



International Monitoring Arrangements for Human Rights

DR. APURVA PATHAK

Associate Professor & In-Charge Principal (LL.M., Ph.D.)
Anand Law College, Anand
Gujarat (India)

Abstract:

Human rights law is embedded in the broader field of international law, and therefore, in general, the rules for interpretation applicable under international law similarly apply to human rights treaties. In general, the principles of interpretation of international treaties contained in the Vienna Convention on the Law of Treaties (VCLT) are considered to be the customary international law principles of treaty interpretation. However, the interpretation of human rights treaties requires that the specific characteristics of these treaties be taken into account.

Keywords: IMA, VCLT, Human rights

1. Introduction

The implementation of human rights treaties cannot be left to states alone. There is a need, even in the case of those states that are committed to human rights, for some form of independent scrutiny. Human rights treaties, therefore, universally provide for some mechanism of "enforcement" or "supervision," which is usually overseen by an independent committee (in the case of UN treaties), commission, or court. Each of the UN treaties discussed in this module has its own "treaty body" or committee, which is required to undertake several tasks in relation to implementation of the treaty concerned. The numerous human rights conventions under the framework of the United Nations and the regional systems in Africa, the Americas and Europe have led to the creation of a wide range of mechanisms for monitoring compliance with international human rights laws.

2. Two distinctive types of Supervisory Mechanisms

(a) Treaty-based mechanisms: supervisory mechanisms enshrined in legally binding human rights instruments or conventions. Within the UN framework these mechanisms are often called 'treaty bodies', e.g., the Human Rights Committee and the Committee on the Rights of the Child. The African Commission and future Court of Justice and Human Rights, the European Court of Human Rights and the Inter-American Court and Commission of Human Rights are also treaty bodies.

(b) Non-treaty based mechanisms: supervisory mechanisms not based on legally binding human rights treaty obligations. Generally, this type of mechanism is based on the constitution or charter of an intergovernmental human rights forum, or on decisions taken by the assembly or a representative body of the forum in question. Under the UN framework, the non-treaty-based mechanisms are referred to as 'charter-based' mechanisms, which include the Human Rights Council 1503 procedure, the Universal Peer Review and 'special procedures'. The European Commission against Racism and Intolerance under the Council of Europe is also an example of a regional non-treaty based mechanism.

The alternative model of supervision is the petition system-otherwise known as a "complaints system" or "system of communications" which is the predominant form of supervision in regional systems. Petition systems are also operated by several UN committees (the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination). The

UN General Assembly has adopted a further petition system for CEDAW, but it has not yet come into force. Moves have been made in relation to ICESCR to adopt such a system.

Petition systems vary both as regards the status of the proceedings and the type of complaints that may be received. Apart from the systems operated under the European Convention of Human Rights (Module 29) and the Inter-American Convention of Human Rights (Module 30), treaty-based petition systems are optional for states parties and are not legally binding. Treaties usually provide for the receipt of petitions from states and/or individuals, but the interstate complaints procedure is very rarely utilized.

By and large, petition systems operate in a manner analogous to domestic legal proceedings in which an independent body is asked to deliberate upon a dispute between two parties and offer a decision or view as to the legal solution. Unlike domestic proceedings, however, petition systems do not seek to function as a means of appeal but simply as a means of ensuring that the states concerned comply with their treaty obligations. The provision of "remedies," in the sense understood in domestic law, is therefore a subsidiary concern as to most human rights treaties. In all cases, therefore, the emphasis is upon the provision of domestic remedies within the national legal order, and international scrutiny will only follow when those remedies have been exhausted.

The following sections provide an overview first and foremost of the treaty-based mechanisms. The United Nations non-treaty-based mechanisms are dealt with in Part II (1.C).

The various supervisory procedures established in human rights treaties can be divided into four main groups:

- Reporting procedures
- Inter-state complaint procedure
- Individual complaint procedure
- Inquiries and other procedures

2.1 Reporting Procedures

Most human rights treaties include a system of periodic reporting. States parties to them are obliged to report periodically to a supervisory body on the implementation at the domestic level of the treaty in question. As formulated, e.g., in Article 40 of the ICCPR, states parties shall 'submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights'. At the UN level, each treaty body has formulated general guidelines regarding the form and contents of the state reports (see HRI/GEN/2/Rev.2), and their own rules of procedures (see UN HRI/GEN/3/Rev.1).

The report is analysed by the relevant supervisory body, which comments on the report and may request the state concerned to furnish more information. In general, reporting procedures under the different treaty-based mechanisms are meant to initiate and facilitate a 'constructive dialogue' between the supervisory body and the state party.

The quality of the reports submitted by states varies. Some reports reflect serious efforts to comply with the reporting requirements, while others lack credibility. In any case, the reports generally reflect the view of the respective state. Along with fluctuations in the quality of state reports, the overall compliance with submitting any report at all is often marginal. Many states' reports are late by several years or simply are not submitted at all. Fortunately, committees often receive information and reports about a country's human rights situation from other sources, including nongovernmental organisations, UN agencies, other intergovernmental organisations, academic institutions, and the press. The quality of decision-making throughout the reporting procedure depends to a great extent on this additional

information that the experts may receive from the external sources. Additional information provided by NGOs and agencies of the United Nations help set forth a wider perspective as to the actual situation in the country concerned. In an increasing number of countries, NGOs prepare and submit alternative or 'shadow' reports to the treaty bodies, aimed at counter balancing the information submitted by the state. In the light of all the information available, the committees examine the reports together with government representatives. Based on this dialogue, the committees decide on their concerns about and recommendations to the state concerned, which in their written form are referred to as 'concluding observations'.

The regular supervision of ILO conventions also encompasses a reporting mechanism. Each member state of the ILO must submit a report at regular intervals on the measures it has taken to give effect to the provisions of conventions which it has ratified. The Committee of Experts on the Application of Conventions first examines these reports in closed meetings composed of 20 independent legal experts. The comments of the Committee of Experts are made in the form either of observations which are published in the Committee's report on the Application of Conventions and Recommendations, or in requests dealing with more technical questions addressed directly to the governments, which remain unpublished. The Committee's report is then considered at the annual session of the International Labour Conference by a tripartite Conference Committee on the Application of Conventions and Recommendations (Committee on Application of Standards). It is worth noting that under the ILO framework member states must also submit reports on conventions they have not yet ratified, showing the position of the law and practice in regard to the matters dealt with in the conventions, and indicating the difficulties which have prevented or delayed ratification.

2.2 Inter-state Complaint Procedure

Some human rights instruments allow states parties to initiate a procedure against another state party which is thought not to be fulfilling its obligations under the instrument. In most cases, such a complaint may only be submitted if both the claimant and the defendant state have recognised the competence of the supervisory body to receive this type of complaint.

In reality, however, inter-state complaint mechanisms are rarely used. Inter-state relationships are delicate and inter-state mechanisms may not be ideal procedures as states bringing complaints may elicit reprisals. In addition, many states have not recognised the competence of the supervisory bodies to receive inter-state complaints, though neither the European Convention for the Protection of Human Rights and Fundamental Freedoms nor the African Charter on Human and Peoples' Rights require any special authorisation for a state party to be able to lodge interstate complaints. The European mechanism is the only inter-state mechanism that has been deployed several times although the Court has only delivered judgements in three cases: Ireland v. The United Kingdom (1978); Denmark v. Turkey (2000) and Cyprus v. Turkey (2001). In 2007 Georgia lodged an application against the Russian Federation with proceedings commencing in April 2009.

2.3 Individual Complaint Procedure

It seems reasonable that individuals, on whose behalf human rights were stipulated in the first place, should be enabled to initiate proceedings to protect their rights. Such a procedure, whereby an individual holds a government directly accountable before an international supervisory body, aims to afford far-reaching protection to the individual. Several international conventions have created the opportunity for an individual who feels that his or her rights have been violated to bring a complaint alleging a violation of certain treaty rights to the body of experts set up by the treaty for quasi-judicial adjudication or to an international Court (i.e. the European Court, Inter-American Court and future African Court of Justice and Human Rights). While there are some procedural variations between the different mechanisms, there are three procedures that all conventions have in common. In order for an individual to bring a case/communication/petition under a human rights convention, the following

requirements have to be met: a) the alleged violating state must have ratified the convention invoked by the individual; b) the rights allegedly violated must be covered by the convention concerned; and c) proceedings before the relevant body may only be initiated after all domestic remedies have been exhausted.

Unlike the complaint procedures under the UN 'treaty bodies', in the European and Inter-American systems oral hearings are a regular part of the complaints procedure. In addition, the decisions of the regional human rights courts are binding upon states.

Some 'non-treaty based procedures', also contemplate the submission of individual complaints. For example, in 1970 the UN Commission on Human Rights established the so-called 1503 procedure, which has been maintained by the replacement body, the UN Human Rights Council. The 1503 procedure allows the UN Human Rights Council to examine communications received from individuals and other private groups, with the aim to 'address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances'. It should be emphasised that even though this procedure allows for individuals and non-governmental groups to file a complaint, no individual redress is possible under this procedure. Instead, the complaints aim at identifying 'a consistent pattern of gross and reliably attested violations'. When the UN Human Rights Council receives a communication under procedure 1503, it can adopt several responses. It may, inter alia, discontinue considering the situation when further consideration or action is not warranted, submit a request additional information from the state concerned, appoint an independent expert to monitor the situation and report back to the Council, take the matter up under its public procedure or recommend to the OHCHR to provide technical cooperation, capacity- building assistance or advisory services to the state concerned.

2.4 Inquiries and other Procedures

The group of supervisory mechanisms now discussed includes all procedures that do not fall under those mentioned above. Most involve inquiries, but others may entail initiatives aimed at preventing violations or promoting compliance with specific human rights. The supervisory bodies discussed in the previous section play a rather passive role as they generally cannot initiate proceedings, and are largely dependent on information submitted by governments, NGOs or individual petitioners. Recently, however, several supervisory mechanisms have been established whereby an independent person or group of persons may raise, on the person's or group's own initiative, issues of non-compliance with human rights. Such a body may, for instance, act upon receipt of complaints or take an initiative itself. It may also initiate a visit in loco to gather information, or do so as part of a regular visit-programme. One example of a visit-programme is that of the Inter-American Commission on Human Rights, which has carried out more than 100 on-site visits from its establishment in 1961. (This system as initially a non-treaty based mechanism, but was later confirmed in Article 41 ACHR). Another example of an enquiry – and in loco visits procedure - is that set out in Articles 126 and 132 of the Third Geneva Convention (1949), and the provision in Article 143 of the Fourth Geneva Convention providing for on-site visits to places of internment or detention. Mention should also be made of the International Fact-Finding Commission established under Article 90 Protocol I to the Geneva Conventions.

Inquiries may also be undertaken by the special procedures operating under the Human Rights Council, such as thematic rapporteurs, country rapporteurs or working groups. These are often well suited to deal with specific situations or specific rights. The thematic rapporteurs or working groups may send communications or 'urgent appeals' to raise human rights issues with governments; they can also institute fact-finding missions in loco and publicise their findings. A complaint is not the prerequisite for the special procedures to act, nor do they have to wait until domestic remedies are exhausted. Special procedures may request the governments concerned to provide more information; they may

even initiate fact-finding missions for information only. However, fact-finding and in loco missions can only take place with the consent of the state concerned.

2.5 Selecting the most Appropriate Procedure

In order to determine which supervisory mechanism applies in a specific case, the following questions may be used for guidance:

- Which specific human right has been violated?
- Where has the alleged violation taken place?
- Which government is held responsible and to what extent?
- Which convention protects this human right?
- Is the responsible state a party to an applicable human rights treaty? If yes, how does the supervisory procedure work? If no, is there some supervisory procedure outside the relevant convention that could be invoked?

The specific character of a particular procedure has to be taken into consideration. An inter-state mechanism procedure is of a rather political nature, which implies that inter-state relations may be unduly strained. On the other hand, some of the other procedures, especially the individual mechanisms, can have a more confrontational character.

Sometimes, individual complaints are possible both at the universal level (e.g., ICCPR, CAT and CEDAW Optional Protocol) and under a regional system (e.g., European Convention and American Convention). Where the victim has a choice it may be preferable to lodge the complaint with the regional human rights court (e.g., the European or the Inter-American Court of Human Rights) as their judgements are legally binding on the state party in question and often include explicit decisions on compensation or reparation.

It should be noted that human rights instruments generally prohibit the submission of the same complaint to both a universal and a regional system. For example, the European Convention prevents the admission of a case which has been dealt with already by the Human Rights Committee (Article 35(2.b)). It is possible, however, to complain before the Human Rights Committee after the European Convention procedure has been exhausted. However, most states parties to the European Convention consider this undesirable and have therefore made a declaration at the time of the ratification of the Optional Protocol to the ICCPR which excludes duplication of procedures in the same case. Other states parties, however, allow persons under their jurisdiction to apply the ICCPR procedure after the ECHR procedure.

2.6 Effectiveness

The purpose of the various supervisory mechanisms is to combat violations and to promote compliance with human rights treaties. Ideally, such mechanisms should function effectively. There are, however, a number of problems.

Firstly, a large number of countries have either not recognised the competence of the relevant treaty-based mechanisms or have failed to ratify the treaties concerned. Secondly, a number of treaty-based mechanisms, such as the individual complaint mechanism, are victims of their own success. The sometimes overwhelming number of individual complaints has led to a serious delay in the decision procedures, especially under the European Court of Human Rights. Moreover, many procedures for individual communications are understaffed and underfunded. At the UN level, the major shortcoming of the individual complaints procedure is the absence of legally binding judgements. Although the treaty bodies have developed certain 'follow-up' mechanisms, such as the 'Human Rights Committee Special Rapporteur on Follow-up' there is still much room for improvement.

On the other hand, the most common supervisory mechanism, the examination of reports under the treaty-based reporting mechanisms, also faces problems. The value of reports depends on the depth of research that underpins them, the clarity of their content and the timeliness of their production and delivery schedules. The value and promptness of reports affects the quality of decision-making throughout the system. Unfortunately, some states do not seem to take the reporting system seriously and there are a great number of states that have not submitted reports required under the various treaties. In general, the human rights instruments do not provide for reprimanding delinquent states. Additionally, the submission of reports to all the major human rights supervisory bodies creates practical difficulties for many states. At present, the reports are overwhelming in number and tend towards duplication. This creates a serious burden for states, especially for developing countries, which have to submit numerous reports. The same problem is encountered by the Secretariat, which needs to struggle to keep abreast of the growing number of reports requested by the various intergovernmental bodies. The sheer volume of reports is challenging the supervisory bodies' capacity to provide focused and value-added analysis. Several proposals have been put forth with the aim to strengthen the treaty body system. One is the 'common core document' wherein states would avoid duplication by providing more general information including information relating to substantive treaty provisions congruent across all or several treaties. This core document, which would minimise repetition of information in states' reports to the treaty bodies, would be updated regularly and submitted to each committee in tandem with targeted treaty-specific reports.

Finally, it is worth noting that any improvement in the supervisory systems requires the support of states. It is fair to say that such support is often lacking, and states seem reluctant to encourage rigorous scrutiny of their human rights records. In these circumstances, NHRIs, NGOs and civil society are crucial to the strengthening of the human rights supervisory mechanisms. For example, the participation of NGOs in the reporting process may help to ensure that reports are submitted on time and that they are well prepared. In general, NGOs should play an active role in lobbying for states to pay more attention to the human rights supervisory systems.

References

1. Ibrahim Salama, (2009). International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moller, 2nd Revised Edition, MartinusNijhoff Publishers.
2. Arambulo, Kitty (1999). Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects, Intersentia.
3. Iyer, V. R. Krishna (1990). Human Rights and Inhuman Wrongs, B.R. Publishing Corporation.
4. Mehra, Vivek (2010). Human Rights in a Globalised World: An Indian Diary, Sage Publication India Pvt. Ltd., New Delhi