

**LLM IN HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA– 2006
CENTRE FOR HUMAN RIGHTS
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**NEW ARCHITECTURE FOR THE UN HUMAN RIGHTS TREATIES MONITORING MECHANISMS:
MERGING AND PARTITIONING THE COMMITTEES**

Dissertation:

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By

Simon Mebrahtu

Student Number 26499844

**PREPARED UNDER THE SUPERVISION OF MR. E Y BENNEH
AT THE FACULTY OF LAW, UNIVERSITY OF GHANA
ACCRA, GHANA
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Declaration

I, Simon Mebrahtu, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided in accordance with academic usage. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Acknowledgement

Exceptionally, making my way to this special course was not simple. The fact that I ultimately made it and progressed to its end is the evidence of the wealth of assistances I have had from many Samaritans. If this is a permitted avenue to acknowledge, I wish I could write long because mentioning few or only some is ungrateful and injustices are always done. However, in works like this the space traditionally dedicated to acknowledgment has been limited.

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Dedication

At the beginning of the new millennium, it is clear that the concept of human rights is widely accepted as the “idea of our time”. The conceptual battle is over, and the focus has shifted to the implementation of human rights. Universal ratification of the main UN human rights treaties might be appearing on the horizon, but ratification in itself is largely a formal and in some cases an empty gesture. The challenge now is to ensure that the promises contained in the treaties and affirmed through ratification are realised in the lives of ordinary people around the world. A paradigm shift to the true “customers” of the system is called for. (CH Heyns & F Viljoen *The Impact of the United Nations human rights treaties on domestic level* (2002) The Hague: Kluwer Law International 1).

In this regard this work is dedicated:

To those ‘reformist’ who continuously and indefatigably exert to erect better human right protection apparatus out of the relics of the past; to those who venture to construct a ‘World House of Human Rights’, a gigantic sanctuary that stand for eternity signifying no posterity would live short of the rights and freedoms he or she deserves as a human being.

Acronyms

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	the monitoring Committee of CAT
CAT Sub-Committee	the monitoring Sub-Committee of OP-CAT
CCPR	International Covenant on Civil and Political Rights
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	the monitoring Committee of CEDAW
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	the monitoring Committee of CERD
CESCR	International Covenant on Economic, Social and Cultural Rights
CESCR	the monitoring Committee of CESCR
CHR	Commission on Human Rights
CHRIF	Chamber of Human Rights Inquiry and Follow-ups
CHRRDC	Chamber of Human Rights Review Dialogue and Cooperation
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CMW Committee	the monitoring Committee of CMW
CRC	Convention on the Rights of the Child
CRC Committee	the monitoring Committee of CRC
FOP	First Optional Protocol
FOP-CRC	First Optional Protocol to CRC – on the Involvement of Children in Armed Conflict
HRC	Human Rights Council
HRC	Human Rights Committee: the monitoring Committee of CCPR
ICC	International Criminal Court
ICJ	International Court of Justice

NGOs	Non-governmental Organisations
ILO	International Labour Organization
NHRIs	National human rights institutions
OHCHR	Office of the High Commissioner of Human Rights
OP	Optional Protocol
OP-CCPR	Optional Protocol to CCPR
OP-CEDAW	Optional Protocol to CEDAW
OP-CAT	Optional Protocol to CAT
SOP	Second Optional Protocol
SOP-CCPR	Second Optional Protocol to CCPR – Aiming at the Abolishing of the Death Penalty
SOP-CRC	Second Optional Protocol to CRC – on the Sale of Children Child Prostitution and Pornography
TMB	Treaty monitoring body
UN	United Nations Organisation
UNHCHR	UN High Commissioner for Human Rights
UNHTRS	UN Human Rights Treaty System
USTMB	Unified Standing Treaty Monitoring Body
WCHR	World Court of Human Rights
WHHR	World House of Human Rights

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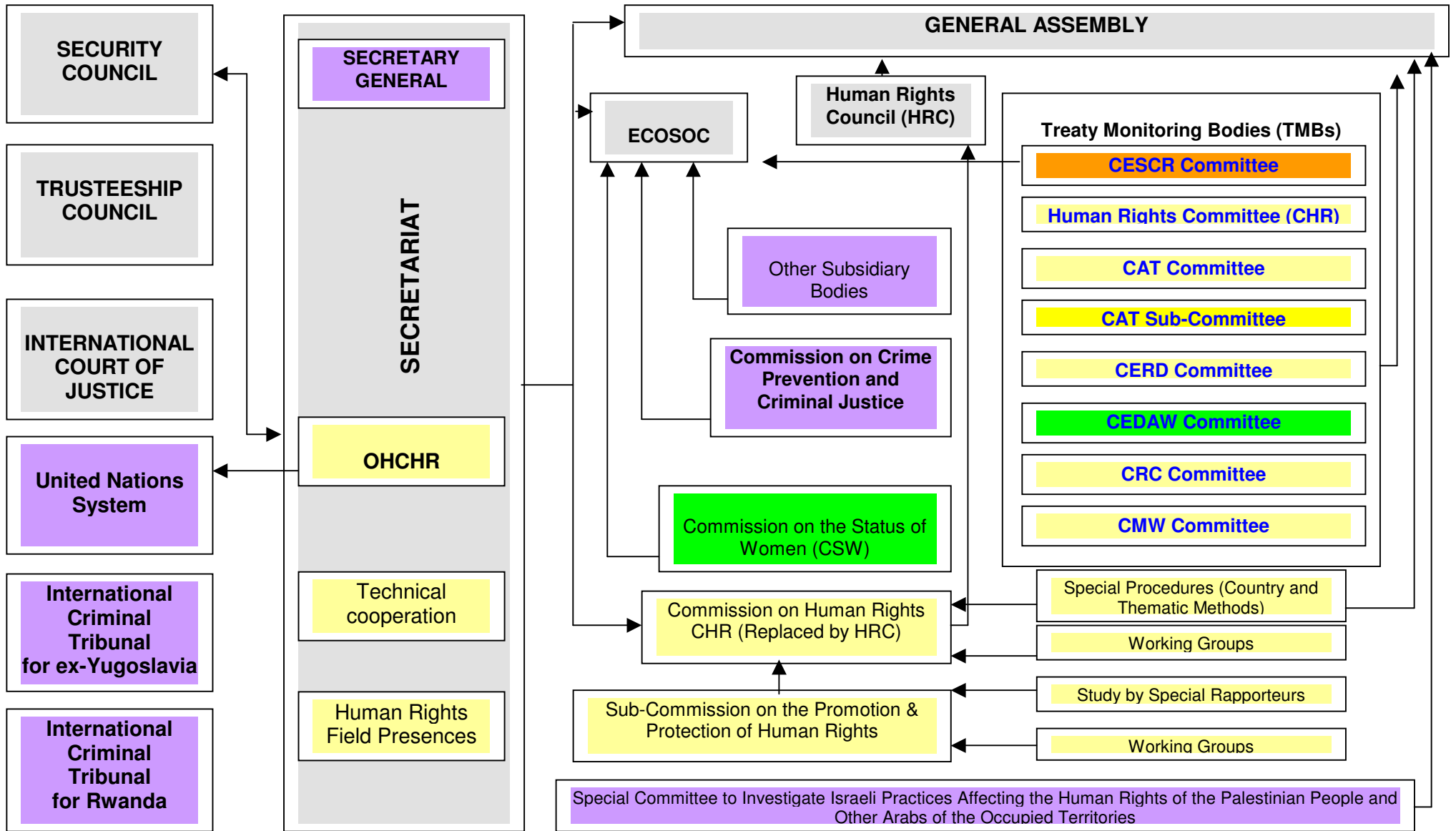
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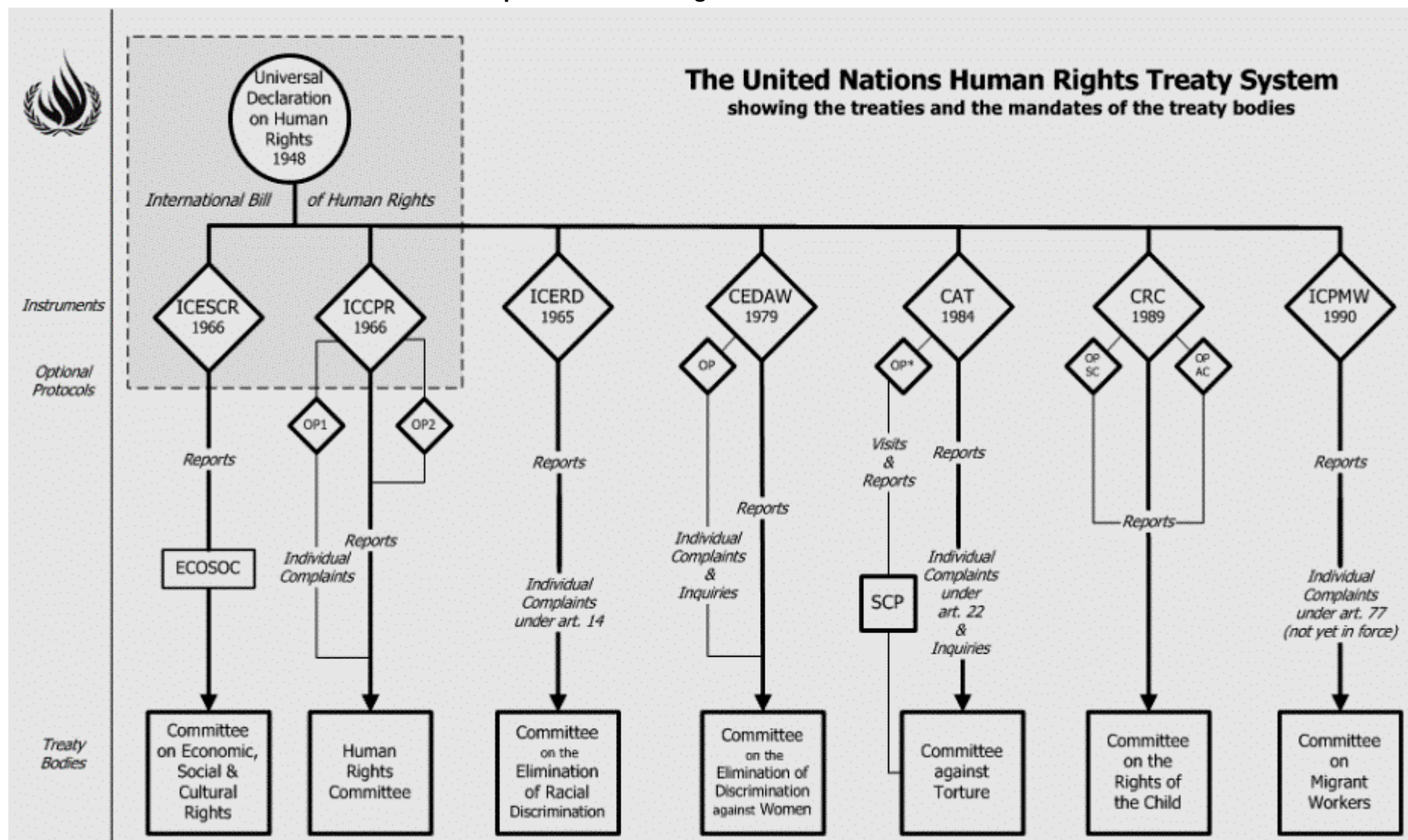
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Structure of the United Nations Human Rights Bodies and Mechanisms

Diagram source: <http://www.ohchr.org/english/chart.pdf> (accessed on 25 July 2006). Updates in regard to the HRC and CAT Sub-Committee are mine.



The present monitoring mechanism of the UNHRTS



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*OP CAT has entered in to force on 22 June 2006. SCP = CAT Sub Committee

Summary of facts of the UNHRTS (Source: www.ohchr.org)

Treaty	OP	Date of Adoption/ Entry into Force	State Parties*	Treaty Monitoring Body	No of Experts	Elected By	Reporting Mechanism				Complaints Mechanism			Inquiry Procedure
							State Reporting	Periodicity: Initial Periodic	Overdue Received Reports♦	Time Required for Consideration of Reports♣	Interstate Complaints	Individual Complaints	Registered Pending Cases♥	
CERD		21.12.1965 4.1.1969	170	CERD Committee	18	State Parties	Art 9 Mandatory	1 Year 2 Years	437 1695 (80%)	12.5 Months	Art 9 Mandatory!	Art 14 optional		
CCPR		16.12.1966 23.3.1976	157	Human Rights Committee	18	State Parties	Art 40 Mandatory	1 Year 4 Years♣	187 334(64%)	12 Months	Arts 41,42 Optional		1453 / 316	
	1 st OP 2 nd OP		108 57	" "								Art 1		
CESCR		16.12.1966 3.3.1976	154	ESCR Committee	18	ECOSOC 1985	Art 16, 17 Mandatory	2 Years• 5 Years	211 213 (41%)	15.5 Months		Draft OP		
CEDAW	Draft OP	INITIATED!												
		18.12.1979 3.9.1981	180	CEDAW Committee	23	State Parties	Art 18 Mandatory	1 Year 4 Years	166 592 (78%)	23.25				
	OP		82	"								Art 1		Art 8 & 10
CAT		10.12.1984 26.6.1987	141	CAT Committee	10	State Parties	Art 19 Mandatory	1 Year 4 Years	178 247 (58%)	19 Months	Art 21 Optional	Art 22 Optional	288 41	Arts 20, 28 Mandatory with Opting Out Possibility An announced visit to detention Centre
	OP	18.11.2002 22.06.2006	25	CAT Sub-Committee	10 25	State Parties								
CRC		20.11.1989 2.9.1990	192	"	10 (18)	State Parties	Art 44 Mandatory	2 Years 5 years	132 302 (70%)	22.3 Months				
	CRC- OPSC⊗ CRC- OPAC*		108	"				2 Years 5 Years	56 14 (20%)					
				108	"				2 Years 5 Years	49 18 (27%)				
MWC		18.12.1990 1.7.2003	34	Committee on CMW	10 (14)	State Parties	Art 73 Mandatory	1 Year 5 Years	26 8 (24%)		Art 76 Optional	Art 77 Optional		

♦ As of February 2006.

* As of 19 September 2006

♥ As of February 2006.

⊗ OP CRC on the sale of children, child prostitution and child phonograph.

♣ Average time from submission to consideration of State party reports by the treaty bodies in 2005. See Concept Paper Annex 3. * OP to CRC on the involvement of children in armed conflict

♣ Art 40 of the CCPR gives the Human Rights Committee discretion to decide when periodic reports shall be submitted. In general, these are required every four years.

• Art 17 of CESCR does not establish a reporting periodicity, but gives the ECOSO a direction to establish its own reporting program.

CHAPTER ONE

INTRODUCTION

1.1 Introduction

The international human rights regime has shown steady developments after the Second World War. The horrors of the war have induced people to reaffirm faith in human rights.¹ The United Nations Organization (UN) was established to primarily maintain international peace and security, and achieve international cooperation, development and human rights.² Though the UN Charter does not mention protection of human rights and none of the principal organs have actually been established to deal exclusively with this issue, the chapter on international economic and social cooperation, and consequently the UN Economic and Social Council (ECOSOC), which regulates promotion of and universal respect for human rights, along with many other tasks, had been primarily responsible for human rights issues.³

According to article 68 of the UN Charter, however, ECOSOC is authorized to entrust commissions with the mandate of performing its many tasks. Consequently, it established a number of commissions including three – the Commission on Human Rights which also had a Sub-Commission; the Commission on Status of Women and the Commission on Crime Prevention and Criminal Justice, which are directly responsible for human rights issues. The UN High Commissioner for Human Rights (UNHCHR) and the Office of the High Commissioner for Human Rights (OHCHR) are two late additions. In 2006 the UN Human Rights Council has replaced the Commission on Human Rights.⁴

Thus in the course of time, with the growth of human rights concerns, a human rights regime encompassing the above main and many other smaller institutions and different procedures with

¹ A M Pennegard 'Overview over human rights – the regime of the UN' in G Alfredsson et al *International human rights monitoring mechanisms* (2000) 23.

² UN Charter, art 1.

³ M Nowak *Introduction to the human rights regime* (2003) 73.

⁴ In May 2006, the Human Rights Council replaced the Commission on Human Rights. This move was expected to create a seven principal organ of the UN and thus formally promote human rights to the level of peace and security. However, the Human Rights Council is made a subsidiary organ of the General Assembly, though the term Council within the UN structural dispensation implies a principal organ. The General Assembly is supposed to review the status of the Council within five years. See General Assembly, A/RES/60/251 par 1.

human rights related mandates was gradually built making the UN Charter its base. This branch of the UN human rights system is commonly referred to as the 'Charter based' UN human rights system.⁵

After the Second World War, the international human rights standard setting that started with the adoption of the Universal Declaration of Human Rights was also intensified, creating the UN Human Rights Treaty System (UNHRTS). There has been proliferation of human right treaties and so far there are seven core human right treaties (some have one or two protocols) in force at the global level.⁶ These seven treaties set legal standards for the promotion and protection of human rights and impose legal obligations on state parties to implement human rights.⁷ The treaties also provide the normative framework for UN efforts to support the implementation of human rights norms at the global level.⁸ The treaties relate to a broad range of human rights concerns: racial discrimination, torture, economic, social and cultural rights, civil and political rights and others. Some of them give specific focus to rights of women, children and migrant workers.

Each of the seven core treaties has a Treaty Monitoring Body (TMB)⁹ commonly known as 'treaty bodies' or 'Committees' composed of 'independent experts'¹⁰ their number ranging from 10 to 23 and entrusted with the task of ensuring state compliance with their obligations contained in the treaties.¹¹ Generally these TMBs (not all) employ (1) consideration of state reports, (2) individual complaints, (3) interstate complaints and (4) inquiries and visits as mechanisms of monitoring implementation of the treaties.¹² Members are not full-time; and beyond expenses during meetings, they receive only a small

⁵ Nowak (n 3 above) 73-152.

⁶ These are the CESCR, CCPR and its two OPs, CERD, CEDAW and its OP, CAT and its OP, CRC and its two Ops and the CMW.

⁷ Concept Paper on the High Commissioner's proposal for a unified standing treaty body, (HRI/MC/2006/2) para 3.

⁸ Concept Paper (n as above).

⁹ The Optional Protocol to CAT (OP CAT), which has entered into force in June 2006 will introduce a new monitoring function – a ten-member Subcommittee on Prevention of Torture (CAT Subcommittee), and the draft International Convention for the Protection of All Persons from Enforced Disappearance adopted by a working group of the Commission on Human Rights in September 2005 (E/CN.4/2005/WG.22/WP.1/Rev.4) envisages the creation of a 10-member TMB to monitor implementation. The Ad Hoc Committee of the General Assembly on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities is considering establishing a monitoring mechanism, including a possible tenth TMB in the system.

¹⁰ Although TMBs members are meant to serve in their personal capacity and to be 'experts with recognised competence in the field of human rights', both the terms 'personal' and 'expert' have been flexibly interpreted. Membership of TMBs is loaded with foreign ministers, serving or retired ambassadors and other officials. S Leckie 'The Committee on economic, social and cultural rights: Catalyst for change in a system needing reform' in P Alston & J Crawford (ed) *The future of UN human rights treaty monitoring* (2000) 131.

¹¹ Nowak (n 3 above) 98.

¹² Nowak (n 3 above) 98.

honorarium and no other support.¹³ The TMBs are serviced by a permanent UN secretariat, which involves only the equivalent of one full-time professional per committee.¹⁴

All TMBs consider state reports; five have competence to consider individual complaints subject to admissibility criteria being met; four are entitled to consider inter-state complaints; and three have competence to inquire into allegations of grave or systematic violations.¹⁵

With regard to state reports, state parties are required to produce reports on how their laws and practices adhere to the terms of the treaties. These reports are written for each treaty generally every four to five years.¹⁶ Once produced, state representatives appear before the respective TMB and answer questions concerning the report. These question and answer sessions are public. Upon conclusion of the so-called 'constructive dialogue', the TMBs formulate and release 'concluding observations' on the state's record of compliance with the treaty obligations.

The final evaluation of the state's compliance with the treaty arising from the consideration of reports and issued as "concluding observations," is published in reports of the TMBs. It is quite different from the ruling of a judicial body in national jurisdictions.¹⁷ Such reports normally identify the states that do not meet their substantive treaty obligations and also name states that fail to submit reports. The concluding observations of the TMBs are sent to the UN General Assembly, the UN Commission on Human Rights or the Commission on the Status of Women. Through these vehicles, the TMBs seek enforcement of their recommendations and demand improvement of their general *modus operandi*.

The process of state reporting was aimed to provide an opportunity for an individual state party to conduct a comprehensive review of the measures it has taken¹⁸ to bring its national laws and policies

¹³ International Law Association 'Report on the Treaty System: The First Report of the International Law Association's Committee on International Human Rights Law and Practice' submitted to the Helsinki Conference, 11-17 August 1996. Available at <http://www.bayefsky.com/reform/ila.php/pfriendly/1> (accessed 10 August 2006).

¹⁴ Leckie in Alston & Crawford (n 10 above) 132.

¹⁵ See table, summary of facts of the UNHRTS.

¹⁶ Nowak (n 3 above) 98.

¹⁷ For example article 9(2) of CERD states that the Committee 'may make suggestions and general recommendations' based on state reports received. See also similar provisions under CCPR article 40(4), CEDAW article 21(1), CAT article 20(4), and CRC article 45(d).

¹⁸ P Alston 'The purpose of reporting' in United Nations manual on human rights reporting, UN Doc. HR/PUB/97/1 (Rev.1) (1997) 19-24.

inline with the provisions of the treaties to which it is a party.¹⁹ The preparation of reports was desired to be a platform for national dialogue on human rights amongst the various stakeholders in a state party.²⁰ The report itself was aimed at providing government and others, including civil society, with a baseline for the elaboration of clearly stated and targeted policies, which include priorities consistent with the provisions of the treaties.²¹ The process of reporting was also expected to encourage and facilitates public scrutiny at the national level of government approaches to implementation and stimulates constructive discussion with civil society of ways to advance the enjoyment by all of the rights laid down in the treaties.²²

Consideration of state reports by the TMBs, through constructive dialogue with state parties was designed to allow individual state and states as a whole to exchange experience on the problems faced in implementation of the treaties, and good practices that facilitate enhanced implementation.²³ It was also designed to allow for international scrutiny, which underlines states' responsibility and accountability for human rights protection.²⁴

The success of this scheme *inter alia* depends on many factors: the extent to which states comply with their reporting obligations and submit reports and use the process as an opportunity for a frank and comprehensive assessment of implementation of international obligations, and engage in a dialogue with national stakeholders before and after the consideration of reports by the TMBs; the amount of time the TMBs have to question state representatives; the amount of independent information on a state's human rights record available to TMBs; the accessibility of many aspects of the process to non-governmental organisations (NGOs) and individuals; the drafting of state reports, the dialogue, information flow to the TMBs; the ability of TMBs to follow-up inadequate reports or oral replies; the quality of the TMBs' concluding observations; and the extent to which conclusions and recommendations of the TMBs are followed by the media.²⁵

¹⁹ Concept Paper (n 7 above) para 12.

²⁰ P Alston 'Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights: Initial Report', UN Doc A/44/668 (1989), para 31-33.

²¹ Concept Paper (n 7 above) para 12.

²² A Trindade 'Reporting in the Inter-American system of human rights protection' in Alston & Crawford (n 10 above) 333-335.

²³ Concept Paper (n 7 above) para 12.

²⁴ Initial Report (n 19 above) para 31-33.

²⁵ International Law Association (n 13 above).

It also depends on the awareness and knowledge of national constituencies and their interest in participating in the process and using it to assess progress in implementation and raise issues, including obstacles to implementation, at the national and international levels. In addition, it depends on the lapse of time between submission and consideration of a report, the quality and fairness of the dialogue, concluding observations and recommendations and any follow-up action that may occur.²⁶

The right of individual complaint (referred as communications in the relevant treaties or Ops) is an optional feature of the CCPR, CERD, CAT, CEDAW and CMW. Where states accept these optional provisions, individual victims of violations of these treaties can complain to the TMBs. Similarly with the exception of CERD, which makes it mandatory, inter-state complaint is an optional feature under CCPR, CAT and CMW. Between or among states that accept interstate complaint, a state or states can on behalf of victims complain against each other to the respective TMB of the treaty of which provisions are alleged to be violated. This mechanism, however, is hardly used.

TMBs examine communications in closed meetings in light of all written information made available and generally they have not sought to supplement written submissions with oral argument by the parties let alone oral testimony of witness.²⁷ Thereafter TMBs issue their 'views' on whether a state has violated a right and finally forward it to the concerned state(s) and individual(s).²⁸ No text defines the form or status of this 'views' – hortatory, recommendatory or binding – or refers to remedies.²⁹

The complaints procedures was aimed to provide an opportunity for TMBs with the competence to receive complaints to identify steps that states should take to comply with their international legal obligations in the context of concrete individual situations.³⁰ The procedures offer individual relief to victims of human rights violations and should stimulate general legal, policy and program change.³¹

²⁶ A Clapham 'UN human rights reporting procedure: An NGO perspective' in Alston & Crawford (n 10 above) 175-198.

²⁷ H Steiner 'Individual claims in a world of massive violations: What role for the Human Rights Committee?' in Alston & Crawford (n 10 above) 23.

²⁸ Steiner (n as above).

²⁹ The deliberate selection of the principal terms: 'Committee' rather than a 'court', 'communications' rather than 'complaints and 'views' rather than 'decisions' however reflect the intention of state parties to distance the TMBs from anything that resembles an adjudicatory body. Steiner (n 27 above) 22.

³⁰ Concept Paper (n 7 above) para 12.

³¹ Concept Paper (n 7 above) para 13.

Effectiveness of this mechanism is *inter alia* dependent on awareness at the national level of the possibility of complaint among rights-holders, the efficiency of the procedures at the international level and the quality of the outcomes as well as the willingness of states parties to implement views and make necessary legislative and policy changes to comply with their obligations.³²

CEDAW and CAT also provide for inquiry and visits by the respective TMBs.³³ Generally based on reliable information, these TMBs may designate one or more of their members to conduct an inquiry or visit a state party and then report back to the respective TMB. After examining the report TMBs transmit their findings together with any comments and recommendations. Inquiry procedures are designed to enable TMBs to address the structural causes of systematic violations and make recommendations relating to a broad range of issues.³⁴

In the past 40 years³⁵ these various procedures and outputs of the UNHRTS have gradually become sophisticated, developed and strengthened. It has made contribution to the promotion and protection of human rights.³⁶ Despite its achievements, however, it also faces serious challenges and weaknesses, which induced some insider commentators to evaluate it as 'a system in crises'³⁷ and to criticise the whole system as one that urgently needs 'a complete overhaul'³⁸.

From time to time, several proposals were made to improve the situation. However, the underlying problems persisted.³⁹ Thus further and radical call for re-organisation of the monitoring mechanism of the UNHRTS into a Unified and Standing Treaty Monitoring Body (USTMB) was made very recently.⁴⁰ A Further call for consolidation was made more explicit subsequently.⁴¹ On March 2006 the UNHCHR has issued a Concept Paper proposing to consolidate the current TMBs into a USTMB in an attempt to

³² Concept Paper (n 7 above) para 10.

³³ OP-CEDAW art 8 & 10, CAT art 20 & and 28 and OP-CAT.

³⁴ Concept Paper (n 7 above) para 9.

³⁵ Since 1970 when the UNHRTS started to be operational with the establishment of the CERD Committee.

³⁶ See chapter two, achievements of the UNHRTS.

³⁷ International Law Association (n 13 above).

³⁸ Evatt (n 38 above) 460-80.

³⁹ See chapter two and three.

⁴⁰ OHCHR 'Plan of Action – Protection and Empowerment' Available at <<http://www.ohchr.org/english/docs/A.59.2005.Add.3.pdf>> (accessed 15 May 2006).

⁴¹ Statement of Ms Louise Arbour, High Commissioner for Human Rights to the Fourth Inter-Committee Meeting, 22 June 2005, available at <http://www.ohchr.org/english/bodies/icm-mc/docs/stat4thmeeting.doc> (accessed 10 August 2006).

address the persistent problems the UNHTRS monitoring mechanism has been facing.⁴² A proposal regarded as too radical by many insiders of the UNHRTS.

1.2 Statement of the problem

In view of the serious weaknesses of the UNHRTS monitoring mechanism, the initiated reform is a positive step. However, in seeking to introduce reform, and particularly within the UNHRTS, great caution is important not to throw the baby with water in the reform process. There is real concern about squandering, in the name of reform, the progress achieved over the last decades. In order to introduce an effective reform, it is important to be aware of what has worked and what has not, and make strategic choice based on these insights. In view of the proposed USTMB as a solution to the weakness of the system, balancing the reform initiative so that it will inherit the positive legacies while redressing the weakness is, therefore, a major contemporary concern.

1.3 Hypothesis

The study is built on the already reached solid conclusion that the UNHRTS monitoring mechanism has been suffering from various weaknesses of dangerous proportion. The study has thus taken the position that provided the appropriate architect is designed; a consolidation of the present 'untidy' monitoring mechanisms into a USTMB could be a solution, albeit not a panacea, to the weaknesses of the UNHRTS monitoring mechanisms.

3.4 The research question

In view of this reform initiative and in particular the proposed USTMB as one reform option, this research then examines how or in what forms and features a USTMB could be a solution to the weaknesses of the UNHRTS monitoring mechanism.

3.5 Scope of the study

This research is confined to the UN TMBs reform; it does not, therefore, extend to UN reform as a whole. Again this research is further confined to analysing the ramifications of a USTMB as one reform option with the view of searching for an appropriate architect of the USTMB that would remedy the weaknesses of the existing monitoring mechanism while at the same time importing new

⁴² Concept Paper (n 7 above).

strengths. Focus is given to the USTMB because of the high backing it has gained from a wealth of reform recommendations.⁴³

1.6 Literature review

Abundant literature exists on the working mechanism of the UNHRTS in particular and has assessed the system from different angles, perspectives and appreciations. The strengths and weakness of the systems is more than anything else well investigated so much so that this research will make no endeavour to outcrop a new discovery or build on it.

A book edited by Philip Alston and James Crawford provides detailed analysis of the strengths and weakness of the UNHRTS and recommendations for reform, written by many leading participants in the work of TMBs.⁴⁴ A book by Michael O'Flaherty similarly describes the working mechanism of the TMBs.⁴⁵ Two books edited by Bayefsky also comprehensively cover the same areas but with different level of appreciation.⁴⁶ In addition they also provide empirical data and figures and host reports of various meetings relevant to the area of study. A book edited by Gudmundur Alfredson and others provides more information on the areas covered by the above-mentioned works.⁴⁷ A book by Christof Heyns and Frans Viljoen provides an assessment of the impact of the UNHRTS on domestic jurisdiction.⁴⁸ The general picture of international human rights regime is also well covered.⁴⁹

Various studies conducted by the insider of the system, independent expert Philip Alston, have provided accounts of the weaknesses of the system and furnished reform suggestions.⁵⁰ Reports of

⁴³ Initial Report (n 19 above); Concept Paper (n 7 above); A Bayefsky 'The UN human rights treaty system: Universality at crossroads', html version available at <http://www.bayefsky.com/report/finalreport.php> (accessed 10 August 2006).

⁴⁴ Alston & Crawford (n 10 above).

⁴⁵ M O'Flaherty, *Human rights and the UN: practice before the treaty bodies* (2002) The Hague: M. Nijhoff Publishers.

⁴⁶ A Bayefsky (ed) *The UN human rights treaty system: Universality at the crossroads* (2001) The Hague: Kluwer Law International; A Bayefsky *How to complain to the UN human rights treaty system* (2003) The Hague: Kluwer Law International.

⁴⁷ Alfredsson *et al* (n 1 above).

⁴⁸ C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) The Hague: Kluwer Law International.

⁴⁹ Nowak (n 3 above).

⁵⁰ P Alston 'Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights: Interim Report' UN Doc A/Conf.157/PC/62/Add.11/Rev.1 (1992). See also P Alston 'Effective functioning of bodies established pursuant to UN human rights treaties: Final Report', UN Doc E/CN.4/1997/74 (1996).

the Meetings of Chairpersons of the TMBs and Inter-Committee meetings also show the situation of the system from time to time. Admittedly, the available literature is voluminous that presenting a review, however summarised, is not possible for space limitations.

In spite of the voluminous literature on the UNHRTS that noted the weaknesses of the system and the fact that consolidation of the TMBs (USTMB) has been recommended as the ultimate solution since 1989, there is however very little work articulating how a USTMB could be a viable reform option. The most important work in this regard is the OHCHR's Concept Paper that in summary provided proposal for USTMB.⁵¹ Another endeavours that can be mentioned are the two conferences/workshops conducted specifically to brainstorm reform options.⁵² As an evidence of the lack of detailed articulation of the proposed USTMB, recently various actors that are called to consider the proposal noted that how the proposed USTMB would be a solution to the weaknesses of the current system is not elaborated.⁵³ In this regard the contribution of this research is investigate the merits and demerits of the proposed USTMB with the aim of establishing whether a viable solution is proposed.

1.7 Research methodology

In the UN TMB reform initiative various stakeholders: states, the OHCHR, the TMB, NGOs and civil society organisations are involved. Suggestions about the reform are streamlining. This study will employ the methodology of analysing these diverse viewpoints with the aim of picking the merits of each remark that could positively contribute to the architect of the USTMB. Emphasis has however been put on the quality of authors of the materials used as well as the authenticity of the sources of information such that views of the insiders of the UNHRTS monitoring mechanism has been particularly relied upon.

⁵¹ Concept Paper (n 7 above).

⁵² Report of Expert workshop on reform of UN Human Rights Treaty Monitoring Bodies, held from 11-12 February 2006, in Senate Chamber, University of Nottingham. Available at http://www.nottingham.ac.uk/shared/shared_hrlcprojects/Projects_Current_Projects_Nottingham_TB_Workshop_Report.pdf (accessed 17 August 2006). See also Report of a meeting on reform of the human rights treaty body system, held in Malbun, Liechtenstein, 4-7 May 2003, UN Doc HRI/ICM/2003/4.

⁵³ Report of the second brainstorming meeting on reform of the UNHRTS TMBs held from 14-16 July 2006 in Triesenberg, Liechtenstein, UN Doc HRI/MC/2007/2, p 6. (Available at <http://www.un.org/esa/socdev/enable//rights/ahc8docs/ahc8hrtreform.doc> (accessed 8 August 2006).

1.8 Limitations of the study

No work of this nature, however small, could be conducted without constraints. Accessing some relevant information on the Internet is one major problem this research has encountered. This has been so because either access to such information is restricted or the Internet connectivity the author used is slow in downloading. For this reason, the archived contents of the online debate on the TMBs reform, initially hosted at portal.ohchr.org have not been directly accessed. Moreover research projects done in fulfilment of academic requirements have to be completed within a given time no matter the occurrence of intervening events. Admittedly this research could have been better with more time dedicated to it.

CHAPTER TWO

ASSESSMENT OF THE UNHRTS MONITORING MECHANISM, ITS EVOLUTIONARY REFORM AND THE RECENT PROPOSAL FOR USTMB

2.1 Introduction

The success or failures of any international human rights system should be evaluated in accordance of its impacts on human rights practices on the domestic or country level.⁵⁴ At present the conceptual battle is concluded out of which human rights have triumphed the 'idea of our time' and universal ratification is now very imminent.⁵⁵ But as has been rightly put, ratification in itself, without ensuring that the promises contained in the treaties are realised in the lives of the ordinary people around the world, is an empty gesture.⁵⁶

In assessing the UNHRTS, Heyns and Viljoen took the term 'impact' to mean any influence that these treaties have in ensuring the realisation of the norms they espoused on the individual countries.⁵⁷ By 'impact' they also mean the extent to which treaty norms have been made part of the general culture of individual countries.⁵⁸ Assessment of the UNHRTS in the section following is however more focused on the assessment of the efficacy of the monitoring mechanism as a means to the impact Henys and Viljoen referred to.

In light of the broad participation in the treaty system and the considerable length of time in which the monitoring bodies have operated, such assessment can now be based on a significant degree of experience.⁵⁹

⁵⁴ Heyns & Viljoen (n 48 above) 1.

⁵⁵ Heyns & Viljoen (n as above).

⁵⁶ Heyns & Viljoen (n as above)

⁵⁷ Heyns & Viljoen (n as above).

⁵⁸ Heyns & Viljoen (n as above)

⁵⁹ See table, summary facts of the UNHRTS.

2.2 Assessment of the UNHRTS monitoring mechanism

Not surprisingly the assessment of the system varies though it is, no doubt, more negatively criticized. Many insiders of the system have a shared belief that the basic assumption upon which the system is based is valid.⁶⁰ In particular, the assumption of the desirability of universal participation in the system is not contested.⁶¹ Indeed, this assumption is now a reality, given that there is no state in the world that is not a party to one of the seven treaties and vast majority of states are party to many of them.⁶²

Some have criticized the system strongly as one, which needs complete overhaul.⁶³ The most persistent critic of the system has been Prof Anne Bayefsky, a prominent writer on the system. Over the past ten years Bayefsky has published several detailed critiques. The first published in 1994 identified the human rights agenda for the 21st century.⁶⁴ Her second work was a detailed report⁶⁵ and the third⁶⁶ consisted a paper presented at the previous year's Annual Conference of the American Society of International Law.

Bayefsky's account is based upon the identification of seven shortcomings of the UNHRTS monitoring mechanisms: (i) non reporting and late reporting by states; (ii) the existence of a large backlog of reports awaiting examination by TMBs; (iii) the ineffectual working methods used by TMBs; (iv) lack of publicity and accessibility; (v) weakness of the fact-finding capacities of the system; (vi) the weaknesses of the complaints system; and (vii) the inadequacy of measures to follow up on the work of the TMBs.⁶⁷

In her 1994 study, she characterized the UN human rights system as being dominated by a solid 'front of rejection' and as a system that remained 'as relics of the past' that 'contain gigantic loopholes that

⁶⁰ P Alston '*Beyond 'them' and 'us: Putting treaty body reform into perspective*' in Alston & Crawford (n 10 above) 502.

⁶¹ Alston (n 60 above).

⁶² See table, summary facts of the UNHRTS.

⁶³ Evatt (n 38 above) 479.

⁶⁴ A Bayefsky 'Making the human rights treaties work' in Henkin & J Hargrove (ed) *Human rights: An agenda for the next century* (1994) 229-295.

⁶⁵ A Bayefsky 'Report on the UN human rights treaties: Facing the implementation crisis' contained in Committee on International Human Rights Law and Practices, First report of the Committee (International Law Association, Helsinki Conference (1996)).

⁶⁶ Remarks by Anne F Bayefsky, a panel discussion entitled: 'The UN human rights regime: Is it effective?' 91 Proceedings of the Annual Meeting of the American Society of International Law 1997, Washington DC, 1998, p 466-472.

⁶⁷ Alston (n 60 above) 502.

are taken up with new zeal by large number of holdouts'.⁶⁸ In her 1996 work the core of the work of the TMBs – the dialogue between states and TMBs was criticized as 'frequently amount[ing] to a serious of unclear, incomplete, misleading or dishonest representation, on the one hand, and a series of polite, but skeptical responses, on the other hand'.⁶⁹ She concluded that, 'on a procedural level the enforcement regime associated with the TMBs is seriously flawed' and that the 'system of implementation ... is riddled with major deficiencies'.⁷⁰ In sum, she concluded that there is 'implementation crisis of dangerous proposition'.⁷¹ Furthermore, in her 1998 work:⁷²

... the information available is not comprehensive; input is not obtained from all interested parties; the dialogue, for these reasons as well as constraints upon time, accessibility, and follow-up, is often marginally constructive, ...

Most commentators including the insiders of the system agree with the first three weaknesses Bayefsky noted, and admit that there is much room for improvement.⁷³ Even with her last four points there is common rooms of agreement; but at the same time her assessment was in return criticized as representative of one extreme. Philip Alston, for example, wrote:⁷⁴

Clearly some of this is true; the system does suffer from some weaknesses. But, as an overall assessment, Bayefsky's analysis is unbalanced and unrealistic ...

Yet, the point Alston made is a point of relativity in the evaluation and appreciation of the system and he only concluded by saying that the truth lies mid way.⁷⁵

Even if these could be considered to be exceptional cases, it is clear that the average is much closer to the middle than to the single extreme case cited by Bayefsky.

Indeed quite before Prof Bayefsky, Prof Alston in his expert study has reported:⁷⁶

United Nations human rights treaty monitoring system has reached a critical crossroads. Its successful future evolution demands that the gravity of the existing problems be recognized, that vital importance of

⁶⁸ Bayefsky (n 64 above) 231.

⁶⁹ Bayefsky (n 65 above) 6.

⁷⁰ Bayefsky (n 65 above) 10.

⁷¹ Bayefsky (n 65 above) 11.

⁷² Bayefsky (n 66 above) 471.

⁷³ See Alston Initial Report, Interim Report & Final Report (n 19 & 50 above).

⁷⁴ Alston (n 60 above) 516.

⁷⁵ Alston (n as above).

⁷⁶ Initial Report (n 19 above) para 8.

the treaty regime as a whole be reaffirmed and the quest for creative and effective solutions be pursued with energy and commitment.

Thus whatever terms may be used to describe the situation, clearly the UNHTRS monitoring mechanism has many problems. At the same time, with all its limitations the system has achievements and has always been struggling to improve. Any reform initiative needs to clearly identify the achievements (strengths) and weaknesses.

2.3 Achievements of the UNHRTS

The various procedures and outputs of the TMBs have become increasingly sophisticated, developed and strengthened over time. Leaving the debate on the proportionality of weakness-strengths equation, the UNHRTS has made a contribution to the promotion and protection of human rights, with TMBs providing authoritative guidance on the meaning of international human rights standards, the application of treaties and the steps states parties should take to ensure full implementation of human rights and their enjoyment by all.⁷⁷

The reporting process has played a role in stimulating the creation of constituencies at the national level to promote implementation of human rights.⁷⁸ It has also provided direct input into the development of new laws, policies and programs. The process has afforded a platform for national dialogue on human rights among various stakeholders, and an opportunity for public scrutiny of government policies.⁷⁹ The outcome of the process - the concluding observations or recommendations of the TMBs, has also offered guidance on implementation to governments and has often constituted a framework for joint action by states, UN entities, civil society and others.⁸⁰

Despite the fact that TMBs' decisions in this context are not legally binding, individual complaints procedures have sometimes resulted in individual relief for victims.⁸¹ Through the decisions in individual cases, the TMBs have also developed a body of jurisprudence on the interpretation and

⁷⁷ Heyns & Viljoen (n 48 above) 5 - 7; Concept Paper (n 7 above) para 11.

⁷⁸ Heyns & Viljoen (n as above).

⁷⁹ G Lansdown 'The reporting process under the Convention on the Rights of the Child' in Alston & Crawford (n 10 above) 114.

⁸⁰ Concept paper (n 7 above) para 14.

⁸¹ See also the discussion in the Interim report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals (2002).

application of human rights treaties, which is referred to more frequently by national and regional courts and tribunals.⁸²

National human rights institutions (NHRIs), NGOs and other parts of civil society, regional bodies and United Nations agencies have also benefited from the treaty monitoring process.⁸³ Other parts of the UN system, including the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Program (UNDP), the United Nations Development Fund for Women (UNIFEM) and the World Health Organisation (WHO), also participate in the reporting process, and, to a greater or lesser extent, seek to integrate its output into their programs.⁸⁴

A multitude of domestic legal systems have been affected by the treaties: the treaties form the basis of a significant number of the world's bills of rights; numerous instances of legal reform are prompted by the treaties; NGOs and national human rights institutions have invoked the treaty standards in relation to proposed government legislation and policies; legislative committees have used treaty standards as reference points; the treaties have sometimes been incorporated into national law, had direct application through constitutional provisions to national law, and been used to interpret domestic law through judicial intervention.⁸⁵

2.4 Strengths of the UNHRTS monitoring mechanism

One of the strengths of the present monitoring mechanism as opposed to a consolidated one is its specificity. Each of the seven treaties has a TMB. One of the benefits of the current pluralistic structure is the diversity of vantage points it brings to bear on any state's human rights performance as several forms of diversity are at stake.⁸⁶ In addition the existence of seven TMBs dealing with each treaty has made it simple for NGOs and civil society organisations to identify their target. The present decentralisation of functions also provides a form of insurance so that if one treaty body is failing to

⁸² Committee on International Human Rights Law and Practice of the International Law Association, Final report on the impact of findings of the United Nations human rights treaty bodies (2004). See also Heyns & Viljoen (n 48 above).

⁸³ For example, the United Nations Children's Fund (UNICEF), which facilitates state and national stakeholder engagement in the reporting process relating to the CRC, uses the output of the CRC Committee as a programming tool, and approaches the reporting exercise as dynamic occasion for assessment and dialogue with states, UN entities and NGOs which results in a framework for state accountability for implementation of their treaty obligations.

⁸⁴ Concept Paper (n 7 above) para 14.

⁸⁵ Heyns & Viljoen (n 48 above) 5 - 7; Bayefsky (n 65 above) 6.

⁸⁶ C Scott 'Bodies of Knowledge: A diversity promotion role for the UN High Commissioner for Human Rights' in Alston & Crawford (n 10 above) 403.

function effectively others might be able to compensate.⁸⁷ Thus reliance upon a USTMB would be, in this regard, like putting all eggs into a single basket.

2.5 Weaknesses of the UNHRTS monitoring mechanism

Despite these achievements and strengths however the system faces serious challenges. Some of these are linked to its success, and result from the growth in human rights instruments and the steadily increasing number of states formally assuming international legal obligations. Others are inherent in the features of the systems.

The growth in the number of treaties and TMBs has been ad hoc and their provisions and competencies overlap resulting in duplication.⁸⁸ Substantively, the existence of provisions in different treaties with overlapping normative content has sometimes resulted in lack of clarity about the boundaries of each of the treaty bodies' mandates, leading to duplication of efforts.⁸⁹ Many states, including those with significant technical capacity and high commitment, find that meeting complex and overlapping reporting obligations are burdensome, bearing in mind other reporting requirements they may have.⁹⁰

TMBs have implemented different working methods, thereby compromising the system's coherence and creating a lack of clarity for state parties and other actors engaged in the system.⁹¹ There is limited coordination and collaboration among the TMBs particularly in relation to the scheduling of report consideration.⁹² A state party may be asked to present reports to several TMBs in the period of a year, a month, or sometimes a week.⁹³ A state party may be asked the same question by several of the TMBs, and find that less time is devoted to treaty-specific issues. This lack of coordination among

⁸⁷ Initial Report (n 19 above) para 183.

⁸⁸ E. Tistouet 'The Problem of Overlapping Among Different Treaty Bodies' in Alston & Crawford (n 10 above) 383-99.

⁸⁹ Tistouet (n 88 above) 393.

⁹⁰ Evatt (n 38 above) 466.

⁹¹ Concept Paper (n 7 above) para 17.

⁹² Bustelo 'The Committee on the Elimination of Discrimination Against Women at the crossroads' in Alston & Crawford (n 10 above) 99.

⁹³ Concept Paper (n 7 above) para 17.

TMBs increases duplication and impedes interaction with stakeholders, who find the system obscure.⁹⁴

The system also faces challenges because many states accept the human rights treaty system on a formal level, but do not engage with it, or do in a superficial way, either as a result of lack of capacity or lack of political will.⁹⁵ Some states fail to submit reports required by the treaties, and most submit them after considerable delay.⁹⁶ Figures from February 2006 indicate that only 70% of the total number of state party reports due have been submitted, a percentage that has been achieved as a result of the submission of consolidated reports.⁹⁷ Of the initial reports that are due, 30% have not been submitted.⁹⁸ As of February 2006, only eight of the 194 states that are party to one or more of the seven treaties are up to date with their reports, with the remaining 186 states owing 1,442 reports to the treaty bodies.⁹⁹

Often, TMBs have insufficient information to enable them to undertake a full analysis of implementation in law and practice of the legal obligations stipulated in the treaties that negatively impacts on the quality of dialogue and recommendations.¹⁰⁰ The reports of state parties may focus on the legal framework, but pay insufficient attention to the practical implementation and de facto enjoyment of rights by individuals.¹⁰¹ Information from United Nations agencies and NGOs on all state parties is not systematically available prior to the consideration of reports.¹⁰² As a result, the subsequent recommendations of TMBs often lack precisions, clarity and practical value required to enhance implementation.

⁹⁴ Evatt (n 38 above) 465.

⁹⁵ J Crawford 'The UN human rights treaty system: A system in crisis?' in Alston & Crawford (n 10 above) 5.

⁹⁶ See Concept Paper: Annex 2: Reporting status per State party as of 16 February 2006 (n 7 above).

⁹⁷ Many of the TMBs accept combined reports to address the reporting backlog. Records show that one state party has submitted its combined initial (due 17 March 1978) to fourteenth periodic (due 17 March 2004) reports in one document of 24 pages. See Concept Paper, Annex 2: Reporting status per state party as of 16 February 2006.

⁹⁸ The TMBs have considered reporting obligations of successor states in different ways. Consequently, it is possible that there may be slight variations in the total number of reports.

⁹⁹ See table, summary of facts on the UNHRTS.

¹⁰⁰ Bayefsky (n 65 above) 7.

¹⁰¹ Bayefsky (n as above).

¹⁰² Bayefsky (n as above).

Another major weakness of the current system is the absence of effective, comprehensive follow-up mechanisms to ensure that the system has a sustained and systematic impact on the enjoyment of human rights at the national level.¹⁰³ Governments frequently pay insufficient attention to the recommendations adopted by the treaty bodies, and lack of awareness or knowledge among national constituencies about the monitoring procedures and their recommendations, renders these invisible at the national level.¹⁰⁴

The growth in the number of treaties and ratifications has resulted in a steep increase in the workload of the TMBs and the Secretariat, backlogs in the consideration of reports and individual complaints, and increasing resource requirements.¹⁰⁵ At the same time, the TMBs have been under-resourced, and their meeting time has been insufficient to handle their workload.¹⁰⁶ Individual complaints procedures are under-utilised, but the time between submission of a complaint and pronouncement of a final decision currently averages 30 to 33 months, which severely challenges the system's ability to provide redress for serious violations of the rights of individuals.¹⁰⁷ An increase in petitions would further delay the processing of individual complaints.

With regard to the delinquency of state parties, the TMBs have little real power to enforce compliance with the procedures, but at the same time, with their current working methods, they could not accommodate full compliance by states parties with reporting obligations.¹⁰⁸ The achievement of the UNHCHR's goal of universal ratification and full acceptance of complaints and inquiry procedures, combined with full compliance by states parties with reporting procedures, would exacerbate these challenges. After submission of reports and individual communications delay in their consideration is also a problem.¹⁰⁹

In confronting these delays the TMBs are in a dilemma: they must give sufficient attention to individual reports and communications, whatever their source, while at the same time the number of states parties and communications has increased. None of these TMBs, however, has received any

¹⁰³ Concept Paper (n 7 above) para 26.

¹⁰⁴ Bayefsky (n 65 above) 7.

¹⁰⁵ Evatt (n 38 above) 461.

¹⁰⁶ Evatt (n 38 above) 462-79.

¹⁰⁷ International Law Association (n 13 above); Concept Paper: Annex 1: Facts and figures about reporting (n 7 above).

¹⁰⁸ International Law Association (n 13 above).

¹⁰⁹ Crawford (n 95 above) 5.

sustained increase to its regular meeting time.¹¹⁰ Moreover it is difficult to use inter-session time, because experts of the TMBs are not paid for intersession work.¹¹¹ To make it worse the way sessions are conducted is not time saving.¹¹² Thus experts of the system agree that the system is working, even at the current ineffective level, due to high level of state default.¹¹³

The system is also facing resource constraints of different features. TMBs' secretariats are understaffed and underpowered.¹¹⁴ There is an acute shortage of funds that in certain cases has led to the cancellation of sessions.¹¹⁵ There are problems arising from restrictions in documentation, delays in translation, and absence of funds for field visits and lack of cooperation between TMBs' organs (special rapporteurs and working groups).¹¹⁶

Another serious problem is related to the composition of the experts of the TMBs. Some members are committed and competent, others lacked sufficient expertise or independence and some do not attend meetings.¹¹⁷ The electoral process is irreducibly political and takes limited account of qualifications.¹¹⁸ Demands on committee members are high. Most had other full-time jobs.

Lack of visibility is a major concern such that the system is little known outside academic circles, government departments and officials directly interacting with the system, and specialized lawyers and NGOs.¹¹⁹ It is rarely perceived as an accessible and effective mechanism to bring about change.¹²⁰ Victims of human rights violations and civil society actors are unfamiliar with the system's complex

¹¹⁰ Crawford (n as above).

¹¹¹ Crawford (n as above).

¹¹² M Banton 'Decisions-taking in the Committee on the Elimination of Racial Discrimination' in Alston & Crawford (n 10 above) 60-63.

¹¹³ Final Report (n 50 above) para 14.

¹¹⁴ Leckie (n 10 above) 130-145.

¹¹⁵ Eg CERD. Crawford (n 94 above) 5.

¹¹⁶ Evatt (n 38 above) 461-498.

¹¹⁷ It is not unusual for a member to be absent for part of a meeting or even several days, perhaps leaving Geneva to deal with governmental business elsewhere, but no one knows because the member need not tell the chairperson of the absence or the reasons for it. See Banton (n 106 above) 61.

¹¹⁸ Crawford (n 94 above) 9.

¹¹⁹ Concept Paper (n 7 above) paras 21&22.

¹²⁰ Bayefsky (n 65 above) 7.

procedures or are unaware of its potential.¹²¹ Media coverage is poor and the use of TMBs' jurisprudence by lawyers and national judicial systems is limited.¹²²

The lack of visibility is attributable to the fact that the system has developed as ad hoc and it does not function as an integrated and indivisible framework for human rights protection; and this has weakened its overall impact.¹²³ The existence of seven TMBs acting independently to monitor implementation of obligations raises the possibility of diverging interpretations which may result in uncertainty with respect to key human rights concepts and standards that threatens a holistic, comprehensive and cross-cutting interpretation of human rights provisions, and that may result in conflicting jurisprudence.¹²⁴ This diminishes the possibility that state parties will translate this output into integrated cross-sectoral national planning and programming.

Furthermore the visibility of the system is linked to the authority of the TMBs, which depends on the quality of the monitoring process, its output and decision-making, as well as the perception, independence and fairness of the procedures employed.¹²⁵ The experience of the current system suggests that TMBs, composed of part-time, unremunerated experts nominated and elected by state parties from among their nationals for fixed renewable terms, have been uneven in terms of expertise and independence, as well as geographical distribution, representation of the principal legal systems and gender balance.¹²⁶ Competing demands have also meant that some TMBs members have been unable to devote the time required to the work of their Committees, and some have been unable to attend sessions.¹²⁷

All the mechanisms of monitoring compliance are not properly used such that visits of TMBs to countries remains an exception, and the system is often described as disconnected from realities on the ground, with meetings confined to Geneva or New York.¹²⁸ The number of complaints filed with the Secretariat is low in comparison to the number of individuals living under the jurisdiction of states that

¹²¹ Concept Paper (n 7 above) para 21.

¹²² Bayefsky (n 66 above) 467.

¹²³ Concept Paper (n 7 above) 23.

¹²⁴ Tistounet (n 88 above) 383-400.

¹²⁵ Concept Paper (n 7 above) para 22.

¹²⁶ Leckie (n 10 above) 161.

¹²⁷ Concept Paper (n 7 above) para 22.

¹²⁸ Bayefsky (n 65 above) 15 & 16.

have accepted individual complaint procedures, and most complaints are directed toward a minority of state parties.¹²⁹ The inquiry procedures of CAT and CEDAW have been little used, while the state-to-state complaint mechanisms have never been used.¹³⁰

2.6 Brief history of the UNHRTS monitoring mechanism reform and the recent proposal

It would be wrong to assume that within the system acknowledgement of this state of affairs has come only recently. Many of the factors were signaled early on. In 1984 a first meeting of persons chairing the TMBs was held, a practice that afterwards came to be known as the Meeting of Chairpersons.¹³¹ This by now yearly gathering was intended to discuss and resolve common problems facing the treaty bodies, in consultation with each other, as well as interested third parties.¹³² Over the years the Meeting of Chairpersons increasingly played the role of a *sui generis* coordinating forum for TMBs and started addressing some of the problems described above.¹³³ Since 2002 an Inter-Committee meeting has also been conducted yearly wherein the Chairperson and at least two other members of each TMB have to attend.¹³⁴

Various studies were also conducted around the same area; initiated by the UN, academic institutions or even individual academics. Systematic presentation of the reform suggestions since the 1980s was available in a report of one expert workshop.¹³⁵ On 8 December 1998, the General Assembly requested the Secretary General 'to consider entrusting an independent expert with the task of preparing a study on possible long-term approaches to the supervision of human rights instruments.'¹³⁶ Pursuant to that resolution, the Commission on Human Rights also requested the Secretary General to entrust an independent expert for the same study.¹³⁷ In accordance with these resolutions, the

¹²⁹ Concept Paper: Annex 4: Statistics relating to individual complaint procedures of ICCPR, CAT and CERD (n 7 above).

¹³⁰ See table, summary of facts on the UNHRTS.

¹³¹ I Boerefijn *The reporting procedure under the Covenant on Civil and Political Rights - Practice and procedures of the Human Rights Committee* (1999) 159.

¹³² Bayefsky (n 60 above) 106.

¹³³ Detailed accounts are contained in the Reports of the Annual meetings of Chairpersons of the Human Rights Treaty Bodies, available at <http://www.ohchr.org/english/bodies/icm-mc/documents.htm>. (accessed 10 July 2006).

¹³⁴ Report of the first Inter-Committee Meeting of the human rights treaty bodies, HRI/ICM/2002/3, para 1.

¹³⁵ Survey and analysis of selected previous reform proposals (1985-2005), Appendix I to an informal Background Paper (n 52 above).

¹³⁶ GA Resolution 43/115 para 15(a).

¹³⁷ CHR Resolution 1989/47 para 5.

Secretary General appointed Prof Philip Alston to carry out the study.¹³⁸ The independent expert prepared three reports on enhancing the long-term effectiveness of the UNHRTS.¹³⁹

The views of states, UN agencies, the Secretary-General and other interested parties were solicited with regard to the final report and submitted to the Commission on Human Rights in 1998 and 2000.¹⁴⁰ Similar to the recommendations of the Meeting of Chairpersons, albeit well reasoned and detailed, the independent expert propounded numerous suggestions aimed at strengthening the system.¹⁴¹

In his initial report the expert noted that the overall environment has changed dramatically in the two decades since the first of the major treaty bodies was established, thus, as a result a major and continuing effort is required to ensure and promote the integrity of the existing system and provided a whole range of suggestions including in the long term consolidation of TMBs into one or two.¹⁴² In his interim report of 1993 the expert noted that many of his recommendations were acted upon but again concluded that the system has reached a critical crossroad as it has grown exponentially over the past decade through a process of 'cumulative incrementalism rather than planned evolution' and once again forwarded suggestions for improvement and stressed the need for consolidating the TMBs.¹⁴³

Professor Anne Bayefsky has been the persistent writer on the improvement of the system. In her report of April 2001, for example, she forwarded a number of suggestions for reform.¹⁴⁴ She assumed that proposals that do not require amendment or radical actions are more easily accomplishable.¹⁴⁵ She, however, stressed that these recommendations are 'inevitably bandaid solutions':

Lasting solution demand a reorganization of the implementation mechanism at the international level ... The system will remain inefficient and inadequate in the absence of consolidation of the treaty bodies, and consolidation will require amendment.¹⁴⁶

¹³⁸ Initial report (n 19 above) para 1-3.

¹³⁹ Initial, Interim and Final Reports (n 19 & 50 Above).

¹⁴⁰ UN Doc, CHR (E/CN.4/1998/85 and E/CN.4/2000/98).

¹⁴¹ Initial, Interim and Final Reports (n 19 & 50 Above).

¹⁴² Initial Report (n 19 above) para 8-25.

¹⁴³ World Conference on Human Rights, A/CONF.157/PC/62/Add.11/Rev.1 22 April 1993 para 1&3.

¹⁴⁴ Bayefsky (n 65 above).

¹⁴⁵ Bayefsky (n 65 above) 8 & 9.

¹⁴⁶ Bayefsky (n 65 above) 9.

Recently, important actors have also noted the persistent problems with the UNHRTS monitoring mechanisms. Proposals were thus made to improve the situation. The most significant of these was the UN Secretary-General report that suggested TMBs to craft a more coordinated approach to their activities and standardise their varied reporting requirements. It also floated the proposal to enable states to submit a single national report with regard to their possible parallel obligations under the core human rights treaties.¹⁴⁷ In his recent report the Secretary-General again re-emphasised the need to streamline and strengthen the TMBs, and called for implementation of harmonised guidelines on reporting to all TMBs, so that the system can operate as a unified one.¹⁴⁸ Still further calls for re-organisation were made very recently. In May 2005, the OHCHR adopted its 'Plan of Action – Protection and Empowerment'.¹⁴⁹ While endorsing the procedural efforts put into drafting of harmonised reporting guidelines, the Action Plan called TMBs to begin functioning more as a unified system.¹⁵⁰

Elements of further consolidation were made more explicit when the UNHCHR acknowledged that a USTMB is worth of consideration.¹⁵¹ Even if the UNHCHR admitted the challenges a USTMB would entail, she nevertheless stressed the expected advantages, including: 'authority and visibility, potential for prioritization of action needed at country-level to comply with human rights obligations, more efficient use of financial and human resources, and greater coherence and consistency of legal interpretation and working methods.'¹⁵² To raise discussions the OHCHR then set a forum for online debate at the end of 2005 on possibility of consolidating the TMBs.¹⁵³

In addition, one Expert Workshop was conducted at the University of Nottingham, which assessed the services of TMBs in the implementation of human rights, challenges facing the current system and the challenges for current reform efforts. The workshop also identified reform options and discussed some important elements that the reform initiative should consider.¹⁵⁴ Similarly, the OHCHR organised two

¹⁴⁷ UN Secretary-General 'Strengthening of the United Nations: An Agenda for Further Change' 2002, A/57/387.

¹⁴⁸ Report of the Secretary-General 'In Larger Freedom: towards development, security and human rights for all' - A/59/2005.

¹⁴⁹ Plan of Action, (n 40 above) .

¹⁵⁰ Plan of Action, (n 40 above) para 99.

¹⁵¹ Statement of Ms Louise Arbour (n 41 above).

¹⁵² Statement of Ms Louise Arbour (n 41 above).

¹⁵³ www.portal.ohchr.org

¹⁵⁴ Expert Workshop (n 52 above).

expert brainstorming meetings *inter alia* on possibility of consolidating the TMBs.¹⁵⁵ Suggestions on the nature of the reform are coming from different actors but mainly from influential NGOs working in the field of human rights.¹⁵⁶

On March 2006 the UNHCHR issued a 'Concept Paper' briefly outlining modalities for a USTMB.¹⁵⁷ The Concept Paper has been circulated to TMBs, state parties, UN partners and NGOs. An inter-governmental meeting is scheduled in May 2007 to consider the proposal.¹⁵⁸ The Concept Paper is not elaborated but a mere starting point for further discussion.¹⁵⁹ The following chapter thus analyses in what form or feature the USTMB proposed by the Concept Paper could maintain the strengths of the current monitoring mechanism while curing the persistent weaknesses.

¹⁵⁵ First and Second Brainstorming Meetings (n 52 & 53 above).

¹⁵⁶ Some of these are Amnesty International, Baha'i International Community, Federation Internationale des Ligues des Droits de l'Homme (FIDH), Human Rights Watch (HRW), International Commission of Jurists (ICJ), NGO group on the CRC, World Organisation against Torture (OMCT), The International Movement Against All Forms of Discrimination and Racism (IMADR), International Service for Human Rights (ISHR), and IWRAW - Asia Pacific.

¹⁵⁷ Concept Paper (n 7 above).

¹⁵⁸ Opening address by Mr Alessio Bruni (Treaty Implementation Team Leader) to CERD 69th session (31 July – 18 August 2006). Available at http://www.ohchr.org/english/bodies/cerd/docs/statement_310706.doc (accessed 15 September 2006).

¹⁵⁹ First Brainstorming Meeting (n 52 above) 6.

CHAPTER THREE

ANALYSING USTMB AS A REFORM OPTION

3.1 Why USTMB: The prominence of USTMB as a reform option

Initiatives to improve the UNHRTS monitoring mechanism have been taken since the 1980s and compliance with the reform recommendations has been fairly encouraging.¹⁶⁰ Many of the reforms previously envisaged have, however, assumed ‘accomplishment’ as the yardstick such that improvements not requiring formal amendment were supported, as they were assumed easily accomplishable.¹⁶¹ There was a belief that further careful consideration was needed before consolidating the seven TMBs into one and that priority should be given to those reforms that could be achieved in the short to medium term.¹⁶² Experts of the system, however, agree that taken alone reform recommendations that do not require fundamental restructuring of the monitoring mechanism are inevitably bandaid solutions. In his initial report the independent expert, for example, noted:

When individual proposals are made for the amendment of one of the treaties a common, although often unstated, response is to assume that the process is too complex, too time consuming and too uncertain of receiving unanimous support to warrant being undertaken. Up until now there may have been good grounds for making such an assumption. In the future, however, the pressures for rationalization of the system and for appropriate measures required to ensure its effective functioning may be so great as to necessitate serious consideration being given to the making of amendments.¹⁶³

It is relevant to note in the present context that, only a few years ago, such proposals [consolidating the TMBs] would have been widely considered to have been much too radical to warrant serious discussion. The turning point seems to have come once the difficulties the system was confronting reached the point where less dramatic solutions appeared pale and ineffective.¹⁶⁴

The independent experts observation was voiced in 1989, thus it remarked that previously done reforms were not sufficient. Twelve years later in 2001 insiders of the system again noted that the system would remain ineffective unless a major reform is carried out.

¹⁶⁰ Final Report (n 50 above) para 4.

¹⁶¹ Bayefsky (n 46 above) 8.

¹⁶² UN Doc (E/CN.4/2002/110) para 15.

¹⁶³ Initial Report (n 19 above) para 193.

¹⁶⁴ Initial Report (n 19 above) para 181.

Lasting solutions demand reorganisation of the implementation mechanism at the international level
...The system will remain ineffective and inadequate in the absence of consolidation of treaty bodies
...¹⁶⁵

In the assessment of the above authorities previously recommended reforms have been fairly acted upon and ended up with positive results.¹⁶⁶ However the underlying challenges remained unresolved.¹⁶⁷ Thus five years later once again, this time with more vigour and seriousness, the OHCHR issued the Concept Paper aimed at consolidating the TMBs. In 2006 in the assessment of the OHCHR:

The proposal is also based on the recognition that, as currently constituted, the system is approaching the limits of its performance, and that, while steps can be taken to improve its functioning in the short and medium term, more fundamental, structural change will be required in order to guarantee its effectiveness in the long term.¹⁶⁸

The above remarks simply indicate that much has been done to reform the system without signifying amendment but yet there are problems that couldn't otherwise be addressed unless the treaties are amended to allow the reorganisation of the monitoring mechanism.¹⁶⁹

3.2 Assessing a USTMB as a reform option

The attraction of USTMB as a reform option is considerable.¹⁷⁰ As has been noted by many experts, the existing system is 'untidy' in virtually every respect.¹⁷¹ Treaty body after treaty body was created, without a relationship to the UNHCHR, and without a relationship to each other.¹⁷² The results according to Bayefsky have been 'a burgeoning reporting burden, duplication of procedures, little effort to synchronise substantive outcomes, and rudimentary follow-up processes and responsibilities'.¹⁷³

¹⁶⁵ Bayefsky (n 46 above) 9.

¹⁶⁶ Interim and Final Reports (n 50 above) para 1 & 4 respectively.

¹⁶⁷ Concept Paper (n 7 above) para 21.

¹⁶⁸ Concept Paper (n 7 above) para 27.

¹⁶⁹ Bayefsky (n 43 above).

¹⁷⁰ Initial Report (n 7 above) para 179.

¹⁷¹ Initial Report (n 7 above) para 179.

¹⁷² Bayefsky (n 43 above).

¹⁷³ Bayefsky (n 43 above).

Therefore, it is instinctively appealing to contemplate its replacement by a system that would, *inter alia*, standardise the various procedures to be followed; reduce the volume of documentation; eliminate the multiple reports and accordingly reduce the overall reporting burden imposed on states; eliminate overlapping competences; greatly reduce the likelihood of inconsistent interpretations; presumably operate on the basis of assured funding; and one that facilitates the emergence of a competent supervisory body potentially enjoying both considerable credibility and higher visibility.¹⁷⁴ How would a USTMB bring about such solutions is briefly analysed below.

According to the Concept Paper the proposed reform, unlike the current system of seven part-time TMBs, is to be 'a unified', 'standing' body with of 'permanent' and 'full-time professionals'. The key terms used in the proposal are not provided with explanations. However, taken within their context, 'unified' is intended to mean that the USTMB would be a single institution though with the possibility of internal division or specialisation; 'standing' is to imply that it would function the whole year continuously while 'full-time professionals' means that appointees would not hold other responsibilities and be dedicated to the works of the body throughout a year. Thus a USTMB would be available to victims any time and could respond rapidly to grave violations.¹⁷⁵

3.2.1 Strengths

There is a consensus among the experts of the UNHRTS that a USTMB has certain advantages over the existing monitoring mechanism.

A USTMB would inevitably be more visible than the existing treaty bodies, and would be able to make its procedures, recommendations and decisions better known at the national level.¹⁷⁶ Unless the international human rights treaty system functions and is perceived as a unified single entity, the lack of visibility, authority and access that affects the current system will persist.¹⁷⁷ Enhanced visibility, in tandem with open and transparent procedures, would also arouse media interest, and conclusions and recommendations adopted by a USTMB on the overall human rights situation in a country are likely to attract more media attention than conclusions and recommendations adopted on the implementation of a single treaty.¹⁷⁸

¹⁷⁴ Initial Report (n 19 above) para 179.

¹⁷⁵ Concept Paper (n 7 above) para 27.

¹⁷⁶ Concept Paper (n 7 above) para 33.

¹⁷⁷ Concept Paper (n 7 above) para 27.

¹⁷⁸ Bayefsky (n 43 above). See also Concept Paper (n 7 above) para 33.

As states implement human rights obligations in an integrated rather than treaty-specific way, and individuals and groups do not enjoy their human rights or experience violations along treaty lines, a USTMB would provide a framework for a comprehensive, crosscutting and holistic approach to implementation of the treaties.¹⁷⁹ In contrast to the current system of seven TMBs, which consider reports submitted in accordance with different periodicities, a USTMB could introduce a single report thus alleviating the reporting burden on states.¹⁸⁰ A single reporting by each state party on implementation of all treaty obligations could occur once every three to five years, providing state parties and partners with the opportunity to carry out in-depth, holistic, comprehensive and cross-cutting assessments and analysis of a state's human rights performance against all relevant obligations.¹⁸¹ After all, if the numbers of overdue reports were submitted, the present TMBs could not deal with them in a timely manner.¹⁸² A USTMB, however, at least due to its permanency, would have more time to consider reports timely and thus avoid the need for updating information.

A single reporting cycle monitored by a USTMB would provide a framework for prioritisation of action needed at the country level to comply with human rights obligations; and reporting could be aligned with national processes and systems such as the development and implementation of national human rights action plans and other reporting obligations of a state party.¹⁸³ As a result of comprehensive examination of a state party's implementation of all its treaty obligations, reporting to a USTMB would stimulate more effective mainstreaming of the rights of specific groups or issues in the interpretation and implementation of all human rights treaty obligations, thereby making these more visible and central.¹⁸⁴ It would also facilitate state parties' and other national stakeholders' consideration of the whole range of relevant human rights concerns and legislative, policy and program measures required.¹⁸⁵

¹⁷⁹ Concept paper (n 7 above) para 28.

¹⁸⁰ TA Buergethal 'A Court and Two Consolidated Treaty Bodies' in A Bayefsky (ed) *The UN Human Rights System in the 21st Century* (2000) 300.

¹⁸¹ Bayefsky (n 43 above).

¹⁸² Bayefsky (n 43 above).

¹⁸³ Concept Paper (n 7 above) para 28.

¹⁸⁴ Concept Paper (n as above).

¹⁸⁵ Concept paper (n 7 above) para 29.

By providing a complete picture of the human rights priorities, this holistic approach would also facilitate the work of stakeholders, such as NGOs, NHRIs and other parts of civil society at the national level, and make it easier for them to integrate these recommendations into their national programs.¹⁸⁶ Partners would benefit from their different areas of human rights expertise and develop a common approach to human rights issues and requirements at the national level.¹⁸⁷

A USTMB would ensure a consistent approach to the interpretation of the provisions in the treaties, which are similar or overlap substantively; and the complainants would also have the opportunity to invoke substantively overlapping or similar provisions of more than one instrument, thereby enhancing consistence and coherence in the interpretation of substantively similar provisions in the different instruments.¹⁸⁸ Similarly a USTMB would also guarantee consistency and clarity of General Comments and Recommendations and, in that way, strengthen the interpretation of treaty provisions.¹⁸⁹ The output of a USTMB would strengthen appreciation of the indivisibility of human rights obligations.¹⁹⁰

Depending on factors such as the number of treaties ratified, a USTMB could considerably extend the period of the dialogue with a state party by combining the seven dialogues currently operating independently into one. An in-depth session with the USTMB rather than seven would transform the dialogue into a strategic and continuous tool for monitoring human rights performance against all obligations.¹⁹¹ State parties would be encouraged to send expert delegations including all government ministries having responsibility for the full range of human rights to respond to detailed questions and benefit from the expertise of TMB members.

An extension of the period of dialogue would provide stakeholders new opportunities to contribute information and exchange views with the USTMB. Enhanced participation, information and exchange of views on all human rights obligations would result in an overall package of more precise, clear and

¹⁸⁶ Bayefsky (n 43 above).

¹⁸⁷ Concept Paper (n 7 above) para 29.

¹⁸⁸ Bayefsky (n 43 above). See also Concept Paper (n 7 above) para 30.

¹⁸⁹ Bayefsky (n 43 above).

¹⁹⁰ Concept paper (n 7 above) para 30.

¹⁹¹ Concept Paper (n 7 above) para 31.

practical recommendations; and improved dialogue, engagement and output would encourage greater participation of civil society and other actors, thereby facilitating implementation at the national level.¹⁹²

Permanency of the USTMB is expected to help develop coherent, innovative and flexible approaches to monitor implementation of the treaties.¹⁹³ Full-time members would enable expeditious adjudication of individual complaints and this would heighten the impact of views adopted in the context of complaints procedures, and encourage their wider use by rights-holders. Similarly, a USTMB would allow strengthening of follow-up capacity, by increasing the potential and feasibility for follow-up missions by the experts.¹⁹⁴ In addition, a USTMB could be more flexible than the current bodies in respect of the timing and venue of its sessions such that it could group the consideration of the reports of several state parties from one region over the course of a few weeks, thereby enhancing regional peer pressure to engage with the system. It could convene sessions in regions, thereby strengthening the visibility of the system and ensuring its accessibility.¹⁹⁵

The permanency of the USTMB would allow for the establishment of stronger links with other human rights bodies, such as the special procedures mechanisms or regional human rights systems. It would also be able to coordinate and establish links with political bodies more readily than the seven part-time TMBs.¹⁹⁶ A comprehensive and overall assessment of the implementation of international legal obligations under human rights treaties for countries in one single document rather than in seven separate documents would more likely attract heightened attention from political bodies such as the Human Rights Council or the Security Council.¹⁹⁷

3.2.2 Weaknesses

It would be wrong to assume that there is a consensus on all the above-mentioned advantages of the USTMB over the existing monitoring system. In addition, as attractive as it may be, any proposal for USTMB also inhibits weaknesses and some have already been identified. It is noted that a USTMB cannot secure the variety of expertise represented on the existing range of committees; the single

¹⁹² Concept Paper (n 7 above) para 31.

¹⁹³ Concept Paper (n 7 above) para 32.

¹⁹⁴ Concept Paper n as above.

¹⁹⁵ Concept Paper (n 7 above) para 34.

¹⁹⁶ Bayefsky (n 43 above).

¹⁹⁷ Concept Paper (n 7 above) para 36.

report that a USTMB could introduce might still be superficial and would probably be presented by one or two representatives of states concerned who would have little, if any, detailed knowledge of some of the relevant fields; concerns of special right holders such as children, women and migrant workers might simply be glossed over and that the supervisory process would no longer serve to galvanise those sectors of government and the community dealing with, or interested in, a specific issue.¹⁹⁸

Moreover at present the aggregated meeting time of the seven TMBs is around 57 weeks. Thus even a USTMB cannot have longer time unless it maintains a system of chambering.

According to Alston the present decentralisation of functions provides a form of insurance so that if one TMB is failing to function effectively others might be able to compensate.¹⁹⁹ Thus reliance upon a USTMB would be, in this regard, like putting all eggs into a single basket.

3.2.3 The strength-weakness balance equation: Is USTMB worth pursuing?

Having seen the above account on advantages and disadvantages of a USTMB, it inevitably seems that USTMB would have more advantages than disadvantages. Though the above remarks on the possible weaknesses of a USTMB are valid there is however a possibility that the way the USTMB is structured could remedy them.

In this regard acknowledging what TMBs have already achieved must be the first step in designing the USTMB. TMBs were not originally intended by state parties to have 'teeth'.²⁰⁰ Yet, over their lifespan, TMBs' contribution to global human rights accountability, and the support they can provide to states at the national level human rights implementation, has gradually strengthened.²⁰¹ These, and other achievements within the UNHRTS, need to be preserved. Particularly, the USTMB should not endanger the specificity that have emerged through TMB practice nor jeopardise the depth and quality of protection it currently helps to secure for rights-holders in different spheres.²⁰² Subsequent sections of this chapter deal with how the architect of the USTMB should strike this balance.

¹⁹⁸ Initial Report (n 19 above) para 182.

¹⁹⁹ Initial Report (n 19 above) para 183.

²⁰⁰ Banton (n 112 above) 57.

²⁰¹ Expert Workshop (n 52 above) 4.

²⁰² Expert Workshop (n as above).

3.3 Views of relevant actors on USTMB

Reform that attempts to consolidate TMBs inevitably requires amendment of the treaties, which can only be done when states as power holders are willing. There is no comprehensive study that explored the views of state parties.²⁰³ The Concept Paper was circulated to all stakeholders on 20 March 2006 and the OHCHR organised a briefing for states parties on the concept paper on 5 April 2006 and on 6 April 2006 for NGOs and specialised agencies.²⁰⁴ The seventeenth session of the International Criminal Court (ICC) held in Geneva on 10 and 11 April 2006, was also briefed.²⁰⁵ But largely states are a bit reserved to identify a position in regard to the proposal.

In different ways, however, different actors including some states have already given varied views that can broadly be categorised as variants of pros and cons. The reasons for the standing they have taken almost fits in above mentioned weaknesses and strengths of a USTMB.

One report of the UN Secretary General, for example, shows different views of some selected countries, specialised agencies, Inter-governmental Organisations (IGOs) and NGOs and interested persons.²⁰⁶ The Australian Government for example believed that further careful consideration was needed as to the suggestion to consolidate the TMBs into one; the Government of Canada expressed caution as to any suggestion that the TMBs be consolidated; the Government of Finland supported the USTMB as a solution and the Governments of Cyprus and Israel welcomed the proposal of the independent expert to convene a small expert group to examine modalities for the consolidation of the TMBs.²⁰⁷

In the recently held brainstorming meeting, statements delivered on behalf of the African and Asian Groups made it clear that these two Groups were not in favour of USTMB.²⁰⁸ This view was echoed by others, and the proposal to create a USTMB found generally little support, while some delegations took the position that they saw great merit and potential in the proposal and wanted to see it discussed

²⁰³ The OHCHR has planned to conduct a meeting of government representatives to discuss the proposed reform in May 2007, a meeting expected to show the standing of states.

²⁰⁴ UN Doc (HRI/MC/2006/6), 'report on the implementation of recommendations of the Fourth Inter-Committee Meeting and the Seventeenth Meeting of Chairpersons' para 16.

²⁰⁵ UN Doc (HRI/MC/2006/6) (n as above).

²⁰⁶ UN Doc (E/CN.4/1998/85) 'report of the Secretary-General on effective functioning of bodies established pursuant to the United Nations human rights instruments' paras 16 - 21.

²⁰⁷ UN Doc (E/CN.4/1998/85) (n 206 above) 16-21.

²⁰⁸ Second Brainstorming Meeting (n 53 above) 5.

further.²⁰⁹ Still others made it clear that their respective countries did not have a position on the proposal as yet and needed more time, background information and analysis before taking a position on this far-reaching proposal.²¹⁰

Irrespective of the positions on the USTMB, the Concept Paper was nevertheless welcomed as a valuable contribution to further discussions on TMBs reform.²¹¹ It was expressed that the Concept Paper contained many elements, which could greatly enhance the quality of the discussion on TMBs reform, though some participants called the proposal aspirational and ambitious.²¹²

From NGO community, the Inter-Church Committee for Refugees supported the idea of a USTMB and favored the establishment of a court of human rights with non-threatening 'advisory' jurisdiction.²¹³ The NGO Group for the Convention on the Rights of the Child, a network of more than 70 NGOs which facilitates the promotion, implementation and monitoring of the Convention, however, demanded the withdrawal of the USTMB as a proposal and replace it with a more sophisticated approach, genuinely focused on the enhancement of the protection of rights holders.²¹⁴

The TMBs themselves seem to oppose the idea of USTMB. In 2003 TMBs unanimously opposed a single comprehensive state report among other reasons for its perceived link to consolidation of the TMBs.²¹⁵ Some years later when USTMB is echoed by the OHCHR TMBs again showed reluctance. While supporting the main objectives of the reforms, the CERD Committee was of the view that the establishment of a USTMB might not be the most effective way to address the weaknesses of the current system; and members expressed concern that the establishment of such a body might result in the marginalisation of certain TMBs including the CERD Committee.²¹⁶ Similarly the CESCR Committee Chairperson said that the Committee was anxious not to lose what it had achieved thus

²⁰⁹ Second Brainstorming Meeting (n 53 above) 5.

²¹⁰ Second Brainstorming Meeting (n as above).

²¹¹ Second Brainstorming Meeting (n as above).

²¹² Second Brainstorming Meeting (n as above).

²¹³ UN Doc (E/CN.4/1998/85) (n 207 above) 20.

²¹⁴ The NGO Group for the Convention on the Rights of the Child, 'Statement to the Fifth Inter-Committee Meeting' 20 June 2006. Available at http://www.crin.org/docs/NGOgroup_2006_interCommittee_statement_final.doc (accessed 15 August 2006).

²¹⁵ Expert Workshop (n 52 above) 26.

²¹⁶ UN Doc (CERD/C/SR.1726) '*CERD Committee Sixty-seventh session, Summary Record of the 1726th Meeting*' para 3.

far.²¹⁷ Individually some Committee members however voiced their support to consolidation of the TMBs.²¹⁸ The CMW Committee also forwarded similar concern, while at individual level Committee members voiced pro and cons.²¹⁹

The OHCHR has sought further views and ideas to inform the development of its reform proposals. One medium through which this was done was via the online discussion on TMB reform, hosted for five weeks from November 2005.²²⁰ Among the 442 participants of the online forum, which included TMB experts, representatives of United Nations specialised agencies, funds and programs, NGOs and other stakeholders there was support for TMB reform, and also a mixed views between those backing, expressing caution over, and rejecting TMB unification.²²¹

Therefore, It can be concluded that there is a mixed views on the proposed USTMB. The academia is divided in to pro and cons though there is an area of agreement that USTMB would inevitably have advantages over the current system. States have so far remained silent though some have expressed their support while others are sceptical. The TMBs themselves and many NGOs, needless to mention the parties with vested interests, seem to reject the proposal. Two commentators have commented that such opposition from TMBs and NGOs is normal as it affects their interests and such objection should not hinder the initiative.²²²

3.4 Moving forward – opting for USTMB: Resolving the challenges ahead

3.4.1 Political challenges

At the centre of the potential challenges for the USTMB is securing the political will of states. Lack of political will has made the system to be born with inherent weaknesses: 'toothless' to use the frequently used term.²²³ And many states have enjoyed its drawbacks such that fortifications of the

²¹⁷ UN Doc (E/C.12/2005/SR.47) 'CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting' para 5.

²¹⁸ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting, E/C.12/2005/SR.47 para 8-43.

²¹⁹ CMW Committee, Third session, Summary Record of the 23rd Meeting, CMW/C/SR.23 para 8.

²²⁰ For full record of the online discussion and summaries see <http://portal.ohchr.org/tbforum/mvnforum/index>.

²²¹ Rreport on the implementation of recommendations of the Fourth Inter-Committee Meeting and the Seventeenth Meeting of Chairpersons, HRI/MC/2006/6 para 16.

²²² Bayefsky (n 43 above); Final Report (n 50 above) para 96.

²²³ Expert Workshop (n 52 above) 9.

implementation machinery will be met with significant resistance.²²⁴ It is beyond the mandate of this study to deal with how this challenge should be resolved. Suffice to say that much need to be done in this area.

3.4.2 Legal challenges

A reform of this magnitude demands amendment of the seven treaties and their protocols.²²⁵ From one expert meeting three was of amendments were suggested: first, a short amending protocol, reallocating certain TMB functions to a newly consolidated body could be promulgated; second, the human rights treaties themselves could be amalgamated and third a meeting of states parties to the UN human rights treaties could be convened and an amendment proposed, this time with votes allocated according to the number of each state's treaty ratifications.²²⁶

Providing for amending protocol has been frequently proposed as relatively simpler way to go about the legal challenges.²²⁷ The proposed USTMB should be shaped in the form of a protocol, which may be called '*Protocol for Monitoring Mechanism of International Human Rights*', which need to be adequately elaborated and articulated such that it would enable states to see what is at stake. Once it is made sure that the 'Protocol' could get acceptance by a certain number of states such that a change is advisable, then in accordance with the amendment provision of each treaty or each relevant OP, states could be asked to annul the existing monitoring system.²²⁸

The amendment states should pass need to clearly note that:

1. The monitoring functions assumed by the seven TMBs would be assumed by the USTMB provided in the '*Protocol for Monitoring Mechanism of International Human Rights*'; and
2. The USTMB would have jurisdiction or power over state parties on the provisions that they have accepted with due regard to their reservations.

²²⁴ International Law Association (n 13 above).

²²⁵ Initial Report (n 19 above) para 193.

²²⁶ Expert workshop (n 52 above) 9 & 10.

²²⁷ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting CERD/C/SR.1726 para 27.

²²⁸ Final Report (n 50 above) para 94.

Parallel to the above amendments, once the box is opened, exclusively imperative substantive amendments could be carried out. In particular the overlapping provisions of the treaties should be highlighted and in the context of the establishment of the USTMB, and states that have put reservation for particular provision of a treaty while identical or substantially similar provision in other treaty is accepted could be asked to withdraw their reservations.²²⁹ In anticipation of a challenge in regard to selection of members of the USTMB due to different ratification patterns, an amendment of the existing election mechanism of TMBs' members is very imperative. An appropriate amendment, which must be provided under the 'Protocol for Monitoring Mechanism of International Human Rights' is suggested *infra* in this chapter.

A challenge will be the case of the states that would oppose the amendment. The old system cannot be retained so that it will continue serving the dissenting states. Thus they might escape out of the human rights enforcement net and unfortunately this could be a tempting excuse for many states to relinquish any sort of obligation in relation to enforcement of international human rights. Depending on some factors, such as the number of dissenting states; whether they have huge population; existence of a working domestic human rights protection system and availability of other means such as economic incentives or disincentive to draw them in the system, the decision to opt for USTMB could nevertheless be followed.

3.5 Underlying principles in shaping the USTMB

3.5.1 Maintaining the current monitoring mechanism

It seems that the reform initiative to organise the present TMBs into a USTMB would not tamper with current monitoring mechanisms, namely state reporting, individual and interstate complaints and inquiry (visit) procedures.²³⁰ Though the monitoring mechanisms have been strongly criticised,²³¹ many experts of the system nevertheless agree that the underlying principles are valid.²³² Thus it is well assumed that the USTMB would continue these procedures, albeit with permissible improvements but without entailing substantive amendment.

²²⁹ Tistounet (n 88 above) 383-401.

²³⁰ Final Report (n 50 above) para 9.

²³¹ International Law Association (n 13 above).

²³² Alston (n 60 above) 501-527.

3.5.2 Financial implications of the USTMB

The USTMB would be a permanent institution and staffed with permanent staff whatever they would be named.²³³ In relation to this point and considering the fact that the UN as a whole is facing serious financial shortcomings, the financial implication of a USTMB is important.²³⁴ Though it has been assured that the goal of introducing a USTMB is not to achieve cost savings but to ensure optimum protection for rights-holders,²³⁵ as far as its financial implications, the proposed USTMB is put on the safe side as its estimated costs wouldn't be substantially different from the costs of the existing system.²³⁶

3.6 Structural options for the USTMB

A USTMB should not give the impression that it would be one body with no division or specialisation of whatsoever. Though such a model could be an option with an advantage of consistency, it would not however address the challenges to the current system arising from its workload and may worsen backlogs. In light of existing TMBs' experiences, a single but internally undivided body might be less efficient than a chamber-based structure.²³⁷ Thus different ways of chambering have been suggested and the most prominent ones are chambering the USTMB along treaty-specific lines, cross-treaty thematic lines, functional lines, regional lines and other variant forms.²³⁸

3.6.1 Chambering along treaty-specific lines

Under this model the USTMB would be structured along lines of the seven treaties and each 'sub-USTMB' would carry out the functions entrusted upon it by the respective treaty and vis-à-vis the respective state parties. This mode of organising the USTMB is criticised as re-creating the existing 'untidy' system under a superficial one house.²³⁹ The benefits that should flow from the establishment of USTMB may be compromised, as this method would reflect the separations and divisions in the

²³³ Concept Paper (n 7 above) para 27.

²³⁴ Evatt (n 38 above) 461.

²³⁵ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting E/C.12/2005/SR.47 para 3.

²³⁶ Bayefsky (n 43 above). See also Concept Paper: Annex 5 (n 7 above).

²³⁷ Expert Workshop (n 52 above) 8.

²³⁸ Expert Workshop (n 52 above) 8.

²³⁹ Second Brainstorming Meeting (n 53 above) 6.

current system.²⁴⁰ It would not also achieve the purpose of mainstreaming crosscutting human rights themes that a USTMB is hoped to bring.²⁴¹

Nevertheless this model would still have threshold advantages than the existing system. To begin with, even if the present TMBs are maintained within the USTMB, they will inevitably get advantage from the fact that they will be standing and staffed with permanent experts. This will provide them with extended time and it would have the advantage of allowing for easy distribution of workload and maintaining specificity of each treaty. Though lesser when compared with the other available chambering options, under this model the mere fact that they would be under one house (USTMB) would give them relatively higher visibility and profile and also enable them to develop a higher level of coordination and exchange of information. Assuming that states would adopt the 'core document' and 'treaty specific' document, this model would make cross referencing practical as the 'treaty specific' report of a state can easily be obtained from a nearby body.

The important advantage of this model, however, is its simplicity as related to the appointment of the experts. Consolidation of the existing TMBs will inevitably entail a challenge related to appointment of the experts due to different ratification patterns of the treaties. As the current TMBs will be maintained, under this model state parties could simply continue electing experts for each treaty to which they are party.

3.6.2 Chambering along cross-treaties thematic lines

Under this option, chambers could be structured along clusters of rights, such as non-discrimination, rule of law, etc.²⁴² An advantage would be the reduced risk of inconsistencies in interpretation of overlapping provisions; however, clusters may be difficult to define and overlap between chambers would remain, and there might be undue emphasis on certain rights to the neglect of others.²⁴³ This model could also overlap with the above-discussed model and tend to recreate the existing system.

²⁴⁰ Concept Paper (n 7 above) para 43.

²⁴¹ Bayefsky (n 43 above).

²⁴² Expert Workshop (n 52 above) 8.

²⁴³ Concept Paper (n 7 above) para 44.

3.6.3 Chambering along functional lines

Under this model the USTMB would be chambered along three functional lines of the existing TMBs – a body for considering state reports; a body for adjudicating complaints and a body carrying out inquiries and follow ups. One proposal suggested that consideration of state report and inquiry be merged in one body.²⁴⁴ Another proposal also suggested that the existing TMBs be consolidated into two TMBs and one ‘United Nations Court of Human Rights’.²⁴⁵

By permitting a concentration of specialist expertise, functionally based chambers might promote quality in the performance of USTMB activities, such as adjudications under the complaints procedures. At the same time, it may be suggested that functional chambers would forego the benefits that TMBs currently derive from their members’ simultaneous engagement in both promotion and implementation activities.²⁴⁶ But arguably, this drawback might be mitigated, at least in part, by an appropriate revision of TMB membership criteria and election processes.

Two points require attention in relation to this model. First, where should responsibility lie for interpretation of the human rights treaties, including the elaboration of General Comments? And second, would a single adjudicatory body be given binding jurisdiction? In regard to the first point it is not imperative that these functions be given to one ‘chamber’ only. They can be shared and be made the product of the three chambers meeting together and with other relevant external agents as well. In regard to the second point, while ‘binding jurisdiction’ would increase effectiveness and be likely to benefit rights-holders, it might plausibly also attract opposition from states.

3.6.4 Chambering along regional lines

This option would allow for development of expertise relating to human rights issues in a particular region and could strengthen relationships with regional systems and partners. However, there could be a risk of inconsistencies among chambers. In addition, this modality might duplicate the work of regional systems,²⁴⁷ and may result in the emergence of regional rather than universal standards.²⁴⁸

²⁴⁴ Bayefsky (n 43 above).

²⁴⁵ Buergenthal (n 180 above) 300 & 301.

²⁴⁶ Expert Workshop (n 52 above) 8.

²⁴⁷ It is not within the scope of this study to investigate whether the present ‘quasi-federal’ nature of the human rights dispensation where there is international in addition to regional and national dispensations be maintained or not.

²⁴⁸ Second Brainstorming Meeting (n 53 above) para 16.

3.6.5 Other variant proposals

There are also other variant proposals. One CESCR Committee member, for example, proposed two options for USTMB.²⁴⁹ The first option would be to merge only the Human Rights Committee and the CESCR Committee replacing them with a professional standing body that would review state party reports and individual complaints, including complaints on economic, social and cultural rights once the relevant OP to CESCR had been adopted. The second option would be to merge the two Committees only in respect of individual communications such that all individual communication, urgent action and interim protection procedures under all the existing treaty monitoring bodies could be concentrated in them, while leaving the consideration of State party reports to the existing Committees.

In the recently held brainstorming meeting, three TMBs forwarded their proposals focusing on the harmonisation of working methods of TMBs but all falling short of the USTMB: CERD Committee proposed the establishment of a single body dealing with individual communications; the CRC Committee proposed the creation of a permanent bureau of the chairpersons of the TMBs whereas CEDAW Committee proposed harmonized and integrated human rights treaty body system but not a unified one.²⁵⁰

3.7 Opting for the best: Establishing ‘World House of Human Rights (WHHR)’

From the available options of structuring the USTMB one forged by a combination of many seems to be the best. The statement of the UNHCHR briefly captures the merit of this option:

A unified treaty body would be less complex, more streamlined, and better known, and would act as one main door, behind which capacity for the necessary level of expertise would perhaps need to be maintained by means of separate chambers.²⁵¹

To achieve visibility of the USTMB careful selection of its name is important. A neutral name, perhaps a ‘World House of Human Rights’, a name that could embrace the three main functions could be

²⁴⁹ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting E/C.12/2005/SR.47 paras 9 & 10.

²⁵⁰ Second Brainstorming Meeting (n 53 above) para 33-38.

²⁵¹ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting, E/C.12/2005/SR.47 para 3.

appropriate.²⁵² Behind the doors of the World House and constituted along the three main functional lines of the existing system there must be three main chambers: Chamber of Human Rights Review, Dialogue and Cooperation (CHRRDC);²⁵³ Chamber of Human Rights Inquiries and Follow-ups (CHRIF) and World Court of Human Rights (WCHR).²⁵⁴

3.7.1 Division of labour and inter-relation between the three chambers

The division of labour within the 'World House of Human Rights' would be based on the three main functions assumed by the present monitoring system. A chamber would be dedicated to promotional aspect of human rights by serving a forum for review of compliance in a spirit of constructive dialogue and cooperation. State reporting thus will remain the main tool. A chamber will be dedicated to conducting inquiries, visits and also follow-ups. The third chamber will assume adjudicatory functions.

3.7.2 Chamber of Human Rights Review, Dialogue and Cooperation

The main function of the 'Chamber of Human Rights Review, Dialogue and Cooperation' would be the consideration of state reports. As has been accurately noted the objectives state reports sought to be achieved were not narrowly conceived.²⁵⁵

The disadvantage of specificity a USTMB would inhibit seems to particularly affect this Chamber. Based on the parameters of staffing provided below, this Chamber can however have three sub-chambers of five members, four of four members or five of three members each. To maintain the specificity of the current system, such sub-chambers could be allocated one for women and children's rights, one for migrant workers, and one for general rights that are contained in CCPR, CESCR, CERD and CAT. As the USTMB should be capable of absorbing the monitoring of future treaties with necessary specificity such treaties would require, means should be devised to increase the number of staffs required and their expertise.

²⁵² At any rate the name 'Committee' should be avoided as it has signified smallness of the body it represents. Similarly a 'Commission' and a 'Court' would not be accurate representatives of the three functions.

²⁵³ Any name given to this Chamber need to reflect the tenets of state reporting: review, dialogue, exchange of experiences and cooperation.

²⁵⁴ 'World Court of Human Rights' as a name could signify the elevation of the human rights protection apparatus and it might help in raising awareness of the complaint mechanism.

²⁵⁵ Initial Report (n 7 above) para 31.

There are several options this Chamber could ask for state reports. It could require states to submit an expanded core document and specific reports. The specific report need to be organised to fit the style of sub-chambering the USTMB would adopt. States would be asked to report only on the provisions that they have accepted. As an alternative the sub-chambers can seek information from states by way of periodic reports by providing each state comprehensive and integrated list of issues relating to their focus.

3.7.3 Chamber for Human Rights Inquiries and Follow-ups

This Chamber would largely carry out inquiries in accordance to the relevant treaties and OP in relation to the states that have accepted such competences of the TMBs. In addition it will also carry out follow up of recommendations of the ‘Chamber of Human Rights Review, Dialogue and Cooperation’ and the ‘World Court of Human Rights’. In so doing the Chamber will assist the other two chambers by providing relevant information by way of its inquiries and investigative visits, and remedy the lack of follow up mechanism the current dispensation is suffering from.

3.7.4 World Court of Human Rights

The Court would assume the functions of individual and interstate complaints in regard to the relevant provisions of the treaties or OPs and on states that have accepted this monitoring mechanism. The decision to empower the Court to give binding decisions is an issue that merits consideration. Some commentators have remarked that the Court should not have a binding jurisdiction and even the term ‘Court’ should not be used as it could impede adoption of the reform by states. One writer noted that the Court should not have contentious jurisdiction but rather render advisory opinion interpreting the human rights treaties and individuals would not have standing to request such opinion although in the course of time a subsequent protocol could enlarge the competence of the Court.²⁵⁶

3.8 Staffing the WHHR

Taking into consideration the availability of budget from the UN and other sources, the ‘World House of Human Rights’ need to be appropriately staffed. The Concept Paper has estimated that the costs of the existing part time monitoring mechanism which employs 115 experts on short part-time basis can recruit 27 permanent staff.²⁵⁷ One CESCR Committee member suggested a body of between 18 and

²⁵⁶ Buergenthal (n 180 above) 300 & 301.

25 or 30 members, selected on a similar basis to the International Court of Justice or the ICC.²⁵⁸ Another CESCR Committee member however noted that 20 or 30 members is a small figure, and 53, which were the number of the Commission on Human Rights, would be ideal.²⁵⁹ One writer remarked that one body (the communications panel) could have twenty-one members, enabling it to work in three panels of seven, or even four panels of five members; and the other body (the body on state reports) could be somewhat larger, but it too should be able to work in at least two panels.²⁶⁰

It seems then 47, a somewhat middle figure of the suggested numbers can at least be a starting point to the WHHR. This figure will enable the CHRRDC to have 17 members that can again form three sub-chambers, each with five members in cases need. The CHRIF would have 15 members. The WCHR would have 15 members that would enable it to seat on three chambers of five members each with the possibility of forming a larger appellate chamber. Staffing mechanism need to possess flexibility so as to accommodate new specific human rights instruments given the likelihood that these will continue to be drafted.²⁶¹ Similar approaches to that of increasing the number of judges of the ICC could be followed.²⁶²

3.9 Ways of Appointment

It has been anticipated that USTMB would inevitably face challenges *inter alia* on the issue of election of staff mainly due to different ratification patterns. When however states are willing, appropriate ways of staffing that avoid the deficiencies of existing system could be planned. One appropriate solution is for member states to agree to totally delegate election of members to the UNHCHR. In the international human rights context, the General Assembly or a conference of state parties is not necessarily the right forum for addressing questions of merit and diversity in a depoliticised fashion.²⁶³ In contrast, the UNHCHR's office may be viewed as an official institution that is at arm's length from states and that is mandated to seek to represent a kind of transnational interests in the protection and

²⁵⁷ Concept Paper (n 7 above) Annex 5.

²⁵⁸ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting E/C.12/2005/SR.47 para 27.

²⁵⁹ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting E/C.12/2005/SR.47 para 43.

²⁶⁰ Buergenthal (n 180 above) 300 & 301.

²⁶¹ Expert Workshop (n 52 above) 9.

²⁶² Statute of the ICC, art 36.

²⁶³ Scot (n 86 above) 433.

promotion of human rights.²⁶⁴ There are strategic benefits in associating a candidate identification process with the UNHCHR such that the UNHCHR, as a single institution, can better approximate the centralized coordination function that the current diffused election process lacks and it can develop a more coherent view of the needs of the USTMB.²⁶⁵

In this regard one writer noted:

The UN HCHR seems institutionally best-situated to assume the task of diversity of promotion. It is proposed that she consider establishing a global search process for potential candidates. To this end, she could set up an Eminent Persons' Group (EPG) to act in an advisory capacity and assist, as needed, in interactions with governments. She would receive suggestions of potential candidates from any persons, group, or organisations. A small number would be identified as desirable candidates based on their individual capabilities and also on their contribution to institutional diversity of experience and expertise.²⁶⁶

However, member states would defiantly object to such way of selection. Thus a modest version is to allow, in a joint conference, state parties to elect members of the USTMB from a pool of nominees prepared by the OHCHR. In such a case states would have the number of votes equivalent to the number of treaties and relevant OPs they have ratified.

Another often-recommended way is to adopt the mode of appointment of Judges of the ICJ or the ICC.²⁶⁷ The yardstick of any way of appointment should however be its ability to enrol people of expertise to the USTMB. Though it will not be welcomed by states, any means that gives member states a complete monopoly of appointments should be avoided.

²⁶⁴ Scot (n as above).

²⁶⁵ Scot (n 86 above) 423.

²⁶⁶ Scot (n as above).

²⁶⁷ CESCR Committee Thirty-fifth session, Summary Record of the 47th Meeting, E/C.12/2005/SR.47 paras 10 & 27.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

At present in the heart of the UN's human rights dispensation lie the UNHRTS composed of seven major human rights treaties, six Ops and seven TMBs. Largely as a product of the Cold War era the UNHRTS monitoring mechanism was borne with its weaknesses which have been voiced in appealing tones: a system facing 'implementation crisis of dangerous proportion' and 'depreciated by chronic levels of non-compliance';²⁶⁸ a system that 'needs a complete overhaul'²⁶⁹.

As much as the criticisms, the UNHRTS has also been the receipt of wealth of recommendations that are fairly acted upon.²⁷⁰ In spite of such recommendations and gradual improvements however, the system is approaching the limits of its performance, and that, while steps can be taken to improve its functioning in the short and medium terms, more fundamental, structural change will be required in order to guarantee its effectiveness in the long term.²⁷¹

In reaction to such recommendations, consolidation of the untidy monitoring mechanisms in to a USTMB has been recently proposed.²⁷² The initiated reform, as positive as it may, nevertheless inhibits a risk – a risk rightly noted:²⁷³

Whatever terms may be used to characterize the present situation, however, it is generally agreed that the United Nations human rights treaty monitoring system has reached a critical crossroad. Its successful future evolution demands that the gravity of the existing problems be recognized, that vital importance of the treaty regime as a whole be reaffirmed and the quest for creative and effective solutions be pursued with energy and commitment. By the same token, that quest must not be embarked without acknowledging the very considerable achievements to date and the importance of proceeding with sensitivity and sophistication in order to ensure that the fundamental integrity of the system, and particularly its ability to safeguard human rights, are not sacrificed to illusory notions of streamlining and efficiency.

²⁶⁸ International Law Association (n 13 above).

²⁶⁹ Evatt (n 38 above) 479.

²⁷⁰ Expert Workshop: Annex 1(n 52 above).

²⁷¹ Concept Paper (n 7 above) para 27.

²⁷² See the Concept Paper. See also Secretary-General's Reports, 'Strengthening of the United Nations: An Agenda for Further Change', 2002, A/57/387 and Investing in the United Nations: for a stronger Organization worldwide, A/60/692..

²⁷³ Initial Report (n 19 above) para 8.

The concern that inspired this study is, therefore, the concern of balancing the proposed reform so that it will not be regressive or weather away the already achieved advantages. The study aimed to investigate how the proposed USTMB would be a solution to the persistent problems of the monitoring mechanisms of the existing system while at the same time preserving the positive experiences.

The study found that the proposed USTMB, though has not taken a definite shape and not articulated in detail, has some pure advantages, and advantages that also inhibit potential weaknesses. The study concluded that in detailing the proposal, designing an appropriate architect within the parameters of a USTMB could preserve the positive features of the existing system while enabling the introduction of new strengths required to cure, albeit not a panacea, the persistent problems.

The appropriate architect the study found is to restructure the existing TMBs and mechanisms into a WHHR. The founding principles of the WHHR would be institutional permanency and salaried full time staff. Without requiring a substantially larger budget than the existing system (less than double)²⁷⁴ the WHHR would have around 47 major staff; and would be chambered into three main chambers designed along the three functional lines: CHRRDC – 17 members; CHRIF – 15 members; and WCHR – 15 members.

To secure specific attention that certain rights and rights holders require, the CHRRDC could have three sub-chambers each having six members. One sub-chamber would deal with civil, political, social and economic rights largely contained in the CCPR, CESCR, CAT and CERD and the rest three treaties; the second will deal with women and children while the third focuses on migrant workers. Similarly, the Court could sit in three chambers to enable it clear the already accumulated communications and decide forthcoming ones expeditiously. The CHRIF could also branch into teams: most appropriately one for follow-ups for both decisions of the Court and concluding observations and recommendations of the CHR; and another for inquiries, investigation and visits to prison establishments.

4.2 Recommendations

The recipients of the dividends of a better human rights monitoring and enforcement system are the more than six billion people living in the present world. Though regrettably the powers of fortifying a better human rights protection regime are at the hands of governments and many of them could be unwilling to introduce positive changes and defiant to democratic principles that could have been used

²⁷⁴ Without including service giving junior staffs such as clerks and secretaries.

to persuade them, UTMBD as briefly detailed in this study should nevertheless be pushed ahead vigorously. While the imports of the reform are valuable, expected rejection or lack of political will of the power holders should not be seen as deterrence.

To this effect the study recommends that the modalities of the USTMB, though so far has been given a rough shape, be articulated further. In this regard, the study recommends that OHCHR continues the scholarly debate and brainstorming meetings.

The OHCHR should attempt to further develop the Concept Paper into a 'Protocol for International Human Rights Monitoring'. In addition, and to the extent possible, UNHCHR should start investigating risks of stalemate related to the transformation to USTMB.

However, the existing monitoring mechanisms of the UNHRTS should not be drugged into the reform machine before the political will of states is secured. Thus a high level of advocacy and lobbying is imperative to lay a favourable ground for the introduction of USTMB.

The overall objective of reform must be to achieve beyond the level of human rights protection currently achieved by TMBs, and not to dilute it. Thus an explicit commitment that the reform will not retreat from existing levels of protection should be assured before tampering with the present monitoring mechanisms.

Careful considerations must be given to the opportunities provided by any process involving a fundamental overhaul of the existing system. Given the magnitude of the changes that would be required in order to achieve a significant consolidation, it might be difficult to prevent the adoption of procedural or institutional 'innovations' that would in practice diminish the effectiveness of existing approaches. When reform is intended to strengthen and rationalise, 'the toothless' system which States comfortably embraced there is a probability that the effort could have opposite effects. Lack of political will of states is a potential danger. Thus consideration of the political mood of the time when the reform is called upon is paramount and much effort is required in this regard.

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Bibliography

Books

Alston, P and Crawford, J (ed) (2000) *The future of UN human rights treaty monitoring* Cambridge: Cambridge University Press.

Alston P (ed) (1992) *The United Nations and Human Rights* Oxford: Clarendon.

Bayfsky, A (ed) (2000) *The UN human rights treaty system in the 21st century* The Hague: Kluwer Law International.

Bayfsky, A (ed) (2001) *The UN human rights treaty system: universality at the crossroads* The Hague: Kluwer Law International.

Bayfsky, A (2003) *How to complain to the UN human rights treaty system* The Hague: Kluwer Law International.

Heyns, CH & Viljoen, F (2001) *The Impact of the United Nations human rights treaties on domestic level* (2002) The Hague: Kluwer Law International.

Mertus, J (2005) *The United Nations and human rights: a guide for a new era* London: Routledge.

Nowak, M (2003) *Introduction to the human rights regime* Boston: Martinus Nijhoff Publishers.

O'Flaherty, M (2002) *Human rights and the UN: practice before the treaty bodies* The Hague: Martinus Nijhoff Publishers.

Vandenhol, W (2004). *The procedures before the UN human rights treaty bodies: divergence or convergence?* Oxford: Intersentia.

Vandenhol, W (2005) *Non-discrimination and equality in the view of the UN human rights treaty bodies* Antwerpen: Intersentia.

Journal

Hudson, A 'Dangerous Potential: Streamlining the United Nations human rights Committees' (2002) *Australian Journal of Human Rights* 15

Report of expert studies

International Commission of Jurists (2005) 'Reforming the human rights system: A chance for the UN to fulfill its promise. Available at www.ohchr.org (accessed on 10 August 2006).

International Law Association, Committee on International Human Rights Law and Practice (A. Bayefsky), Report on the Treaty System: Facing the Implementation Crisis (1996). Available at www.bayefsky.com (accessed 10 August 2006).

International Movement Against All Forms of Discrimination and Racism, NGO Participation in the Work of UN Human Rights Treaty Monitoring Bodies (Submission to 14th Meeting of Chairpersons of the Human Rights Treaty Bodies). (Available at www.ohchr.org (accessed on 10 August 2006).

International Movement Against All Forms of Discrimination and Racism, 'NGO non-paper: Treaty body reform following the UN Secretary-General's proposals' (2002). Available at www.ohchr.org (accessed on 10 August 2006).

Joseph, S & Kyriakakis, J 'Inquiry into the revised draft guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties', 2005, <http://www.law.monash.edu.au/castancentre/publications/ohchr-submission.pdf>

Niemi, H & Scheinin, M 'Reform of the United Nations human rights treaty body system seen from the developing country perspective' (2002) Institute for Human Rights - Åbo Akademi University. Available at <http://www.abo.fi/instut/imr/norfa/heli-martin.pdf> (accessed on 10 August 2006).

UN, Initial Report, Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights, UN Doc A/44/668

UN, Initial Report, Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights, UN Doc A/Conf.157/PC/62/Add.11/Rev.1

UN, Effective functioning of bodies established pursuant to un human rights treaties: final report on enhancing the long-term effectiveness of the UN human rights treaty system, UN Doc E/CN.4/1997/74

Reform documents

Background note on the Secretary-General's proposals for reform of the treaty body system

Draft guidelines on an expanded core document and targeted treaty-specific reports and harmonized guidelines for reporting under the international human rights treaties - HRI/MC/2004/3

Effective functioning of the human rights treaty bodies: Note by the Office of the High Commissioner for Human Rights - E/CN.4/2004/98

Effective functioning of the human rights treaty bodies: Note by the Office of the High Commissioner for Human Rights - E/CN.4/2003/126

Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights: General Assembly Resolution - A/RES/57/202

Management review of the Office of the United Nations High Commissioner for Human Rights (report by Office of Internal Oversight Services) - A/57/488

Report of a brainstorming meeting on reform of the human rights treaty body system, Malbun, Liechtenstein - A/58/123

Report of the fifteenth meeting of chairpersons (including the report of the second inter-committee meeting - A/58/350

Report of the sixteenth meeting of chairpersons (including the report of the third inter-committee meeting - A/59/254

Report of the Secretary-General "In Larger Freedom: towards development, security and human rights for all" - A/59/2005

Report of the Secretary-General "Strengthening of the United Nations: an agenda for further change" - A/57/387

Revised draft harmonized guidelines for reporting under the international human rights treaties, including guidelines on an expanded core document and targeted treaty-specific reports - HRI/MC/2005/3

Status of implementation of actions described in the report of the Secretary-General entitled "Strengthening of the United Nations: an agenda for further change" - A/58/351

The OHCHR Plan of Action: Protection and Empowerment

Views on the report of the independent expert solicited in 1998 and 2000 UN Doc. E/CN.4/1998/85, UN Doc E/CN.4/1998/85/Corr.1, UN Doc E/CN.4/1998/85/Add.1, UN Doc E/CN.4/2000/98 and UN Doc E/CN.4/2000/98/Add.1.

Websites

www.ohchr.org

www.bayefsky.com