

The Secretariat Support to the United Nations Treaty Bodies: What is the High Commissioner for Human Rights' Mandate?

A role in Need of Clarification

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According to a press release dated 17 May 2019, the chairpersons of all 10 United Nations human rights treaty bodies¹ were informed by the High Commissioner for Human Rights that six treaty bodies were very likely to have sessions cancelled in the autumn due to financial reasons.² This news prompted many reactions and questions regarding its legal basis and the mandate of the UN Secretary-General/UN High Commissioner for Human Rights (the High-Commissioner) to provide ‘secretariat support’³ to the treaty bodies. In this context and in response to this situation, the Geneva Academy has undertaken a brief study to clarify this particular part of the High Commissioner’s mandate. This study does not examine budgetary issues; however, it is worth stating our doubts at the outset, regardless of whose mandate it is to cancel treaty body sessions that this eventual small financial gain will be worth the huge damage done to the UN human rights protection system.⁴

We hope that this paper will trigger a more in-depth study of the legal situation surrounding the functioning of the treaty body secretariat, with the aim of improving its efficiency and effectiveness. Whereas treaty bodies are composed of part-time pro bono experts, meeting for a few weeks during the year, the secretariat is composed of full-time staff who maintain the permanent functioning of the structure. Therefore, greater attention should be paid to the role the secretariat plays in the treaties’ implementation.

The first part of the study looks for answers in the history of the organization and the letter of the relevant legal provisions. The second part presents the current challenges resulting from that institutional legacy and makes a tentative to reply to the question in title of this paper. Finally, the third part suggests solutions.

¹ The system is currently composed of the following ten treaty bodies: the Human Rights Committee, Committee on Economic Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of all Forms of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on Enforced Disappearances (CED), Committee on the Rights of Persons with Disabilities (CRPD) and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

² UN Office of the High Commissioner for Human Rights (OHCHR), ‘UN Budget Shortfalls Seriously Undermine the Work of the Human Rights Treaty Bodies, 17 May 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24621&LangID=E>

³ OHCHR, ‘What We Do’, <https://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx>

⁴ While the problem seems to have been solved for 2019, a long-term solution is needed.

1. THE INSTITUTIONAL LEGACY

Human rights treaty bodies are neither international organizations nor subsidiary bodies.⁵ They were created by the human rights treaties as supervisory bodies composed of independent experts to evaluate states' implementation of their relevant legal obligations. This unique legal status under international law⁶ has had consequences in terms of their relationship to UN organs, including the secretariat.

A. THE EVOLUTION OF THE TREATY BODY SECRETARIAT

The treaties creating treaty bodies do not establish a separate secretariat for each of them. Each treaty specifies that the Secretary-General provides support for the relevant committee.⁷ Originally, the secretariat in charge of human rights issues for the whole United Nations was a small division in New York. This Human Rights Division later moved to Geneva, where UN Human Rights Treaty Bodies meet, and was upgraded to the Centre for Human Rights in 1982 by a Secretary-General decision 'noted' by the General Assembly.⁸ The Section on the Status of Women was also established. This became the Division for the Advancement of Women in 1978 before being consolidated in UN Women in 2010, which coincided more or less with the move that 'attached' the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) to the High Commissioner services and moved it to Geneva.⁹

⁵ On the reasons why states decide to establish treaty bodies rather than full-fledged international organizations in the international human rights and arms control fields, see G. Ulfstein, 'Reflections on Institutional Design – Especially Treaty Bodies', in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations*, Edward Elgar Publishing, 2011.

⁶ For more details on the distinction between UN human rights treaty bodies and international organizations and subsidiary bodies, see H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012, p 3.

⁷ On those specific treaty provisions, see section 2.A.

⁸ UNGA Decision 37/437, Centre for Human Rights, 18 December 1982. For a timeline of the UN Secretariat in relation to human rights bodies, see UN Library Geneva, 'Human Rights Timeline: Secretariat', <http://libraryresources.unog.ch/hrtimeline/secretariat>

⁹ This was the result of years of negotiations between the CEDAW and OHCHR. The latter argued that all human rights treaty bodies should be served by the same entity, while the former considered that there was an inherent specificity requiring the CEDAW to be dealt with in a specific manner. The discussion lasted several years and when UN Women was established, an agreement was reached and the secretariat of the committee moved to Geneva. See also, UN Women, *A Short History of the Commission on the Status of Women*, 2019, <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2019/a-short-history-of-the-csw-en.pdf?la=en&vs=1153>

The Human Rights Division of the UN Secretariat and then the Centre for Human Rights serviced the existing treaty bodies – the Human Rights Committee, the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD) – until the creation of the position of High Commissioner in 1994. Today, the High Commissioner oversees the Office of the High Commissioner for Human Rights (OHCHR), which inherited the prerogatives of the Centre for Human Rights. It thus provides support to all human rights treaty bodies.

B. THE CREATION AND MANDATE OF THE HIGH COMMISSIONER

1. A LONG PROCESS

The process that culminated in the creation of the position of High Commissioner for Human Rights in 1993 was a lengthy one.¹⁰ The idea of a high official in charge of human rights was first launched in 1947 by René Cassin, as an ‘Attorney General’. A controversial project, it met with opposition for many years. Theo van Boven explains that there are three moments in the history of the proposal for a High Commissioner for Human Rights corresponding to draft resolutions presented to the General Assembly in 1967, 1977 and 1993.¹¹ The first draft resolution was elaborated in the Commission on Human Rights and adopted by the Economic and Social Council on 6 June 1967¹² for recommendation to the General Assembly, but in vain. A second draft resolution, prepared by the Commission on Human Rights and the General Assembly,¹³ was presented to the Third Committee of the General Assembly in 1977, which decided not to vote on it and referred the matter back to the Commission on Human Rights.

In the late 1970s and 1980s, several institutional and political factors increased the popularity of the proposal for a High Commissioner. At the institutional level, the UN human rights machinery greatly expanded with the adoption of new instruments and the creation of three new treaty bodies – the CEDAW, the Committee against Torture and the Committee on the Rights of the

¹⁰ See the enlightening articles by two experts on the system: A. Clapham, ‘Creating the High Commissioner for Human Rights: The Outside Story’, 5 *European Journal of International Law* (1994); T. van Boven, ‘The United Nations High Commissioner for Human Rights: The History of a Contested Project’, *Leiden Journal of International Law* 4 (2007)

¹¹ Van Boven, ‘The United Nations High Commissioner for Human Rights’, *supra* fn 10.

¹² ECOSOC Res 1237 (XLII), 6 June 1967.

¹³ Alternative Approaches and Ways and Means Within The United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Revised Draft Resolution, UN Doc A/C.3/32/L.25/Rev.1, 16 November 1977.

Child – in addition to the already existing Human Rights Committee, CESCR and CERD. In parallel, the Commission on Human Rights created special procedures mandates, both thematic and geographic, which are also independent expert mechanisms. These developments justified the need to raise the secretariat's profile and for greater coordination amongst the many mechanisms.¹⁴

At the political level, with the end of the Cold War, the situation became more favorable. This auspicious period culminated in the World Conference on Human Rights in Vienna in 1993, the outcome document of which recommended that the General Assembly considers the establishment of a High Commissioner for Human Rights.¹⁵ The post was created that same year by General Assembly Resolution 48/141 and the first High Commissioner, HE Mr José Ayala-Lasso from Ecuador, was appointed.

2. A BROAD MANDATE

The process of creating the position and the political context shed some light on the reasons why the High Commissioner was finally entrusted with a broad mandate. Initially, it was considered that the role should be equivalent to that of a human rights monitor and mediator whose mandate would involve examining complaints and lending good offices.¹⁶ With the creation of other monitoring mechanisms (treaty bodies and special procedures of the Commission on Human Rights), it was politically anticipated that the High Commissioner would be a coordinator of the UN human rights machinery as well as its secretariat support, without, however, giving him/her the exact parameters on this.¹⁷

The wording of Resolution 48/141 gives the High Commissioner a broad mandate to promote and protect all human rights for all.¹⁸ From an institutional point of view, the High Commissioner

¹⁴ For an overview of the development of human rights institutions at the UN since its inception, see E. Decaux, 'Les Nations Unies et les Droits de l'homme, 60 ans après', 7 CRDF (2009).

¹⁵ See Vienna Declaration and Programme of Action, 25 June 1993, 'Adaptation and Strengthening of the United Nations Machinery for Human Rights, Including the Question of the Establishment of a United Nations High Commissioner for Human Rights', §§17–18.

¹⁶ Van Boven, 'The United Nations High Commissioner for Human Rights', supra fn 10

¹⁷ For Special Procedures this was more or less sorted out by the resolution A/HRC/RES/5/1 commonly called "Institutional building package" for the Human Rights Council. There is no equivalent in the UN treaty bodies field.

¹⁸ In accordance with UNGA Res 48/141, 20 December 1993, the first of the responsibilities listed is for the High Commissioner to 'promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights' (§4(a)). §4(f) provides that it is also the High Commissioner's responsibility to 'play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world'.

has the rank of Under-Secretary-General¹⁹ and is the UN official with principal responsibility for UN human rights activities.²⁰ The High Commissioner is also mandated with the ‘overall supervision of the Centre for Human Rights’,²¹ the director of which was also given the status of Under-Secretary-General. The functions of the Centre for Human Rights were eventually absorbed by OHCHR in 2000.²² It should be noted that the resolution establishing the mandate of the High Commissioner does not mention his or her office.²³

In addition to the broad mandate outlined in Resolution 48/141, the High Commissioner has inherited a wide range of activities from the Centre for Human Rights, including secretariat support for treaty bodies. This institutional legacy has resulted in challenges highlighted by the question in the title of this paper.

3. CURRENT CHALLENGES

A. GENERAL TREATY PROVISIONS ENGAGING THE SECRETARY-GENERAL

The first human rights convention establishing a treaty body, the International Convention on the Elimination of All Forms of Racial Discrimination adopted in 1965, provides in general terms that ‘[t]he secretariat of the Committee shall be provided by the Secretary General of the United Nations’.²⁴ The subsequent human rights conventions creating the other treaty bodies contain a similar provision drafted in more specific terms: ‘The Secretary-General of the United Nations

¹⁹ Ibid, §2(c).

²⁰ Ibid, §4.

²¹ Ibid, §4(k).

²² Between 1997 and 2000, the double reference to OHCHR and the Centre for Human Rights disappeared from the reports of the annual sessions of the Commission on Human Rights.

²³ As a high official of the UN could not fulfill this mandate alone, a legal fiction, called ‘the Office of the High Commissioner’ was created over the years. This is the function of the staff of the Secretary-General who are entrusted with tasks related to human rights. Similarly to those working for the UN Office for the Coordination of Humanitarian Affairs, the Department of Peacekeeping Operations or the UN Office for Disarmament Affairs, these members of staff are said to be working for the Office of the High Commissioner, while their employer is the UN Secretary-General. In this sense, OHCHR is rather an internal division of labour within the Secretary-General’s administration.

²⁴ Art 10(3), International Convention on the Elimination of All Forms of Racial Discrimination.

shall provide the necessary staff and facilities for the effective performance of the functions of the Committee'.²⁵

It should be noted that that this duty was recalled in the 1993 Vienna Declaration and Programme of Action, according to which the World Conference on Human Rights requested the Secretary-General and the General Assembly 'to provide sufficient human, financial and other resources to the Centre for Human Rights to enable it effectively, efficiently and expeditiously to carry out its activities'²⁶ and stressed that it 'should be assured adequate means for ... treaty bodies'.²⁷

While the relevant provisions do not provide any clarification regarding how the Secretary-General is expected to service the treaty bodies, they clearly impose a legal obligation on this high official, anchored as they are in the human rights conventions.

B. FROM THE SECRETARY-GENERAL TO THE HIGH COMMISSIONER: HOW TREATIES ENVISAGE SECRETARIAT SERVICES

The only UN official mentioned in the relevant treaty provisions as being responsible for providing secretariat support to the treaty bodies is the Secretary-General. This is logical as the Secretary-General is the chief administrative officer of the organization.²⁸ None of the relevant treaty provisions, even those adopted after 1993, mention the High Commissioner, whose mandate lies in a General Assembly Resolution that came into existence after the adoption of the first human rights treaties. The more recent treaties, such as the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from

²⁵ See Art 36, International Covenant on Civil and Political Rights; Art 17(9), Convention on the Elimination of All Forms of Discrimination against Women; Art 18(3), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art 43(11) Convention on the Rights of the Child; Art 72(7), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Art 26(7), International Convention for the Protection of All Persons from Enforced Disappearance; Art 34(1)1, Convention on the Rights of Persons with Disabilities; Art 25(2) Optional Protocol to the Convention against Torture. Regarding the CESCR, ECOSOC Res 1985/17 establishing the Committee contains a similar provision (g).

²⁶ Section II, §11, Vienna Declaration and Programme of Action.

²⁷ Section II, §15, *ibid.*

²⁸ Art 97, UN Charter. In comparison, the legal basis of the High Commissioner's mandate lies in a General Assembly resolution, which is lower than the Charter in the hierarchy of norms in the UN legal order. United Nations Dispute Tribunal, *Villamorán v Secretary-General of the United Nations* (UNDT/2011/056), §29: 'At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions'.

Enforced Disappearance, followed the 'tradition' established by the earlier ones, requesting general support from the Secretary-General.

In practice, the Secretary-General has entrusted the High Commissioner with the responsibility to service the treaty bodies, as her office inherited the prerogatives of the former the Centre for Human rights. Should his/her Office have been created as a separate entity with a separate overseeing body (an Executive Committee for example in the case of the UN High Commissioner for Refugees) responding directly to the General Assembly and the ECOSOC, there would have been a formal delegation may be. Since the Office of the High Commissioner for Human Rights remains part and parcel of the UN secretariat there cannot be any formal delegation of powers.

One of the challenges arising from the current situation, is that it is not clear what exactly the mandate of the Secretary-General itself is insofar as the support to the treaty bodies are concerned. This, in turn, results in some confusion in what the High-Commissioner should (or should not) decide upon the functioning, the system, and ultimately the budget of the treaty bodies. For the latter, as the 5th Committee of the General Assembly decides the days of the sessions of all the TB, automatically it decides about the budget. The question is therefore how much "lobbying" power has internally (within the whole UN secretariat) the High-Commissioner to obtain more of less for the treaty bodies. In any case the decision of cancellation of sessions due to budget issue might come this way, i.e. through the budgetary GA Committee and not through the Secretary-General or the High Commissioner.

C. CLARIFYING THE SECRETARIAT SUPPORT TO TREATY BODIES: WAYS FORWARD

In the current circumstances, it is necessary to clarify what the treaty provisions relating to the duty of the Secretary-General to service the treaty bodies entail, including the extent of the transfer of powers/tasks from the Secretary-General to the High Commissioner.

Therefore, it looks as though the mandate of the Secretary-General itself needs to be clarified. There are several ways this could be done. The first could be an opinion of the Office of Legal Affairs of the United Nations (OLA), which has the advantage of being quick and internally available, but the OLA has no authority to impose its opinion on Treaty Body members or states parties. Therefore, we do not recommend this option.

Secondly, the states parties assemblies (nine states parties assemblies for nine treaties creating the ten treaty bodies) could activate their own role. This is unlikely, however, as they have never done it before. In reality, states parties to the human rights treaties are merely used as an arena for the election of treaty body members.

A third possibility would be a General Assembly resolution such as the above mentioned Decision 37/437,²⁹ which simply enshrines a decision by the Secretary-General on 1) how to service the treaty bodies, and 2) how this could be implemented by the High Commissioner, her staff or any other appropriate entity in the Secretary-General's office.

General Assembly Resolution 68/268, which might be renegotiated and reviewed during the so-called 2020 Treaty Body Review process, could serve this purpose. However, in that case, another resolution would have to be completely redrafted and adopted. The follow-up resolution to 68/268 could thus at once solve the problems related to 'reporting' and 'individual communications' and the structural issue with the High Commissioner's mandate.³⁰ This seems like a possible theoretical option, provided that there is enough political support from states and the secretariat. This would, however, represent a clear-cut case of oversight of the High Commissioner and OHCHR by way of a General Assembly resolution, something that has always been rejected by a large portion of stakeholders. There is, therefore, rather little chance of this materializing anytime soon but surprises are part of the UN multilateral diplomacy.

The fourth and last option would be to request an advisory opinion from the International Court of Justice (ICJ). As the principal judicial organ of the UN, the ICJ is competent to provide advisory opinions, which, although non-legally binding, carry great legal weight and moral authority. In accordance with Article 96, paragraph 1 of the UN Charter, this procedure is available to the General Assembly and the Security Council on 'any legal question', while paragraph 2 makes it available to 'other organs of the United Nations ... on legal questions arising within the scope of their activities', provided they are so authorized by the General Assembly.³¹ Given how vaguely the treaty provisions concerned were drafted and the lack of clarity regarding the transfer of the mandate from the Secretary-General to the High Commissioner, a legal opinion may bring some clarification. This opinion might constitute a useful addition to the current debate.

Arguably, the current matter is a legal question in that it involves the interpretation of international treaty provisions related to the Secretary-General's duty to provide secretariat support to the treaty bodies, arising within the scope of his activities.

If such an avenue was to be explored, the question would then be to determine which UN organ should file the request. There are three options in the present case. The first is the General Assembly as per Article 96(a) of the UN Charter. The second option would be for the Secretary-General himself, with the authorization of the General Assembly, to request an advisory opinion to clarify how he should discharge his duties in accordance with the relevant treaty provisions as

²⁹ UNGA Decision 37/437, *supra* fn 7.

³⁰ For an analysis of the possible solutions see the Geneva Academy publications: "Optimizing the UN Treaty body system"; <https://www.geneva-academy.ch/research/publications/detail/356-optimizing-the-un-treaty-body-system> and "Treaty Bodies individual communications procedure..." <https://www.geneva-academy.ch/news/detail/234-new-publication-provides-guidance-to-improve-the-un-human-rights-individual-complaints-mechanism>

³¹ For the list, see International Court of Justice, 'Organs and agencies authorized to request advisory opinions', <https://www.icj-cij.org/en/organs-agencies-authorized>.

per Article 96(b). The meeting of the chairpersons of treaty bodies could request the Secretary-General to do this. Finally, any member state of the United Nations can request an advisory opinion from the ICJ.

KKemileva/CCallejon, June 2019