



BOCHUMER SCHRIFTEN
zur FRIEDENSSICHERUNG und
zum HUMANITÄREN VÖLKERRECHT

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Challenges and Chances of a Written State Report

Analysis and Improvement of a Monitoring Instrument on
the Implementation of Human Rights



Berliner
Wissenschafts-Verlag

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Acknowledgements

This thesis was submitted and accepted as a doctoral thesis by the University of Greifswald (Germany) in December 2019. The publication was revised and updated according to the recommendations of my supervisor and my second reviewer.

The initial idea for pursuing this project was sparked during my voluntary service in Lesotho. Mr. Booi Mohapi gave me space and his trust to develop my own project, which introduced me to state reporting in the first place. Professor Frans Viljoen from the Centre for Human Rights at the University of Pretoria (South Africa) indicated that my project could be interesting for a PhD thesis, a thought that I took up and followed through. I wish to thank both for their confidence in my work.

My sincerest gratitude goes to my first supervisor Professor Claus Dieter Classen, whom I approached with this project while working in Lesotho and who accepted me as his PhD student without having met me. His advice and excellent supervision were significant for the successful completion of this project. Furthermore, I want to thank Professor Pierre Thielbörger, my second reviewer, for his detailed review which was helpful and motivating for the finalization of this publication. I want to extend my thanks to Professor Stefan Harrendorf for being part of the committee and to Ms. Dietlind Behnke for her help with the formalities of the procedure.

I would also like to thank Professor Adelheid Puttler for her organizational support and interest in my development, Dr. Isabella Risini for always patiently answering my various questions and the Chair's student assistant Mr. Van Hoang for saving me from drowning in footnotes.

For organizing this publication, my thanks goes to Ms. Jessica Gutsche from the Berliner Wissenschaftsverlag for her kind way of guiding me from the first contact to the publication.

Last but not least I want to thank my dear friends Dr. Judit Beke-Martos and Ms. Ella Schönleben, my wonderful husband Marco and my beloved family for their tireless support which made this endeavor not only possible, but even delightful.

Jule Giegling

Preface

State Reporting is the oldest monitoring instrument and one of the truly universal procedures to monitor states' compliance with their treaty obligations. First introduced by the League of Nations and the International Labor Organization in 1918, the State Reporting Procedure today is enshrined in nine treaties and two optional protocols within the United Nations Treaty Body System as well as in several regional human rights treaties. Nevertheless, monitoring through state reports cannot be considered a success. Its sensitivity towards state sovereignty is at the same time the reason for its widespread positive acceptance and one of its biggest challenges. For decades, the lack of sanctions combined with a massive overburdening of States parties has significantly paralyzed the effectivity of the system. Full compliance with all reporting obligations is rare. The challenges of the instrument have been intensively assessed by interdisciplinary scholarship and multiple United Nation organs over the past 30 years. Despite all the difficulties the instrument has, it holds great potential for the protection of human rights. The importance of the procedure and the ambitions to continue its application can be seen in the recent review process of the UN General Assembly, which was initiated in 2014 and culminates in the General Assembly Review 2020. This thesis contributes to the reform debate with a detailed analysis of the state reporting obligation and, based on the findings, the proposal of integrative reporting as a new reporting procedure combined with sanctions. Simplification of the procedure and strengthening compliance by presenting the prospect of sanctions is expected to improve compliance as well as the efficiency of the procedure. Herewith, the state reporting procedure may finally be able to fulfill its object and purpose in the protection of human rights.

Part One: Introduction

The state reporting procedure is one of the oldest monitoring instruments in international law. Used since 1919, it has been included in numerous multilateral treaties as a tool to evaluate the process of implementation by the states party to the respective treaty. At its core a self-evaluation procedure, it evolved into an increasingly sophisticated system with multiple stakeholders. In human rights treaty law, the stakeholders involved in the procedure are the state parties, oversight committees, civil society and even individuals. State reporting is the only monitoring instrument that becomes mandatory as soon as a state ratifies the treaty containing it. Furthermore, it is one of the few instruments that focuses on constant monitoring to prevent violations of the treaty framework – contrary to repressive measures such as court trials. Due to its sovereignty-sensitive nature, it is widely accepted by the States. Nevertheless, over the years of operation, it proved to be ineffective. Especially the large number of states which did and do not comply with the obligation by not submitting a report, submitting it late or submitting it in an inadequate quality has been hindering the effectivity of the procedure and prevented the achievement of its object and purpose. The challenges to the system derived on the one hand from the unwillingness of states to report. On the other hand, a fundamental systemic dysfunction has been challenging the procedure for decades: the increasing amount of reporting obligations on the international¹ and regional level made compliance increasingly difficult and burdensome for state parties.² Especially those states which neither have the institutional and structural nor the financial capacities struggle to comply with every reporting obligation they have. The difficulties the reporting procedure has been facing were recognized early in the system of the United Nations Treaty Bodies, and reform efforts were initiated.

In 1989, Mr. Philip Alston issued his initial report on the effectivity of the human rights Treaty Body System of the United Nations (UN).³ Mandated by the General Assembly he undertook a detailed investigation towards the effectivity of the whole system. In

1 'International' in this thesis is used as a synonym to globally, specifically in the sphere of the United Nations Treaty System.

2 See already: Note by the Secretary-General, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights*, UN Doc. A/44/668, 8 November 1989, p. 21 ff.

3 Note by the Secretary-General, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights*, UN Doc. A/44/668, 8 November 1989.

Part One: Introduction

his final report⁴, he came to the conclusion that the system was indeed not successful and in need of reforms, for which he offered various proposals. However, those reforms were only partly implemented, wherefore the system in major parts stayed as it was until today. For the past 30 years, various experts published their own ideas on possible reforms of the system. Within the UN system the need for reform has been addressed by multiple officials of the UN: by the Secretary-General 2002 ('Strengthening of the United Nations: an agenda for further change')⁵, 2005 ('In larger freedom: towards development, security and human rights for all')⁶ and by the then High Commissioner for Human Rights in 2012 ('Strengthening the UN Treaty Body System')⁷. The last document introduced a well-founded study of the most pressing problems of the system including possible solutions and their expected costs. An unlimited working group was concerned with the topic and mandated with finding possible solutions following this report. In 2014, the General Assembly in Resolution 68/268 decided to request biennial reports on the progress of implementing said resolution (and thereby strengthen the treaty body system). The Secretary-General⁸, according to Resolution 68/268, is obliged to submit biennially a status report as part of the reform process towards the strengthening of the United Nations Treaty Body System.⁹ On 18 July 2016, the Secretary-General provided the General Assembly with the first biennial report on the status of the human rights Treaty Body System, on 6 August 2018 with the second.¹⁰

Even though the reform process has now been going on for thirty years, none of the reform proposals was able to solve those problems within the UN system so far.

Reporting compliance by the state parties remains low. In the Treaty Body System of the UN, by 19 January 2016, only 13 percent of the state parties were fully compliant with their reporting obligations.¹¹ Three committees informed the Secretary-General

4 Note by the Secretary-General, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, 27 March 1997, UN Doc. E/CN.4/1997/74.

5 Report of the Secretary-General, *Strengthening of the United Nations: an agenda for further change*, UN Doc. A/57/387, 9 September 2002.

6 Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, UN Doc. A/59/2005, 21 March 2005.

7 Note by the Secretary-General, *United Nations reform: measures and proposals*, UN Doc. A/66/860, 26 June 2012.

8 The notation 'Secretary-General' refers to the Secretary General of the United Nations (as opposed to 'Secretary General').

9 UN General Assembly, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, UN Doc. A/Res/68/268, 21 April 2014, operative clause 40.

10 Report of the Secretary-General, *Status of the human rights treaty body system*, UN Doc. A/73/309, 6 August 2018.

11 Report of the Secretary-General, *Status of the human rights treaty body system*, UN Doc. A/71/118, 18 July 2016, para 5.

that they had 15 state parties overdue with their initial report for more than ten years. Two treaty bodies had State parties with periodic reports overdue for more than ten years.¹² In 2019, only 35 state parties fully complied with their reporting obligations.¹³ Of those, only 15 had reporting obligations for 10 or more human rights treaties or protocols.¹⁴ In the second biennial report of the Secretary General, presented in 2018¹⁵, an increased reporting rate was described, despite of the fact that every Treaty Body claimed to have a decrease in submitted reports.¹⁶ In 2019, only 18.7% of the State Parties were reporting. At least 66% of the submitted reports were submitted in ‘a timely manner’.¹⁷ As the challenges remain, the General Assembly decided to review the overall progress and decide on the way forward in 2020.¹⁸

For some states, however, the difficulties with reporting, resulting in large parts from the amount of reports requested, do not end with the UN Treaty Body System. The three biggest regional human rights systems – Europe, Inter-America and Africa – also oblige States to report on the implementation of several of their regional treaties. Those reporting obligations are similar to, if not the same as those of the UN system. This leads to the difficulty that States are not only obliged to report on the implementation of the UN treaties – which, in many cases, already leads to double reporting – but also on various regional treaties, which for the most part regulate the same topics. The workload for those states is therefore immense.

The challenges of the reporting procedure have been subject to discussion in academia as well as in the sphere of the human rights treaty bodies. Reform proposals of a great variety have been discussed over decades. This thesis wants to contribute to the discourse on the topic by identifying the legal nature of the obligation and the challenges as well as the conclusions that can be drawn from the extensive discussions about this instrument. Based on those findings, the final contribution of this thesis will be a proposal encompassing the legal core, the legal challenges and the lowest common denominators to develop a procedure which caters to all needs and provides a feasible solution against persistent non-compliance based on public international law.

12 *Ibid*, para 6.

13 United Nations Treaty Body Database, <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx> [accessed 02 December 2019].

14 *Ibid*.

15 Report of the Secretary-General, *Status of the human rights treaty body system*, A/73/309, 6 August 2018.

16 *Ibid*, para 19, 21.

17 Chairs of the Human Rights Treaty Bodies, *Implementation of human rights instruments*, UN Doc. A/74/256, 30 July 2019, para 14.

18 UN General Assembly, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, UN Doc. A/Res/68/268, 21 April 2014, operative clause 41.

I. Scope and Aim of the Thesis

Even though state reporting is just one of the human rights monitoring instruments, this thesis is restricted to an evaluation of the state reporting system for the reason that it is the only monitoring instrument which is binding on the state party immediately after it ratified the concrete treaty.¹⁹ No additional declaration on the acceptance of this monitoring instrument is required. Reporting is compulsory for every state party. Therefore, this instrument holds a great potential for the protection of human rights through continuous and extensive monitoring. The aim of this thesis is to evaluate the content and problems of this instrument, to identify the legal issues of the challenges of this instrument and provide a proposal for its improvement.

The state reporting procedure consists of different steps which altogether create the reporting cycle under the relevant treaty. Each step requires a different action from the state party, be it written or oral, comprehensive or specific. However, as every process, the reporting cycle starts with the first act by the state: the initial report and/or the first periodic report. If a state does not initiate the process, the reporting procedure is stopped before it even begins. Strengthening the state reporting system must therefore begin with the first step of the reporting procedure.

Therefore, this thesis focuses on the written state report. It analyzes the act of written reporting, its object and purpose, its challenges, the previous reforms and perspectives. While it is acknowledged that the procedure functions as a whole and may not be artificially divided, it is important to have a closer look on the functioning and options of the first step of the procedure.

The state reporting system and the reform process have been of interest to a number of scholars²⁰ and United Nation organs²¹ for years. Nevertheless, there are aspects which

19 See for further details Part Two, Chapter 1.

20 See for example O'Flaherty & O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 HRLR 141, 141–172; Bowman, 'Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions – Legal Mechanisms for Treaty Reform' (2007) 7 HRLR 225; Kjaerum, 'State Reports', in Alfredsson, Grimheden, Ramcharan & Zayas (eds), *International Monitoring Mechanisms: Essays in Honour of Jacob Th. Möller* (2009), 17–24; O'Flaherty, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10 HRLR 319; Spenlé, *Die Staatenberichtsverfahren der UNO-Menschenrechtsverträge* (2011); Morijn, 'Reforming United Nations Human Rights Treaty Monitoring Reform' (2011) 58 NILR 295; Kälin, 'Examination of state reports' in: Keller & Ulfstein (eds), *UN human rights treaty bodies: law and legitimacy* (2012) 16 ff. [hereinafter Kälin, 'Examination of state reports']; Egan, 'Strengthening the United Nations Human Rights Treaty Body System' (2013) 13 HRLR 209, 209–243; de Schutter, *International Human Rights Law* (2nd edn, 2014) [hereinafter de Schutter], 923 ff.; Gaer, 'The Institutional Future of the Covenants: A World Court for Human Rights?' in Moeckli, Keller & Heri (eds), *The Human Rights Covenants at 50: Their Past,*