

**Submission from Center for Reproductive Rights to OHCHR Questionnaire in relation to General Assembly resolution 68/268**

*Comments on the state of the human rights treaty body system in view of the upcoming review by 9 April 2020, of the effectiveness of the measures taken in order to ensure the sustainability (of treaty bodies), and, on any further action to strengthen and enhance the effective functioning of the human rights treaty body system.*

**Introduction**

The Center for Reproductive Rights —an international nonprofit legal advocacy organization headquartered in New York City, with regional offices in Nairobi, Bogotá, Kathmandu, Geneva, and Washington, D.C.—uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to respect, protect, and fulfill. Since its inception 25 years ago, the Center has advocated for the realization of women and girls’ human rights on a broad range of issues, including on the right to access sexual and reproductive health services; preventing and addressing sexual violence; and the eradication of harmful traditional practices.

The Center for Reproductive Rights has been using all mechanisms of the treaty body system – engaging in State party reporting, filing individual complaints, requesting inquiries, and we attach the utmost importance to the work of the United Nations human rights treaty bodies. The jurisprudence from the treaty bodies has been key to advancements in international human rights standards related to contraception, maternal health care, and abortion. The scrutiny from the treaty monitoring bodies through periodic reviews, communications, and inquiry procedures has had a positive impact on the implementation of international human rights law, and on the lives of women and girls, in all regions of the world. We welcome the opportunity to provide input to the Office of the High Commissioner for Human Rights for the Secretary-General’s third biennial report on implementation of General Assembly Resolution 68/268, in advance of the upcoming review in 2020.

We consider that the adequate funding and effective functioning of the human rights treaty bodies is essential to maintaining a robust international human rights framework. The primary objective of the 2020 review should be to strengthen the international human rights framework through enhancing the effectiveness of the treaty monitoring bodies to the benefit of rights-holders and victims of human rights violations, including through ensuring access to justice and an effective remedy, and assist States parties in complying with their treaty-based human rights obligations.

The review should provide for the full and effective participation of civil society organisations and other stakeholders. We fully support the view expressed by the Secretary-General in the last report that the discussions on the review by the General Assembly of the human rights treaty body system in 2020 should “be held in an open, transparent and inclusive manner”. In the context of shrinking civil society space it is important to recognise that the effectiveness and strength of the treaty body system requires the engagement and accessibility of the system to civil society organizations, and enhancing civil society engagement should be an integral part of the review process.

The submission below addresses a range of issues that have been discussed in the context of the treaty body strengthening process, and at the annual meeting of Chairpersons of the human rights treaty bodies, and covers: (i) Resource constraints; (ii) Individual communications; (iii) Compliance with reporting obligations; (iv) Follow up to implementation of views/decisions; and (v) Annual calendar and harmonization of working methods.

### **(i) Resource constraints**

The lack of sufficient financial and human resources is the biggest challenge to the effective functioning of the human rights treaty monitoring bodies. This challenge has only increased in the past two years, in part due to a significant increase of submissions of individual communications. This rise in demands on the treaty body system, whether through increased ratifications of treaties and optional protocols, or greater public awareness, civil society involvement and use of the communications procedure, should be regarded positively. Demands on the system are an indication of its credibility and importance, but it must be accompanied by the provision of sufficient financial, human, and technical resources.

The ability of the treaty bodies to function properly has already been negatively affected due to financial constraints, and this has recently led to a potential cancellation of the third annual session of 2019 for several treaty bodies.<sup>1</sup> The system for monitoring implementation of human rights treaties, which are by nature treaty obligations assumed by States parties, should be protected from budgetary fluctuations and risk of funding cuts. It is important that full funding is provided through the regular budget to provide certainty in scheduling. It would also be desirable for OHCHR to consider the prioritization of the treaty bodies in the internal allocation of its resources.

The creation of the formula in General Assembly resolution 68/268<sup>2</sup> to assess resource allocation for the treaty bodies was positive and should be replicated in the next resolution. It did, however, contain gaps that should be addressed through the review process. The next General Assembly resolution should ensure that the formula adequately covers all functions of the treaty bodies, including individual and inter-State communications, urgent actions, inquiries, general comments/recommendations, and follow-up procedures. Resources should also be allocated for reviews in the absence of State reports. The calculation of resources required for the treaty bodies should not only account for meeting time but must also cover related human resources for the Secretariat, in particular with regard to individual communications (which require increased Secretariat time compared to other functions).

### **(ii) Individual communications**

The efficient and effective functioning of the individual communications system of the human rights treaty monitoring bodies is integral to providing victims of human rights violations timely access to justice and an effective remedy. The Center for Reproductive Rights has filed communications on behalf of victims and successfully advanced women's sexual and reproductive health and rights, for example in the Committee on the Elimination of Discrimination Against Women (*Alyne da Silva Pimentel Teixeira v. Brazil* (2011) and *L.C. v. Peru* (2011)), and the Human Rights Committee (*Mellet v. Ireland* (2016), *Whelan v. Ireland* (2017) and *K.L v. Peru* (2005)).

There has been a significant rise in submissions of communications in the last four years<sup>3</sup>. The capacity of the system is not likely to be able to handle the number of communications it receives unless there is a significant increase in Secretariat staff with relevant skills. As outlined above, resolution 68/268 and its implementation did not adequately cover the resourcing of individual communications, and

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<sup>1</sup> Letter from the High Commissioner for Human Rights to the Chairpersons of the UN Human Rights Treaty Bodies, 30<sup>th</sup> April 2019 (unpublished)

<sup>2</sup> A/RES/68/268 operative paragraph 26

<sup>3</sup> Geneva Academy (Callejon, Kemileva, Kirchmeier), *Treaty Bodies' Individual Communication Procedures: Providing Redress and Reparation to Victims of Human Rights Violations*, May 2019, page 10

could not cover the rise in demand, so it is all the more important to give due attention to individual communications resource requirements in the follow-up to resolution 68/268.

In addition to an increase of Secretariat resources for the Petitions Unit, we understand that there could be merit in modernizing the case-management system, in line with best-practice from regional human rights courts/tribunals. It would therefore be desirable if the 2020 review could cover information technology and human resources, including the establishment of an online platform with relevant information available for victims and States parties, with provision of electronic receipt of all documents submitted, and improving the functioning and updating of the database of decisions. There may also be efficiency gains through allocating certain tasks to para-legal type staff at the Secretariat, which would increase capacity of legally qualified Secretariat staff to cover substantive matters.

### **(iii) Compliance with reporting obligations**

The failure of States to comply with their human rights treaty body reporting obligations is a long-standing problem. At the end of 2017 83% of States parties were overdue in submitting at least one initial or periodic report. Of the overdue initial reports, the majority are more than 10 years overdue. On the other hand, for periodic reports the largest proportion of reports are less than 5 years overdue<sup>4</sup>.

While universal compliance of treaty-body reporting is of course desirable, the system of reviews should overall still be considered successful even without full and timely reporting from every State party, recognizing that the treaty bodies undertake approximately 160 reviews annually. Each year the Center for Reproductive Rights engages in the reviews of many country reviews, covering all regions of the world. The ability of civil society to engage in the review process, and the concluding observations advancing the implementation of sexual and reproductive health and rights, are highly valued and critical to Committees' understanding of the human rights situation in the country. The success of the State reporting system, including the accuracy and breadth of the concluding observations and national level monitoring of implementation of the recommendations are dependent on civil society engagement.

The practice of considering country situations in the absence of a State report, with inputs from civil society, is an appropriate and useful response to the failure of a State party to report. By proceeding with a review regardless of a report (e.g. on the basis of list of issues prior to reporting) it sends a signal to States parties that failure to report in a timely fashion will not save the State from being subject to review, and could incentivize reporting by States for subsequent reviews. Reviews without a report from the State party, and/or in absentia reviews can also help with certainty of scheduling and forward-planning (i.e. as part of a master calendar) if all reviews take place with or without a report by the State party.

Despite a considerable investment of funding (approximately \$5 million USD) the capacity building programme appeared to have limited impact in improving States parties' rate of reporting. It may be worth considering whether or not that programme is worth continuing at a time of budgetary constraint as those resources could arguably be better used for core treaty body activities.

We regard possible innovations to the treaty body system, which may involve the reduction of frequency of States parties being subject to review, as having significant risk without sufficient certainty of an appreciable increase of States parties' reporting. The complementary and mutually reinforcing nature of different treaty bodies considering the implementation of sexual and reproductive health and rights is a strength of the system. The 'overlap' between different

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<sup>4</sup> HRI/MC/2018/2 pages 9 and 10 (table 7 and 8)

Committees is positive and desirable, with their views taking into account the specificities of the jurisprudence under the applicable treaties, and this ensures that States' implementation of their obligations are monitored and evaluated at regular intervals.

A consolidated treaty body review process could also lead to a significant reduction in the treaty monitoring bodies ability to meaningfully engage with civil society. The constraints in the amount of time available for consultations with civil society organisations would be exacerbated, and a clustered or consolidated process would involve a larger number of organisations competing for attention if reviews were clustered.

In addition, civil society organisations working on specific issues, such as the rights of persons with disabilities, children's rights or women's rights may not find same space (in person and in submissions) to engage as they have under an issue specific treaty. This is potentially problematic given the vulnerable situations and marginalization such groups often face, and inconsistent with international commitments to address the need of key populations.

A clustered or consolidated review process could also lead to a reduction in the quality of the constructive dialogue between the treaty monitoring bodies and the States parties, as it could be difficult for States to bring a sufficiently large delegation including individuals with the appropriate range and depth of expertise to cover both general and specialized issues. Furthermore, while jurisprudential coherence is desirable in principle, it could also lead to a 'lowest-common denominator' approach and a reduction in the progressive development of international human rights standards.

#### **(iv) Follow-up to implementation of Views/Decisions**

Follow-up procedures are an important way in which the treaty bodies can try and ensure State parties comply with their obligation to act in good faith in cooperating with the procedures under the Optional Protocol and to consider the Committee's finding of violations, as well as the obligation to ensure the substantive right to a remedy is fulfilled. It is important to recognise that it is not just the individual complainant that has an interest in follow-up – effective remedies serve to deter violations and uphold the international human rights framework, and the concept of 'satisfaction' includes deterrence and guarantees of non-repetition, which might include legislative amendment or repeal<sup>5</sup>.

One study found that States parties have implemented approximately 23% of treaty body decisions, with around 14% discontinued by the treaty bodies due to the provision of remedies<sup>6</sup>. This leaves approximately two-thirds of Views/Decisions that are not implemented, which raises potential breaches of the obligation to act in good faith in responding to a Committee's findings of violations and providing an effective remedy.

Fully funding the work of the treaty monitoring bodies should also take into account the work of the Secretariat as support to the follow-up procedures. Addressing the lack of resourcing given to the OHCHR Secretariat for follow-up could help, and sends the appropriate message that States parties will be held accountable for violations of human rights treaty obligations. The Committees should request information from State parties on implementation of decisions and Views during State reporting processes.

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<sup>5</sup> Kate Fox Principi, *Implementation of Decisions under UN Treaty Body Complaint Procedures – How do States Comply?* Human Rights Law Journal, Vol. 37, 30 June 2017, p.12 paras 60 - 84

<sup>6</sup> *Ibid* p.12 para 61

While in principle harmonization of working methods is desirable and the adoption by treaty bodies of policies on follow-up is positive, we have concerns with the ‘Possible elements for a common aligned procedure for follow-up to conclusion observations, decisions and Views for all treaty bodies’, endorsed at the 30th meeting of the Chairs of the human rights treaty bodies in 2018.<sup>7</sup> There are elements within the note that do not adequately consider the difference between individual and general measures, and do not properly incentivize States parties to fulfill their obligations. In particular, we have concerns with paragraphs 12(e),(j), and (i) and offer the following comment in this regard:

- Paragraph 12(e): Any assessment after 24 months should be considered preliminary in nature, as while individual remedies such as compensation should be afforded immediately, general measures such as legislative or policy changes to ensure non-recurrence may take considerably longer than 24 months.
- Paragraph 12(j): Suspending the case where a State party does not fulfill their obligation to provide an effective remedy for a violation or cooperate with the Committee sends the wrong signal and does not incentivise compliance; three years is a short time for implementation of general measures even when a State is interested in complying, and suspending the dialogue would be highly counterproductive in maintaining pressure on the State party to comply with the views/decisions when the State is reluctant to implement.
- Paragraph 12(i): the Committees must exercise due diligence in keeping contact with the authors and in any event the Committee should consider that general measures reflect interests of potential victims and society as a whole.

#### **(v) Annual calendar and harmonization of working methods**

##### *Annual calendar*

All treaty bodies should move towards a predictable review cycle, with a comprehensive reporting calendar to the extent possible. This enhances the ability of the State under review and civil society for planning engagement both at the country-level and at the United Nations, as well as follow-up. At a minimum it would be desirable to have enhanced transparency of regarding which States parties are to be reviewed, which views on individual communications are to be considered, and what follow-up is planned for each session.

##### *Harmonization of working methods*

We welcome the adoption and increasing use of the simplified reporting procedure, and hope that in the near future the use of the simplified reporting procedure will become universal. We recognize the efforts made by the treaty bodies in enhancing harmonization of working methods, while acknowledging their independence and legal competence to establish their own rules of procedure and working methods. At the same time, while we encourage further efforts at harmonization if there are efficiency gains and enhanced clarity and accessibility without an adverse impact on effectiveness. As noted above regarding follow-up procedures, the result of harmonization efforts is not necessarily positive.

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<sup>7</sup> A/73/140 para 21; HRI/MC/2018/4 Note of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on ‘Procedures of the human rights treaty bodies for following up on concluding observations, decisions and Views’, Section IV.B paragraph 12