

Amplifying the Impact of UN Human Rights Treaty Bodies on the Enjoyment of Human Rights: Opportunities for Civil Society Action

Marcia V. J. Kran, O.C., Member of the UN Human Rights Committee¹

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1. Introduction and History

At this Lawyers Rights Watch Canada webinar to commemorate International Human Rights Day, I will reflect upon the value of the United Nations Human Rights Treaty Bodies, highlighting how lawyers and civil society can engage to help maximize the purpose of treaty body work: a greater ability of people around the globe to exercise their rights.

When the United Nations was founded in 1946, given its time in history, one of its first tasks was to develop universal human rights standards. The UN Charter lists human rights, as well as peace and development as the Organization's mandate. The vision was for the United Nations to secure three fundamental values: freedom from want, freedom from fear, and freedom to live in human dignity. As the former Secretary General Kofi Annan said in 2005: *"There is no peace without development, no development without peace and there can be neither peace nor development without respect for human rights."*

The rights to be protected were defined in the *Universal Declaration of Human Rights*, a collaborative effort between individuals from different countries, cultures, and legal systems. John Humphrey, a Canadian, worked at the UN in New York at the time; he advised officials during the process. The *Declaration* was a remarkable achievement. In 1948, 48 countries with diverse political regimes voted for the *Universal Declaration of Human Rights* (Declaration) at the General Assembly.

2. The Development of the Human Rights Treaty Body system

A system of "treaty bodies" or human rights committees was developed following the adoption of the Declaration.

Between 1948 and 1989, international agreement was successively reached on rights protection in six general areas:

- civil and political rights;
- economic, social and cultural rights;
- freedom from torture, cruel, inhuman or degrading treatment or punishment;
- freedom from all forms of discrimination, including racial discrimination and discrimination against women; and
- the rights of the child

Other standards were agreed at the UN, also based on the Declaration including on the following areas:

- protection of persons from enforced disappearance;
- the rights of migrant workers and their families; and
- the rights of persons with disabilities.

¹ Marcia V. J. Kran, LL.M. B.A., Dip. So. Sci. M.A. (O.C.) is a Member of the UN Human Rights Committee (2017 - 2024) and its Rapporteur on Follow Up to Concluding Observations, as well as a former director at the UN Human Rights Office and the UN Development Programme. (See: https://en.wikipedia.org/wiki/Marcia_V._J._Kran and @MarciaVJKRAN1.)

Until recently, the trajectory since the adoption of this historic Declaration has been positive. The first two UN treaties, the *International Covenant on Civil and Political Rights*,² and the *International Covenant on Social and Economic Rights*,³ were adopted in 1966, and entered into force with the necessary number of ratifications in 1976. They are the most comprehensive in their areas and the other, more specific international treaties flow from those two.

The human rights treaties that subsequently entered into force were, in chronological order:

- *Convention on the Elimination of All Forms of Racial discrimination*⁴ (1969).
- *Convention on the Elimination of All Forms of Discrimination Against Women*⁵ (1979); a very high number of states ratified CEDAW: 189 States parties.
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*⁶ (1987)
- *Convention on Rights of the Child*⁷ (1990). This is the most ratified human rights treaty: it has 196 States parties. All members of the United Nations have ratified the Convention, except the United States, which has signed but not ratified
- *International Convention on Protection on the Rights of All Migrant Workers and Members of Their Families*⁸ (2003)
- *Optional Protocol to the Convention Against Torture*,⁹ establishing the Subcommittee on Prevention of Torture, to pay visits to countries to monitor (2006)
- *Convention on the Rights of Persons with Disabilities*¹⁰ (2008)
- *Convention for the Protection of All Persons from Enforced Disappearance*¹¹ (2010) .

3. What does ratification by countries mean in terms of legal obligations?

States have voluntarily committed themselves to applying and achieving the agreed standards by ratifying these treaties. Human rights treaties have the same binding nature as other multilateral treaties developed under the auspices of the UN. Article 26 of the *Vienna Convention on the Law of Treaties*¹² provides that: “Every treaty in force is binding upon the parties to it and must be performed in good faith.”

² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

⁴ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

⁵ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

⁶ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

⁸ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <https://www.ohchr.org/en/professionalinterest/pages/cmwf.aspx>.

⁹ UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>.

¹⁰ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*, available at: <https://www.ohchr.org/en/hrbodies/crpd/pages/conventionrightspersonswithdisabilities.aspx>.

¹¹ UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, available at: <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx>.

¹² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

Today, the vast majority of countries have ratified some binding international human rights treaties and undertaken to respect, protect, and fulfill the human rights referred to in them. When they ratified and became a State Party to a treaty, they undertook a legal obligation to respect, protect and fulfill the rights set out in the treaty, so that everyone in the State can enjoy them. The obligation to respect rights requires States to refrain from interfering in the enjoyment of rights by individuals and groups (think here of freedom from torture, as one example, where certain aspects of the right can be respected by refraining from acting). The obligation to protect involves preventative and remedial dimensions, includes an obligation on States to act with due diligence to protect against violations of human rights by third parties like armed forces and corporations. The obligation to fulfill requires positive action to ensure that human rights can be realized (participation in political affairs is one example of a right which can only be exercised effectively where a functional electoral system is put in place). Exercising many civil and political rights requires all three dimensions of the obligation.

Action at the national level is generally the best way to protect internationally agreed human rights. However, sometimes countries tend to fall short of their obligations in one way or another.

Factoring in this reality, monitoring mechanisms were set up at the UN to assist, guide and encourage national implementation of treaty provisions. The system which generally speaking scrutinizes the human rights performance of the States Parties to the treaties comprises ten committees. Each committee generally corresponds to a particular human rights treaty.

4. Who sits on treaty bodies?

Committees are made up of independent experts who are nominated by their governments and elected by States that are party to the relevant treaty for four year-terms. According to article 28 of the ICCPR, for example, the “Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.” Independence from their governments is important if committees are going to fairly assess country compliance with human rights obligations. The Human Rights Committee has 18 members. Nine are elected every two years. Having been elected once, Committee members can be re-elected. States vote for nominated candidates at the UN in New York.

5. What are the functions of treaty bodies?

There are ten bodies that monitor the implementation of the nine core international human rights treaties and one, the Subcommittee on the Prevention of Torture (SPT), monitors the *Optional Protocol to the Convention against Torture*. Generally speaking, these treaty bodies review the performance of countries that have ratified the particular treaty. The States Parties submit periodic reports to a committee about their national implementation of human rights obligations, and committees make authoritative recommendations for action.

The UN Human Rights Committee was the first committee to be established, in 1976. I am a member of this Committee and will use my direct experience to illustrate the way the committees function. Our focus is on how States implement the civil and political rights contained in the *International Covenant on Civil and Political Rights*. These rights are far-reaching in scope, and range from the right to a fair trial; the right to be free from torture, ill treatment, slavery and arbitrary detention; freedom of movement, privacy, religion, assembly, equality before the law and so forth. A total of 173 countries have agreed to have their human rights records scrutinized by this Committee. The Covenant mandates us to carry out three main functions:

5.1 Country reviews

First, the Committee reviews compliance by States with civil and political rights obligations through a constructive dialogue with State delegations in Geneva. Under the simplified reporting procedure, the

Committee prepares Lists of Issues for State Parties in advance. To enhance the quality of periodic reporting, we strive to focus on what we see as the most important issues. The State Party responds with a report on these issues. The Committee then engages in a constructive dialogue, i.e., questions and answers with the representatives of the State party in Geneva. Based on reports submitted and information exchanged during the constructive dialogues, Treaty Bodies provide tailored observations for countries to enable them to fully implement covenants and conventions.

These are called Concluding Observations and call for a carefully selected combination of measures. Treaty bodies usually recommend a range of legal (amendments or passing new laws), policy and programmatic measures. These are a mix of measures which serve to recognize the difference between, on one hand, processes that represent steps toward the goal of fulfillment of human rights; and, on the other hand, actual or full implementation, that is, creating real impact that changes peoples' enjoyment of their human rights, improving the lived experience for people in exercising their human rights.

Past dialogues are archived on UN Web TV,¹³ both the questions by members of the Committee and answers by government representatives. These are webcast, in part, for the audience in the countries concerned to view. The Committee's Concluding Observations or the recommendations to the State Party that flow from the Constructive Dialogue are also public online on UN Human Rights Office website.

The Committee then continues to monitor implementation of our recommendations using the Follow Up to Concluding Observations procedure. I am currently the Committee's Special Rapporteur on Follow Up to Concluding Observations. Our Committee has a rather unique follow up system.

When we issue Concluding Observations, we select some for follow-up. We generally select two to four recommendations from the full set for follow-up, based on two criteria: (1) the recommendations can be in whole or in part implemented within one or two years and (2) they require immediate attention because of their gravity or urgency. States have one year to reply to these specific concerns. The Committee then considers the responses and adopts a grade for the state's action to implement the recommendations selected as follows:

- "A" (largely satisfactory)
- "B" (partially satisfactory)
- "C" (not satisfactory)
- "D" (no cooperation with the Committee)
- "E" (contrary to or reflects rejection of the Committee recommendation)

The discussion and adoption of the Follow-Up report and assignment of grades is also webcast live on UN Web TV.

Some States set up national processes and systems for follow up. Early on, Paraguay set up such a system called SIMORE which includes focal points across government and software to track implementation. It has been used as a model in other countries, to encourage and systematically tracks implementation of human rights treaty body recommendations and ease the burden of periodic reporting to committees. I believe these types of tracking systems hold enormous potential to facilitate implementation if combined with a willingness and leadership to reform national practices.

¹³ See <http://webtv.un.org/>.

5.2 Individual communications

The Committee's second main function is to decide communications or cases submitted to us by individuals who, generally speaking, believe they have not received justice at home. The first *Optional Protocol to the International Covenant on Civil and Political Rights* entered into force in 1976. It gives the Committee the jurisdiction to hear cases, referred to as individual communications, against State parties. Currently there are 116 State parties to the Optional Protocol. In effect, these States have given the Committee the mandate to hear cases against them.

While the Committee is not a court or a tribunal, it does have a court-like function. In closed sessions, we decide on individual petitions concerning human rights violations by authors who have exhausted all domestic legal remedies available to them in their countries – or do not have access to effective remedies because they are not available-- and subsequently submit their cases arguing violations of the Covenant to the Committee.

Upon considering the case, the Committee issues its decisions, referred to as “Views.” (Again, Article 26 of the *Vienna Convention on the Law of Treaties* provides that “Every treaty in force is binding upon the parties to it and must be performed in good faith”.)

To provide you with just three examples of different types of cases where we adopted Views:

- In 2019, we adopted views against Turkey, directing the release of alleged two Gulen followers after they had been secretly rendered from Malaysia to Turkey. The two men were detained without charge for long period and without effective access to counsel. The Committee found that no evidence was presented by the State party as a basis or a reasonable suspicion that they had committed a criminal offence that required pre-trial detention.
- In 2020, the Committee found for the first time that it is possible to be a “climate change refugee”. Mr. Tetoita, a man from Kiribati, brought an individual communication against New Zealand. He based an asylum claim on the predicted danger due to land disputes and difficulties accessing safe drinking water as a result of the climate crisis. New Zealand denied the claim. The Committee did not find a violation based on the facts. It did find that future claims might be successful where the evidence shows “the effects of climate change in receiving states may expose individuals to a violation of their rights”.
- In 2016, the Committee found that Ireland's ban on abortion violated the Covenant by discriminating against women. The woman who brought the case was forced to travel to another country to terminate a non-viable pregnancy. The Committee found that Ireland had subjected the author to intense physical and mental suffering. It violated her rights to privacy, freedom from ill-treatment and non-discrimination. The action was based on stereotypes about gender and the reproductive role of women primarily as mothers. Ireland subsequently changed its law.

As per Committee rules, I do not participate in the consideration of cases against Canada.

5.3 General Comments

The third main function is to develop General Comments. General Comments codify the status of international law and good practice on selected rights. Through consultation with States parties and civil society, the Committee selects a topic that is timely, where there is a need for specific guidance to states. Then we elaborate a draft on how the particular right can effectively be implemented by states. Thus far, the Committee has issued General Comments on 37 topics such as, to name a few examples:

- General comment no. 32, on the Right to equality before courts and fair trial¹⁴ (in 2007);
- General comment no. 34, on Freedom of opinion and expression¹⁵ (in 2011);

¹⁴ UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

- General Comment No. 35, on Liberty and security of the person¹⁶ (in 2014);
- General comment no. 36, on the Right to Life¹⁷ (in 2019); and
- General Comment no. 37, on the Right of peaceful assembly¹⁸ (adopted in July 2020).

6. How can lawyers and civil society more generally engage with the TBs to advance human rights in countries? How can you amplify the impact of the treaty bodies?

There is much potential for civil society, working both internationally and locally, to help the work of treaty bodies so together we can maximize the impact of our recommendations, that is the respect, protection and fulfilment of human rights on the ground. Let me make seven straightforward suggestions of ways you can engage with – and use – the work of the Committee at all stages of the State Party reporting process and afterwards. You can likely think of other ways.

6.1 Stages of the Country Review process

The first ways revolve around points in the Country Review or Constructive Dialogue process, described below in the order of the review process.

6.1.1. LOI/LOIPRs

First, non-governmental organizations (NGOs) can contribute to shaping the agenda for the dialogues between the State Party of the Committee in Geneva. You have the chance to contribute information to the human rights committees before they adopt Lists of Issues and share them with the State Party for response. As an example, at our month-long March 2021 session, we plan develop Lists of Issues for Burundi and LOIPR for Democratic People's Republic of Korea, Fiji, Grenada, Iceland, Malawi, Nepal, Sao Tome and Principe, Seychelles, and the United Republic of Tanzania. Other committees are doing so for other countries which you can see on UN Human Rights website. An announcement is made on the OHCHR Treaty Body Database website with deadlines.

6.1.2 Contributing to the Country Review File with Reports

Second, closer to the time of the dialogue, NGOs can submit “alternative” or “shadow reports” to the Committee for their consideration well enough in advance of the session so we can thoroughly digest them. Credible non-governmental submissions to the Committee are very useful as they provide up-to-date information on the actual implementation of human rights based on the lived experience of the rights holders in the country concerned, identifying who is affected and the extent of the problems. Both international and local civil society groups can assist. International human rights groups can cover many issues. Local groups are closest to the issues on the ground and often have a more comprehensive understanding of rights challenges and the reasons they exist. NGOs can comment on the effectiveness the measures taken in terms of the actual human rights impact. Quality data collection by civil society can help demonstrate degree of compliance with the Covenant. I find this non-governmental input useful as it can give the Committee a clearer grasp of the *de facto* situation in the countries it reviews.

¹⁵ UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

¹⁶ UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

¹⁷ UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

¹⁸ UN Human Rights Committee (HRC), *General comment no. 37, Article 21 (Right of Peaceful Assembly)*, 17 September 2020, CCPR/C/GC/37, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

This also applies to the follow up procedure for Concluding Observations that I mentioned. Civil society will know if the State party has acted based on the Committee's recommendations.

6.1.3 Constructive Dialogues

Third, we are often briefed by local and international civil society interested in the country before the constructive dialogue begins. Not all NGOs can come to Geneva, but remote briefings have been set up especially since the COVID 19 pandemic has been declared and Committee sessions have been conducted online. If NGOs have directly relevant and reliable information, they could consider briefing the Committee. We do go into great detail about the issues at hand. This requires in depth knowledge on our part. We work hard to verify and cross check all information we receive so that we get the facts and the situation right. Reliable information provided in real time while following the live webcasts or watching the Constructive dialogues can be valuable.

6.1.4 Publicize the dialogues and the results

Fourth, some civil society organizations now "live-tweet" in real time about the questions that Committee members ask the State party delegation and the answers given. This can be an effective way of disseminating information about the prevailing human rights situation. NGOs can also publicize the concluding observations and circulating them widely. Publicity including via social media can be powerful catalyst for positive change.

6.1.5 Advocacy and strategic use of the Committee's work

Fifth, NGOs are well placed to leverage the recommendations to prompt implementation and follow-up by the State Party. You may be able to use these recommendations as authoritative sources to discuss with governments the need to reform law, policy and practice and live up to their human rights commitments. As one example, a finding by the Committee that practices violate Covenant rights, may form the basis for a domestic court case. The views of the Committee and the Concluding Observations can be used by lawyers in pleadings and arguments in domestic court cases. The outcomes of the Committee's work are material for lawyers; Canadian courts at various levels cite the Committee. An example is below (i.e., the *Nevsun*¹⁹ case).

6.1.6 Individual communications

I have been referring to ways civil society can contribute to the country review process. There is also potential for action concerning individual communications. Of course, cases can be submitted against Canada as they can against any State Party to the Optional Protocol to the Covenant. More broadly, for a year now, it has been possible according to the Committee's Rules of Procedure to submit a third-party amicus brief in a case of an individual petition. Persons wishing to do so must be granted permission by the member of our Committee who serves as Special Rapporteur on new communications. Under Rule, the Committee can accept information and documentation submitted by third parties "which may be relevant for the proper determination of cases. In accordance with the rule, the Committee has established Guidelines for third party submissions. If a third-party submission is accepted, the Committee will forward it to the parties to the communication, who may submit written observations and comments in reply. If the Committee decides the third-party submission is appropriate and relevant, the third-party submissions and observations of the parties of the communication related to them may be used in the Committee's deliberation and reflected in the Committee's final Views.

6.1.7 General Comments

Civil society groups make submissions and brief the Committee when themes for General Comments are in the process of being selected. What topic is the most pressing need for our next General Comment? Civil society also comments in writing on the draft Comment when it is debated before adoption by the Committee. Usually a draft is made available online on the OHCHR Treaty Body Database website with deadlines and guidance for

¹⁹ *Infra* note 19.

comments. Thus there is potential for you to help shape this agenda with your suggestions for future General Comments.

General Comments as well as Concluding Observation and Views can and are used in domestic cases.²⁰ A direct example of use of The Committee's General Comments in Canadian courts is the recent case of *Nevsun Resources Ltd. v. Araya*²¹ in the Supreme Court of Canada. The case concerned Eritrean workers who were compelled to work at a Canadian-owned mine in Eritrea. The workers brought a claim in Canada, alleging the mining company violated customary international law because of the harsh and dangerous conditions they were forced to work in. The mining company tried to have this claim summarily dismissed, and the case reached the Supreme Court. In upholding the decision not to summarily dismiss the plaintiffs' claim that the mining corporation violated the rights of Eritrean workers, and to permit lower courts to adjudicate on the alleged breaches of customary international law, the Supreme Court referred to the Committee's General Comments establishing that States have international obligations to ensure an effective remedy to victims of violations of human rights. The Court also stated that the Committee has specified that States Parties must protect against the violation of rights not just by states, but also by private persons and entities. Thus they refused to dismiss the claims of Eritrean workers. They did not decide whether *Nevsun* was responsible for violating the workers' rights although it used the Committee's reasoning to rule that the case should proceed past the preliminary stage.

In conclusion, these are some of the ways that lawyers and civil society can engage to help maximize or amplify the results of the mandated work of UN treaty bodies in order to advance the ability of people around the globe to exercise their rights. I hope this has provided some "food for thought" and sparked ideas for action you can take toward this end.

²⁰ The precise ways that use can be made of the Human Rights Committee's decisions could be the subject of a separate lecture.

²¹ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, available at: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do>.