaty provisions, or to assess the results of individual complaint and other treaty procedures.<sup>19</sup> Indeed, the main issues discussed have been various matters to simplify the reporting ‘burden’ on States, to strengthen the membership of the treaty bodies, to properly resource the secretariat staffing and the treaty bodies, and to decide whether or not to consolidate the multiple treaty bodies. From time to time, issues of the capacity of States to report, as well as the quality of the actual treaty body review—the questions asked, the time devoted to the review, etc—were also raised.

#### IV. Alston’s Recommendations for Reform, and Others’

As early as 1988—when there were only four treaties in force—Philip Alston warned that the human rights treaties were at a ‘critical crossroads’.<sup>20</sup> States complained of a reporting ‘burden’,<sup>21</sup> secretariat assistance was minimal, and there were crippling, acute funding problems.<sup>22</sup> He expressed serious concerns about membership, doubting that non-governmental organisations (NGOs) could maintain interest in the treaty bodies much longer due to the low quality of the diplomatic representatives then serving on the treaty bodies.

Alston pointed to four major problems with the treaty bodies: capacity, efficiency, quality, and the reporting burden. The proliferation of instruments might require more serious measures to be adopted by the General Assembly, he explained, such as a formal moratorium on new instruments, establishment of a new and separate standard-setting body, or setting priorities for any future instruments. However, he concluded, none of these seemed likely.<sup>23</sup> Alston also called for eliminating overlapping competences, for obtaining greater consistency between treaty bodies especially on the interpretation of norms, and for procedural standardization. With enhanced competence, he said, he hoped for greater credibility and visibility of the treaty bodies.

Alston proposed three options: to consolidate existing treaty bodies, to give new functions provided for in new treaties to existing treaty bodies, or to attach new instruments to existing treaties.<sup>24</sup> To a large degree these remain the options considered in most of the proposals and reform plans since. He noted that a single, consolidated committee might expand the capacity of the treaty bodies to keep up with the large quantity of reports submitted for review and individual

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<sup>19</sup> For example, the new ‘Inter-Committee Meeting’ (ICM) convened in June 2002 discussed State reporting and sharing of information, but did not address communications. The ICM brought together the chairs and two other members of the then-six treaty bodies to discuss reform measures. See HRI, ‘Report of the First Inter-Committee Meeting’ (24 September 2002) UN Doc HRI/ICM/2002/3 (hereafter HRI, ‘Report of the First Inter-Committee Meeting’). It followed and partially overlapped with a treaty reform-focused meeting convened by Australia.

<sup>20</sup> This warning appeared in Alston, ‘1989 Report’ (n 8), para 1.

<sup>21</sup> Ibid, 11, para 8.

<sup>22</sup> Ibid, 26–40, paras 54–99.

<sup>23</sup> Ibid, paras 150–159.

<sup>24</sup> Ibid, para 178.

cases requiring decisions, but would likely overlook important issues examined currently by treaty bodies, making it risky.<sup>25</sup>

In 1996, Alston conceded that many procedural changes had in fact been made, but found that the larger long-term issues remained. Consolidation had not been seriously considered by those treaty body members who were busy trying to make the existing system work, he noted. Changes were now urgent, he argued, but should not be *ad hoc* or reactive, and instead needed to be planned carefully and systematically.<sup>26</sup>

Alston examined certain ideal scenarios for reform, but in the end expressed doubts about their feasibility. Costs and budgets loomed large in his analysis. As for consolidation, he emphasized how much this depended on political will—if it was present, he called for an expert working group to begin to explore options for consolidation.

Alston made many suggestions about what needed to be done, but his recommendations ultimately tended toward the practical: addressing chronic non-reporting by introducing flexibility, including consolidation of reports; addressing documentation issues more transparently and utilizing electronic databases more effectively; ensuring better coordination among treaty bodies; and engaging the High Commissioner to bring committee experts together to develop better cooperation.<sup>27</sup>

## V. Consolidation Ideas: Stakeholder Meetings and Beyond

The idea of a ‘super-committee’—or of some form of unification or consolidation—has been a favourite in the many recommendations that were made by academics, NGOs, and other observers in the years in which Alston was examining the effectiveness of the treaty bodies and thereafter.<sup>28</sup>

I attended many of the treaty reform meetings, including the initial Inter-Committee meeting, Malbun I and II, and other specialized sessions that followed.<sup>29</sup> In this capacity, I observed how

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<sup>25</sup> Ibid, paras 181 and 183.

<sup>26</sup> Alston, ‘1996 Report’ (n 17), para 80.

<sup>27</sup> Ibid, paras 110–122.

<sup>28</sup> While there were many meetings and articles that discussed the impact of and reform of treaty bodies, the following were noteworthy in discussions and policy debates that followed: Anne F Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Martinus Nijhoff, 2001) (hereafter Bayefsky, *Universality*); a collection by Anne F Bayefsky (ed), *The UN Human Rights System in the 21st Century* (Kluwer 2000); and a volume by Philip Alston and James Crawford (eds), *The Future of Human Rights Treaty Monitoring* (Cambridge 2000). Additionally, a lengthy article by Christof Heyns and Frans Viljoen summarized their major project, which attempted to assess the impact of the human rights treaties in many different countries (Christof Heyns and Frans Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23 Human Rights Q 483).

<sup>29</sup> Treaty reform meetings in which I participated included six of the 11 Inter-Committee meetings (namely the 1st, 4th, 7th, 9th, 10th, and 11th ICMs: see HRI, ‘Report of the First Inter-Committee Meeting’ (n 19); UNGA ‘Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights’ (19 August 2005) UN Doc A/60/278, Annex: Report on 4th

earnestly the Secretariat members pressed to establish harmonized procedures and coherence in the treaty system.

In an extensive report on treaty reform produced shortly after Alston's third report, in 2000, Anne Bayefsky recommended establishing two consolidated treaty bodies, one for review of State reports and another for examining communications, interstate complaints, and inquiries.<sup>30</sup> She argued that the procedural requirements, concerns, and functions for handling communications sent to different treaty bodies 'are very similar and call for the same expertise' and that the substantive outcomes of the cases would be improved if staff concentrated only on communications or State reports.<sup>31</sup>

The UN Secretariat began to organize a new kind of treaty reform conference after this: so-called 'Inter-Committee Meetings', which consisted of the chairs of the existing human rights treaty bodies plus two other members of each committee. While ostensibly aimed at having broader discussions of reform options, Secretariat officials privately acknowledged that the Inter-Committee meetings also had the goal of breaking the stranglehold that committee chairs had had on the harmonization and reform efforts to that date.<sup>32</sup> Numerous interested parties were invited to weigh in with treaty reform proposals at these meetings, which began in 2002 and continued until 2011. A wide array of subsidiary meetings and discussions were also incorporated in these sessions.

In 2002, consolidation supporters picked up another influential ally in UN Secretary General Kofi Annan. Citing the 'growing complexity' of the diverse UN treaty committees and the

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Inter-committee Meeting of Human Rights Treaty Bodies, 10; UNGA, 'Report of the Chairpersons of the Human Rights Treaty Bodies on their Twentieth Meeting' (13 August 2008) UN Doc A/63/280, Annex: Report on 7th Inter-committee Meeting of Human Rights Treaty Bodies, 9; UNGA 'Report of the Chairpersons of the Human Rights Treaty Bodies on their Twenty-first Meeting' (10 August 2009) UN Doc A/64/276, Annex II: Report on 9th Inter-committee Meeting of Human Rights Treaty Bodies, 24; UNGA, 'Report of the Chairpersons of the Human Rights Treaty Bodies on their Twenty-second Meeting' (6 August 2010) UN Doc A/65/190, Annex I: Report on 10th Inter-committee Meeting of Human Rights Treaty Bodies, 11, and Annex II: Report on 11th Inter-committee Meeting of Human Rights Treaty Bodies, 24), as well as the two Malbun meetings and a variety of subsidiary working groups that focused on harmonization of guidelines, core reports, and follow-up. I also participated in the Dublin meeting, which began the treaty strengthening process, in November 2009, and a specialized inter-committee consultation on petitions.

<sup>30</sup> Bayefsky, *Universality* (n 28).

<sup>31</sup> Ibid. Bayefsky also noted that a petitions unit had been created only a short time before her report. Indeed, the former Deputy High Commissioner for Human Rights, Bertrand Ramcharan, has explained that he considered the management consultants' recommendation to eliminate the special unit for human rights communications (including those outside the treaty system, for example under Resolution 1503 [UN Security Council Res 1503 (28 August 2003) UN Doc S/RES/1503(2003)]) to have been 'a notorious error' that he (successfully) sought to correct (Bertrand Ramcharan, *A UN High Commissioner in Defence of Human Rights* (Brill 2004)). Ramcharan has noted that a communications unit (upgraded to a 'section') existed at least from the 1970s. It was upgraded to a Communications Branch under former UN Under-Secretary-General Jan Martenson, but abolished under the management reform overseen by José Ayala Lasso, the first High Commissioner for Human Rights. As recounted in his book, Ramcharan worked successfully in 1998 to re-establish a separate petitions team during his tenure as Deputy High Commissioner.

<sup>32</sup> Based on confidential interviews conducted by the author on the basis of anonymity.

‘burden of reporting obligations’ as straining resources, Annan surprised human rights experts by calling for a simplification for States through the submission of a single comprehensive report that would, in turn, be reviewed by each relevant treaty body.<sup>33</sup>

After Annan’s proposal for a single report, treaty reform efforts became more focused. At the invitation of Liechtenstein, in 2003, a large and high-level ‘brainstorming’ meeting was convened in Malbun with a wide range of stakeholders.<sup>34</sup> The Malbun I meeting in 2003 rejected Annan’s proposal for a single report to all treaty bodies, citing the difficulty both of preparing and examining a single report. Not only would it not solve the problem of non-reporting, participants concluded, it would probably make things worse by slowing down individual submissions of State reports. Participants called instead for an expanded ‘core document’ with basic information that could be reviewed by all the treaty bodies, and for other efforts to ‘harmonize’ the format of the reports submitted.<sup>35</sup>

In response to another, more comprehensive reform report by Secretary-General Annan, entitled ‘In Larger Freedom: Towards Development, Security and Human Rights for All’,<sup>36</sup> Louise Arbour, the new High Commissioner for Human Rights, issued a Plan of Action in which she indicated how she would expand and improve the UN’s human rights programme. She affirmed that she would develop proposals for a ‘unified standing treaty body’ and that she would invite States parties to an intergovernmental meeting in 2006 ‘to consider options.’<sup>37</sup>

Arbour also discussed her Plan of Action with members of the Human Rights Committee (HRC), explaining that treaty body reform was then at what she termed an ‘embryo stage.’<sup>38</sup> In a one-hour discussion, several members of the HRC mentioned the need to consider the individual petitions, or communications, as the reform proceeded, but none offered any specific suggestions for doing so. Despite earlier suggestions, the idea of a separate entity for all treaty-related petitions was not discussed at the session with Arbour. It became clear in this discussion that there was ongoing concern with preventing the loss of the specialized expertise of each of the treaty bodies while continuing to protect rights-holders.

Arbour’s reform plans were discussed with lower-ranking Secretariat officials in other treaty bodies. At the Committee on the Elimination of Racial Discrimination (CERD), a Secretariat official was told that the CERD, as a whole, was not convinced that a single unified standing body was the most effective way to reform the treaties, as members were concerned that it might

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<sup>33</sup> UNGA, ‘Strengthening the United Nations: An Agenda for Further Change’ (9 September 2002) UN Doc A/57/387, paras 52–4.

<sup>34</sup> UNGA, ‘Letter Dated 13 June 2003 from the Permanent Representative of Liechtenstein to the UN’ (8 July 2003) UN Doc A/58/123 (hereafter ‘Malbun I report’).

<sup>35</sup> Ibid, paras 23–30.

<sup>36</sup> UNGA, ‘In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General’ (21 March 2005) UN Doc A/59/2005.

<sup>37</sup> Ibid, para 147.

<sup>38</sup> HRC, ‘Summary Record (Partial) of the 2296th Meeting’ (26 July 2005) UN Doc CCPR/C/SR.2296, para 4 (hereafter HRC, ‘Summary Record of July 2005’).

end up marginalizing many subjects, such as racial discrimination. It was therefore argued that alternatives to the unified body might be better. The CERD suggested that a strengthened petitions unit might speed up processing the backlog,<sup>39</sup> as might ‘establishing a single body entrusted with considering individual communications.’<sup>40</sup> Only one member of the CERD actually mentioned the petitions unit, and did so solely in the context of whether it could increase visibility of petitions.<sup>41</sup> Other members questioned the solution offered by Arbour—the creation of a unified standing treaty body—by suggesting it was ‘ill-suited’ to the specific problems of the system that had been outlined.<sup>42</sup> The Secretariat said consultations would continue as no decision had been reached yet.<sup>43</sup>

At the Committee on the Rights of Migrant Workers (CMW), Secretariat members also heard a variety of views, most of which also emphasized the need to maintain specific treaty bodies even as the plan for a unified body proceeded. However, one member, Ms Cubias Medina, stated that ‘the only way that the treaty bodies would achieve greater political or judicial authority would be through the creation of a world court of human rights’ and she asked whether this had been discussed as a possibility. She stated that the authority carried by decisions of the body were key. Other members expressed regret that no State party had yet ratified or accepted the optional individual complaint procedure as set forth in article 77 of the Migrant Workers Convention.<sup>44</sup>

## **VI. Arbour’s Proposal Deferred: A Unified Standing Treaty Body**

In March 2006, a Concept Paper was issued by the Secretariat, following up on High Commissioner Arbour’s proposal to establish a unified standing treaty body.<sup>45</sup> It was aimed for consideration at the meeting of chairpersons of the human rights treaty bodies in late June and at an intergovernmental meeting to be scheduled thereafter. The Concept Paper cited a variety of by now familiar shortcomings.<sup>46</sup> It also brought up the issue of differing interpretations of human rights standards and inconsistent jurisprudence, and it offered a wide range of proposals for improvement—from examining reports of States parties jointly to convening joint thematic working groups and issuing joint General Comments, along with other kinds of harmonization proposals.

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<sup>39</sup> Ibid, para 6.

<sup>40</sup> CERD, ‘Summary Record of the 1726th Meeting’ (9 September 2005) UN Doc CERD/C/SR.1726.

<sup>41</sup> HRC, ‘Summary Record of July 2005’ (n 38), para 24.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> CMW, ‘Summary Record of the 23rd Meeting’ (19 Dec 2005) UN Doc CMW/C/SR.23, para 9.

<sup>45</sup> See HRI, ‘Concept Paper’ (n 7), 30.

<sup>46</sup> Such as the failure of States to submit reports or to send them in on time, the low quality of many of the reports, the uneven expertise of treaty body members, and the increased burden on the treaty body members because of the increase in ratifications and new treaties, as well as the backlog in consideration of reports and individual complaints. The lack of financial resources and meeting time was said to contribute to the low visibility of the treaty bodies and to the absence of follow-up on the recommendations of the treaty bodies.

In the end, the Concept Paper concluded that the best way to address these challenges fully would be to create a unified standing treaty body to cover all the treaties, rights, and groups concerned. It offered several different models for such a body—from a single body that would consider every treaty provision together to one with multiple chambers, operating perhaps along the lines of each treaty, or with clustered rights, or perhaps divided along geographic lines. In addition, the Concept Paper offered assurances that the new body would take measures to ensure that ‘specialized expertise’ would not be lost in the new structure. Also proposed were measures to ensure the quality of the new body’s members.

The proposal was breath-taking not simply in its critique of shortcomings (as in prior written submissions on the treaty body system), but particularly in its proposals for change. But neither the reasoning of the Concept Paper nor the political initiatives pursued by the High Commissioner and her supporters resulted in the changes she proposed. Indeed, Arbour’s proposals obtained very little support from the participants in a second ‘brainstorming’ meeting convened in Malbun.<sup>47</sup> Nearly every aspect of the proposal was criticized by one or another of the participants, who again included government representatives, treaty body members, and NGOs. However, many suggestions were proposed for further harmonization of working methods—such as the preparation of Lists of Issues for the oral dialogue with representatives of States being reviewed. Among the many suggestions voiced by participants at Malbun II was a proposal to create a separate system—an extra chamber—for individual communications lodged with any of the treaty bodies.<sup>48</sup> The High Commissioner recommended the designation of members to handle new complaints and authorize ‘interim measures’ to prohibit irreparable harm to the complainant, expedited procedures for manifestly unfounded complaints, and even giving treaty bodies the capacity to consider and decide that a violation in one case may involve provisions of more than one treaty.

Despite the absence of support for Arbour’s proposed consolidation of treaty bodies, her effort was not a total failure. Participants in Malbun II and subsequent meetings engaged more actively in various ‘harmonization’ activities, including the preparation of guidelines for core documents, periodic reports, and greater standardization of the dialogue procedure. I participated in many of these sessions, which were often intense. These meetings would lead, once a new High Commissioner came to office in 2008, to a renewed effort to bring about reforms starting in 2009.

## **VII. The Dublin Statement and Treaty Body Strengthening**

In November 2009, Navi Pillay, the new High Commissioner for Human Rights, began the ‘treaty strengthening process’ and continued it through April 2012, when she issued a major

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<sup>47</sup> ‘Chairperson’s Summary of a Brainstorming Meeting on Reform of the Human Rights Treaty Body System’, annex to UNGA, ‘Letter Dated 14 September 2006 from the Permanent Representative of Liechtenstein to the UN’ (18 September 2006) UN Doc A/61/351 (hereafter, ‘Malbun II report’).

<sup>48</sup> Reference was made to the CERD’s proposal on this matter.

report and recommendations.<sup>49</sup> More than 20 consultations were convened worldwide, from Dublin (where they began) to Marrakesh, Poznan, Seoul, Pretoria, and Geneva, involving all kinds of stakeholders. Written submissions were received and posted online.<sup>50</sup>

Pillay reported that the treaty body ‘system’ doubled in size from 2004 to June 2012. During this period, four new treaty bodies came into existence, along with three new complaint procedures for other existing bodies.<sup>51</sup> In 2000, there were 97 experts serving on treaty bodies; in 2010 there were 125, and by 2012 there were 172.<sup>52</sup> Today, there are three more human rights treaties under negotiation—on multinational corporations, on the rights of ‘the aging’, and on the rights of peasants. Each new treaty may well establish a separate new entity to monitor its implementation. Observers have expressed concern over duplication in these treaties, as well as anxiety about differences in norms, which may create problems of consistency in interpretation and jurisprudence by the oversight bodies. A 50% increase in ratifications, with the substantial backlogs in reporting and in review of individual communications remaining,<sup>53</sup> has created numerous pressures on the already thinly-stretched infrastructure supporting the treaty bodies.

Faced with this growth in number of instruments and of reports due, as well as the huge growth in independent experts and diverse committees monitoring compliance by States, new and huge institutional challenges for the UN and the monitoring bodies have been created. The High Commissioner’s report included a bevy of recommendations developed during the many meetings and discussions convened by her. Most prominent was a proposal to develop a single five-year calendar with fixed dates for countries to report to diverse committees, which was aimed at bringing predictability to State reports.

### **VIII. The General Assembly Concludes the Treaty Strengthening Process**

In 2012, before the High Commissioner completed her report, the UNGA intervened directly to take the process over from Geneva, eventually adopting Resolution 68/268 in April 2014.<sup>54</sup> Led by Russia and a ‘cross-regional group’ including China, Cuba, Iran, Syria, North Korea, Venezuela, and others, the Assembly’s intervention seemed initially to threaten the independence of the treaty bodies, not to mention the proposals launched by Pillay. But the Resolution, after almost two more years of this process, endorsed many of the proposals made by Pillay for harmonization and simplification of working methods. Resolution 68/268 directed the UN Secretariat and the independent committees to reconsider the country-specific reporting system by adopting a simplified procedure, and suggested numerous other actions that should be taken to address institutional aspects of the system—from the languages used to the need for a training component for States burdened by numerous reports.

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<sup>49</sup> Pillay, ‘Strengthening’ (n 1).

<sup>50</sup> Ibid, 29 (where a full list can be found).

<sup>51</sup> Ibid, 17.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> UNGA Res 68/268 (21 April 2014) UN Doc A/RES/68/268.

Although the UNGA intergovernmental process began as an effort by a group of States to instruct the treaty bodies how to conduct their affairs, it ended up technically respecting the competencies of independent treaty bodies and only ‘recommended’ a variety of measures, leaving it to the treaty bodies to decide whether to adopt or implement them. Its most visible output were decisions on reallocation of financial resources, producing cost-savings by curtailing the translation, interpretation, and production of documents, which account for some 65% of the treaty body costs. Pocketing these savings, the UNGA authorized additional meeting time for the treaty bodies to address the reporting backlog and increase the review of reports, and allocated some five million dollars previously used for Secretariat expenses for ‘capacity building’ to assist States in preparing their reports to the treaty bodies.

However, a wide range of the High Commissioner’s proposals were not endorsed—such as the recommendation to establish national mechanisms to coordinate with treaty bodies. Similarly, Pillay noted that the CERD recommended the creation of a joint treaty working group for communications consisting of experts from different treaty bodies whose recommendations would be presented to the plenary of the committee to which the complaint was initially directed. While she included this proposal in her 2012 report, the UNGA did not comment on it.<sup>55</sup>

### **IX. A ‘World Court’ for Human Rights?**

Discussion of the proposal to create a ‘world court’ for human rights, originally made by Australia in 1947, has been revived from time to time since then by scholars.<sup>56</sup> The current proposal, by Manfred Nowak and Martin Scheinin, is essentially an expansion of the proposal to create a separate petition unit for treaty-based complaints by individuals.<sup>57</sup> The ‘court’ would place all treaty-related individual complaints, together with inquiries, into a new and separate unit. States would be free to designate which treaties and which rights would be subject to the binding jurisdiction of the court, and new ratification of the ‘world court’ statute would be all that is needed to establish such jurisdiction, they claim. Treaty bodies would continue to exist, reviewing reports on country compliance but not the individual complaints. States parties accepting the new ‘world court’ would thus opt out of the complaints procedures under the existing human rights treaties. 21 separately selected judges would preside over the cases, which would come from all parts of the world. The proposal has gained the support of Norway, Austria,

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<sup>55</sup> Pillay, ‘Strengthening’ (n 1), 68.

<sup>56</sup> Stefan Trechsel, ‘A World Court for Human Rights?’ (2004) 1 *Northwestern J of Intl Human Rights* 1, 3 (hereafter Trechsel, ‘World Court’); Jesse Kirkpatrick, ‘A Modest Proposal: A Global Court of Human Rights’ (2014) 13 *J of Human Rights* 230 (hereafter Kirkpatrick, ‘A Global Court’).

<sup>57</sup> Most of the ten human rights treaties now have optional individual complaint procedures, although as many as 94% of all complaints are still processed by the HRC and Committee against Torture (information obtained from the UN in response to an inquiry by the author). See also Report of the Secretary-General, Status of the Human Rights Treaty Body System, UN Doc A/71/118, Annexes VIII and IX, 18 July 2016.

and Switzerland, and was endorsed by the Swiss Initiative for the 60th Anniversary of the UDHR.<sup>58</sup>

When participants in earlier UN treaty reform discussions addressed the matter of creating a separate body to handle all treaty-related communications, most of those who expressed a view about such consolidation spoke positively, often citing the fact that, while States parties have obligations to give victims of violations access to an effective remedy,<sup>59</sup> this right remains ineffective and unenforceable at the national level. Those advocating a ‘world court’ seem to cite, as reasons for failure of the current system, one of two arguments: (1) the current lack of power to enforce the decisions on individual complaints under the ICCPR or other human rights treaties, or (2) the structural or organizational shortcomings of the current international supervisory system, such as the lack of visibility about decisions made and the lack of efficiency in processing cases as they come to the treaty bodies.<sup>60</sup>

The ‘world court’ proposal, its proponents argue, would correct these problems and provide victims of violations with a more effective way to pursue remedies than currently exists. Decisions on individual complaints by the treaty bodies are not binding and rarely implemented. One reason for non-implementation is that the authority of these decisions is poor,<sup>61</sup> in part due to low visibility, low quality of the decisions reached, and a lack of efficiency.<sup>62</sup> The UN devotes very minimal resources to the petition system, employing only 15 lawyers for the unit which examines cases from all of the human rights treaties.<sup>63</sup>

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<sup>58</sup> Scheinin, ‘World Court’ (n 11), 63.

<sup>59</sup> See article 2(3) ICCPR: ‘Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted’.

<sup>60</sup> See Trechsel, ‘World Court’ (n 56); Kirkpatrick, ‘A Global Court’ (n 56); Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights* (OUP 2014), 141–149 (hereafter Freedman, *Failing to Protect*); and Philip Alston, ‘Against a World Court for Human Rights’ (2014) 28 *Ethics & Intl Affairs* 197 (hereafter Alston, ‘Against a World Court’). See also a simplified argument by Alston entitled ‘A Truly Bad Idea: A World Court for Human Rights’ (Open Democracy, 13 June 2014) <[www.opendemocracy.net/openglobalrights-blog/philip-alston/truly-bad-idea-world-court-for-human-rights](http://www.opendemocracy.net/openglobalrights-blog/philip-alston/truly-bad-idea-world-court-for-human-rights)> accessed 7 April 2017.

<sup>61</sup> Trechsel, ‘World Court’ (n 56) and Freedman, *Failing to Protect* (n 60).

<sup>62</sup> Geir Ulfstein, ‘Do We Need a World Court of Human Rights?’ in Ola Engdahl and Pål Wrange (eds), *Law at War: The Law as it Was and the Law as it Should Be* (Martinus Nijhoff 2008) 261 (hereafter Ulfstein, ‘Do We Need a World Court?’). High Commissioner Louise Arbour is associated with earlier criticism of the system for lacking accessibility and visibility to victims, and deficits in its effectiveness and authority (HRI, ‘Concept Paper’ (n 7), paras 21 and 27).

<sup>63</sup> As stated at the Oslo Conference on the Individual Communications Practice of the UN Treaty Bodies, 8–9 September 2015. The unit consists of 12 ‘drafters’ (P2/3 level) and three supervisors/secretaries communications procedures (P4 level). In addition, the unit was given one drafter (P3 level) on a temporary basis to help deal with the backlog.

Manfred Nowak's long list of reasons in favour of the 'world court' proposal begins by affirming the core principle that, to protect individuals, human rights must be accompanied by remedies that can be enforced. Legally binding judgements and decisions, as proposed in the 'world court', would surely be better than the current non-binding Views adopted by the HRC, Committee against Torture, and other treaty bodies. The subject matter covered in complaints to the new body could be extended to include violations by non-State actors, and the new set-up could also address the matter of extraterritoriality. Nowak argues that the times have changed, as the Cold War is over and the Arab Spring has brought a new openness, and that States would more readily submit themselves to binding court decisions on a wide range of human rights issues. He points to their willingness to do this in the regional courts, whose experiences he believes would offer much insight into the new 'world court'. Enforcement of treaty body decisions could therefore be aided by actions of the Human Rights Council directly, he argues, rather than having the treaty bodies conduct their own follow-up efforts on their own decisions. A legally binding 'court' can also provide reparation to victims, pecuniary or otherwise.<sup>64</sup>

According to Martin Scheinin, who, together with Julia Kozma and Manfred Nowak, has developed a draft statute of the 'world court', realization of the proposal to create this new body would demonstrate the commitment of States to human rights and their universality. A 'world court' would enhance the coherence and consistency of the decisions and interpretations of norms by the committees. In this way, he argues, it would expand the binding force of the treaties worldwide.<sup>65</sup>

To make it happen, Nowak and Scheinin suggest that States should be free to designate which treaties, and which rights in the treaties, would be subject to the jurisdiction of the 'world court' and to its judgements, which would become binding. Nowak argues also that no treaty amendments are needed to make the institutional change to establish a 'world court' handling all petitions. A new statute, however, would need to be authorized, and a new institution, properly staffed and capable of following up on enforcement, should then be built around it.

Critics of the 'world court' cite many concerns about whether the proposed body could achieve all that it is claimed it would do to improve the binding nature of decisions on individual complaints and, more broadly, the effective implementation of human rights norms at the national level. While the visibility of the 'world court' may be its most obvious and positive added feature, there are questions whether the new body would in fact broaden the subject matter under scrutiny or, in the course of its actual development, narrow the scope of rights to those to

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<sup>64</sup> See Nowak, 'It's Time' (n 12); Manfred Nowak, 'The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights' (2014) 32 *Nordic J of Human Rights* 1, 10–11; and Nowak, 'World Court' (n 11). Non-pecuniary forms of reparation could include rehabilitative care, satisfaction, guarantees of non-repetition, etc.

<sup>65</sup> Scheinin, 'World Court' (n 11). See also Julia Kozma, Manfred Nowak, and Martin Scheinin, 'A World Court of Human Rights: Consolidated Draft Statute and Commentary' (2010) <[www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf](http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf)> accessed 7 April 2017.

which States subject themselves. The ability of States to pick and choose which rights in which treaties they would subject themselves to under the new ‘world court’ raises concerns: would this diminish existing obligations under the human rights treaties, and would it at the same time enable States to ‘capture’ the court’s jurisprudence in ways more friendly to States than to rights-holders?<sup>66</sup> Similarly, it may not be feasible to assume that States would agree to have the new ‘world court’ cover extraterritorial acts and abuses by non-State actors.

This leads to the question whether, indeed, the times have changed in the ways Nowak suggests. Regressive trends in the former ‘eastern bloc’ and the collapse of the ‘Arab Spring’, together with a crackdown on human rights defenders and principles worldwide, may be the more relevant context in which this debate is unfolding. As for the possible role of the Human Rights Council in overseeing enforcement, the Council remains a highly political body, with a membership that is less respectful of human rights than earlier in its history.<sup>67</sup> Its Universal Periodic Review procedure has not, to date, developed an expert component, and it remains unlikely to take on an impartial follow-up role for treaty body decisions as proposed by Nowak.

As a practical matter, there are also serious questions about whether the new ‘court’ would result in greater implementation of decisions. Under the current complaints procedures of the treaty bodies, there is presently no independent fact-finding, and only a rudimentary, largely unexplored capacity for examination of witnesses and experts.<sup>68</sup> The authority of the treaty body decisions is in part limited because they lack a reliable means for assessing the facts. It is unclear if the will and resources exist to change this. If it is not changed, there are questions about whether national authorities are likely to implement the new ‘court’s’ judgements when based on such procedural rules.

A large array of other practical problems with the proposed ‘world court’ have also been noted, ranging from whether its worldwide focus would result in an unmanageable overload of cases<sup>69</sup> to whether the substantial resources it would require would actually be allocated. In view of the UNGA’s recent action to cut support for the treaty system following the ‘treaty strengthening process’,<sup>70</sup> the ‘world court’ seems likely to encounter significant resource roadblocks at its outset.

Scheinin has raised the importance of ensuring coherence and consistency of the decisions reached. Previously, advocates of a single unified treaty body questioned whether the distinct and separate treaty bodies, with differing legal instruments governing their decisions and staff

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<sup>66</sup> Alston, ‘Against a World Court’ (n 60).

<sup>67</sup> Freedman, *Failing to Protect* (n 60), 147.

<sup>68</sup> Ulfstein, ‘Do We Need a World Court?’ (n 62), 265.

<sup>69</sup> *Ibid*, 263.

<sup>70</sup> Christen Broecker and Michael O’Flaherty, ‘The Outcome of the General Assembly’s Treaty Body Strengthening Process’ (Universal Rights Group, June 2014) <[www.universal-rights.org/wp-content/uploads/2015/02/URG\\_Policy\\_Brief\\_web\\_spread\\_hd.pdf](http://www.universal-rights.org/wp-content/uploads/2015/02/URG_Policy_Brief_web_spread_hd.pdf)> accessed 7 April 2017.

dedicated to their separate entities, would maintain consistency.<sup>71</sup> In an important article, Geir Ulfstein has asked whether creating a separate ‘world court’ for complaint procedures under the treaty bodies, but separate from these bodies, might in fact fracture the movement towards the coherence of the international legal regime for human rights.<sup>72</sup> Nowak and Scheinin do not address this matter in their proposal.<sup>73</sup>

Among the factors relevant to this is whether the new ‘court’ would operate on a basis of deference (complementarity) with regional human rights courts, or function instead as the top of a hierarchy. It remains uncertain what authority the decisions of other treaty bodies and regional courts would have for the new ‘world court’ and what the screening process for taking up decisions from other courts for further review would look like. All these matters would be up for negotiation and decision in a new structure.

This brings us to ask whether the ‘world court’ is a politically feasible option in today’s world. Would States consent to broad and binding jurisdiction by such a court and would it be applicable, as well as enforceable, worldwide? Rosa Freedman recalls that a diverse set of issues—such as sexual orientation or the treatment of migrants—still divide the member States of the UN and are likely to continue to inhibit broad consent to the ‘world court’ decisions on controversial matters.<sup>74</sup> As long as adherence to the court’s jurisdiction is voluntary, she questions the feasibility of enforcing human rights treaty guarantees.

Philip Alston, whose earlier work on treaty reform was so central, believes the ‘world court’ proposal is not merely utopian, but is actually misconceived. Citing the ‘world’s deep-rooted human rights dysfunctions’, Alston emphasizes the need to have nationally-based legal systems in place, including national accountability mechanisms, in order to bring about implementation of human rights decisions stemming from the treaty-based complaint procedures. He further notes the weakness or absence of effective regional systems in Asia, the Pacific, and the Arab world. ‘These complex challenges cannot be dealt with in a meaningful way by seeking to bypass them all and create a [world court for human rights] as if it were some magical panacea.’<sup>75</sup>

## **X. Improving Individual Communications: What Should be Done?**

In considering the ‘institutional future of the Covenants’, the present chapter has drawn attention to the history of UN treaty reform efforts, which have been longstanding and extensive. Much attention has historically been paid to the question of reforming State reporting procedures under the treaties, and, in marked contrast, very little to the matter of how to handle individual communications (complaints) procedures that are also part of the same instruments. Despite the

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<sup>71</sup> HRI, ‘Concept Paper’ (n 7), para 42.

<sup>72</sup> Ulfstein, ‘Do We Need a World Court?’ (n 62).

<sup>73</sup> Ibid, 271.

<sup>74</sup> Freedman, *Failing to Protect* (n 60), 147–9.

<sup>75</sup> Alston, ‘A Truly Bad Idea’ (n 60).

interest in justiciability expressed by the President of the Human Rights Council in March 2016,<sup>76</sup> there has been, for the most part, a dearth of serious discussion of how to examine such communications and to implement the rights guarantees of the treaties. It has only been with the proposal to create a ‘world court’ of human rights that the issue of effectiveness of the individual complaints procedures has gained attention, and raised questions. For this, Nowak and Scheinin deserve credit.

In general, discussions about reform of the communications procedures in the context of treaty reform have largely focused on follow-up to decisions on cases—not the admissibility, adjudication, staffing, identification of facts or evidence, standards of proof, normative consistency, or other aspects of the communications proceedings themselves. Yet these issues need attention to enable the work and decisions of any new body on complaints to ensure the availability of redress to individual complainants and the enforcement of the treaty norms.

One exception to this pattern took place when the CERD raised the issue of a creating a new and separate institution to deal with communications. In 2006, the CERD had proposed that the High Commissioner create a joint body to handle *all* individual complaints submitted to all treaty bodies, arguing this would add visibility to the complaints proceedings. In October 2011, in a discussion at a small and rather narrowly-focused meeting on petitions organized by the Office of the UN High Commissioner for Human Rights (OHCHR) within the ‘treaty strengthening process’, the CERD suggested a different approach which would not require treaty amendment. It proposed that the joint body could be an ‘Inter-Committee’ working group to prepare decisions on individual cases. It would be composed of persons from each of the ten treaty bodies who would reach recommendations on the complaints and then present them, in turn, for formal approval to the plenary of the treaty body to which the complaint was initially sent.

The meeting where this idea was presented included only seven representatives from five treaty bodies. The member from the CERD, urging a holistic approach to treaty implementation, stated that the proposed joint body would offer opportunities to harmonize registration of cases and rules of procedure, and provide consistency in the application of admissibility criteria for complaints and in the interpretation of substantive norms. Key to the argument was the idea that this joint body would help bring about some cross-fertilization between treaty bodies, allowing additional expertise on the norms in question to be brought to bear by members of other treaty bodies. Later, as noted above, in 2012, the CERD formally proposed creating a joint body, and the High Commissioner endorsed the idea, though no action on it was taken by the UNGA.

There are obviously serious drawbacks that would come about if one were to consolidate all of the communications under all of the treaties into a single body, some of which were raised in the OHCHR-organized discussion in 2011. Such disadvantages could be legal, organizational, logistical, and/or financial. Because each treaty only authorizes its members to deal with that

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<sup>76</sup> ‘HRC High-level Panel Discussion’ (n 3).

specific treaty, it is unclear whether there are legal obstacles to members of one treaty body acting to decide complaints submitted to another body. Similarly, there may be difficulty in agreeing to the optimal composition of a joint body, given that the overwhelming number and proportion of complaints presently submitted to the UN human rights treaties are directed to the HRC, with the Committee against Torture in a distant second place. Other treaty bodies have complaints procedures that have rarely if ever been employed, and they have little expertise on deliberating on complaints. This raises the question of whether membership in the proposed joint body should be weighted or not. Alternatively, there needs to be consideration of whether an equal number of members from each treaty body should routinely serve on the joint body. No one has yet examined what might be the outcome of such composition on the decisions reached, but it cannot be assumed it would constitute an ideal outcome. Since the plenary sessions of each treaty body could overrule the joint working group's decisions, there is also concern about whether such an arrangement would lessen one committee's 'ownership' of final decisions that will be taken by a different body. Additionally, there are logistical and financial matters to be sorted out to be able to convene such a body in a timely fashion, given the staggered meeting schedule of the different committees, not to mention staffing issues.

In considering the institutional future of the Covenants and the other human rights treaties more broadly, the likely size and role of individual complaints proceedings clearly needs more attention. There are already signs that the number of complaints is growing. Among other issues meriting attention are how to ensure the independence of the treaty bodies handling complaints and the impartiality of their members; whether there are inconsistent outcomes and unconvincing reasoning in cases; whether there are adequate procedural guarantees (and whether others, such as a fact-finding mechanism, should be added); whether some cases have been unduly prolonged or too expeditiously addressed; and the degree to which complainants conduct 'forum shopping' and play off international institutions against one another. Yet another area of concern is the language about complaints and remedies in the treaties themselves, which differs; the remedies in specific cases are also treated differently by the relevant treaty bodies, sometimes because of the specific and differing language of the treaties themselves. How to handle the backlog of cases remains a key concern, too. The 'world court' proposal should focus attention on whether or not there is compliance or non-compliance by ratifying States with the decisions of the treaty bodies. Clearly there is much more to be examined regarding the operation and handling of individual complaints procedures, whether by a joint entity or the original, separate committees.

Bringing together representatives of ten different treaty bodies into a special 'working group' or new committee to reach a decision on a case involving a human right in one of the treaties raises very serious questions about the likely competence and experience of the persons chosen to serve on the proposed unified body. This is a reality whether or not the new body is called a working group or a 'world court.' Most human rights complaints to the UN (74%) are handled by one

Committee, the HRC. The Committee against Torture, in second place, receives 20%.<sup>77</sup> It seems inconceivable that a majority of experts deciding cases sent to one specific treaty body would actually come from another entity, and possibly operate without substantive knowledge of the subject matter of the other treaty (or treaties)—or that they should. Yet that is one of the options that would exist if the proposal for a joint petitions body were to be implemented.

The 50th anniversary of adoption of the International Covenants on human rights is a fitting moment not only to ask whether the nations of the world that have ratified them are implementing the norms contained in these instruments, but also to ask whether institutional changes can bring about better compliance. While the proposal for a new ‘world court’ to implement the human rights guarantees in the ICCPR and other human rights treaties has drawn attention to the petition system, there remain many questions about the feasibility or desirability of such a new mechanism. Instead of arguing about the details presented in the draft statute prepared by advocates, energy and advocacy would be better devoted to examining the current system, exploring proposals developed during the treaty body strengthening process and thereafter. In searching for an institutional future, it is essential to keep in mind the need to ensure that the victims of violations have an effective remedy if the rights in the Covenants are violated. Currently, the decisions under individual petition procedures are little known and less observed by the States concerned.

When, in March 2016, the Human Rights Council’s President spoke of making all rights justiciable and consolidating the two Covenant committees into a single body, he did not offer suggestions about how this might be achieved. It seems important to explore whether the different treaty bodies—the two Covenant committees as well as the other treaty monitoring

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<sup>77</sup> According to the Office of the High Commissioner for Human Rights, as of December 2016, the HRC, which first met some 40 years ago, had dealt with a total of 2282 individual complaints (out of a total of 2924 received), of which 1084 had been considered inadmissible or discontinued, and 1198 had been the subject of merits decisions. By comparison, as of the end of December 2016, the Committee against Torture had dealt with a total of 623 cases (out of a total of 892 received), of which 314 were inadmissible or discontinued, and 309 had been the subject of merits decisions. The CERD—in its more than 45-year history—had dealt with a total of only 55 communications as of the end of December 2016, of which 21 were inadmissible or discontinued and 34 had been the subject of merits decisions. The CEDAW Committee, whose experience with complaints is much more recent, has dealt with only 67 communications in total by the end of 2016 (out of a total of 110 received), of which 42 were declared inadmissible or discontinued, and 25 have been the subject of merits decisions, 23 of which were violations. In recent years, other treaties have added complaints procedures, although not all of them are yet in force nor have all bodies adjudicated such cases. For the HRC, see ‘Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights’ (March 2016) <[www.ohchr.org/Documents/HRBodies/CCPR/StatisticalSurvey.xls](http://www.ohchr.org/Documents/HRBodies/CCPR/StatisticalSurvey.xls)> accessed 9 May 2017. For the Committee against Torture, see ‘Status of Communications Dealt With by CAT Under Art. 22 Procedure’ (15 August 2015) <[www.ohchr.org/Documents/HRBodies/CAT/StatisticalSurvey.xls](http://www.ohchr.org/Documents/HRBodies/CAT/StatisticalSurvey.xls)> accessed 9 May 2017. For the CERD, see ‘Statistical Survey of Individual Complaints Dealt With by the Committee on the Elimination of Racial Discrimination (*sic*) under Article 14 of the Convention for the Elimination of all forms of Racial Discrimination’ (May 2014) <[www.ohchr.org/Documents/HRBodies/CERD/StatisticalSurvey.xls](http://www.ohchr.org/Documents/HRBodies/CERD/StatisticalSurvey.xls)> accessed 9 May 2017. Finally, for the CEDAW Committee, see ‘Status of Communications Deal With by CEDAW Optional Protocol’ <[www.ohchr.org/Documents/HRBodies/CEDAW/StatisticalSurvey.xls](http://www.ohchr.org/Documents/HRBodies/CEDAW/StatisticalSurvey.xls)> accessed 9 May 2017.

committees—differ in their treatment of the normative standards they consider in individual cases.

Institutional reforms of the treaty bodies should meet several overarching concerns. In principle, any change should bring about better implementation of substantive obligations and enhance the level of protection afforded to rights-holders by States parties to the human rights treaties. Similarly, any such change should maintain, or intensify, the scrutiny of implementation of the treaty guarantees by the treaty bodies. At a minimum, any institutional changes in the future should not weaken or dilute their implementation. In recent years, a plethora of individual complaints procedures have been added to the treaties, including before the Committee on Economic, Social and Cultural Rights. New treaty bodies, such as the Committee on the Rights of Persons with Disabilities, not to mention the Committee on the Elimination of Discrimination against Women, bring new perspectives to bear on some rights issues.

Therefore, it would seem that there is room and time for another modest proposal: to explore whether there have been differences in treatment of human rights norms depending on which treaty body examines an individual complaint. One way forward might be to conduct studies to review and reassess decisions in individual cases that have already been decided by the committees. Experimentation and simulations of how the cases might be decided differently by differently structured treaty bodies or joint committees could be conducted in an academic or think-tank setting. Alternatively, some model cases could be prepared and given to differently constructed joint committees to see whether each comes up with similar or different outcomes.

Similarly, there is also a need to look into the ways different States have (or have not) upheld the individual complaints decisions of the treaty monitoring committees. While the UN Secretariat has been fostering a variety of efforts aimed at harmonizing the approaches of the committees for the review of State reports, there has been little effort to examine why some States are more or less likely to comply with individual complaints decisions and proposed remedies on different topics.

It is also important to ask what will happen to the jurisprudence of the treaty bodies and to human rights more generally if the Covenant committees and/or other human rights treaty bodies are left to work solely on State reports, as the ‘world court’ proposal suggests they would. Would separating consideration of general compliance by a State from the consideration of individual cases lead to inconsistency and incoherence in the normative development of human rights?

To date, there has been substantial progress in adopting reforms proposed for State reporting under the human rights treaties. But there remains, by and large, a dearth of attention to the individual petition proceedings and the enforcement of their outcomes. When we look back at the treaty reform proposals that have seized reformers at the UN, very many of them concerning State reporting (including those in Alston’s and Bayefsky’s earlier studies) have already been implemented. This reminds us that academic proposals and subsequent advocacy have the

potential to create real improvements. More attention to the individual complaints procedures could also have a substantial and institutional impact on the future efficacy of the Covenants and other human rights treaty bodies.

It seems that a proposal to abandon current human rights treaty implementation structures and start anew in favour of creating a ‘world court’ is based less on an analysis of what has transpired than on a desire to create the next ‘big idea’ in human rights in the form of a court. It also seems that questions of consolidation of staff into a single petitions unit are not based on specific data. While there are surely economies of scale to be found and expertise can be better focused in the treaty branch, it seems clear that more study is needed—the questions posed above are in need of attention, as are questions of optimal staffing requirements.

Surely the ultimate goal—to provide greater human rights protection and enforcement of decisions on individual complaints—merits exploring such approaches before forging forward too quickly with new institutional structures. Rather than rushing to tear down the treaty body system that currently exists, there is a need to do the work either to correct it or prove that it is broken beyond repair. Anything less would be a dangerous sacrifice of the institutional and legal foundations upon which the human rights treaties have been constructed. In short, there is a need for greater due diligence. Supporters of the Covenants and advocates for human rights—still the ‘idea of our time’—owe it not just to ourselves but to the members of communities around the world seeking to implement the Covenants and related treaties in ways that are more effective.

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