

Ending reprisals against those who cooperate with the United Nations treaty bodies:

Submission to meeting of treaty body chairpersons

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I. INTRODUCTION

The views and experiences of civil society are a crucial source of knowledge and expertise for the UN human rights system, and are central to enhancing decision-making, increasing ownership of decisions, improving accountability and transparency, and enriching outcomes. However, as individuals and organisations increasingly avail themselves of the UN system to pressure and subject their governments to greater scrutiny, their efforts are met in some cases with resistance and backlash.

The right of unhindered access to and communication with international bodies, and to be protected in doing so, is codified in both specific provisions applying to certain human rights bodies and more broadly in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (commonly referred to as the Declaration on Human Rights Defenders). These provisions provide essential recognition that fear of intimidation or reprisal can deter individuals and organisations from interacting with international human rights bodies and place a positive obligation on both States and the human rights bodies themselves to protect against reprisals and intimidation and ensure effective access.

This paper puts forward a range of proposals to the United Nations treaty bodies as to the steps and measures that could be taken to secure the right of access and communication and to more effectively prevent, protect against, and promote accountability for, intimidation and reprisals for exercising that right.¹

“ The United Nations could not do its invaluable work for human rights without those who cooperate with us. When people who cooperate with the United Nations are targeted for reprisals, we are all less secure. When their voices are stifled, our work for human rights is also a victim.”

UN Secretary-General Ban Ki-moon, 2011 remarks to a high-level panel discussion on ‘Stopping reprisals for cooperating with the UN in the field of human rights – a priority for all’.

¹ ISHR has previously published a paper on the primary obligations of States to protect those who cooperate with the United Nations, entitled *Ending Reprisals: The role of national laws and policies in protecting those who cooperate with the United Nations* (2013), available at http://www.ishr.ch/sites/default/files/article/files/ishr_reprisals_report-09_13_updated.pdf.

II. THE LEGAL OBLIGATION OF TREATY BODIES TO ADDRESS REPRISALS

International law provides for a right to unhindered access to and communication with international bodies with general or specific competence to receive and consider communications on matters of human rights and fundamental freedoms. This right is derived from the human rights to freedom of expression, association, and movement contained in international human rights instruments and in customary international law.

The right to unhindered access to and communication with international bodies is explicitly recognised in the Declaration on Human Rights Defenders.²

Enjoyment of this right implies that those accessing or attempting to access or communicate with these bodies should not face any form of reprisal for doing so. The Declaration on Human Rights Defenders recognises the right of human rights defenders to protection from reprisals for their communication or cooperation, or attempted communication or cooperation, with the United Nations' human rights bodies.³

The right to be free from reprisals that threaten an individual's life or physical liberty is also an aspect of the protection afforded by other international human rights, such as freedom from arbitrary arrest, detention or deprivation of liberty; torture; cruel, inhuman and degrading treatment; and arbitrary deprivation of life.

States have the primary responsibility for upholding these rights. However as subjects of international law, international organisations, including treaty bodies, may also be bound by these rights.⁴

The requirement to uphold international human rights standards, particularly the right to unhindered access to and communication with international bodies, is also enshrined in some of the treaties themselves, or the optional protocols to those treaties:

1. Article 15 of the Optional Protocol to the Convention against Torture (OP-CAT), stipulates that '[n]o authority or official shall order, apply, permit or tolerate any sanction against any person or organisation for having communicated to the Subcommittee on Prevention of Torture or to its delegates any information, whether true or false, and no such person or organisation shall be otherwise prejudiced in any way';⁵
2. Article 11 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW), '[r]equires a State Party to ensure the protection of those submitting communications';⁶

² United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, Annex to UN Doc A/RES/53/144, 8 March 1999, Articles 5(c) and 9(4).

³ Declaration on Human Rights Defenders, Articles 2(1), 9(1) and 12(2).

⁴ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, pp 89–90. See also *Reparations for injuries suffered in the service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, p 179.

⁵ *Optional Protocol to the Convention on the Prevention of Torture*, Article 15, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

⁶ *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, Article 11, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>.

3. Article 13 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), commits States parties to taking 'all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol';⁷ and
4. Article 4 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3-CRC), says that a 'State party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to any human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the Committee'.⁸

It follows from the above that treaty bodies have a legal obligation to exercise their functions in a manner that both contributes to the prevention of reprisals and enhances the protection of individuals from reprisals who seek to or have communicated or cooperated with it.

Treaty bodies have a broad discretion as to what action they take to fulfil their obligations. However, as subjects of international law, they must act in good faith, which informs the assessment of the type of action that the treaty bodies are required to take to discharge their obligations.⁹ As a general proposition, the principle of good faith requires that the treaty bodies' powers must be reasonably exercised,¹⁰ and that they must not unreasonably decline to exercise their powers in circumstances where the honest and loyal fulfilment of their mandate in compliance with international law would require them to do so.

The observance in good faith of their legal obligations requires the treaty bodies to act in genuine pursuit of the prevention of reprisals and the protection of persons who cooperate with them, and requires that their internal practice is consistent with the public positions that they endorse. Any failure by a treaty body to take appropriate action where it possesses information about reprisals having occurred or a credible risk of their occurring would be inconsistent with its legal obligations. It follows that the treaty bodies are legally obliged to take action if they possess information about a credible risk of reprisals.

“ Regrettably, reprisals against persons cooperating with the United Nations, its mechanisms and representatives in the field of human rights continue. They take many forms, ranging from smear campaigns, threats, travel bans, harassment, fines, the closing of organisations, sexual violence, arbitrary arrests, prosecutions and lengthy prison sentences through to torture, ill treatment and even death.”

UN Secretary-General Ban Ki-moon, 2013.

⁷ *Optional Protocol to the international Covenant on Economic, Social and Cultural Rights*, Article 13, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>.

⁸ *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, Article 4, available at https://treaties.un.org/doc/source/signature/2012/CTC_4-11d.pdf.

⁹ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, p 268 (“[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.” (Emphasis added.)).

¹⁰ B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p 131.

III. WHAT HAVE THE TREATY BODIES DONE TO MEET THIS OBLIGATION?

A number of treaty bodies have recognised the need to ensure a more systematic approach to reprisals, and have created dedicated rapporteurs or focal points on reprisals. As far as we understand, this is the case for the Human Rights Committee, the Committee on Enforced Disappearances, the Committee on the Rights of Persons with Disabilities, and the Committee against Torture.

The Committee against Torture has two such rapporteurs, one to handle reprisals in connection with State reporting, and one to handle reprisals in connection with individual communications. The Committee on Enforced Disappearances has only one, but it explicitly sets out in its rules of procedure that this focal point can receive information in relation to all aspects of the Committee's work including the State parties' reporting procedure, urgent actions, individual communications, or country visits.

The treaty bodies vary in how comprehensively and explicitly they set out the functions given to these focal points or rapporteurs. In some cases the creation of the focal point or rapporteur is contained within the rules of procedure of the Committee, as is the case for the Committee on Enforced Disappearances and the Committee on the Rights of Persons with Disabilities. In the case of the Committee Against Torture, a separate statement sets out the Committee's policy on reprisals, contact details for those wishing to report alleged reprisals, and the process that will be followed by the rapporteurs.¹¹ This makes it easier to locate all relevant information on reprisals.

The policy of the Committee on Enforced Disappearances on reprisals is contained within its rules of procedure and its document on working with civil society actors. The Committee's rules of procedure set out how allegations will be handled, specifically rule 63(2) states that cases of reprisals will be sent by the Committee to the State, with the request that they take steps to protect those affected. Rule 99 adds that the State will be requested to urgently adopt measures to ensure protection of those concerned, and submit written explanations or clarifications of the situation and steps taken.¹² Finally, in its document on working with civil society actors (paras 25 and 26) the Committee encourages human rights defenders and civil society organisations to submit information about reprisals to the Committee, and notes that the information received may be kept confidential in order to protect those submitting it.¹³ While the documents do set out clearly what steps the Committee will take in response to reprisals, it is not easy for defenders to locate the relevant text.

In other cases the functions are left vague. For example the Committee on the Rights of Persons with Disabilities, in its guidelines on the participation of disabled persons' organisations and civil society organisations in the work of the Committee, 'condemns all acts of intimidation and reprisals towards individuals and organisations for their contribution to the work of the Committee', and appoints a focal point, simply stating however that the focal point 'will follow-up and provide advice' on situations relating to reprisals.¹⁴

¹¹ Statement of the Committee against Torture, adopted at its fifty-first session (28 October – 22 November 2013), on reprisals, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f51%2f3&Lang=en.

¹² Committee on Enforced Disappearances, *Rules of procedure*, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/1&Lang=en.

¹³ Committee on Enforced Disappearances, *The relationship of the Committee on Enforced Disappearances with civil society actors*, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/1&Lang=en.

¹⁴ Committee on the Rights of Persons with Disabilities, *Guidelines on the Participation of Disabled Persons Organisations (DPOs) and Civil Society Organisations in the Work of the Committee*, available at <http://www.ohchr.org/Documents/HRBodies/CRPD/guidelinesDisabledPersonsOrganizationsCivilSocietyOrganizations.doc>.

The treaty bodies also vary in how much visibility they give to their work on this issue. The Committee against Torture has created a webpage on reprisals where all communications sent to and received from States concerning alleged reprisals are housed, along with public statements made by the Committee on the subject.¹⁵ In other cases, however, it is difficult to find information on the steps taken by the treaty body, and defenders may remain unaware that the treaty body has a particular policy on reprisals, or a dedicated contact point, which means that many cases may be going unreported.

Other Committees have no formal procedure in place but generally make efforts to address reprisals by raising allegations with the State concerned during its review. Without a dedicated focal point following up on the case, however, any assessment of how the State responded will fall under the general follow-up that the treaty body undertakes following a State review. This falls short of responding to the particular obligation that the treaty bodies have in the case of reprisals. It means that cases of reprisal are unlikely to receive the dedicated attention that they merit, and there will not be sustained attention on the response of the State to any recommended measures, which increases the chances that they will commit or allow reprisals to take place again in the future.

In ISHR's view, the obligation that the treaty bodies have to address reprisals requires a more systematic process for responding to and following up on alleged cases, combined with measures to ensure that defenders are aware of and able to engage safely with this process.

¹⁵ Committee Against Torture, Reprisals letters, available at <http://www.ohchr.org/EN/HRBodies/CAT/Pages/ReprisalLetters.aspx>.

IV. RECOMMENDATIONS

ISHR makes the following recommendations to ensure that treaty bodies more effectively discharge their obligation to uphold the right of unhindered access to and communication with the treaty bodies and to protect persons against intimidation and reprisals for exercising or seeking to exercise this right.

TO TREATY BODIES

Recommendation 1: Adopt a comprehensive policy on reprisals

Each treaty body should adopt a comprehensive policy on reprisals, in which the body recognises its legal obligation to respect and protect the right of all persons to communicate with the body in all aspects of the body's work and to take all necessary steps to prevent, protect against and promote accountability for any alleged acts of intimidation or reprisals.

Recommendation 2: Establish a rapporteur, focal point or working group on reprisals

Each treaty body should establish a procedural mechanism – such as a rapporteur, focal point or working group – mandated to promote the right to communicate with the body and to take such steps as are necessary to prevent, protect against, investigate and pursue accountability for any alleged acts of intimidation or reprisals, whether perpetrated by State or non-State actors.

To achieve these ends the mechanism should be empowered to respond urgently to allegations of reprisals, including during the inter-sessional periods by:

- investigating allegations or reports of cases of intimidation or reprisals against those cooperating or seeking to cooperate with the treaty body;
- to the extent that the allegation is verified and the safety of the defender will not be put at risk, sending a communication to the State concerned which:
 - strongly condemns the allegations;
 - sets out what steps are required to prevent recurrence and provide an effective remedy;
 - requests the State to report back urgently on the steps and measures taken in this regard; and
- following up on all communications with States in this context.

Recommendation 3: Create a public webpage on reprisals

Each treaty body should create a webpage on reprisals that includes the contact detail of the member responsible for this mechanism (the focal point or rapporteur), as well as cases received, communications sent to States concerned, responses received, and follow-up communications.

TO THE MEETING OF CHAIRPERSONS

The annual meeting of Chairpersons should be used to ensure that the treaty bodies are taking a coherent and consistent approach to reprisals. The meeting should also be used to make an overall assessment of the pattern of reprisals against individuals who engage or attempt to engage with the treaty body system. A coherent approach across all treaty bodies will allow the creation of a common database of reprisals that, in turn, will enable better coordination between the treaty body system and the wider UN human rights system. Ultimately, a UN-wide coherent and coordinated response needs to be put in place. The Chairpersons can play a role in facilitating such a response by ensuring a coordinated response across the treaty bodies.

Recommendation 4: Adopt a system-wide policy on reprisals

The Meeting of Chairpersons should adopt a policy to guide action on reprisals across the treaty bodies, which:

- recognises the legal obligation of treaty bodies to respect and protect the right of all persons to communicate with the body in all aspects of the body's work and to take all necessary steps to prevent, protect against and promote accountability for any alleged acts of intimidation or reprisals;
- encourages treaty bodies to ask questions and make recommendations during reviews of State parties in relation to the right to communicate with international bodies and protection against reprisals, and ensure that these issues are fully reflected in concluding observations; and
- sets out the functions of the focal points or rapporteurs so that consistency is achieved across treaty bodies for this important role.

Recommendation 5: Annually review all cases of reprisals

The Meeting of Chairpersons should annually review cases of reprisals across all the treaty bodies and assess both the actions taken by the treaty body and by the State concerned, and make recommendations to the treaty bodies as relevant to ensure a consistent and effective approach.

Recommendation 6: Coordinate on follow up to cases of reprisals

The Meeting of Chairpersons should share particular cases of reprisals arising with respect to one treaty body with other treaty bodies where this could be relevant in an upcoming review, to provide for follow up and ensure that States are held accountable in a consistent manner.