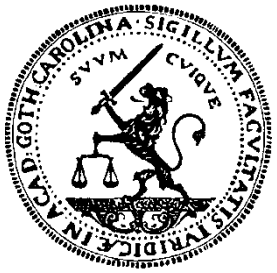

FACULTY OF LAW
Lund University

Anders Nordenskjöld

Who watches the watchmen and do they need watching?

The independence of the UN Treaty Bodies and the on-going process to strengthen them

Master thesis
30 credits

Supervisor Karol Nowak

International Human Rights Law

Spring 2012

Contents

Summary

This thesis examines the independence of the UN treaty bodies, both in its entirety and the autonomy of the individual treaty body members. Since independence is very difficult to measure empirically, this paper uses the theoretical framework of Principal-Trustee theory as a tool by which the independence can be understood. This instrument allows us to examine the independence of the treaty body system by looking at what possibilities the state parties have to influence their behavior.

The UN treaty body system is explained in detail, including its purpose and how it has developed over the years. All the various ways the committees have to monitor the human rights situation in the state parties are also described. This section also includes a discussion on the apparent paradox that states are voluntarily giving up part of their sovereignty to cooperate with a system whose main task is to criticize them.

The independence of the treaty bodies is examined by the application of Principal-Trustee theory. This theory is therefore explained thoroughly, including its development from the broader type of agent theory that preceded it. The theory posits that a Principal in order to gain legitimacy creates a new entity to which it delegates power. This is called the trustee. In the context of this thesis the Principal consists of the state parties to the human rights conventions since it was the states that created the monitoring bodies, and still control the budget and appointment processes, while the treaty bodies make up the Trustee.

The theory explains that there are four main ways for the principal to sanction the trustee in order to influence its behavior. These are A) to fire the trustee, B) to refuse to re-appoint her, C)to re-write the delegation contract and D) to change the budget the trustee is dependent of. These four ways of sanctioning are applied to the legal and institutional framework of the treaty bodies in order to determine their independence. While it is hard to fire a treaty body expert, they are subject to re-election after fairly short terms of mandate. In order to re-write the delegation contract the states need to amend the original treaties, a very difficult process but the states do have the power to change the budget. Taken together these factors point towards the treaty bodies being fairly independent.

This is also the conclusion given when comparing the treaty bodies with some other actors whose independence has been threatened recently; UN civil servants, Special Procedures and International Judges.

This descriptive analysis is followed by a normative discussion on how independent the treaty bodies *ought* to be. In the context of the strengthening process a Code of Conduct has been proposed that would make the experts accountable to the member states. Even though there might be some gains of legitimacy it is the opinion of this author that the system would function better without it.

Sammanfattning

Denna uppsats undersöker FN:s människorätts kommittéer och hur oavhängiga de kan sagas vara, både vad gäller hela systemet sammantaget och de enskilda medlemmarna. Eftersom det är svårt att mäta oavhängighet empiriskt använder denna uppsats ett teoretiskt ramverk som förklarar Principal-Förvaltare förhållanden. Detta ramverk är ett verktyg som kan användas för att förstå oavhängighet eftersom det möjliggör undersökningar av vilka möjligheter medlemsstaterna har att påverka människorättskommittéernas beteende.

Systemet med FN:s övervaknings kommittéer förklaras i detalj, tillsammans med dess ursprung, syfte och alla metoder de har för att övervaka staternas beteende. Detta avsnitt innehåller också en diskussion om paradoxen att stater frivilligt ger upp delar av sin suveränitet för att samarbeta med ett system vars främsta funktion är att kritisera dem.

Kommittéernas oavhängighet undersöks genom att Principal-Förvaltarteorin appliceras på dem. Teorin förklaras därför genomgående, även hur den utvecklades från den bredare Agentteorin. Ramverket förutsätter att det finns en Principal som, för att uppnå legitimitet, skapar en enhet som den delegerar makt till. Denna nya enhet kallas Förvaltaren. När det gäller denna uppsats består Principalen av alla stater som är part till FN:s människorättskonventioner. Det är nämligen de som skapade systemet och fortfarande har kontrollen över vilka som utses till experter i kommittéerna och hur budgeten ska se ut. Människorättskommittéerna i sin tur är Förvaltaren i detta avseende.

Teorin förklarar att det finns fyra huvudsakliga metoder för Principalen att sanktioner Förvaltaren för att försöka påverka hennes beteende. Dessa är att A)avskeda henne, B) inte på nytt utse henne, C) skriva om kontraktet som innehåller villkoren för hennes arbete och D) ändra budgeten som förvaltaren är beroende av. Dessa fyra metoder appliceras på FN:s kommittésystem för att på så sätt undersöka dess oavhängighet. Det visar sig vara väldigt svårt för staterna att avskeda en expert, men å andra sidan är mandatperioderna ganska korta. Att skriva om delegationskontraktet är oerhört komplicerat eftersom de villkoren slås fast i själva originalkonventionerna, men staterna har kvar kontrollen över budgeten och kan därigenom utöva inflytande över systemet. Men sammantaget pekar dessa faktorer, samt en jämförande analys av FN-tjänstemän, Människorättsrådets Speciella Procedurer och internationella domare på att kommittéerna är relativt oavhängiga staterna.

På denna deskriptiva analys följer en normativ diskussion om hur oavhängiga övervakningskommittéerna *borde* vara. Under den pågående reformprocessen har en Uppförandekod föreslagits som skulle göra experterna ansvariga inför medlemsstaterna. Även om det kan finnas vissa fördelar vad gäller legitimitet med en sådan kod, är det författares åsikt att systemet skulle fungera bättre utan den.

Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment *or* Committee Against Torture
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women *or* Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on Migrant Workers
CRC	Convention on the Rights of the Child *or* Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities *or* Committee on the Rights of Persons with Disabilities
ECOSOC	United Nations Economic and Social Council
ICED	International Convention on Enforced Disappearances
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICRMW	International Convention on the Rights of Migrant Workers
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
HRC	Human Rights Committee
OHCHR	United Nations Office of the High Commissioner for Human Rights
P-A theory	Principal-Agent theory
P-T theory	Principal-Trustee theory
SP	Special Procedures of the Human Rights Council
SPT	Subcommittee on the Prevention of Torture
UNHCR	United Nations High Commissioner for Refugees

UNICEF	United Nations Children's Fund

1 Introduction

1.1 Background

The United Nations Treaty Bodies have been described as the heart of the UN human rights machinery.[1] Yet, at the moment, this heart is having difficulties pumping. The system has faced problems for a long time but they are growing more serious every year. In order to combat this there has been many efforts to reform and strengthen the treaty body system. As early as 1989 an independent expert issued a report on how to make implementation of the treaty body system more effective and how to deal with the long-term growth of the system.[2] Since then there have been several other initiatives, but the problems are yet to be solved.

The problems facing the treaty bodies are of a twofold nature. One is that states are not fulfilling their obligations to report. In 2012 only 16 percent of the States were handing in their reports on time[3] and for some of the Committees[4] 20 percent of the States have never submitted their initial report at all and consequently never taken part in a session.[5] The other problem is that the system has grown in a dramatic way over the last decade without a corresponding increase in financial and human resources. This has led to huge backlogs of reports paralyzing the work of the treaty bodies. For some committees the consideration of a report takes place up to six years after it is submitted, rendering most of the information obsolete.

In order to deal with this, the High Commissioner of Human Rights has initiated a Strengthening Process of the UN human rights treaty body system. The goal of this initiative is to improve the visibility, accessibility and impact of the treaty bodies on right-holders and duty-bearers at the national level by strengthening the system.[6]

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[1] Secretary General's remarks at Treaty Body Strengthening Consultation for States Parties, New York, 2 April 2012 http://www.un.org/sg/statements/index.asp?nid=5967 retrieved on 11/09/2012.
[2] Note by the Secretary General: *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights.* Published 8 November 1989 UN Doc. A/44/668.
[3] Pillay, N. *Strengthening the United Nations human rights treaty body system – A report by the United Nations High Commissioner for Human Rights*, 2012 p. 21. Available at http://www2.ohchr.org/english/bodies/HRTD/docs/HCreportonTBstrengthening210612.doc
[4] CESCR, CAT and HRC.
[5] N. Pillay *supra* note 3, p. 22
[6] *Ibid*. p. 29.

1.2 Purpose

One issue that has been highlighted during this strengthening process, involving the OHCHR, the treaty bodies themselves as well as member states and NGOs, is the independence of the treaty bodies. According to the treaties that founded them they are supposed to have the liberty to change their working methods and decide their rules of procedures by themselves.[7] However, many of the suggested changes and proposed reforms brought forward by the treaty bodies themselves have been met with strong opposition and have not been implemented.[8] This underscores the somewhat paradoxical nature of a system that is funded and to a certain extent controlled by the same actors that the system is meant to scrutinize.

The conventions might give the treaty bodies the mandate to engage in many activities, but as long as it is the state parties that elects the treaty experts and controls the budget, the treaty bodies will never be fully independent. Since the main purpose of the treaty bodies is to monitor how well the state parties comply with their human rights obligations it is very important that they can maintain their independence. If the states that are supposed to be scrutinized can impose their own will on the treaty bodies, and influence them in their work, an impartial examination of the human rights situation will not be possible. For the treaty bodies to have any legitimacy they have to be able to decide for themselves how to perform their functions. An examination performed by a state controlled puppet would not shed much light on the de-facto human rights situation in that state.

The purpose of this thesis is therefore to answer the following questions:

How independent are the UN treaty bodies?

and,

How independent ought the treaty bodies to be?

The thesis is therefore interested not only in the descriptive part of independence but also the normative discussion that is its natural consequence. In answering these two questions there are a number of definitions that first needs to be settled. By treaty bodies, this thesis refers to all committees assigned with monitoring the implementation of the UN human rights treaties. These are the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the

[7] For example ICCPR art. 39.2, or ICERD art. 10.
[8] For instance there have been requests for more meeting time and additional administrative support from the secretariat, but more on this below, in chapter 4.1.

Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC), the Committee on Migrant Workers (CMW), the Subcommittee on Prevention of Torture (SPT), the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on Enforced Disappearance (CED).[9] This thesis will examine the independence both of the treaty bodies as a whole but also that of their individual members.

It is slightly more challenging to clarify what the notion of independence means. Therefore, this is discussed in further detail in chapter 3. A small introductory explanation, however, follows below. In the legal debate there has been a separation of *independence to* from *independence from*. The former term refers to specific decisions and whether they, in their given context, were independently taken or not. That is, without the decision-maker adapting his or her conclusion to please another stakeholder. The latter term, refers instead to the incentive and limits that the decision-maker has vis-à-vis other institutions, in other words if he or she has *independence from* the other actors. While the former approach centers on the specific context of specific decisions and whether or not these verdicts have gone contrary to the will of the actor trying to influence the outcome, the latter focuses more on the institutional framework, and whether it is being abided by or not.[10] This thesis will focus mainly on *independence from* since it gives a broader understanding of how the framework of the UN system works. Since the aim of the treaty bodies is to scrutinize states, it is states that are most likely to try to apply pressure on the treaty bodies; it is also the states that are the creators of the whole system. Therefore it is the autonomy from the states that is the main focus. Efforts to influence the treaty bodies from third actors will not be dealt with to the same extent. *Independence to* is better suited when looking at judicial procedures and since the monitoring bodies are of a non-, or at most quasi-, judicial character, *independence from* is the more helpful framework.

Since this thesis concerns itself with both the treaty body system as a whole and with the individual members, it has to deal with two

[9] It has now become custom to refer to all the committees founded by the human rights treaties as 'treaty bodies' even though the conventions themselves only refer to 'Committee'. It should also be noted that CESCR is technically not a treaty body since it was established by ECOSOC and not by a human rights treaty but for all intents and purposes it amounts to one. The Subcommittee on the Prevention of Torture (SPT) is also slightly different from the other treaty bodies, since it relies on state visits rather than state reporting, and was established by an optional protocol rather than an original treaty. But for the purposes of this thesis SPT can also be considered a treaty body. In the thesis, the terms 'treaty body' 'committee' and 'monitoring body' will be used interchangeably.

[10] Ríos-Figueroa, J. *Judicial Independence: Definition, Measurement, and Its Effects on Corruption. An analysis of Latin America*, 2006, pp. 3-4.

different sides of independence. When it comes to the system in its entirety it will be the just mentioned *independence from.* That is, their ability to perform their duties and choose their own direction and methods without having to adapt to the will of, or try to please, the member states. When dealing with the individual members and their independence, the focus will be on what possibilities the state parties have to influence their behavior to suit their own purposes. This part will also examine what standards of accountability apply to the treaty members. Not that being held accountable is necessarily a limitation of an actor's independence, but the more norms one has to follow, the larger is the risk that ones independent wish will be impeded. It is therefore a factor that needs to be considered when examining independence.

1.3 Method and Theory

Since the treaty bodies main function is to monitor how well state parties are complying with their human rights obligations and to criticize them when their commitments are not being met, there is a natural opposition between the states and the committees. This would not necessarily amount to a problem, but because it is the state parties, through the General Assembly, that fund and therefore have the financial control over the system, there are obvious risks that the independence of the treaty bodies might be affected. This thesis will therefore examine the relationship between the treaty bodies and the state parties. By looking at how these two actors correlate to each other, it is possible to deduce how much independence the monitoring bodies have.

The methodological approach of this paper will be that of rational choice. This theory builds on the assumption that the behavior of actors are motivated by them seeking their individual goals in a world of constraints.[11] In a world where no actor can have everything she wants, she is forced to make choices on which route to take in order to achieve the most benefits for herself. What these individual goals of the actors are can vary greatly and the theory presupposes in no way that all actors are egoistical, only that they strive to realize their own goals, whatever they may be.

In this its broadest form, rational choice does not always help provide valid conclusions. When looking at the independence of the treaty bodies, a more detailed framework will therefore be used: that of Principal-Trustee theory (P-T theory). This theory, which as part of the rational choice tradition was first developed in economics and then later used in political science, has contributed greatly to

[11] Carlsnaes, W., Risse-Kappen, T. & Simmons, B. A. (red.), *Handbook of international relations [Electronic resource]* 2009, p.74.

organizational theory in these fields.[12] Yet it has only rarely been applied to international human rights law.[13] This despite of the utility the framework has to offer also in this context. The theory will be explained and analyzed in greater detail in chapter 3, but a basic definition is as follows: P-T theory is a tool that can be used when looking at the nature of the relationship between a principal (something that delegates power) and a trustee (the entity that receives the power delegated).[14] It is a framework that can offer a helpful lens through which to look at the relationship between the treaty bodies and the state parties. This will provide a deeper understanding of how they relate to each other and the effect the structure has on the independence of the committees.

P-T theory was developed from a broader framework called Principal-Agent theory. In order to understand the independence of trustees, it is necessary to also understand the logics of delegation to agents. Simply put, an agent is an actor who the principal delegates power to in order to achieve gains in effectiveness, while a trustee gets her mandate because the principal wants to gain legitimacy.[15] A more in-depth discussion of this distinction is provided in chapter 3. When diving deeper into these theories and how they help explain the independence of the treaty bodies, this thesis will draw from the work of Philip Alston whose application of P-A and P-T theory in a human rights setting corresponds very well with the objectives of this paper. Karen Alter has given a big contribution to the development of P-T theory, and also her ideas will be taken into account. Since independence is very hard to measure empirically, it will be examined from a more theoretical point of view where the logical conclusions of applying Principal-Trustee theory will be used to understand how independent the treaty bodies are, and what risks might exist in the current system.

Even though these theories originate in international relations theory rather than international law, they can still be of great value by situating legal rules and institutions in their political context so that the level of abstraction of the norms is reduced and their practical consequences highlighted.[16] Research in the field of human rights cannot be done in a vacuum, because the norms themselves do not exist in one. Therefore, theories of international relations must be used to give political context so that the law can be understood.

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[12] Eisenhardt, K. M. *Agency Theory* 1989, p. 57.
[13] The notable exceptions being Hawkins, D. and Jacoby, W. *Agent permeability, principal delegation and the European Court of Human Rights, 2008*; and Alston, P. *Hobbling the Monitors 2011*.
[14] Alston, P. *Hobbling the Monitors*, 2011, p. 627.
[15] Alter, K. J. *Agents or Trustees?* 2008, p. 38.
[16] Abbott, K.W. *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts 1999*, p. 362.

The thesis will also follow a classical method of international law in its descriptive parts. This entails going to the sources of law, the international treaties creating the monitoring bodies. And in want of a court or other judicial instance having interpreted these treaties, further information will be sought in the doctrinal work of international legal scholars as well as the documents issued by the UN itself.

1.4 Delimitations

In order to make this thesis focused it will mainly look at two parts of the independence of the treaty bodies. The first is how the committees are able to change their rules of procedure and working methods without being limited by the state parties. Since it is the state parties, through the General Assembly and the Secretariat of the UN, that provides the necessary facilities to the committees, they always have the last say when a proposal from a treaty body entails new costs. The influence of individual states on specific communications therefore falls outside of the scope of the paper.

The other part the thesis will focus on the independence of the individual treaty body members. What is it that they can or cannot do? What are the limitations? Who are they geld accountable to? There have been many proposals put forward during the on-going strengthening process but this thesis will only concern itself with those relating to the implementation of Codes of Conducts since these are the proposals that most directly affect the treaty bodies' independence.

1.5 Outline

After this introduction, which explains the objectives and method of the paper, Chapter 2 follows with a descriptive explanation of how the UN treaty body system works, based on the treaties themselves and the scholarly doctrine. This is to give the reader a general orientation of what roles this institution plays and how it has developed over the years. This chapter begins with a short segment on the reasons why states cooperate with the system at all since it is important to be aware of the motives of the states when examining how they might influence the treaty bodies and limit their independence.

Chapter 3 has four parts. The first is a detailed clarification of what P-T theory entails. It consists of a descriptive part explaining the theory and also how the concept of trustees was developed from the broader term agents, using the works of legal, but also political, scholars. The penultimate segment consists of a breakdown of the

critique that has been directed towards the theory and it ends with an explanation of how the theory can be used in this context to determine the independence of the treaty bodies.

The second and third parts of Chapter 3 are the analytical segments were the theoretical framework explained previously is applied to the treaty body system described in Chapter 2. The parts are divided so that one applies the theory to the system in its entirety and the other to the individual treaty body experts. In explaining the independence of the individual there is also a comparative part that relates them to other actors facing similar challenges. The chapter ends with a conclusion of the findings of how independent the treaty bodies turned out to be.

Chapter 5 contains some final remarks where the findings of the thesis are put into a broader context to see what the results might bring for the future.

2 The UN Treaty Body System

After the disaster that was the Second World War, one of the first steps to rebuild the world was the creation of the United Nations. In its foundation it recognized the struggle for a better protection of human rights and dignity. However, the international climate was not such as to allow for binding international legal obligations requiring states to protect human rights.

One of the main problems was that states were still considered as the main actor on the international arena and to limit a state's sovereignty for the sake of human rights was a highly contentious idea.[17] Indeed, the UN Charter states that promoting and encouraging respect for human rights is part of its purpose, while at the same time limiting itself to act within the principle of non-intervention when it comes to the domestic jurisdiction of its member states.[18] However in the sixties the three first major UN human rights treaties were drafted and since then six others have followed.[19] Step-by-step the international community was thus able to create a global system of human rights.

This chapter explains the purpose and functions of this global system, also known as the UN human rights treaty body system. A descriptive exposition of how the mechanism works provides the foundation on which to base the analytical discussion on the relationship between the states parties and the treaty bodies in Chapter 4. After it has explained the main functions of the committees, that is; state-reporting, general comments, individual communications and inquiries, the chapter concludes with an overview of the on-going strengthening process. But first follows a

[17] Bayefsky, A. F. (red), *The UN human rights treaty system in the 21st century*. 2000, p. xvii.

[18] The United Nations Charter, 1 UNTS xvi (in force 24 Oct.1945), Articles1 (3) and 2 (7).

[19] The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) the 1984 Convention Against Torture (CAT), the 1989 Convention on the Rights of the Child (CRC), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), the 2006 Convention on the Rights of Persons with Disabilities (CRPD) and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICED). There is also the Subcommittee on Torture established by the 2002 Optional Protocol to the Convention Against Torture (OP-CAT).

short discussion on what motives states have to participate in the system at all. This is important since without an understanding of *why* states subject themselves to the scrutiny of the monitoring bodies, any analysis of their work is surely doomed to miss part of the point.

2.1 Why Do States Participate in the System?

By becoming party to the human rights treaties sovereign states subject themselves to a host of different monitoring functions to be explained below. All of these entail, in one way or another, a limitation of the states' sovereignty. Despite this, the main topic of discussion in the scholarly debate regarding the UN treaty body system has been on why states do not fully abide by the rules they have committed to respect. This has also been the case during the on-going strengthening process.[20] Perhaps a more interesting approach is to turn the question around. After all most states do submit their reports and they do partake in the constructive dialogue taking place in Geneva and even though many recommendations still go unheard, a surprisingly large amount are followed, considering there is no legal authority that can force states to abide by them. So the question to be asked is instead: why do states cooperate with the treaty body system at all?

By signing up to the system, the state parties delegate authority to an actor whose very purpose it is to scrutinize and criticize them.[21] Not only that, the states are also funding the system: 40 per cent of the financial resources of the OHCHR comes from the UN general budget, approved by the member states through the General Assembly and out of the rest, almost 90 per cent comes from voluntary donations from the member states directly.[22] Consequently, states, acting rationally, are funding and complying with (to at least some extent) a system that is doing its best to expose their shortcomings. How can this paradox be explained?

There are many different explanations that seem plausible and it is not necessarily so that only one is true. The reasons one state participates might be very different from what motivates another to take part. One explanation is that states taking part in the diplomatic

[20] See for example the High Commissioner for Human Rights' report on treaty body strengthening where a substantive part of the section describing the challenges to the system deals with non-compliance with reporting obligations. Pillay, N. *supra* note 3, pp. 20-28.
[21] More on delegation in Chapter 3.
[22] OHCHR Report 2011 p 124. Available at http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/pages/downloads.html

game might ratify and comply with certain human rights treaties in order to be in a stronger position when negotiating with other states and in that way achieves advantages in other areas. This relates to what Heyns and Viljoen stated in their study on the impact of human rights norms on the country level, that the "primary reason why states ratify international human rights treaties relates to international diplomacy."[23] Another explanation is that states appreciate how the treaty bodies can highlight the shortcomings of other states. States comply with their obligations believing that they benefit more from an exposition of other states' failures in meeting their human right obligations, than they suffer from the (expected) mild critique of their own inadequacies. Another reason, put forward by Alston, for a government to allow an independent organ to scrutinize its activities and performance is that it will prevent future governments from crossing certain boundaries that the current government find agreeable.[24] It is thus a way to make ones successor follow the rules of ones own choice.

Yet another cause for participating in the system can be that governments do not have full control over their state. They also have to consider the views of it's own population and the international community as a whole. Ratifying and complying with a certain human rights treaty can be seen as a way to exert influence in a specific political issue. This was for example the reason stated by many states that ratified the Convention on the Elimination of All Forms of Racial Discrimination to express their opposition against apartheid in South-Africa.[25] The urge to lead by example is another valid explanation. Some states want to be perceived as 'good'. By doing what they (and their populations) believe is right and complying with the treaties, they hope to influence other states into doing the same. This can be illustrated by Japan's reported regard that their ratification of the Convention on the Rights of the Child primarily was intended to protect children, not in Japan, but in developing countries.[26]

Another explanation is what can be called the culture of human rights. Since the Second World War, states have, in their interactions with each other and with international organizations, created the culture of human rights. This culture, or institution, has become so strong that associating oneself with it leads to a sense of inclusion in the international arena. Opting out on the other hand makes a state seem backwards or even despotic. This is reinforced through the international media and international civil society so that states not

[23] Heyns, C. & Viljoen, F. *The impact of the United Nations human rights treaties on the domestic level*. 2002, p. 9.
[24] Alston, P. *supra* note 14, p. 579.
[25] Heyns, C. and Viljoen, F., *supra* note 23, p. 9.
[26] *Ibid.*

fulfilling their obligations risk a loss of identity as they are excluded from the group of 'modern, human rights abiding' states. For some states, this identity (that of being a state that complies with human rights norms rather than violates them) has become so important that the state, in a way, characterizes itself through it. This means that the state cannot act contrary to its human rights obligations without losing part of this 'identity' and this regardless of what other states are doing or what the practical positive consequences will be.

A final explanation could be that states see the fulfillment of their obligations under the human rights treaties as a reciprocal bargain: that all states have more to gain from respecting their obligations than ignoring them. This is akin to one of the classic explanations of how human rights were developed in the first place. That by preventing other states from performing atrocities on their own populations, it would also be less likely that these practices would spread and affect the internal affairs of other states.[27]

There are thus a host of different reasons for states to live up to their obligations under the treaties. The one thing they all have in common is that states no matter what the objective a state has for participating, it could not be fulfilled by it simply trying to, unilaterally, condemn the human rights records of other states. Not only would it be politically dangerous for the state speaking out, with risks of repercussions in other fields, it would also be hard to maintain the image of objectivity needed for other states to actually take the allegation into consideration and not simply dismissing them as politically motivated. This has been solved by the delegation of authority to the treaty bodies, so that they, and not the state, can issue the critique, but more on delegation in the Chapter 3 below.

2.2 The Purpose of the System

Whenever a state ratifies[28] a treaty it becomes legally bound to respect and protect the rights enshrined in that treaty. These ratifications are however only the first formal step on the road to actual implementation, and a signature on a paper only means so much. Because of this, the drafters of the conventions included a passage in every treaty that would establish an expert committee in charge of monitoring the rights enshrined in that respective convention.[29] These expert committees are what make up the UN human rights treaty body system.

[27] See, among others, Cassese, A. *International Law*, 2005, p. 377.
[28] Or chooses to be bound by it any other way, such as accession or succession.
[29] Except the Committee on Economic, Social and Cultural Rights that was established by ECOSOC.

There are to date ten such treaty bodies[30], each consisting of between ten and twenty-five experts of recognized competence in human rights, who are nominated and elected by the States parties and have a mandate that extends for four years that can be renewed. Half of the committee members are elected every other year to prevent too many new members starting at the same time. The experts are not paid but do their work on a voluntary basis, although they do receive per diems for travel and other expenses.[31]

The treaty system does not only monitor human rights situations but also contribute significantly to the struggle to make sure States comply with their legal obligations. The work they do in developing and elaborating the substantive content of the various treaties is also widely recognized.[32] It has been called 'one of the greatest achievements in the history of the global struggle for human rights'.[33] And even an independent expert who, pursuant to a resolution by the Commission on Human Rights, issued a very critical report on the state of the treaty body system acknowledged that the system had, for all its shortcomings or weaknesses, exceeded the expectations that might reasonably have been held out for it.[34]

But what does these grand words mean? When evaluating a system it is possible to look at either its normative effects or the impact that it has on the human rights practices on the ground, on the country level. Has the treaty system actually changed the behavior of the states for the better or is ratification simply an empty gesture? The normative consequences are often vague and difficult to measure, which makes the effects seen on the ground a more natural starting point when looking at the effectiveness of the treaty body system. According to one in-depth study of the impact of the work of the monitoring bodies[35] some general conclusions can be drawn.

Firstly, that the importance of the system is on the increase. For example, human rights law forms much bigger part of the curricula of law schools worldwide than it has in the past. However it is still only rarely that the human rights norms that a State has acquiesced to implement are being applied in its national courts, both in monist and dualist countries.

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[30] The Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC), The Subcommittee on Prevention of Torture (SPT), the Committee on Migrant Workers (CMW) the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on Enforced Disappearance (CED).

[31] Lundberg, A. (red), Mänskliga rättigheter – Juridiska Perspektiv, 2010, pp.173-175.

[32] Eisenhardt, K. M., *supra* note 12. p. 57.

[33] Ban Ki-moon, United Nations Secretary-General, June 2012, in Pillay N., *supra* note 3, p. 7.

[34] Note by the Secretary-General, *supra* note 2, p. 12.

[35] Heyns, C. and Viljoen, F., *supra* note 23.

Secondly, that the impact of the treaties has been greater through the recognition of the norms they contain, than through the international monitoring of compliance. However these two processes are inherently interwoven and it is at times very hard to find the direct causal link. The greatest impact of the treaties can be found where they have influenced, or form the basis of the constitutional provisions on human rights in a State. Finally the treaties have also in numerous cases prompted legislative reform. This is usually a consequence of either compatibility studies, (studies comparing the domestic legislation with the provisions of the treaties) or as a response to the concluding observations issued by the treaty bodies. There are also instances of legislation being changed to align with the treaties after ordinary legislative review. The human rights treaty system also often leads to the implementation of national action plans on different human rights issues.[36] There is thus at least some basis for the praise the system has received, but also for the criticism.

The treaty system was created to be a global mechanism for the protection of human rights and from the onset; the focus was very much on achieving universal ratification.[37] However this has changed when four new human rights treaties entered into force between 2003 and 2010.[38] And since the ratification of the original six treaties have progressed very far already with each of them having more than 150 member States and the Convention on the Rights of the Child only missing two ratifications[39], focus has now moved towards the need for implementation of the provisions. [40] This can be seen as a reaction to the fact that functioning of the treaty system is very uneven.

As mentioned above[41], there are many sides to the system and some are working better than others. But the critique can be divided into two parts, one criticizing how the treaty bodies are functioning and the other complaining more on how the State parties live up to their obligations. The latter of the two is a problem that has been present during the entire existence of the treaty system and even though the treaty system is somewhat to blame for States non-

[36] *Ibid.* p. 5-19.
[37] Universal ratification was first used to mean the ratification of all the main United Nations human rights treaties by all UN members but has also been understood as containing the additional criteria of ratification of all individual complaints procedures. This dual use has made the term slightly confusing.
[38] The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (2003), the Optional Protocol to the Convention Against Torture (2006), the Convention on the Rights of Persons with Disabilities (2008) and the International Convention for the Protection of All Persons from Enforced Disappearance (2010).
[39] Somalia and The United States of America.
[40] Pillay, N. *supra* note 3, p. 16.
[41] See *supra* text accompanying notes 18-19.

compliance there is also a limit to what can be done without the cooperation of the States. The functioning of the treaty bodies themselves, on the other hand is going through a period of difficulties that directly relate to how the growth of the system has not been coupled by an increase in funding and resources. This difficulty has become especially apparent since 2000, when the four latest treaty bodies were created and the system more than doubled in ratifications when it went from 927 to 1.586, and increased the number of experts in the committees from 97 to 172.[42]

The status of the treaty system is complex and there are many factors enhancing the impact of the treaties on the behavior of State parties that are at work at the same time as factors limiting the impact. The traditional explanation that States are not willing to limit their sovereignty and therefore do not want to expose themselves to international supervision is still true, but at the same time this is not experienced in states that have a strong national constituency, that is, a judiciary, government officials, civil society and/or media in favor of the process.[43] It is only natural that in a global system that encompasses nine different categories of human rights, there will be conflicting developments happening at the same time and that some countries, or groups of rights might experience difficulties while others are improving.

It should also be remembered that the treaty system does not operate in a vacuum. Not only are there several different regional mechanisms for the advancement of human rights, the UN Charter also states that one of the goals of the entire United Nations is to promote and encourage respect for human rights.[44] There are several different parts of the UN system that works for this goal and the treaty system is but one of them. The most important other mechanisms are the Special Procedures of the Human Rights Council (also called "extra-conventional mechanisms" or "Charter based bodies") and the Universal Periodic Review and there are also other agencies whose work often relate to specific human rights, such as UNHCR and UNICEF, working with rights of refugees and children respectively.

When the special procedures were created there was concern that there would be friction and discrepancies between the two systems and there have even been suggested that one should be dismantled in favor of the other.[45] Now, however such suggestions are rare and instead there is a growing consensus that the two systems are

[42] Pillay, N. *supra* note 3, p. 17.
[43] Heyns, C. and Viljoen, F., *supra* note 23, p. 31 ff.
[44] UN Charter Article 1 (3).
[45] Rodley, N. *United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights*, 2003, p. 882 ff.

mutually reinforcing each other. As mentioned above[46], it is sometimes hard to establish a causal link to determine if it has been the treaty system or the Special Procedures that has led to the improvement of a situation in a country. And if the human rights treaties influence the Human Rights Council to establish a Special Procedure for a specific right and then that Independent Expert in turn influences a state to improve the human rights situation then it matters little to the person whose rights are now being respected whether it was the Special Procedures or the Treaty body system that made it happen. As long as the situation is improving there is no need to argue what brokered the change.[47] The same can be said for the Universal Periodic review, whose recommendations, to a large extent, build on the concluding observations of the treaty bodies.

2.3 The Main Functions of the System

The treaty bodies all have their own mandate, tied to their specific treaty, but as will be explained below, the main activities of the different treaty bodies are similar. They all have between two and four sessions every year[48] that are generally held at the OHCHR headquarters in Geneva, although the CEDAW and HRC hold some of their meetings in New York. The OHCHR is also the organization that provides the support needed for the treaty bodies to perform their duties.[49]

The main task of the expert committees is monitoring the compliance of their respective treaty. Indeed, in some instances they are even called the treaty monitoring bodies. The only exception is the Subcommittee on the Prevention of Torture that has a purely preventative function. This monitoring is achieved through a number of functions. The main one is the mandate the committees have to receive and consider reports. When a State becomes party to a treaty they have the obligation to submit reports on a regular basis detailing the implementation of the treaty on the domestic level. The treaty bodies also issues guidelines to the states in order to help them with the preparation of their reports. Another task related to the monitoring is the drafting of General Comments. These comments are an interpretive tool laying down in more detail what the obligations arising from the treaties are. Furthermore, the committees

[46] See *supra* text accompanying note 20.
[47] Heyns, C. and Viljoen, F., *supra* note 23, p 4.
[48] However the CED, since it was only very recently established, has only met twice so far, once in 2011 and once in 2012.
[49] Although when CEDAW meets in New York it is Division for the Advancement of Women (since 2011 a part of UN Women) that provides the services needed.

also organize discussions on different themes that relate to the various treaties.[50]

Apart from these general tasks that all the bodies share, there are also some functions that only some of the committees perform. Out of these it is the consideration of individual complaints that stands out. This allows for victims of human rights abuses to petition to the treaty body relevant to that right and enter into quasi-judicial proceedings to determine if there has been a violation or not and if the state in that case should offer compensation.[51] Some treaty bodies also have the mandate to conduct inquires and even country visits to ascertain the human rights situation in a country. This can be very effective when it comes to convincing national authorities to stop on-going abuses observed on site.[52] The following passages will develop these different mechanisms a bit further.

2.3.1 Monitoring by Means of State Reporting

State reporting is the most widespread and established method of implementation of the human rights treaties at the international level and it is the core of the monitoring mechanisms of the treaty bodies.[53][54] It is a voluntary system based on the concept that the states should monitor themselves.[55] This is done by sending reports on the human rights situation in the country to the independent and expert committees. This has later been complemented by reports also being submitted by non-state actors, so called shadow-reports.

All of the treaties provide for periodic reporting, generally every state party has to submit a report every two to five years.[56] These

[50] Factsheet 30 Rev.1: The United Nations Human Rights Treaty System: An Introduction to the core human rights treaties and the treaty bodies, p. 19 ff.
[51] *Ibid.* p. 21.
[52] Tomuschat. C., *Human Rights: between idealism and reality* 2008, p. 224.
[53] State reporting is common to all treaty bodies except the SPT.
[54] Tomuschat, C., *supra* note 52, p. 168.
[55] Bayefsky, A., *supra* note 17, p.5.
[56] ICERD, art. 9: the report is due within one year after the entry into force of the Convention for the state concerned and thereafter every two years and whenever the Committee so requests; ICCPR, art. 40: within one year of the entry into force of the Covenant and thereafter when the Committee so requests; ICESCR, art. 17: within one year of the entry into force of the present Covenant; CEDAW, art. 18: within one year of the entry into force for the state concerned and thereafter every four years and when the Committee so requests; CAT, art. 19: within one year after the entry into force of the Convention and thereafter every four years or when the Committee so requests; CRC, art. 44 within two years of the entry into force of the Convention for the state party concerned and thereafter every five years; ICRMW, art. 73: Within one year after the entry into force of the Convention for the State Party concerned; Thereafter every five years and whenever the Committee so requests; CRPD, art. 35. within two years after the entry into force of the present Convention for the State Party concerned. Thereafter, States parties shall submit subsequent reports at least every four years and further whenever the Committee so requests; CPED, art 29: within two years after the entry into force of this Convention for the State Party concerned. The Committee may also request States Parties to provide

reports contain information on the measures the state has adopted to give effect to the rights enshrined in the treaty, what progress has been made and any factors impeding the realization of the states obligation under the treaty. After submission, the committee of experts of the relevant treaty considers the report. This consideration takes place in the form of a constructive dialogue in the presence of state party representatives. The aim is to have a non-contentious and non-adversarial process, nevertheless, open criticism of the state parties behavior is commonplace when their human rights obligations have not been met. Open accusations of human rights violations are however rare. When the consideration of the report is finished the Committee issues its concluding observations on the report and the dialogue. These outcome-documents contain information on whether the treaty body considers that the state party is fulfilling its treaty obligations. They also include recommendations on what measure the State should implement in order to be in compliance with the human rights standards required of it.[57] The committees also have different types of follow-up mechanisms aiming to ensure that the recommendations actually get acted on.[58]

The main purpose of the system is to encourage states to perform the tasks they have voluntarily agreed on by signing the treaties.[59] Other goals the system is meant to achieve are:

1. to ensure that a comprehensive review of national legislation and administrative practices is undertaken so as to ensure their conformity with international norms;
2. to guarantee that the state party continuously monitors the actual human rights situation and thereby become aware of what polices and priorities would be most helpful to implement and to actually implement such policies;
3. to facilitate public scrutiny of how these government policies are functioning;
4. to provide a platform on which the progress achieved in the human rights situation can be evaluated;
5. to help state parties themselves to develop a better understanding of the challenges faced in realizing human rights;

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additional information on the implementation of this Convention. (CPED has no periodic reporting system yet) There are also currently discussions taking place on aligning all the committees to receive reports at the same interval.

[57] Bayefsky A., *supra* note 17, pp. 5-6.

[58] The most common procedure is to request the state to submit follow-up information to some of the recommendations made in the concluding observations. All treaty bodies except the CRC have this mandate. The CRC instead have the possibility to organize regional follow-up workshops. There are also other follow-up mechanisms but space does not permit to explain them all here.

[59] Bayefsky A., *supra* note 17, p.6.

6. to enable an exchange of information among states parties and the committees, in order to develop a better understanding of the common problems faced.[60]

The system was developed out of the experiences of the ILO. That organization also used a system of periodic reporting obligations on the states to ensure that they honored their commitments.[61] This followed on the non-adversarial approach of the ILO and was deemed preferably for the UN. In the original approach when the system was created there was an assumption that the examination of reports would lead to an interactive dialogue between the state and the treaty body, which in turn would lead to the progressive improvements in the observance of the State parties' obligations. The system was therefore, in contrast to the regional systems that were developed roughly during the same time,[62] kept of a non-judicial nature.[63]

The system therefore relies on a process furthering dialogue and the treaty bodies are only trying to 'assist' the states in fulfilling their human rights obligations. However, the system is not as non-contentious as it seems. The treaty bodies establish whether or not the situation in the country meet international legal obligations. And they also determine what measures are needed to combat the situation and make the violation stop.[64]

How well does the state reporting system fulfill these goals? There has been much criticism but is has been very varied. It can be seen as ranging along a continuum. On the one extreme there is the view that the entire system is flawed and only amounts to a diplomatic scheme that should be abandoned in its entirety. On the other end you find the opinion that acknowledges that the system is not flawless but still holds that it is a valuable tool in the struggle to implement human rights and that it is functioning as good as can be expected given all the constraints.[65]

Another way of looking at the effectiveness of the system is to examine the extent to which the state parties implement the recommendations contained in the concluding observations. There is not one answer to that question, however, since it varies very much from state to state. There are also different reasons that the recommendations are not followed. Sometimes they are not

[60] United Nations, *Report of the Committee on Economic, Social and Cultural Rights – Third Session* UN Doc. E/1989/22/(Supp), 1989, pp. 87-89;
[61] Tomuschat, C., *supra* note 52, pp. 167-168.
[62] The European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights.
[63] Alston, P. & Crawford, J. (red.), *The future of UN human rights treaty monitoring*, 2000, pp. 1-3.
[64] *Ibid.* p. 335.
[65] Bayefsky A., *supra* note 17, p.4

respected because they are not detailed enough to make it practically possible for the state to implement them or because they do not contain priorities. But in many cases they are formulated in a proper manner and then simply ignored. However there are also instances when the observations are implemented and where they do have a significant impact on how the legal situation evolves.[66] In other words, sometimes the system works, sometimes it does not because of the lack of effort or good-will on the part of the state parties and sometimes it does not work because of the flaws of the system. This last category of problems is mainly attributable to lack of funding and the extreme backlog of reports this has given rise to. In order to combat this, there has been an on-going process aimed at strengthening the entire treaty body system but more on this below.[67]

To sum up, the state reporting mechanism allows the committees to critically examine the human rights situation in a given country and hold it accountable for its shortcomings. It is, in other words, a context where it is the treaty body that has the power to influence the state rather than vice versa, this is in contrast to channels the states have to influence the treaty bodies examined in Chapter 3.

2.3.2 Monitoring by Means of General Comments

The treaty bodies also have the possibility to issue general comments or general recommendations.[68] In the early days of the system, many states were critical to the committees having the possibility to issue critical reports regarding any specific country. Instead the founders of the system agreed on a compromise that allowed the committees to formulate general comments that are addressed to all states. In these statements the treaty bodies set out how the hold of the substantive provisions of the conventions should be interpreted. These interpretations are based on the experiences the committees have from both dealing with state reports and individual communications.[69] This is not genuinely a monitoring mechanism but rather a way to make the monitoring performed through other methods more effective.

The general comments also provide general guidance on how the state should submit information on specific articles of the treaties.[70] Other topics dealt with by the comments are cross cutting issues.

[66] Heyns, C. and Viljoen, F., *supra* note 23, p. 26.
[67] See *infra* chapter 2.3.
[68] All treaty bodies use the term 'general comments' except CERD and CEDAW who prefers 'general recommendations'. SPT, CRPD and CED have not yet issued any.
[69] Alston, P. & Crawford, J. (red.), *supra* note 63, p. 257.
[70] Factsheet 30 Rev.1, *supra* note 50, p. 37.

This has for example included comments on the role of human rights institutions and rights of minorities, issues that are relevant to all the monitoring bodies.[71]

Through the general comments the treaty bodies have a possibility to communicate their views on a specific right, article or subject, directly to the community of state parties. Not surprisingly the first general comment issued by both CESCR and HRC were directed towards getting the states to fulfill their reporting obligations.[72] This channel of communication needs not to be forgotten when examining the relationship between the state parties and the treaty bodies.

In this context the days of general or thematic discussion also deserves to be mentioned. This is used by a number of committees and usually takes place during one of the days of certain sessions.[73] Normally they deal with a particular theme and are open not only to the state parties but also to other UN partners, NGOs and individual experts. This forum also provides for an opportunity of the relevant actors to try to influence each other.

2.3.3 Monitoring by Means of Individual Communications

As mentioned above[74] the UN treaty body system is not of a judicial nature. However, there is one element of it that works in a somewhat quasi-judicial manner: the individual communications procedure. This is an optional procedure that is provided for by many of the human rights treaties, established through two different methods: the ICCPR, CEDAW, CRPD each have an optional protocol and any state that is party to both the treaty and the protocol recognizes the competence of the committee to receive and consider communications from individuals claiming that their rights have been violated by the state;[75] the CAT, ICERD and CED follow a different approach where a state becomes part of the communications procedure by making a 'necessary declaration' provided for in the treaties.[76]

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[71] For a complete list of all General Comments issued to date, see UN Doc. HRI/GEN/1/REV.9(Vol.1) and (Vol.2).

[72] CESCR General Comment 1: Reporting by state parties, *in* UN Doc. HRI/GEN/1/REV.9(Vol.I) pp. 1-3; CCPR General Comment No. 01: Reporting Obligation, *in* UN Doc. HRI/GEN/1/REV.9(Vol.I) p. 173.

[73] Such discussions have been held by HRC, CESCR, CERD, CRC, CMW and CRPD.

[74] See *supra* text accompanying notes 56-58.

[75] ICCPR-OP 1 art. 1, OP-CEDAW art. 1, OP-CRPD art. 1. There is also an Optional Protocol to ICESCR that will establish a communications procedure when ten states have ratified it. To date only two ratifications are missing.

[76] CAT art. 22, ICERD art. 14 and CED art. 31. The ICMW also provides for such a declaration to be made under art. 77 but will only be established when such declarations

Anybody who can claim that the rights given to him or her by any of the mentioned human rights treaties is allowed to complain before the respective committee. The only caveat is that the state allegedly responsible for the violation must be a party to both the treaty and the optional protocol (or have issued the necessary declaration).[77] Also third parties can file communications on behalf of alleged victims provided they have their written consent, or if it is justifiable that the third party is acting without such consent.[78]

After a petition is filed a process which has some judicial features follows. The relevant committee first notifies the concerned state of the alleged violation and gives it six months to respond.[79] The committee then examines if the communication is admissible or not, for example, domestic remedies must have been exhausted before turning to the treaty bodies. If the petition is deemed admissible the committee then convenes in closed session to consider the issue at hand.[80] After such consideration, the committee in question will issue its 'views' on the matter. This view consists of the treaty body's interpretation of the relevant part of the convention and their conclusion on whether the merits of the case constitute a violation of the convention by the State party or not.[81] Views are directed directly to particular states, which make them somewhat adjudicatory, in contrast to the general comments mentioned above which are directed to all state parties.[82]

The final views cannot be enforced, so even though it might be considered quasi-judicial there is no agency a victim can turn to with the final decision and expect compensation. However, in many cases, the states parties do follow the recommendations of the committees and award remedies to the complainants.[83]

As mentioned above[84], it was important not to give too much of a judicial framing to the system. Even now when delivering decisions on individual petitions, they are phrased as 'views' and the petitions to the committees are known as communications, not complaints. In practice there is no difference between the concepts but the use of the term 'communication' has made it easier to gain acceptance for the

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have been made by ten states. At the moment only two states, Uruguay and Mexico, have made such declarations.

[77] ICCPR-OP 1 art. 1, OP-CRPD art. 1 (2). the other conventions have similar provisions

[78] OP-CEDAW art. 2. Used analogously by the other committees as well.

[79] OP-ICCPR 1 art. 4 the other conventions have similar provisions

[80] OP-ICCPR 1 art. 5 the other conventions have similar provisions

[81] Alston, P. & Crawford, J. (red.), *supra* note 63, p. 257-8.

[82] See subchapter 2.1.2. However, even though the general comments do not follow a procedure akin to a judicial one, they are still based on the experiences the committees have of consideration of the state reports and specific cases and do contain some elements of a judgment, only not directed to a specific state but to all. This, in a sense, makes them somewhat judicatory.

[83] Factsheet 30 Rev.1, *supra* note 50, p. 25

[84] See *supra* text accompanying notes 56-58.

mechanism among the state parties, since it does not carry with it the more hostile implication of a charge.[85]

So what is the objective of this procedure? Since the state reporting mechanism takes such a panoramic view of the human rights situation it is not uncommon for things to be left out. This makes the individual communications an important complement. There have, for example, been cases where inconsistencies in the domestic legislation of a country were not discovered during the state reporting, but later found to violate the convention through the individual communications procedure.[86]

In theory there can be three possible positive outcomes from individual communications: primarily, an individual whose rights are deemed to have been violated, may receive compensation from the state that has wronged her and the violation be stopped; secondarily, the committee finding a violation against one complainant might not only result in benefits for her, but also to others in a similar situation through changes in domestic legislation or practices; and tertiarily, taken together, views can be used as evidence of systematic and widespread violation of specific rights in a particular state.[87]

How well the system performs these functions and what the precise legal significance of the views is, is not entirely agreed upon. One position is that they are not legally binding in a formal sense but that they are an authoritative ascertainment of law that obliges the state parties, through general international law and the provisions of the treaty, to eliminate any violations.[88] Another view, put forward by F. Pocar, a former chairperson to the HRC, builds on a reading of the convention as a whole. It entails that even though the provision ICCPR-OP 1 art. 5(4) only states that the view shall be forwarded to the concerned state it must be read together with ICCPR art. 2(3) stating that each party to the convention undertakes to ensure that

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[85] Tomuschat, C., *supra* note 52, p. 193.

[86] See case No. 196/1985 (*J. Gueye et al.* v. France) Report of the Human Rights Committee, UN GAOR 44th Session., Suppl. No. 40, p. 189 ff. UN Doc A/44/40 (1989) where a violation was found because of discriminatory practices regarding pensions to soldiers without French nationality, something that was not brought up during the state reporting procedure. Report of the Human Rights Committee, UN GAOR 43rd Session, Suppl. No. 40 para. 376 ff. at page 86 ff, UN Doc A/43/40 (1988). See also case No. 265/1987 (*Voulanne v. Finland*) in UN Doc. A/44/40 (1989) p. 249-257.

[87] Müllerson, R., 'The Efficacy of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR', in *Monitoring Human Rights in Europe* (eds. A. Bload et al.), Dordrecht, 1993, p. 27.

[88] This was said regarding the status of views coming from the HRC, but is applicable to all views. Herndl, K., 'Zur Frage des rechtligen Status der Entscheidungen eines Staatsgemeinschaftsorgans: Die "Views" des Menschenrechtsausschusses' in *Völkerrech zwischen normativern Anspruch und politischer Realität: Festschrift für Karl Zemanek zum 65. Geburtstag* (eds. K. Ginther et al.) Berlin, 1994, pp. 203, 212 (translation by Iwasawa, in Alston, P. & Crawford, J. (red.), *supra* note 55, p. 258.

any person whose rights are violated shall have an effective remedy. This, according to Pocar, leads to the only possible conclusion that if the HRC discovers a violation of any of the rights of the HRC then the state party responsible for that violation is, under that same covenant, obliged to remedy that violation.[89] A third approach is that the legal importance of the system is less important than its practical effects, and that in that regard, it is only as a way to remind states, of inconsistencies in their domestic legal systems that may or may not lead to change, that the procedure has importance.[90] This role can of course also be played by the state reporting procedure mentioned above, but states might be more susceptible to change when the consequences of their practices for specific individuals are made clear.

The individual communications procedure is not the only mechanism of this type. There is also a process dealing with state-to-state complaints. It varies slightly depending on which committee is concerned but HRC, CERD, CEDAW, CAT, Committee on Migrant Workers and Committee on Enforced Disappearances all have some way of resolving disputes between states.[91] However, none of these have ever been used.

Individual communications is thus yet another way through which the state parties and the treaty bodies communicate with each other, albeit be it only concerning particular cases. It differs also from the general comments in that it is a two-way communication in which the states have an opportunity to put forward their opinions on how a specific obligation arising from the conventions should be interpreted. The committee, however, always gets the last word. This makes the procedure more akin to that of state reporting.

2.3.4 Monitoring by Means of Fact-Finding

Another mechanism used to monitor the human rights situation in the state parties is to initiate inquiries. This procedure is only available to CAT, CEDAW and the Subcommittee on the Prevention of Torture. The two first mentioned follow an almost identical procedure while the third, whose very *raison d'etre* is to perform country visits, has slightly different working methods. This chapter will first deal with the two original treaty bodies and then continue with the subcommittee.

For both CAT and CEDAW their ability to initiate inquiries begin in situations where they have received reliable information giving

[89] Pocar, F. *Valeur Juridique des Constatations du Comite des Droits de l'Homme, La*, 1992, pp. 129–130.
[90] Müllerson, R. *supra* note 87, p. 27.
[91] ICCPR arts. 41-43, ICERD arts. 11-13, CEDAW art. 29, CAT arts. 21 & 30, CMW arts. 74 & 92, CED arts. 32 & 42.

well-founded indications either that torture is being systematically practiced (for CAT) or (for CEDAW) of grave or systematic violations of the rights set forth in the convention.[92] However, the conventions do not provide whom it is that shall that provide this information. This has lead to NGOs taking an active role and they are often the ones to inform the committees.[93]

The main features of the inquiry procedure is that they are confidential and that the committees to the greatest extent possible are trying to pursue cooperation with the concerned state. The process is as follows: after the committee receives the information mentioned in the last paragraph, it invites the state to cooperate in the examination of this information. After that it may designate one or more of its members to make a confidential inquiry into the situation and to report back to the committee. This inquiry may, if the state agrees to, include a visit to the country itself. The committee then examines the results and transmits them to the concerned state, accompanied with any comments or recommendations they find relevant. The committee may then issue a summary report of the results of the inquiry to be included in its annual report, but only if the state concerned agree to lift the confidentiality.[94] The state parties also have the possibility of opting out of the inquiry system by issuing declarations that exempt them from this mandate of the committees.[95]

Since country visits is one of the main activities of the Subcommittee on the Prevention of Torture, and since they work purely preventative, their approach is slightly different.[96] By ratifying the Otional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment all State parties obligates themselves to receive visits to any place where persons are deprived of their liberty.[97] There is thus no need for any specific information to arise in order for a visit to be motivated. The mandate of what can be done during these visits are also more detailed when it comes to the Subcommittee on the Prevention of Torture in comparison with the other treaty bodies.[98]

There is, however, one aspect that both systems share: they do not have the long delays inherent to them as the individual communications procedure or the state reports. Instead they can work in a more preventative fashion. This is mainly done through

[92] CAT art. 20, CEDAW art 8-9.
[93] Tomuschat, C., *supra* note 52, p. 226.
[94] CAT art. 20, CEDAW art. 8-9.
[95] CAT art. 28 & OP-CEDAW art. 10.
[96] Fact File on the UN Subcommittee on Prevention of Torture and Other Forms of Ill-Treatment (SPT) p.1.available at: http://www2.ohchr.org/english/bodies/cat/opcat/factfile.htm
[97] OP-CAT art. 4.
[98] OP-CAT art. 11.

contact with officials and authorities at the grass-root level and often has a more direct effect on the concrete insufficiencies of the state practices leading to human rights violations on the ground.[99] This meeting between representatives of the committees and those of the state is different from the ones taking place in Geneva or New York where it is mostly high-level officials in the meetings.

It is a channel of communications where again it is the committee that has the upper hand, even though the state still has the possibility of denying access, either to the country as a whole or to the areas where the gravest violations occur, something that is not uncommon. Still it is a situation where it is the representatives from the committees that have the possibility of influencing the behavior of the state officials on the ground while the officials themselves have hardly any possibility of affecting the committees' work.

2.4 The Strengthening Process of the UN Treaty Body System

The treaty body system is currently going through a period of difficulties. It is suffering from both under-funding and lack of cooperation from the state parties. As of April 2012 there were 626 state reports that had not yet been submitted.[100] But even with this large number of reports overdue, the system is still struggling to keep up with the ones that are submitted. The treaty bodies have backlogs amounting to 281 state reports that are waiting to be treated. [101] This means that even the states that do cooperate and submit on time have to wait years and years for their reports to be considered. The monitoring bodies that receive individual communications suffer similar problems when it comes to this procedure. The HRC has now an average time of three and a half years from when a case is registered until a final decision arrives.[102] That this is a problem for a body set to guarantee, among other things, the right to a fair trial without undue delay[103], goes without saying.

These are not new problems, however, and efforts to combat them have been going on since 1997 when the independent expert Philip Alston issued his milestone report on how to enhance the long-term effectiveness of the UN human rights system.[104] In 2002

[99] Tomuschat, C., *supra* note 52, p. 224.
[100] Pillay, N. *supra* note 3, p. 23.
[101] *Ibid.*
[102] *Ibid.*
[103] ICCPR art. 14 (3) (c).
[104] 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.

the Secretary General issued a report[105] on strengthening of the entire UN system, which also contained a section on how the treaty bodies could be made more effective. The former High Commissioner for Human Rights, Ms. Louise Arbour, worked actively to reform the system and published a concept paper on a unified standing treaty body, to replace the ones already in place.[106] It contained many bold proposals aiming at solving the structural problems of the system but was not adopted. One of the main reasons put forward for the failure of this proposal is that it was developed by the OHCHR on their own, without sufficient consultations with the treaty bodies and the member states.[107] This led to a severe backlash once the report was finally put forward and many stakeholders felt left out of the process. The concept paper did, however make the treaty bodies themselves more actively engaged in improving the system. This continued through Inter-Committee Meetings and Chairpersons Meetings, where representatives from the various treaty bodies meet and exchange working methods in order to harmonize their procedures.

This harmonization on the initiative of the monitoring bodies has lead to efficiency gains for the entire system but the huge backlogs and the problems of states not reporting on time did not go away. Therefore, the current High Commissioner for Human Rights, Ms. Navanethem Pillay, initiated her own strengthening process in 2009. This time, the OHCHR tried to learn from past mistakes and made the reform process a very inclusive one. Informal consultations were held with states on several occasions[108], as well as with the treaty body members[109] and civil society and national human rights institutions.[110] The High Commissioner has also throughout the process encouraged all actors to submit their own proposals for change. In 2012 she issued her report on Treaty Body Strengthening[111] in which a host of different proposals were put forward. These proposals, including a comprehensive reporting calendar, a simplified reporting process and guidelines on independence of the members of the treaty bodies, will now be considered by an open ended inter-governmental working group, currently in session in New York, that will submit their conclusion

[105] Report of the Secretary General: Strengthening of the United Nations: an agenda for further change, 9 September 2002. UN Doc. A/57/387 p. 12.
[106] Report by the Secretariat: Concept paper on the High Commissioner's proposal for a Unified Standing Treaty Body, 22 March 2006. UN Doc. HRI/MC/2006/2,
[107] O'Flaherty, M. *Reform of the UN Human Rights Treaty Body System*, 2010 p. 331.
[108] In Sion (May 2011), Geneva (February 2012) and New York (April 2012).
[109] In Dublin (November 2009 and 2011), and Poznan (October 2010).
[110] In Marrakesh (June 2010), Seoul (April 2011) and Pretoria (June 2011).
[111] Pillay, N. *supra* note 3,

and their proposals of reform to the General Assembly for a final decision.[112]

The HC report is not a take it or leave it proposition, but rather contains a number of different proposals that, although mutually reinforcing, can be accepted individually. It remains to be seen which of the High Commissioners proposals will make it into the end document of the state-working group.

[112] Inter Governmental Working group established through GA Res. A/66/L.37, 16 February 2012.

3 Independence now and tomorrow

Historically states have been the only actors with the authority to interpret what their international obligations are. It is only a relatively new phenomenon that other actors have been empowered to decide what the state of the law is. The UN treaty bodies are one such actor with a mandate to tell states what their obligations under international human rights are and issue recommendations. This is a development that not all states have been eager to accept. It is therefore important to determine if the states, in establishing the treaty bodies, really have given up their control, or if the states still retain some tools to influence the decisions of the treaty bodies, that is, to limit their independence.

In trying to determine the independence of any actor there are, however, some ontological problems that needs to be acknowledged. The first problem, as mentioned in the introduction, is to determine what is meant by independence. Only after that has been defined is it possible to examine if there is a possibility to determine its scope. This paper uses the concept of *independence from,* meaning how autonomous an actor is to act according to its own preferences without having to adapt to the will of others. However this definition carries with it some empirical problems. It is not very easy to measure what the preference of any given actor really is and even if we can measure that we also have to compare this to the preferences of another actor, the one that wants to influence the first. To measure the independence empirically we thus need to distinguish the difference in preferences and then compare outcomes to see if they follow the wishes of the former or the latter. This can be done, indeed it has been done, but it is best suited when examining actors that regularly produce outputs that can easily be compared to the preferences of others.[113]

The treaty bodies, however, are not very well suited for this type of studies. The ones that accept individual communications could perhaps be studied to compare the 'views' of the committee with the desired outcome of the state party concerned, but this is only a small part of the whole treaty body system, and the main outcome, the

[113] In many studies the judgments of courts are examined and compared to what the preferred verdict of the state party was, in cases when the court ruled against the will of the state it was assumed that the court had acted independently and not given in to state pressure. (although the opposite conclusion could of course not be drawn from the cases when the state and court agreed, it could just as well be that the state just was 'right'). For more examples see Ríos-Figueroa J. *supra* note 10, p. 3.

concluding observations, are not the product of an adversarial procedure where two disagreeing parties are pitted against each other. Studying them would therefore not provide much information regarding their independence.

If empirical studies cannot provide an answer to our research question, what is our next step? Should we give up and just accept that the ontological obstacles are so great that it is impossible to know how independent or not the monitoring bodies really are? Or is there another way to look at it? In other field than law, scholars often turn to theoretical frameworks to help explain the world when it proves hard to measure empirically.

One such framework is that of Principal – Trustee theory (P-T theory). The following explains how this framework can be used to shed some light upon the autonomy of the treaty bodies.

3.1 Principal-Trustee Theory as a Tool to Understand Independence

Principal-Trustee theory is a framework that builds on the rational choice tradition that helps explain and understand delegation. In the context of this thesis, the P-T theory is relevant in that it can offer predictions and perspective about the autonomy of the treaty bodies (the trustee) and the influence the state parties to the treaties (the principal) exerts on them.

The states are in this thesis considered as the principal collectively because it was through their drafting and ratifying of the human rights treaties that the committees were created.[114] It is also the member states that have the ability to amend the treaties, which in this instance fills the function of a delegation contract.[115] They also provide the financial resources to the treaty bodies.[116] The experts serving as committee members are also appointed and re-appointed by the states parties to the respective conventions.[117] It is thus the member states that control who gets appointed as experts in a treaty body, and they also control how much funding that body has at its disposal. For the purposes of this thesis the collective made up by all the state parties are, as stated above, therefore the Principal, while all the treaty bodies together make up the Trustee. The third criterion that defines a P-T relationship is that there must be a beneficiary. In

[114] ICCPR through GA res 2200A (XXI); ICERD through GA res 2106 (XX); CEDAW through GA res 34/180; CAT through GA Res 39/46; SPT through GA Res 57/199; CRC through GA res 44/25; ICRMW through GA res 45/158; CRPD through 61/106; ICED 61/177. CESCR was established by ECOSOC through Res 1985/17 and not the GA but the ECOSOC members form part of that same community of states.
[115] Although this delegation contract is very hard to change, but more on this in Chapter 4.
[116] OHCHR Report, *supra* note 108. p 124.
[117] ICCPR art. 30 & 32;

this case it is the population of the world. It is for their sake the treaty bodies exist and it is they who are supposed to be guaranteed the rights of the different treaties. In the wider sense they are also represented by the international community of NGO's and civil society organizations.

In the following the framework of Principal Trustee relationships is explained. First comes a short segment of how the theory was developed, followed by a more detailed explanation of the P-T approach. Since no framework is without its problems, next follows an outline of the critique directed towards the theory and finally comes a part describing what the theory can teach us about independence.

3.1.1 Development of Principal-Trustee theory

So what is P-T theory? It is a theory that was developed from a broader structure called Principal-Agent theory. The trustee is in reality a type of agent, a subcategory if you will. Here follows therefore an explanation of the broader concept of agents and how it came to be developed into the more specific term trustees. This background is necessary to understand in order to be able to use P-T theory to offer explanations and insights into the independence of the treaty bodies.

Principal-Agent theory was first used in economics and political science to help explain and understand the commonly observed phenomena of delegation. It builds on the framework of rational choice theory of both domestic and international politics. At the domestic level the actors are mainly voters or legislators while at the international level, it primarily concerns the activities of states. These actors are assumed to be instrumentally rational in that they want to achieve the largest gains possible for as low a cost possible. In order to do this they sometimes delegate authority or power to other actors, called agents. These agents can in that way perform activities that had earlier been performed by the principals. However, there are several risks with this delegation and the principals therefore try to tailor the delegation in order to avoid them. These risks include the fear that the agent will not be sufficiently committed to its tasks and that the information given and received will not be relevant or sufficient.[118]

The main problem, however, is that the agent's interests will never correspond perfectly to those of the principal and that this will lead to situations where the agent acts according to his or her self-interest instead of the wishes of the principal. For example in

[118] Pollack, M, A. *Principal-Agent Analysis and International Delegation*, *2007*, *p*, 3.

business the main goal of an agent running a regional office is not to make money for the principal at headquarters but to make money for herself. This will sometimes lead her to acting in ways that are not intended by the principal. This is called agency 'slack' or 'losses' and is defined as behavior that the principal has not, or would not, approve of.[119] Agency slack is a natural consequence of differences of interest and exists in any P-A relationship and principals have always tried to come up with ways in order to limit it. However principals sometimes gives agents a certain amount of discretion to decide matters for themselves. This discretion should not be confused with unwanted agency slack.

P-A theory was developed in order to better understand these relationships and to help principals shape the delegation contracts in such a way as to minimize agency slack. It has now risen to be the main perspective from which to analyze the behavior of states and the agents to whom they delegate power.[120] The essence of principal agent theory is to draw attention to issues of hierarchical control when it comes to information asymmetry and conflicts of interest.[121] Since any attempt to limit agency slack is also an attempt to limit the autonomy of an agent to act according to its own preferences, there is an obvious use for this theory when trying to determine how independent an actor is. The theory has also been used when it comes to international organizations[122], courts[123] and the EU[124][125] and is also starting to be applied to the field of human rights.[126] There are however aspects of that the P-A theory does not take into consideration. This is why a more specific category of agents, called trustees was developed, as explained below.

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[119] Alston, P. *supra* note 14, p. 627.

[120] Space does not allow to exhaustively list all works. Some examples include Majone, G. *Two logics of delegation: Agency and Fiduciary Relations in EU Governance*, 2001, Pollack, A. *Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications and Empirical Disputes*, 2003; Hawkins, D. et al *Delegation and Agency in International Organizations*, 2006 and Tallberg, J. *Executive Politics* in Jørgensen, K. E., et al. (eds.) *Handbook of European Union Politics* 2006.

[121] Terry Moe, *The new Economics of Organization*, 28 Am. J. Pol. Sci. 1984, p 739.

[122] Vaubel, R. *Principal-Agent problems in international organizations*, 1 Rev. Int'l. Orgs. 125. 2006, or Hawkins, D. G. *Delegation under anarchy: States, International Organizations and Principal-Agent theory*, in Hawkins, D. G., et al (eds) *supra* note 117 pp. 3, & 18-19.

[123] See Alter, K. J., *supra* note 15.

[124] See Curtin, D. *Executive Power in the European Union Law, Practice and Constitutionalism*, 2009.

[125] Vaubel, R. *Principal-agent problems in international organizations, 2006*.

[126] See for example, Alston, P. *supra* note 14.

3.1.2 Moving from Agents to Trustees

One of the criticisms directed towards the Principal-Agent theory is that it does not take third party actors into consideration. The relationship between the principal and the agent is strictly hierarchical but in reality it is often the case that the agents are influenced, not only by their principals, but also by others.[127]

Building on this criticism; Majone came up with the theory that there are two different motives why a principal would give up power to another entity. He called this the "two logics of delegation". The first is to reduce decision-making costs and gain efficiency, and the other is to enhance credibility. The former delegates to agents that have expertize that is relevant for the type of policy the principal wants to implement through the agent. In this case it is mostly executive functions that are delegated and they are accompanied by quite strict control mechanisms. In the latter case power is delegated to someone that is then deliberately separated from the principal. Majone called this latter category, where credibility is the main aim, fiduciary delegation, and the classic type, agency delegation. In agency delegation the main aim of the principal is to find an agent that is closely aligned to herself as possible and to find the best ways to control the agent. Since fiduciary delegation is aimed at gaining credibility and pleasing a third party, a puppet agent would not help. Instead the optimal agent is one whose preferences differ systematically from those of the principal.[128]

This fiduciary delegation was further developed by Alter into what she called Principal-Trustee theory.[129] Her theory replaces the somewhat cumbersome term fiduciary delegation, with delegation to trustees. A trustee is different from a 'true' agent in that the delegation, as was the case for fiduciary delegation, is motivated by gains in legitimacy and not in efficiency.[130]

In the original principal - agent relationship the true agent is acting only for the benefit of herself and the benefit of the principal. And there is only agency slack when these two do not correspond. Under the Principal–Trustee framework on the other hand, the agent is also acting to serve a third party, a so-called beneficiary. It does not matter who this beneficiary is, only that it exists. The relationship is thus more complex than in the case of true agents, where it is purely hierarchical with the principal on top and the agent below. In a P-T relationship the principal is still above the agent (the trustee), in the hierarchical sense, but both are trying to convince the audience

[127] Pollack, M. A., *supra* note 115, pp. 13–17.
[128] Majone, G. *supra* note 117, pp.103–122.
[129] Alter, K. J., *supra* note 15.
[130] *Ibid.*, p. 35.

of the third party that they are acting in a legitimate way. The beneficiary therefore binds the trustee; it cannot blindly follow the principal's wishes without creating damages to its own credibility. The same applies for the principal, for often the trustee is viewed as a better decision maker by the beneficiary, which would make instructions from them principal look like 'political interference'.[131]

To sum up, a trustee is defined as an agent that is 1) selected because of their personal and or professional reputation, 2) given authority to make meaningful decisions according to the trustee's best judgment or the trustee's professional criteria, and 3) is taking these decisions on behalf of a beneficiary.[132]

There has been some discussion on whether P-T theory really is that different from P-A theory. Alter and Alston favor a dichotomy while Polack does not. Polack believes that understanding the delegation to a 'true' agent also help us shed light on the delegation to a trustee, since many share motives and behavior. He also finds it hard to draw an exact line between the two types of agents.[133] This is echoed by Hawkins and Jacoby who claim that the differences between agents and trustees sometimes change and that they might grow to look alike. The more agents develop relationships with their constituency, creating a personal or office-based reputation for authority, the more the agent becomes like a trustee and there is therefore always a grey zone where it is difficult to determine whether an actor is a trustee or an agent.[134]

But in the context of the treaty body system, it does not matter if there is a grey area where it is hard to determine if an agent is a true agent or a trustee. The treaty bodies are doubtlessly found in the second category. They are definitely elected because their personal and professional reputation, it is even stated in the treaties that they shall be of high moral standard and with recognized competence in their field.[135] They are given authority to make decisions according to their own best judgment. It is the experts themselves that formulate the concluding observations and other outcomes from the treaty body system. And finally, they are taking these decisions on the behalf of a beneficiary. It is not for the sake of the member states themselves that the monitoring bodies work. As stated in the preamble of the Universal Declaration of Human Rights, it is for the benefit for "all peoples and all nations", indeed even for "every

[131] *Ibid.*, p. 40.
[132] Alston, P. *supra* note 14, p. 634; Alter, K. J., *supra* note 15, p. 39.
[133] Pollack, M. A., *supra* note 115, p. 10.
[134] Hawkins, D. G. & Jacoby, W. *How agents matter* in Hawkins, G. D., et al (eds.) *supra* note 117.
[135] ICCPR art. 28, ICERD art. 8, CEDAW Art. 17, CRC Art. 43, CAT art, 17, SPT Art. 5, CMW Art 72, CRPD Art. 34, CED Art.26, and for CESCR: GA res. 1985/17 para. 7.

individual and every organ of society".[136] They therefore fulfill all the criteria that define a trustee.

3.1.3 Critique directed against Principal-Trustee Theory

In order to understand the critique that has been directed towards P-T theory we need to remember what the purpose of the theory is. This thesis concerns itself with the independence of the treaty bodies. If the P-T framework helps us understand or determine this independence then it is a good tool that should be used. If not, then it should not. Therefore it is only critique that brings to doubt the theories usefulness in this regard that needs to be seriously responded to.

In the following the most common critiques will be explained and then responded to. Some of these critiques were originally directed towards 'true' agents and not trustees but they are still relevant since both agent and trustees are based on the same theoretical framework.

One such criticism, which is really no more than a misconception is that agents, in the interests of the effectiveness of their own organizations, prefer not to anger the principal in order to keep their discretion.[137] That they, even when they have other preferences than their principals, would still adapt to those wishes so that they would not force the principal to step in and overturn their decisions or revoke their delegation contract. But, as Alter notes in the context of international courts, professional norms or values might be just as, or even more, important than the desire to please the principal. She found that often the courts would rather openly go against the principal only to have their decisions, sometimes humiliatingly, overturned. The assumption that agent seek to avoid sanctions at all cost is therefore not always true, especially when it comes to the judicial context. An agent or a trustee, might prefer to have their decisions overturned by their principal, (the legislature) than to adopt a decision that is, or appears to be, colored by political considerations[138]

Another type of critique is directed towards the ontological and the empirical side of P-T theory. It holds that it does not matter how theoretically stringent or internally consistent the P-T model is if it cannot systematically and correctly identify why and how principals delegate or how independent the agents are after the delegation has taken place. It claims that the theory does not help us understand the

[136] Universal Declaration of Human Rights, adopted by GA res. 217 A (III)
[137] Pollack, M. A. *supra* note 115., p. 6.
[138] *Ibid.*, p. 7.

real reason why principals delegate, or how autonomous the trustees become and that other theories are better employed instead. Sociological institutionalist or constructivist theories might be more useful. Since this thesis concerns itself with independence, we must look at if other theories are better suited to explain and determine the autonomy of a trustee, in our case the treaty bodies.

There is also the constructionist standpoint, that P-T theory (or any rationalist theory) is "ontologically blind" to the most important factors influencing behavior. For example some scholars hold that international organizations are bureaucracies which entails that there behavior cannot be simply predicted by a theory that builds on preferences since there is not one set of preferences common for all working in the bureaucracy. Instead there are common values shared internally that instead needs to be taken into consideration in order to understand how they act.[139] However it has been hard for these constructionists to show empirically that this blindness, or the factors that rationalist theories do not consider, really changes the results of the studies.[140]

It should also be noted that P-T theory is a rationalist mid-level theory, and as any such theory it is compatible with many other rationalist mid-level theories, so it can be just one out of many building blocks. The aim of this paper is not to come up with one grand theory that can explain everything, just to look at the independence through this perspective in order to get some insights that so far have been overlooked.

3.2 Using Principal-Trustee Theory to Determine Independence

What does P-T theory tell us about the member states possibilities to influence the treaty bodies? It tells us that there are four main ways for the principal to sanction the trustee when it is not happy with its behavior. These are: A) to fire the trustee, B) to not-re-appoint the trustee when the tenure of the contract runs out, C) to rewrite the terms of the delegation contract and D) to change the budget the trustee has to work with.[141] These are the main tools a principal has to limit the independence of a trustee and they are dealt with in detail in the following two subchapters. First some other instruments of influence deserve mention.

Another tool often used to limit the independence of 'true' agents is threats. This is, for a number of reasons, however not quite

[139] Barnett, M., & Finnemore, M. *supra* note 128, pp. 10-17 & 20-25.
[140] Pollack, M. A., *supra* note 115 p. 18.
[141] Alter, K. J., *supra* note 15, p. 34.

as effective when it comes to getting trustees to stay in line with the principal's wishes.[142] The first is that in a P-T relationship there is always a beneficiary watching. The international organizations representing the populations that the treaty bodies are set to protect would react very negatively on threats coming from the member states trying to influence the behavior of the treaty bodies. This would lead to state issuing the threat being painted in a very negative light in the international arena and other adverse consequences in the principals' relation to the beneficiary. This is especially true if the beneficiary is approving of the actions of the trustee the principal is trying to threaten.

For a threat to be effective, it also needs to be credible. In this context, and any context where the principal consists of a large group of actors, this is always a problem. The disgruntled state must first convince the other member states that the trustee was indeed out of line before being able to put some strength behind its words. The third reason threats are often useless after a trustee has been appointed are her strong professional norms.[143] These were in fact one of the reasons the trustee was appointed.[144] As long as a trustee believes that she is acting within her mandate, these norms often makes her more likely to take the fall than to bow down to pressure. It therefore seems the treaty bodies are quite protected against threats from the member states.

Another way the principal might try to influence the trustee that P-T theory highlights is the use of legitimacy and rhetorical politics.[145] This is a channel of influence unique to the principal-trustee relationship. It does not exist in the case of 'true' agents since it is dependent on the beneficiary, the third party for whose sake the trustee was established. It is also unique since it provides for a two-way line of influence; both the principal and the trustee can try to use this instrument to try to influence the other. This is because both are dependent on remaining on a good footing with the beneficiary. This is however a very fickle way of imposing ones will, since it is dependent on shaping popular opinion. If the state collective can convince the beneficiary (say through the international NGOs) that the treaty bodies are not useful or not doing what they are supposed to do, they would have obtained a very important tool that could be used to impose a new regime. The same goes for the treaty bodies, their recommendations are only as powerful as other actors make them. If they are able to convince, for instance, the civil society in a

[142] *Ibid.*, p. 40.
[143] *Ibid.*, p. 41.
[144] In the treaty body context as stated in ICCPR art. 28, ICERD art. 8, CEDAW Art. 17, CRC Art. 43, CAT art, 17, SPT Art. 5, CMW Art 72, CRPD Art. 34, CED Art.26, and for CESCR: GA res. 1985/17 para. 7.
[145] Alter, K. J., *supra* note 15, p. 35.

country, to continue to apply pressure on the state regarding a specific recommendation, the state is a much more likely to change its practices. This is unfortunately quite difficult to measure empirically. One way would be to examine how the views of the treaty bodies and the states are being forwarded and used by third parties. This would give an indication of how well the actors are able to use the beneficiary to strengthen their respective positions. This however, falls outside the scope of this thesis.

The main instrument, available to the state collective, of limiting the independence of the treaty bodies remain the four sanctioning methods mentioned earlier: to fire, or not re-appoint the trustee, changing the terms of delegation and cutting the budget. In the following they are examined in the context of limiting the independence of the treaty body system as a whole, and then how they affect the individual treaty body experts.

3.3 Independence of the Treaty Bodies as a Whole

For the treaty body in its entirety it is changes in the budget that is the largest threat to its independence. The other three methods of sanctioning rather concern the individual members. This chapter will therefore examine what possibilities the state collective (the principal) has to use the budget to influence the treaty bodies (the trustee).

P-T theory posits that cutting the budget of the trustee can provide the principal with significant political leverage to make sure the trustee does not stray too far away from the course approved by the principal. When applying this theory to the treaty body system one must first look at the legal foundations of the system. All monitoring bodies were created to be independent. The treaties contain provisions stating that the members of the committees shall serve in their personal capacity.[146] They are not there to represent their own member states, or any other side-interest. The treaties also state that the treaty bodies are independent to decide their working methods for themselves with but a few minor caveats.[147] For example the ICCPR, the CAT and the Optional Protocol to the CAT all contain

[146] ICCPR art. 28 (3), ICERD art. 8 (1), ECOSOC. Res 1985/17 para. b, CEDAW art. 17 (1), ICRC art. 43 (2), CAT art. 17 (1), OP-CAT art. 5 (6), ICMRW art. 72 (2b), ICERD art. 34 (3), ICED art. 26 (1).

[147] ICCPR art 39 (2), ECOSOC res. 1979 / 43, ICERD art. 10, CEDAW art. 19 (1), CRC art. 43 (8), CAT art. 18 (2), OP-CAT art. 10 (2), CRMW art. 75, CRPD art. 34 (10), CED art. 26 (6).

minimum rules on how many of their respective members need to be present for a decisions to be valid.

However this legal authority to decide how to work does not automatically mean that the treaty bodies also have the practical possibility of achieving it in reality. In order to function properly the committees require funding. This was taken into account in the original treaties. The wording differs slightly between the covenants but in all of them it is stated that the Secretary General of the UN shall provide the committee with the necessary staff and facilities to allow the monitoring body to effectively perform its functions.[148] Since the creation of the Office of the High Commissioner for Human Rights (OHCHR) in 1993 it is this office that has been responsible for providing these resources. The treaty bodies do not have any independent budgets but are only given what is allocated to them by the OHCHR. In order to determine the principal's, the member states', possibility to use the budget as a tool for influencing the treaty bodies, we must take a closer look into the budget of the system.

The budget of the OHCHR comes from the general budget of the UN (40.9 percent as of 2011) and from voluntary contributions (59.1 percent), mainly from member states.[149] Out of these funds only 7.4 percent goes to the Treaty Body Division. The funds coming from the general budget of the UN is earmarked to very specific posts and every activity need to be carefully cost-assessed before the General Assembly can approve any funds for it. This goes down to the level of how much money can be spent on translation of documents, on interpreters for specific meetings and every position employed by the treaty division.[150] The funds coming from voluntary donations to the treaty body division are not as fixed. Less than 5 percent are earmarked for specific projects.[151] But the majority of the funds used by the treaty body system still have to go through the official UN budget process.

The main example of how the General Assembly's control of the budget affects the work of the treaty bodies is meeting time. The treaties vary when it comes to how often the committees shall meet. The HRC, the CAT and the Subcommittee on the Prevention of Torture are explicitly given the authority to decide on their own on how often to meet.[152] Despite this, getting more meeting time for the

[148] ICCPR art 36, ICERD art. 10 (3), ECOSOC Res 1979/43 para (g), CEDAW art. 17 (9), CRC art. 43 (11), CAT art 18 (3), OP-CAT art. 25 (1), CRMW art. 72 (7), CRPD art. 34 (11), CED art. 26(7).
[149] OHCHR Report, *supra* note 22, p. 136. 89.1 percent comes from member states, the rest from institutions such as the European Commission but also from individuals.
[150] Proposed budget for the biennium 2010-2011, Part IV Human rights and humanitarian affairs, Section 23, Human Rights, 14 April 2009. UN Doc. A/64/6 (Sect. 23).
[151] OHCHR Report, *supra* note 22, p. 147.
[152] ICCPR art. 37 (2), CAT art. 18 (4) and OP-CAT art. 10 (3).

committees has been extremely hard. Since all the committees have large back-logs of state reports and individual communications that have not yet been considered requests for more meeting time to deal with these have been on the table for a long time, first mentioned in 2006 during the brainstorming meeting on reform of the treaty body system, also known as Malbun II.[153] But it has been very hard to secure the funding for permanent additional meeting time. The committees have instead been forced to apply for additional time on an ad-hoc basis. CERD, CRC, CEDAW and CAT have been able to secure extra meeting time but only temporarily to deal with their backlogs.[154] But these provisional measures do not sufficiently deal with the long-term problems. And the additional meeting time has not been accompanied with a corresponding increase in the necessary secretarial support.[155] The hardship to secure more funding has also forced treaty bodies to down-prioritize some parts of their mandate in order to just stay afloat. The Subcommittee on the Prevention of Torture for example, has due to budgetary constraints not yet undertaken an official visit to advise states on national preventative mechanism, despite this being one of their tasks established in the treaty.

The committees have thus not been able to meet as often as they have wanted and not been able to perform their tasks due to the fact that they need the approval of the General Assembly for the additional expenses. Indeed in the Rules of Procedure of the CEDAW it is even stated that they can only hold as many meetings as are authorized by the state parties.[156]

What does this information tell us about the independence of the treaty bodies from a Principal-Trustee perspective? The state parties and the General Assembly do not have to issue any reasons for denying a request for additional funds or meeting time. It does show that the trustee, the monitoring bodies, do not have sufficient resources to perform their duties effectively. It also shows that this is because of decisions taken by the principal. There have been no instances of state parties explicitly referring to the activities or outcomes of the treaty bodies as reasons for cutting the budget, (or rather, not increasing it to cope with the growth of the system). The only thing Principal-Trustee theory tells us is that the budget is a clear and useful channel for the principal to let the trustee now what the former thinks of the latters work. During the informal

[153] Annex to the letter dated 14 September 2006 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary General published 18 September 2006 UN Doc. A/61/351 p. 6.
[154] GA Res. 63/243 and 63/244 both from 22 February 2009, and 62/218, 12 February 2008,
[155] Note by the Secretary General: Evaluation of the use of additional meeting time by the human rights treaty bodies, 27 August 2010, p. 12.
[156] CEDAW Rules of Procedure. Chapter V. Rule 1.

consultations that have taken place during the strengthening process[157] many states have forcefully voiced their distrust of the system and alleged that it is being misused for political reasons to target certain states. And when taking this resistance to provide budgetary means together with the lack of willingness of states to report on time according to their obligations it is hard not to infer a supposition that at least some states are quite satisfied with the fact that the treaty body system has difficulties to function. Even if freezing the budget is not a direct interference in the autonomy of the trustee, failing to act to save the system affects the trustee just as much.

3.4 The Independence of the Individual Treaty Body Experts

The budget is not the only tool the principal can use to sanction her trustees. The three other measures highlighted by Principal-Trustee theory and mentioned above are: A) dismissing the trustee, B) not re-electing her and C) re-writing the delegation contract. These three all relate to sanctioning of the individual experts of the committees. They will now be examined starting with the possibilities the member states have to dismiss trustees that are not living up to the expectations of the states.

When it comes to true agents firing is often the first natural reaction for many principals when they are unhappy with the way the agent is acting. When it comes to trustees it is often more difficult. Since the trustee is created in order to bring credibility to a system, there are often safeguards against frivolous dismissals in the founding documents.

This is also the case when it comes to the monitoring bodies. None of the treaties allow for state parties, neither alone nor collectively to dismiss an expert of a treaty body. In half of the treaties[158] dismissal is not mentioned at all. Some treaties[159] mention that in circumstances when an expert is not able to perform her duties, a new one shall be appointed, but no details are given on who decides when someone is deemed to not be able to function any longer. The Convention on the Rights of Persons with Disabilities gives this choice to the expert herself: only if she declares that she no longer can perform her duties shall she be replaced.[160] The International Covenant on Civil and Political Rights however gives this power to the other experts. If all other members of the Human

[157] In Sion, Geneva and New York.
[158] ICERD, ECOSOC Res. 1985/17, 28 May 1985 CEDAW, CRC and CRMW.
[159] CAT art 17 (6), OP-CAT art. 8 and CED art. 26 (5).
[160] CRPD art. 34 (9).

Rights Council unanimously are of the opinion that an expert has ceased to carry out her functions, that position shall be declared vacant.[161] This method or similar has also been chosen by some of the other committees and can be found in the Rules of Procedure they themselves have established.[162] So far, no post has ever been declared vacant due to the inactivity or inability of an expert to perform her functions.

As a way to influence the individual members dismissal thus seems to be an impossible route to take. For this to happen, which it only could for a few of the committees, the state parties would need to convince every other member of a committee to vote for the dismissal of the unwanted one. And even if this were possible, the formal reason for dismissal must be absence and inability to participate. If states would want to get rid of an expert it would hardly be because of inactivity, being over-zealous in her criticism seems more likely. This lack of influence has frustrated some state parties and this has led to the discussion on codes of conduct, but more on this below.

If the member states cannot dismiss the experts what other means are left to them? As mentioned they also have the possibility to refuse to re-appoint a trustee when the term runs out. Indeed P-T theory tells us that it is in appointment and re-appointment politics that the principals have one of the greatest opportunities to secure a trustee they are comfortable with.[163] What are the practical possibilities for this in the treaty body system?

The experts serving in the committees all serve for mandate periods of four years (except for Subcommittee on the Prevention of Torture that only serve for two). All except CERD and CEDAW allow for re-election at least once.[164] This, it would seem, provides for plenty of incentive for the experts to keep a friendly relationship with the member states. Especially when considering that experts can only be nominated by the state they share nationality with and can only be re-appointed if they are re-nominated.[165] The experts must therefore remain on good footing with their respective 'home' states as well as with the majority of states needed in order to get the necessary votes. The relationship with the 'home' state is however seldom put to the test since experts rarely participate in the consideration of the state of their nationality. This is explicitly

[161] ICCPR art. 33 (1).
[162] This is the case for CESCR Rules of Procedure, Rule 11 (1), CRC Rules of Procedure, Rule 14 (2) and CED Rules of Procedure, Rule 13.
[163] Alter, K. J., *supra* note 15. p. 44.
[164] ICCPR art. 32 (1), ICERD art. 8 (5a), ECOSOC Res 1985/17 para. c (i), CEDAW art. 17 (5), CRC art. 43 (3&6), CAT 17 (5), OP-CAT art. 10 (1), CRMW art. 72 (5a&c), CRPD art. 34 (7) and CED art. 26 (4).
[165] For SPT states may nominate nationals of other state parties but these candidates must be approved by their 'home' state. OP-CAT art. 6 (2).

prohibited in the Rules of procedure for some committees[166] and is custom for the others. All experts make a solemn statement before taking office guaranteeing their impartiality[167] and this is generally taken to include that they shall refrain from considering their own state.

It is hard to deny that the fact that the expert need to be re-elected after only four years (and for Subcommittee on the Prevention of Torture only two!) gives a very strong tool to the principal to get rid of experts speaking out in a way they do not approve of. Even though the last paragraphs show that experts only rarely would be put in a situation were they would risk angering their home state and thereby losing their nomination for re-election the risk that the community of state parties as a whole would disprove of an expert is very much real. The election process has therefore not surprisingly been very criticized during the current strengthening process. There have been many calls for a more transparent and participatory election process.[168] However since it is the States that nominate and elect the members, it is only they who can change the process in order to bring forward better-suited and more out-spoken experts. But from a rational-choice point of view, it is easy to see how this is not likely to change any time soon. Many states are perfectly happy with the way many candidates are brought forward today and have no incentive to open up the process. There are exceptions[169] speaking out against the bargaining character of the election process. Criticizing that states bargain to make deals with each other to secure votes for their candidates along the lines of "if you vote for my candidate for the Human Rights Council then I will vote for your General Assembly resolution that you are trying to get through". The fact remains that the control the member states have over the election and re-appointment process gives them clear channel to indirectly influence the work of the treaty bodies.

One of the defining criteria that makes an actor or group of actors into a principal is that it, or they, control the delegation contract: the document giving power and authority to the trustee or

[166] HRC Rules of Procedure, Rule 71 (4); SPT Rules of Procedure, Rule 28; CRPD Rules of Procedure, Rule 43 and CED Rules of Procedure, Rule 47.
[167] ICCPR art. 38, CESCR Rules of Procedure, Rule 13; CERD Rules of Procedure, Rule 14; CEDAW Rules of Procedure, Rule 15; CRC Rules of Procedure, Rule 15; CAT Rules of Procedure, Rule 14; SPT Rules of Procedure, Rule 9; CRMW Rules of Procedure, Rule 11; CRPD Rules of Procedure, Rule 14 and CED Rules of Procedure, Rule 11.
[168] For example at the Informal Consultation in Geneva 7-8 February 2012. *Report of the consultation for States on treaty body strengthening* para. 29-32 accessible at http://www2.ohchr.org/english/bodies/HRTD/GenevaConsultation2012.htm
[169] Liechtenstein being the noteworthy example at the Geneva consultations. For examples from the Sion consultation see *Report of the Informal Technical Consultation with States parties in Sion* 12-13 May 2011 p. 17 accessible at http://www2.ohchr.org/english/bodies/HRTD/hrtd_process.htm

agent.[170] This also gives the principal a strong sanctioning mechanism. Since it is the principal who wrote the original contract, she can also re-write it if she is not happy with how the delegation is working so far. This is a common way to maintain some kind of control over the agents. However dealing with trustees is quite different from dealing with true agents in a relationship in business, where for instance a company has set up a regional office somewhere. In this case the contracts are renegotiable and if the principal is not happy with the way the delegation is working she can rewrite the contract, and if the agent is not ready to accept these new terms, there is always the risk that she will be fired. When it comes to principals that consist of many different actors, or states, as in the case of the treaty body system, the situation is a bit more complicated. In this context it is the multi-lateral treaties establishing the monitoring bodies that have to be changed. To re-write these is very difficult.

All of the human rights treaties include, more or less detailed, provisions regulating the procedure for changing them.[171] The most common process is that one state proposes a change. If, within four months, at least one third of the state parties are in favor of having a conference to discuss the amendment, the Secretary General shall convene one. If, during this conference, a majority of the states present adopts the amendment, then it shall be submitted to the General Assembly. After the General Assembly has approved the amendment it will enter into force when two-thirds of the state parties to the treaty has accepted it. It will however only be binding on those states that have accepted it.[172] In the relations between one state that has accepted and one that has not, it is still the old treaty without the amendment that applies. This however is somewhat of a truism. If a proposed amendment for instance changes the composition of a treaty body. This was the case with the amendment of the Convention on the Rights of the Child approved by General Assembly resolution 50/155 changing article 43 (2) and increasing the number of experts from ten to eighteen.[173] It entered into force in 2002 when the 128th state accepted it, bringing the total to two thirds of the state parties. According to the article 50 of Convention on the Rights of the Child this should not be binding on states that had not yet accepted the change, but it is of course unreasonable to think that

[170] See *supra*, text accompanying note 135.
[171] ICERD art. 23 and CEDAW art 26. only states that a proposed amendment shall be sent to the SG and it is then up to the GA to decide freely how to move forward.
[172] This process applies to CRC, art 50; CAT, art. 29; SPT, art. 34; CRWM, art. 90; CRPD, art. 47 and CED art. 44. It also applies to ICESCR, art 29 and ICCPR, art 51 except that those two treaties do not require a four month deadline for gathering the first third to convene the conference.
[173] GA Resolution 50/155, 28 February 1996.

two committees should exist at the same time, one with ten and one with eighteen members. This is a classic paradox of international law.

Since none of the treaties explicitly prohibits it, the Vienna convention also opens up for the theoretical possibility to changes the treaties only apply between two states parties. This is allowed as long as it would not affect the enjoyment of the rights or obligations of any other party.[174] Given the structure of the system, however, and the paradox just mentioned, it seems hard to imagine a situation were this would be practically enforceable. Any change that would affect the committee or its members would naturally also affect the other states enjoyment of the convention.

These procedures make amending the treaties very difficult. It has happened, for instance the just mentioned expansion of the number of experts of the Convention on the Rights of the Child, but it is very rare. Another way of changing how the system works is to draft an Optional Protocol. This is a common way of adding features that for some reason were left out in the original drafting of the treaty. This has been done to add material rights, such as the Second Optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty or the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, or to add procedural structures such as the many optional protocols establishing individual complaints mechanisms.[175] The drafting of a optional protocol is somewhat like a mixture between drafting an entire new convention and amending an already existing treaty as per above.

But neither amending treaties nor creating optional protocols provide state parties with a convenient way to influence the experts of the monitoring bodies. As a sanctioning mechanism they are both extremely cumbersome. The independence of the treaty bodies seems quite unthreatened on this account. The principal does have the possibility to use what is called the nuclear option when she is very unsatisfied with how the trustees are working. This entails disbanding the entire system.[176] It the context of today however, this seems extremely unlikely. Not only does it require collective decision making by all the state parties to the convention. It would not only rid the principal of the unruly trustees, it would also destroy all the positive benefits that motivated the creation of the system in the first place. Changing the delegation contract is nevertheless not completely unlikely. During the on-going strengthening process

[174] 1969 Vienna Convention on the Law of Treaties. Art 41 (1bi)
[175] The 1966 Optional Protocol to ICCPR, the 1999 Optional Protocol to CEDAW, the 2006 Optional Protocol to CRPD, the 2008 Optional Protocol to ICESCR and the 2011 Optional Protocol to CRC on a communications procedure.
[176] Alter, K. J., *supra* note 15, p. 44.

there have been much talk by states of implementing some sort of code of conduct as a way to control the individual experts. This debate has from time to time been so heated that it merits examination in its own right. Even though it falls under the P-T theory of re-writing contracts it will therefore be granted its own subchapter below.

3.4.1 Code of Conduct and Its Effects on Independence

In the previous chapter it was shown how difficult it is for the state parties to sanction the experts of the treaty bodies by changing the delegation contract. There exists however one such change that is being discussed at the moment that cannot be disregarded without examination on the merits. This is the debate on a Code of Conduct. Such a code, created by the states and written into the treaties would create a set of rules that the experts would have to abide by. These rules are meant as a way for the states to guarantee impartial investigation of their human rights records, free from politically motivated confrontations. Calls for such a code has been made at all the state consultations hosted during the strengthening process.[177] It has also been explicitly taken up in some of the states' individual written submissions on proposals during the process.[178]

This Code of Conduct is meant to prevent abuse of authority and misconduct by the experts and to ensure that they do not politicize or manipulate the treaties. The code is meant to achieve this without impeding the independence of the monitoring bodies, however, this has been brought into question.[179] Some states complained that under the current regime they are, by political reasons, forced to answer questions that fall outside of the treaty being considered, something that a code would prevent.[180] These proposals have been strongly opposed by the treaty body experts themselves, mainly with the claim that the experts already self-regulate themselves.[181]

This begs the question: what mechanisms of guaranteeing the impartiality of the experts exist today? The solemn declaration experts take when beginning their mandate has already been

[177] Sion Report, *supra* note 169, p. 18; *Report of the Second Consultation with States parties in Geneva*, February 2012, para. 37 f. and *Report of the Third Consultation with State parties in New York*, April 2012, para. 33 f. All accessible at http://www2.ohchr.org/english/bodies/HRTD/hrtd_process.htm

[178] For instance in the letters by China and Iran. Both accessible at http://www2.ohchr.org/english/bodies/HRTD/StakeholdersContextConsultations.htm

[179] Geneva Report *supra* note 177, para. 37.

[180] This was voiced strongly, particularly by Cuba during the Geneva consultations.

[181] For example O'Flaherty's statement during the New York Consultation. A summary of which can be found in New York report *supra* note 189, para. 36.

mentioned[182] but deserved to be examined a bit further. The Committee on the Rights of the Child declaration is as follows:

> I solemnly declare that I will perform my duties and exercise my powers as a member of the Committee on the Rights of the Child honourably, faithfully, impartially and conscientiously.[183]

The declarations of the other committees are very similar. Some mention the principle of non-discrimination as well. As stated in the treaties to be elected the members also need to be of "high moral character".[184] None of these are enforceable in any way. To call the system self-regulating is therefore an exaggeration at best. The rules of procedure of Committee on Enforced Disappearances explicitly state that the experts are accountable only to the Committee and to their own conscience.[185] It should not be very surprising that some states are not comfortable with the conscience of the experts as the only enforcement mechanism guaranteeing impartiality.

The HRC has also adopted an internal set of guidelines relating to the impartiality of its members. These guidelines characterize independence as an "essential" principle requiring that "the members are not removable during their term of office and are not subject to direction or influence of any kind, or to pressure from the state or its agencies in regard to the performance of their duties."[186] The rest of these guidelines concern the conduct of the members of the committee and requires them to not directly involve themselves when it comes to reports and communications that concern their country of nationality. Further, they are urged, but only in a non-binding manner, not to participate in the governance of international NGOs that deal with the Committee. It is also states that they should abstain from participation in any political body of the United Nations or of any other intergovernmental organization concerned with human rights and abstain from acting as experts, consultants or counsels for any Government in a manner that might come up for consideration before the committee"[187] However, there is no prohibition keeping the experts from working for their own government while in office as experts, and indeed many them do so

[182] See *supra* text accompanying note 190.
[183] CRC Rules of Procedure, Rule 15.
[184] ICCPR art. 28 (2), ECOSOC Res. 1985/17 para. b, ICERD art. 8 (1), CEDAW art. 17 (1), CRC art. 43 (1), CAT art. 17 (1), OP-CAT art. 5 (2), CRMW art. 72 (1b), CRPD art. 34 (3) and CED art. 26 (1).
[185] CED Rules of Procedure, Rule 10 (2).
[186] Report of the Human Rights Commission, Annex III, 15 September 1998, para. 1.
[187] *Ibid.*, para 9.

(18 percent of the experts of all committees are currently serving as diplomats or government officials).[188]

Such internal guidelines have been brought up as an alternative to state enforced codes of conduct.[189] During the treaty bodies Chairpersons meeting in Addis Ababa in June 2012 such a set of guidelines was discussed and endorsed. It has not become final yet as it is for each of the committees to adopt into their rules of procedure. This draft contains general principles on independence and impartiality as well as detailed rules on conflict of interests and relationships with states.[190] The implementation of these guidelines can be seen as an effort by the OHCHR and the treaty bodies to come out from under the pressure applied by the states. If there already is a concrete framework on impartiality in place, it will be harder for states to push through a new set of rules via a Code of Conduct. The General Assembly resolution establishing the inter governmental working group that is responsible for drafting the final proposal of the entire strengthening process has even a reference to the guidelines contained in the High Commissioner's report even though it was not published at the time when the resolution was issued.[191]

3.4.2 Are Treaty Body Experts Powerful Enough to Warrant Accountability?

The answer to the question if the treaty bodies shall have to abide by a code of conduct issued by the states or if internal guidelines are enough depends on how one looks at accountability. Who is it that shall be hall be held accountable?

Not everyone is in a position that merits the scrutiny of her actions by others. As early as 1690 John Locke stated that one of the central principles of accountability is that people with power ought to be held accountable to those who have entrusted them with it. And the standard for recognizing abuses of power will be violations of that trust: acting beyond the authority of the office or in violation of its purposes.[192] Locke only wrote about those who have power, he did not concern himself with those who do not. This means that there is no need to hold the powerless to account. There is in other words a minimum level of power required for a person or entity to be classified as a power wielder and for the standards of accountability

[188] Pillay, N. *supra* note 3, p. 76.
[189] *Ibid.*, pp. 74.-75.
[190] Guidelines on the independence and impartiality of members of the human rights treaty bodies (Addis Ababa guidelines) available at ww2.ohchr.org/english/bodies/icm-mc/docs/Guidelines_on_independence.doc
[191] GA Res. 66/254 15 May 2012, para. 3.
[192] Locke, J., *Two treatises of Government* [Electronic Resource] 1764, paras. 149-151.

to apply.[193] A more recent scholar, Philip Alston, has also concluded that actors wielding significant power should be held accountable.[194] On the topic of accountability Klabbers, quotes Frankenstein's monster: "You are my creator, but I am your master; obey!"[195] The states have created the TB system but now they are subject to the opinions and recommendations of their creation. And to a certain extent this is a frightening scenario for states when dealing with strong international organizations. Such organizations are in general considered to wield enough power to qualify as power wielders to be held accountable. But this is on the aggregate scale when looking at the institution as a whole, not their individual members. Turpin writes that responsibility should only be commensurate to the extent of the power possessed.[196] Thus, if the degree of accountability depends on the degree of power, we must ask ourselves, how powerful are the Treaty body experts?

There is no entity tied to the system that allows them to enforce their decisions. All they can do is issue views and recommendations and hope that the state targeted will absorb the criticism. This is a tool called naming and shaming. It may seem as a very weak instrument but it does seem to have a certain effect. One study, also in the human rights context, came to the conclusion that naming and shaming is not able to prevent future violations but that it does lead to states taking some steps in the direction intended.[197]

Another way to look at the power the treaty bodies wield is to look at how they are perceived by the international community of states. When the Subcommittee on the Prevention of Torture was established the optional protocol creating it took a very long time to draft since it encountered a lot of resistance. When the Commission on Human Rights finally adopted it the United States of America, who abstained during the vote, issued a statement in which it argued that the powers given to the Subcommittee on the Prevention of Torture would be incompatible with principles of accountability and the need for reasonable checks and balances on any grant of power.[198] This proves that at least some member states perceive the treaty bodies to wield quite some power.

This might seem a vague way to measure power but it might be the more concrete examples to be found. In chapter 2 a study on the impact of the treaty body system was cited that provides some more

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[193] Grant, R. W. & Keohane, R. O., *Accountability and Abuses of Power in World Politics*, 2005, p. 29.
[194] Alston, P. *supra* note 14, p. 605.
[195] Klabbers, J., *An Introduction to International Institutional Law* 2002.
[196] Colin Turpin, *Ministerial Responsibility*, in Jowell, J. & Oliver, D. *The Changing Constitution* 2007 pp. 109-111.
[197] Hafner-Burton, E., *Sticks and Stones*. 2008.
[198] United States permanent mission to Geneva. Press release 22 January 2002 in Tomuschat, C., *supra* note 44, p. 228.

practical outcomes.[199] But the truth is that the system deals with such abstract concepts that it will always be very difficult to measure its practical impact. Especially when it comes to such mandates as the general comments and the treaty bodies' power as norm creators. These only give long-term effects as they influence the mind-set of different stakeholders, together with a range of other actors. Perhaps in deciding if the treaty bodies should be held accountable one can look at other similar actors and see how the international community has regulated their mandates.

3.4.3 Other Actors Facing Similar Problems

The treaty bodies are not the only actors on the international arena who are facing problems relating to independence. Perhaps it is possible to draw some conclusions by examining some of these other actors. By looking at actors in situations potentially analogous to the treaty bodies and how independent they are, it might be possible to draw some conclusions with validity also for the treaty bodies.

It deserves to be mentioned that the development in the international arena has been towards more accountability for quite some time now. Examples include the UN in general,[200] the World Bank[201] and the IMF[202]. They have all been forced to implement policies on accountability to satisfy the beneficiaries. When it comes to humanitarian affairs there have been accountability initiatives both at the inter-governmental and non-governmental level. Both the UNHCR[203] and the UN human rights field workers of the OHCHR[204] have had accountability standards implemented.

Even NGO's have been under pressure to show that they are accountable.[205] In 2005 the International Non-Governmental Organizations' Accountability Charter was adopted. This states that the signatories should be held responsible for their actions and achievements, act in accordance with their stated values and procedures as well as to report on their outcomes in an open and

[199] See *supra* note 23.
[200] For example in Kuyama, S. & Ross Fowler, M., (eds) *Envisioning reform: Enhancing UN accountability in the twenty-first Century*, 2009.
[201] The World bank was criticized so they established the Inspection Bank Panel in 1993 to enable the lodging of complaints when projects had led to harm because the Bank had not acted in accordance with its own policies and procedures. Majone, G. *supra* note 117, p. 113.
[202] Weaver, C. *The Politics of performance evaluation: independent evaluation at the International Monetary Fund*, 2010 p. 365.
[203] Turk, V. & Eyster, E., *Strengthening accountability in the UNHCR*, 2010, p. 159.
[204] Ulrich, G. *The statements of ethical Commitments of Human Rights Professionals: A Commentary* in O'Flaherty, M. & Ulrich, G. (eds) *The Professional Identity of the Human Rights Field Officer* 2010, p. 49.
[205] Bendell, J. *Debating NGO Accountability*, 2006.

accurate manner.[206] The International Committee of the Red Cross now has its own code of professional standards.[207] But these examples relate more to people actively working in the field. The role of the treaty body experts is quite different. It is more akin to that of the judge, and judges, while not being under strict monitoring mechanism have long had some methods of securing impartiality. It can be through something as vague an oath of office or detailed provisions on conflicts of interest.

The entities to be examined are therefore International Civil Servants, the Special Procedures of the Human Rights Council and International Judges. These have been chosen since they all struggle with similar problems of independence and they all, in one way or another, answer to the international collective of states.

A UN Civil servants

International civil servants, meaning professionals employed full time as officials at international organizations, is a very broad category. The following will direct its attention only to officers working for the UN.[208] Article 100 of the UN Charter states that officers are "responsible only to the organization". This was deemed to be enough for a long time but in 2009 a new system of accountability was established. The General Assembly held that the old system was cumbersome and ineffective and lacking in professionalism and wanted one that was independent, transparent, professionalized adequately resourced and decentralized.[209] The system implemented is a very complex one, with many different types of mechanisms such as judicial bodies to which disputes or appeals can be brought.[210]

This system is now what is holding the UN staff accountable. Although it does not work perfectly, which is evident by all the scandals of peacekeepers who have been abusing and exploiting others. However this criticism is a bit misdirected since the UN internal system is not directed towards criminal activities but rather how the internal life of the organization shall be managed. In dealing

[206] International Non Governmental Organizations Accountability Charter 4, 2005. Available at www.ingoaccountabilitycharter.org/wpcms/wp-content/uploads/INGO-Accountability-Charter_logo.pdf

[207] Int'l Comm. Of the Red Cross, *Professional Standards for protection work carried out by humanitarian and Human Rights actors in armed conflict and other situations of violence*, 2009.

[208] For a more general discussion on accountability and civil servants see de Cooker, C. (ed) *Accountability, investigation and Due process in international organizations*, 2005.

[209] GA Resolution 61/261, 4 April 2007, preamble paras. 4-5.

[210] An overview can be found in Report of the Secretary General: *Administration of justice at the United Nations,* 16 September 2010.

with nationals living in a country it is still that nations laws that apply. This criticism also falls a bit outside the scope of this paper since neither the internal guidelines of the treaty bodies or the proposed codes of conduct are meant to deal with criminal activity either.

What can be taken from these UN wide guidelines that is relevant to the present discussion is that according to this system, officers who are accused of misconduct are held to account, just as in the old system. The difference is that now responses of senior managers, including the Secretary General, to such allegations are subject to a more meaningful scrutiny, review and appeal.[211] For the treaty bodies this could mean that it is not who can complain or how a complaint is lodged that should matter, but what the resulting process would be. And this is very much at the heart of the differences between the Code of Conduct and the guidelines where the latter can only lead to internal, not quite transparent, processes.

In general it can be said that, when it comes to international civil servants, the system has changed recently giving much more focus to accountability. This is in line with the recent developments mentioned above. We have now left the days of Dag Hammarskjöld, who believed in creating a class of civil servants who should be independent and only this independence could prevent them from falling prey to corruption. Today the pendulum has noticeably swung back towards accountability. But we need to be careful with what conclusions to draw from this regarding the treaty body experts. Their work is quite different from that of ordinary UN civil servants

B Special Procedures

The special procedures of the human rights council is the entity that has been mentioned the most in the discussions on treaty body independence. Special procedure is the general name used to describe all the human rights mechanisms established by the Human Rights Council (previously the Human Rights Commission). When the council finds the human rights situation in a specific country or concerning a specific theme needs extra scrutiny, it appoints an individual (either as a Special Rapporteur or as an Independent Expert) or a group (called a Working Group) to examine this specific situation. The first mandate, the Working Group on Enforced or Involuntary Disappearances, was established in 1980 and today there are 48 different mandates, twelve of which concern specific countries

[211] GA Resolution 61/261, *supra* note 220 para. 25.

and 36 thematic.[212] The country specific mandates are finished when the council deems that the situation no longer warrants extra scrutiny, however the thematic mandates are rarely discontinued.[213] The functions of the special procedures include urgent action and contact with the concerned authorities, fact-finding missions, examination of the global aspects of a type of violation and clarification of the legal framework of the right concerned.[214]

The special procedures have also followed the general trend towards more accountability and in June 2007 the Human Rights Council adopted a resolution containing a code of conduct for the special procedures mandate-holders.[215] This code contains both general principles of conduct as well as detailed instructions on how to perform field visits. The most severe provision is the last one that states that the mandate-holders are accountable to the Council.[216] They were accountable to the council even before this provision but the effect of its implementation is that there is now a clear list of do's and don'ts that the council can use to judge the behavior of the mandate-holders against. The Special Rapporteurs themselves tried to avoid this and adopted a manual on their own providing guidelines on their working methods and an Internal Advisory Procedure to review their working methods that was meant to be a self-regulating process of the entire Special Procedures system. This was not enough, however, and the Council still pushed through with the code of conduct.

How much can be drawn from comparing the treaty body experts to the mandate-holders of the Special procedures? They differ in number of important manners. The treaty bodies are more independent to begin with. They were created once, and then more or less left to their own devices. The state parties retain some ways to influence their behavior, as mentioned above but it is very different from the Special Procedures. They are created with a specific mandate to perform a specific function. If the council, who is the principal in this relationship, is not happy with how the mandate-holder is performing, it is much easier for it to terminate the mission or appoint someone else as rapporteur. The Special Procedures mandate holders serve at the discretion of the Human Rights Council. This means that there has always been a much larger interference in their independence than in that of the treaty bodies.

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[212] For an up to date list visit the OHCHR website: http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx for the thematic and http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx for the country specific.
[213] Boyle, K. *New Institutions for human rights protection*, 2009 p. 50.
[214] Steiner, H., Alston, P. & Goodman, R. *International Human Rights Law in context: Law, Politics, Morals: text and materials*, 2008 p.767.
[215] Human Rights Council Resolution 5/2 18 June 2007.
[216] Art. 15 Draft Code of Conduct for special Procedures Mandate-holders of the human rights council annexed to *Ibid*.

They also differ somewhat in their mandate. The task of the special procedure is to issue harsh criticisms of state behavior. They only exist because of grave human rights breaches; it is only in such situations mandates are created. Their task is not, in contrast to that of the treaty bodies, to hold constructive dialogues and issue recommendations, but rather to tell states the hard truth. This does not mean that no conclusions can be drawn what so ever, only that they need to be drawn with care. The mandate-holders of the human rights council and the treaty bodies are indeed very much alike when it comes to their struggle to avoid control by their respective principals, as shown by their respective resistance to Codes of Conduct.

C International Judges

The Treaty Body experts can also be compared to international judges, and when it comes to the individual communications mechanisms they are indeed quite similar.

When it comes to judicial independence the Bangalore Principal of Judicial Conduct is one of the main international statements.[217] They are a set of standards meant for international judges but they can perhaps also help us understand the situation of the treaty body members.

Judicial independence is a corner stone in any society and it is guaranteed in almost every human rights treaty.[218] There are also a high number of soft law standards that have been adopted in efforts to spell out the specific requirements that are derived from this general principle. As mentioned the best known of these are the Bangalore Principles of 2002, which build on the 1985 Basic Principles on the Independence of the Judiciary.[219] Of the two, the earlier version is very rudimentary and the section dealing with

[217] The Bangalore Principles of Judicial Conduct of 2002, *reproduced in* Report of the Special Rapporteur on the Independence of Judges and Lawyers, Annex, U.N. Doc. E/CN.4/2003/65 (Jan. 10, 2003), available at http://www.unodc.org(pdf/crim/corruption/judicial_group/Bangalore_principles.pdf http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf

[218] see for example, the Universal Declaration of Human Rights art 10. G.A Res. 217A. U.N. GAOR, 3d Sess., 1st plen. Mtg. U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on civil and Political Rights art. 14(1), Dec. 16, 1966, 1976 U.N.T.S. 172; European Convention for the Protection of Human Rights and Fundamental Freedoms art 6, Nov. 4, 1950, C.E.T.S. 005; African Charter on Human and Peoples' Rights art 7, June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights art 8, Nov 22, 1969, 1144 U.N.T.S. 123

[219] Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985) (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan It., Aug. 26-Sep. 6, 1985, *endorsed by* G.A. Res. 40/32. U.N. Doc. A7RES/40/32 (Nov. 29, 1985); G.A Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985)).

judicial independence only states that: "the independence of the judiciary shall be guaranteed by the State" and that:

> "The judiciary shall decide matter before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

The principles also acknowledge that each member state has the duty to provide adequate resources to enable the judiciary to properly perform its functions.[220][221] The 2002 principles are more detailed but in the effort to make them relevant for as many different judicial systems as possible they have been distilled down to list of rules for how the judge should behave, what he or she should and should not do. It has been criticized for not taking all the relevant contextual and environmental notions that many consider to be important when discussing judicial independence.[222]

In the scholarly debate three different methods in approaching judicial independence can be identified. One focuses on the institutional dimensions and emphasizes elements such as judicial tenure, how the appointment process is regulated (mainly if it is not only under the control of one branch of government) and the judiciaries power to decide its budget for itself and how the accountability processes work.[223]

The second method puts less emphasis on how the institutions work and instead focuses on how capable judges are to exercise discretion in individual cases and the extent it is possible for them to come to their decisions without fear of negative consequences.[224]

The last method stresses that independence is a term that is relative and needs to be understood through analyses of the judiciary that examine how independent it is from something else. The independence of a particular judge for example, can only be understood by identifying the other entity from which its independence is measured. Another version of this is to look at judicial independence as the result from the interaction of the

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[220] *Ibid.*, para 7.

[221] This is interesting since it would mean that if the Treaty body system is to be treated as a judiciary then there is an obligation on the member states to provide the resources needed for it to function. Which is quite the contrary to how the situation looks today. But the system is only quasi-judicial at best.

[222] Alston, P. *supra* note 14, p. 612.

[223] McCubbins, M. D. & Rodriguez, D. B., *The Judiciary and the Role of Law*, in Weingast B. R. & Wittman D. A., *The Oxford Handbook of Political Economy*,*2006*, p. 273.

[224] Ferejohn, J. *Independent Judges*, 1999.

judiciary, the legislature and the executive. It can therefore grow or shrink depending on how powerful the other branches of governments are.[225] To this approach one could also add how independent the judiciary is from the media. So when comparing the treaty body experts to judges, it must be noted that there is not one single idea of what independence of judges mean.

When it comes to accountability, which as discussed above can be a counterbalance to independence, the Basic Principles from 1985 allows for the application of sanctions in specific circumstances. They allow for the removal of judges but there are strict criteria for when this should be possible, such as incapacity or behavior making them unfit to perform their duties. Such sanctions should however be subject to an independent review.[226] Although this process may be different depending on the country, it is almost universal today to have some sort of mechanism to hold judges accountable and even to remove them from office, in the case of very grave misconduct[227] One thing that most of them have in common is that the review should not be performed by people who have any previous relationship with the judges under review.[228]

Similar mechanisms also apply to international courts and tribunals. But it varies between the different systems. One strategy is to give all or most of the power to the other judges of the Court, for instance to have an unanimous vote of all the other members as the only means of dismissal of one of the judges. This is the case in the International Court of Justice[229], The international Tribunal on the Law of the Sea[230] and the African Court on Human and Peoples' Rights.[231] The European Court of Human Rights follows the same procedure but only requires two thirds of the judges to vote in favor of dismissal.[232] It can also be up to the member states to decide, as in the case of the Inter-American Court where it is a two-thirds majority vote by the member states of the Organization of American States and the State Parties to the Convention that is needed.[233] The International Criminal Court has merged these ideas and demands a two-thirds majority vote from both the judges and the States Parties in order to dismiss a judge.[234] When it comes to internal codes of

[225] McNollgast, *Conditions For Judicial Independence*, 2006.
[226] Basic Principles on the Independence of the Judiciary, *supra* note 219, paras. 18 & 20.
[227] Alston, P. *supra* note 14, p 613.
[228] Dakolias, M., *The Judicial Sector in Latin America and the Caribbean: Elements of reform.* World Bank Technical Paper No. 319, 1996 pp. 17-18.
[229] Statute of the International Court of Justice, art. 18.
[230] Statute of the International Tribunal on the Law of the Sea, art. 9.
[231] Protocol to the African Charter on Human and Peoples' Rights, art. 19.
[232] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 23.
[233] Statute of the Inter-American Commission on Human Rights, art. 8.
[234] Rome Statute of the International Criminal Court art. 46.

conduct, the international courts have generally opted for a self-regulating mechanism.

The two tribunals that were established in 2009 to deal with internal administrative misconduct, the United Nations Dispute Tribunal and the United Nations Appeals Tribunal have a much lesser protection of the tenure of their judges. These Judges can be dismissed by just a simple majority vote of the General Assembly.[235] When these tribunals were set up the General Assembly made a request to the Internal Justice Council to draft a code of conduct.[236] In 2010 the Council submitted their draft code, which contains very comprehensive provisions on many different aspect of independence, from impartiality and transparency to fairness and diligence.[237] The stated purpose of the document is (only) to provide guidance, which has been interpreted as meaning that it would be part of a self-regulatory system, not tied to any sort of compliance mechanism.[238]

This is interesting when comparing to the treaty bodies. On the one hand the experts seem to be even more independent than the international judges just mentioned since all of them are subject to rules that allows for dismissal. This is something only the Human Rights Committee has and then only by the unanimous vote of all other experts. But on a closer examination this might not be the case. Because even if the experts of the treaty bodies are very hard, or even impossible, to dismiss during their tenure, they are still subject to re-election after only four years[239] while international judges generally hold their offices longer.[240]

3.5 Conclusions on Independence

In the above subchapters Principal–Trustee theory has been explained and then applied to the UN treaty body system. The monitoring bodies have also been compared to some other actors on the international arena who struggle for independence. What conclusion can be drawn from this? How independent did the treaty bodies turn out to be? In the following I will try to summarize my findings on the scope of the treaty bodies autonomy.

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[235] G.A. Res. 63/253, 24 December 2008, Annex I art. 4, para. 10, Annex II art. 3, para. 10.
[236] G.A. Res. 62/228, 6 February 2008, para. 37.
[237] Report of the Internal Justice Council, Code of Conducts for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, 15 June 2010, Annex. U.N. Doc. A/65/86 (June 15, 2010).
[238] Alston, P. *supra* note 14, p. 624.
[239] Or less, in the case of the Subcommittee Against Torture.
[240] Seven years in the case of the European Court of Human Rights, nine for the International Court of Justice and the International Criminal Court etc.

Let us begin with the conclusions that can be drawn from the theoretical framework used. In chapter three it was shown that P-T theory suggests four main ways to sanction agents and trustees. The easier it is for a given principal to use this tool, the less independent the trustee is. These were to fire or fail to reappoint the trustee, to change the delegation contract and to change the budget. It was shown that it was very difficult for the state collective making up the principal for the treaty monitoring bodies to fire individual experts whose actions do not approve of. It was also hard for the states to amend the treaties and apply pressure on the experts that way. These two factors point towards the treaty bodies being fairly independent.

However, the states do have control over the budget and can change it fairly easy and above all, they are in charge of re-appointing the experts after only very short terms. These two factors point towards the states' collective to have some influence over the way the system works. P-T theory also points out that threats are likely very ineffective when dealing with trustees with a very high sense of professional ethics, robbing states of another important instrument in shaping their behavior. These factors would together lean towards the conclusion that the system if fairly independent. There are channels that are open for the states to use to influence the actions of the experts, but there are others that are closed. Just the fact that the treaty bodies fits more easily into the model of trustees than true agents should also give some presumption towards independence.

Alter also put forward the concept of agency slack as a way to determine the independence of an agent. This is an accepted part of the principal-agent relationship but also has some relevance when applied to trustees. As mentioned above[241] agency slack is defined as behavior not wanted or approved of by the principal. The size of the agency slack experienced by a trustee is dependent on three things: the amount of information disparities, that is how much the agent knows that the principle does not; how difficult, or how high the costs are, to change the delegation contract; and how hard it is to replace agents the principle find misbehaving.[242] These criteria leads us to believe that determining the agency slack, and through that, also the independence of an agent is quite straightforward, but this has been criticized. Alter states that P-A theory has a hard time determining the autonomy of agents when these three factors do not coincide.[243] What happens if the information disparities are high, but the costs of redoing the contract low and there are no protection of the employment of slacking agents? When the factors are pointing in

[241] See *supra* text accompanying note 120.
[242] Alter, K. J., *supra* note 15, p. 37.
[243] *Ibid.*, pp. 36–37.

different directions, the model loses a lot of its power in describing the relationship.

In one study P-A theory was used to describe the ECJ as not very independent because judges needed to be reappointed after only a short time in office and therefore were to be assumed to be eager not to anger the principal. But in another study the same model was used to arrive at the conclusion that the ECJ *was* independent because it is so hard to change the rules of the court, an amendment to the treaty requires unanimous support of all EU member states.[244] So two studies using the same theory, studying the same subject, came up with two different conclusions. This is valid criticism but rather than falsify the utility of the whole theory of P-A it tells us to be careful when giving importance to conflicting factors.

When applying the three criteria to the UN treaty body system it indicates that they maintain a quite large amount of agency slack, and therefore can be considered quite independent. The information disparities are quite high. The treaty body members are experts that receive information from a host of different sources, such as civil society organizations and many members also often have personal contacts working in the field. They are all qualified in their respective area of expertize, something that cannot always be said for those representing the member states. The information disparities thereby points towards the treaty bodies being relatively independent. As subchapter 3.3 shows, it is also very difficult to change the delegation contract. This is another factor pointing towards independence. The last criterion mentioned by Alter is how difficult it is to replace the trustees. In the case of the treaty body members this sends a mixed message. On the one hand, they are almost impossible to fire, but on the other they have to be re-elected after only a quite short period of service.[245] All in all this leads to the conclusion that the treaty bodies are fairly independent, more so at least than was the pre-understanding of this author at the outset.

[244] Tallberg, J., *Delegation to Supranational Institutions*, pp. 23–46.
[245] As was discussed *supra* in the text accompanying notes 165-170.

4 Final thoughts

When the framework of Principal-Trustee theory was applied to the UN treaty body system in the last chapter, I arrived at the conclusion that the system is fairly independent. However there are some factors that the theory does not take into consideration, factors that still are of importance for the independence of the monitoring bodies.

One is that the states are not only the principal of the system; they are also the main targets of its activities. As such they have another way of affecting the work of the treaty bodies. The system is dependent on the states in a number of key aspects. The states are responsible for handing in the reports on which the concluding observations are based. They are also supposed to participate in a constructive dialogue during which these reports should be discussed and, most of all, they are the ones that are responsible for the implementation of the recommendations the treaty bodies issue. This gives a considerable power to the state that P-T theory does not take into consideration.

The state can refuse to hand in their report, or hand it in overdue or with errors. This will post-pone the constructive dialogue, sometimes for years. They can refuse to show up for the meetings in Geneva. This way the dialogue cannot be held at all. And, since the recommendations are non-binding, they can in the end, choose just to ignore them, without having to face a worse sanction than being criticized at the next hearing. Even though these measures do not affect the independence of the treaty body system, they do affect its effectiveness. And since the treaty bodies want the system to be effective, they might be convinced to hold back on some of their criticism in order to get states to participate. This can be seen as an indirect influence on their independence. Either they say what they want to a state that is not listening, or they say what the state wants to hear just to get a dialogue going.

The lack of enforcement mechanism that makes the monitoring bodies dependent on the states to implement their recommendations is nothing unique for the treaty body system. It is present in all international law. Nevertheless, in this context it has the consequence that the experts have to strike some sort of deal with the states. This is never explicit, but a kind of balance needs to be found if the system is to have any effect at all. If the experts criticize the states to harshly there is always the risk that the states will tire of the scrutiny and just withdraw from the system. This does not have to be a public statement where the state withdraws officially from the treaty. It can take the form of the state just stopping to issue reports and showing

up for the meetings. Even though some committees have started issuing concluding observations also in instances when states have not issued a report or not shown up to the constructive dialogue, the likelihood that such recommendations will be heeded is very small. This indirect form of pressure is not present in the P-T theory, yet it has consequences for how the treaty bodies can act all the same.

One sanction mentioned above is the so-called nuclear option: the disbandment of the entire treaty body system. This seems very unlikely at the moment but to disband might not be the only way to rob the system of its power. It has been suggested that the UK under Margaret Thatcher realized that they could not withdraw from the European Convention of Human Rights without a major loss in international prestige. Instead of trying to disband the system, they opted to slowly suffocate it. The idea was to allow a large number of eastern European states, with human rights records far below the standards of the court, into the system. Their presence, before they had raised their minimum standard to the level first deemed necessary to join, would flood the court with cases that it simply lacked the resources to deal with. This would leave it incapable of what was deemed as meddling in British internal affairs. A similar line of reasoning might have crossed a few of the state parties to the UN human rights treaties. Instead of withdrawing or trying to disband the system, actions that would lead to much negative publicity, states can, just by doing nothing and to vote against any proposals for raised funds, put the treaty body system in a position where it is simply unable to perform its functions. It would be suffocated by its mounting backlogs and the states would very rarely have to concern themselves with it. The treaty body experts know this and realize that time is against them and that they need to drum up support for the system among the member states as soon as possible. This puts the states in a very strong negotiating position and is definitely a threat to the monitoring bodies' independence.

Another difficulty when it comes to the treaty body system that the P-T theory does take into account, but only slightly, is the complexity of having a principal that is made up of several entities. As was shown in Chapter 2.1 there are many different reasons whys states elect to cooperate with the system. Some might do it to improve the human rights situation in other countries; others to gain legitimacy within their own electorate and others still might only participate because of expected gains in other fields of international diplomacy. This plurality of motives makes it even harder to predict the behavior of the relevant actors especially since there seems to be different consequences for different groups of states.

Of all the states parties to any of the conventions there is one group that engages actively. They submit their reports on time, show up for the constructive dialogues and generally at least try to

implement the recommendations given. Then there is another group who tries to shy away from the system, reporting late if at all and hardly bothering to respect recommendations or answer follow-up questions. Of course there is no clear cut line between the two groups but rather a continuum and sometimes a state that is very cooperative when it come s to one committee can be very stubborn in its dealings with another. This duality in approaches to the system leads to somewhat of a paradox. It is the states that are active and trying to oblige that receives the most criticism from the experts while the other group manages to be left alone. The reward for higher participation is more negative reactions. This of course has a negative impact on the will of states to participate in reforming the system into something more effective. Why should I help when it is only me that is being criticized, despite that other state's appalling human rights record? This was made painfully clear throughout the informal consultations in Sion, Geneva and New York during the strengthening process. Some states truly care about reforming the system so that it can be made effective while others are perfectly happy with the status quo, others yet would rather use the on-going process as an opportunity to bend the system to what would match their own preferences.

Be that as it may, this divergence in state preferences does also have another consequence. As was made clear in chapter 3, in order to sanction the treaty bodies the states need to find some level of agreement. To appoint an expert you need a certain number of votes, to change the budget you need a majority in the General Assembly and to amend a treaty you need nothing less than the support of two thirds of the state parties. This makes the strengthening process of the system painstakingly difficult but it can also be seen as a bulwark against unwanted state interference that is actually improving the independence of the monitoring bodies. If the state collective always were in agreement it would be a lot easier for them to apply the sanctions mentioned in this thesis to impose their will on the experts. In the world as it stands today, with many different state interests opposing each other, this might be the best guarantee the experts' independence have got.

But if this thesis has shown that the experts have a quite strong independence, it begs another question: should they? Subchapter 3.3.2 discusses accountability and that only those that wield a certain amount of power need to be held accountable for their actions. Does the treaty body experts fall within this category of the powerful? In order to answer that question it is first necessary to understand what accountability means for independence. There are many ways to be held accountable, but the one that is relevant for this discussion is that proposed through the Code of Conduct, that is, external accountability to norms set up by the states, separate from the treaty

bodies themselves. To be held accountable does not necessarily mean a limitation of an actor's independence. As long as the code of conduct is respected, the treaty body experts would be independent to do whatever they please. However, there is also the risk that the states would misuse the accountability mechanism as a way do discredit an voice of the treaty bodies, especially when that voice is criticizing the states. Even a treaty body expert who abides by the code could be accused of breaching it, and even if the accusation were unfounded it would still raise doubts about, and draw attention from, the point the expert was making. An actor answering to an accountability structure is not necessarily a puppet, but the risk is higher than for one who answers only to her self.

The comparison with other actors in chapter 3.3.3 showed, with the possible exception of international judges, that there is a general trend towards demanding more accountability from actors on the international stage. The limit of their independence seems to be worth the cost. This is something the state parties are very aware of and some have tried to surf this wave and to use it in order to implement code of conducts also for the treaty body experts. There are many arguments that can be found to both support and oppose a state controlled accountability procedure but in the end it comes down to what serves the purpose of the system best. The problem is that the purpose is not one hundred percent clear. Are states supposed to submit reports and participate in meetings to really have a genuinely constructive dialogue where problems can be discussed and different sides of arguments weighed against each other? Or is the treaty bodies just a tool for the international community to use to name and shame states no matter how little it will actually change their behavior? If one genuinely supports the idea of an inclusive system that takes the states' views seriously, a code of conduct might not be the worst of ideas. But one still has to realize that a code of conduct will provide the non-cooperative states with yet another tool to bring into doubt the views of the committees, making it easier for human rights violating states to defend their actions, lessening the impact of naming and shaming. It is the opinion of this author that what could possibly be gained by increased legitimacy through a code of conduct would not outweigh the costs of forcing the treaty experts to defend themselves from accusations of breaches of the code from states with no interest in cooperating in the first place.

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