

## **Opinion on the key aspects of strengthening and enhancing the effective functioning of the human rights treaty body system,**

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### **I. General considerations**

#### **1. No reform (unification)**

There is a need to recall the fundamental aspects of the intergovernmental process of the General Assembly (GA) on strengthening and enhancing the effective functioning of the human rights treaty body system resulted in the adoption of the GA resolution 68/268. The key principle of the process, which started in 2009 by the High Commissioner and followed by the intergovernmental process, is that it aimed at “strengthening” rather than “reforming” the treaty body system. Lessons learned from previous reform initiatives, mostly focusing on the unification of the work of treaty bodies, have led to the understanding that the legal parameters of the treaties should not be altered. This principle was enshrined in the GA resolution on 66/254 of 23 February 2012 launching the intergovernmental process and in the outcome resolution 68/268.

Strengthening is a smooth approach that entails a step by step process of improving the functioning of the treaty body system without so-called reforming - bringing structural changes leading to re-thinking of the legal basis of their activities – treaties. Previous proposals - unified standing treaty body, single treaty body on communications, joint working group on communications or even the world court of human rights – proved to be unsuccessful as they did not receive support among treaty bodies and States. In fact, although suggesting certain solution to the problems faced by the treaty bodies, these initiatives were a distraction from deeper and much more important challenges (trust of States in the system based on trustworthy relationship between States and treaty bodies) and raised practical issues of their implementation. The key concept of these proposals was the unification of work of treaty bodies. Such a vision undermines not only the principle of no treaty amendments, but also the other key principle of the strengthening process – preserving independence, specificity and autonomous nature of these mechanisms, which allows them to ensure objective and non-selective approach to all human rights.

Therefore, at this stage of the strengthening process it is vital to ensure, that no initiatives to undermine legal basics of the functioning of the treaty bodies, restructure the system or unify the work with imposing the decisions (requirements, measures to be taken) of the treaty bodies, are taken.

#### **2. No misinterpretation of the parameters of the resolution 68/268 in the Geneva Academy project documents**

The Geneva Academy project documents are following the basic parameters of the intergovernmental process as provided in the GA resolution 68/268, however, a number of concerns are raised in terms of conceptual inconsistency in the text of these documents as regards the aforementioned considerations as principles of the strengthening process.

At P. 3 of the Concept Note it is mentioned that “the Treaty Body Strengthening resolution, adopted by consensus on 9 April 2014, did not undertake to reform the Treaty Body System in an institutional or structural manner in order to enhance its effective functioning.”

However, P. 4 states that “the 2020 horizon presents an opportunity to further reflect on the Treaty Body System’s future and to develop innovative proposals and solutions without weakening the human rights protection the Treaty Body System currently affords.” To what extent could these proposals be innovating? Does it entail the structural changes in the work of the system? If yes, then this is contradictory to the parameters of the ongoing strengthening process.

Then it goes that “the 2020 review provides the opportunity for the General Assembly to complete the unfinished work and to make the Treaty Body system sustainable at national and international levels, based on

(1) A stock-taking of the implementation of resolution 68/268 (biennial report of the Secretary-General), and

(2) An analysis of options for structural and procedural reform of the Treaty Body System.”

The attention here should be given to the wording of the para. 41 of the resolution 68/268, which is contrasting largely with the aforementioned.

The GA “decides to consider the state of the human rights treaty body system no later than six years from the date of adoption of the present resolution, to review the effectiveness of the measures taken in order to ensure their sustainability, and, if appropriate, to decide on further action to strengthen and enhance the effective functioning of the human rights treaty body system.” No mentioning of the reform may be found in this provision.

The other contradictory provision states that the aim “academic research project from 2016 to 2018 would yield innovative proposals and solutions for the Treaty Body System without weakening international human rights protection.” The same concerns arise here.

The document “Suggested Research Questions” goes much further in terms of misinterpreting the basic concepts of the strengthening process, although claiming, that “the research questions use the same parameters as resolution 68/268.”

The idea of considering adapting and integrating previous proposals (such as consolidation of reports to treaty bodies, joint treaty body working group on communications, unified standing treaty body) is put forward, however, it remains largely unclear, how it could be built on General Assembly resolution 68/268. The paper suggests to consider these proposals for inclusion in the review of the treaty body system in 2020. It is not clear, though, how these proposals may not necessarily require normative change?

These considerations demonstrate that we are facing misinterpretation of the parameters of the resolution 68/268 providing a framework for the strengthening up to 2020 in terms of the aims of the 2020 review.

### **3. No misleading of Secretary General regarding the key aims of the strengthening process in the context of preparing the 2018 report**

All these considerations lead to the following question.

The proposals, emerged as a result of the Geneva Academy research project finishing in 2018, would be transmitted to Secretary General for the consideration in terms of

preparation of a comprehensive report on the status of the human rights treaty body system to be elaborated and presented to the GA in 2018. In this respect, it is highly important to seek for constructive ideas on how to improve the functioning of the human rights treaty body system within the parameters of the GA resolution 68/268 without bringing structural changes leading to legal implications. It is inadmissible to mislead the SG regarding the key aims of the strengthening process, especially taking into account that the report of the SG is to be considered by the GA, composed of States who were the leading actors in the intergovernmental process and who struggled for the preserving the non-amendment of the treaties and the independence and specificity of each treaty body. These considerations will be highly relevant during 2020 review process, which would be based on the 2016 and 2018 SG report.

## **II. Specific issues to be considered**

### **1. Lack of resources**

It is crucial to form a clear vision of the real problems of the treaty body system. The growth of the system is a positive step, including expansion of number of treaties, ratifications, new procedures (petitions, inquiry and follow-up), recommendations. Expressing the opposite opinion would be a negative step, since the system was created by States, who foresaw the growth in the number of ratifications and functions to be performed by the treaty bodies and wished the system to be bigger and cover more countries and therefore more human rights holders. This fact should not be imputed to States as they were the ones to create the system.

The only issue, that needs to be addressed, is provision of adequate financial support for treaty bodies to allow them to deal with this growth effectively. With the additional time allocated to the meetings of the treaty bodies the situation with clearing the workload (backlog) is improving. We should not underestimate that over the past two years, we may see decrease in the backlog in a number of the committees – the greatest for the Committee on the Elimination of Racial Discrimination (less 51 per cent) and the Committee on Economic, Social and Cultural Rights (less 49 per cent). The Committee on the Rights of the Child significantly reduced its backlog of initial reports submitted under the two Optional Protocols, on the involvement of children in armed conflict (less 73 per cent) and on the sale of children, child prostitution and child pornography (less 47 per cent).

### **2. Adequate cost-saving approach**

The GA resolution provides for additional resources to be allocated to treaty bodies and at the same time provides for cost-saving measures by putting limits on documentation of treaty bodies. However, there are a number of proposals that, while being cost-saving, nonetheless undermine the effectiveness of the whole treaty body system. This is related to reducing in twice the number of working languages in the committees as provided by para. 30 of the resolution.

Firstly, it is not absolutely clear, how it is possible by reducing the number of working languages to three out of six to fully ensure the right of each State party to interact with the treaty bodies in any of the six official languages of the United Nations? Secondly, how to interpret the provisions of para. 30 of resolution 68/268, taking into account the provisions of preamble of the resolution on the importance of multilingualism in the UN and the equality of

all official languages of the UN. Thirdly, how would such a decision influence the authority and credibility of the treaty bodies in the eyes of the main actors - States, civil society and the rights holders themselves - when the recommendations of the committees will not be issued in an accessible language for them? Here it is worth thinking about the Russian language and the population of States, where Russian is largely used. Fifthly, the most important question arises on how the measure proposed in para. 30 of resolution 68/268 may be consistent with the main aim of the intergovernmental process - strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings? This measure increases reporting burden of States instead of alleviating it.

The ineffectiveness of this cost-reduction measure is even more visible, if we look at how much money the annual and informal meetings of the chairpersons take. Is it possible to compromise the reduction of the number of languages and thus undermine the visibility of the human rights treaty bodies with the need to find financial support for these meetings?

It seems more rational to spend money on buying new equipment to organize videoconference to hold a constructive dialogue with a State, not being able to come to Geneva for the dialogue.

### **3. Preserving balance in the universal human rights system**

In the “suggested list of research questions” it is asked what would be the potential impact of treaty body reform on other international human rights mechanisms (Human Rights Council, Universal Periodic Review, Special Procedures)?

Stating, that incoherence between UPR, Special procedures and treaty bodies is a challenge, is not correct. These mechanisms have different mandates and interact with each other with a view to complement each other’s work. They are elements of one universal human rights system with each of them having their own role in it. The synchronization of timelines for reporting and interactive dialogues within treaty bodies and UPR would be practically unreal, as it would lead to changes in the principles of work of these mechanisms – reforming them – which is not feasible today. A stable balance between expert (non-governmental) - represented by treaty bodies - and intergovernmental – represented by Human Rights Council and UPR - elements of the universal human rights system has been developed. Introduction of structural changes in the established interrelation between these mechanisms would undermine this balance.

The possible ways of strengthening cooperation between these mechanisms would be enhancing mutual cross-referencing and information exchange as well as increased participation of Special procedures in the consultation process on the elaboration of general comments.

### **4. Rethinking the procedure and mandate of the meetings of the chairpersons**

Regarding the meetings of chairpersons of treaty bodies, it is mentioned that “individual TBs have challenged, blocked or ignored the leadership of these meetings on the strengthening process. As a result, decisions and conclusions reached and endorsed by the 10 Chairs have frequently remained unimplemented by TBs”. In this respect, it is important to highlight conceptual aspects dealing with the role and mandate of these meetings. First, the legal basis of their activities needs to be considered. In accordance with the rules of procedure of the committees, the chairperson shall declare the opening and closing of each meeting of

the committee, direct the discussion, ensure observance of rules of procedure, accord the right to speak, put questions to the vote and announce decisions. The chairperson, subject to these rules, shall have control over the proceedings of the committee and over the maintenance of order at its meetings. Therefore, there is no mandate to adopt decisions on behalf of their committees. Chairpersons may only convey the position of their committees upon authorization of the committee.

Initially GA resolutions on the meetings of the chairpersons, adopted in 1983 and 1984, provided that chairpersons should exclusively consider the problems facing the reporting systems of the treaty bodies. Thus, the chairpersons were supposed to raise the issues, discuss them, search for solutions, but not to decide on the ways to overcome the problems.

Para. 38 of the resolution 68/268 “encourages the human rights treaty bodies, with a view to accelerating the harmonization of the treaty body system, to continue to enhance the role of their Chairs in relation to procedural matters, including with respect to formulating conclusions on issues related to working methods and procedural matters, promptly generalizing good practices and methodologies among all treaty bodies, ensuring coherence across the treaty bodies and standardizing working methods.” There is no specific reference to the meetings of chairpersons of treaty bodies in this provision. However, the wording of the resolution 68/268 has been taken by the chairpersons seriously as a call to take active measures. Even before the resolution was adopted the chairpersons started active work towards harmonizing methods of work of their committees in frames of meetings of chairpersons in accordance with the recommendations of the High Commissioner in her 2012 report. Referring to the resolution 68/268, chairpersons have considered issues of coordination of the work of the committees in such directions of their activities, as reporting procedure, adoption of concluding observations, adoption of general recommendations. As a result, chairpersons adopted and suggested human rights treaty bodies to integrate: simplified reporting procedure in their work, guidance note for States parties on the constructive dialogue, framework for concluding observations, elements for the elaboration of and consultation on general comments, as well as such documents, as San José Guidelines against Intimidation or Reprisals adopted in 2015.

Concerns arise with regard to the latter document. As stated in para. 38, treaty bodies are recommended to enhance the role of their chairs in relation to procedural matters and ensuring harmonization within treaty body system. However, San José Guidelines were adopted by the chairpersons without any discussion with the treaty bodies themselves and the States parties, who under para. 8 of the 68/268 resolution are urged “to take all appropriate action, consistent with the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms and all other relevant human rights instruments, to prevent and eliminate such human rights violations.” This document is not only related to reaffirming well-known facts, but also deals with concepts which received no unified consent on the side of States, going beyond the scope of the international human rights treaties themselves.

There is also another document, which deserves attention - Addis Ababa Guidelines on the independence and impartiality of treaty body members of 2012. These guidelines were adopted by the chairpersons at their meeting, however, the purpose and positive effect of this document is still questionable, as it restated the rules already existing in the rules of

procedures of the committees. And there is still no overall approval of this document on the side of the treaty bodies - eight treaty bodies have adopted or endorsed the Addis Ababa guidelines, while two treaty bodies have not yet adopted them (Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination).

Furthermore, the procedure of adoption of documents at the meeting of the chairpersons raises questions in terms of the mandates given to the chairpersons. The chairpersons elaborate and draft a model document, the text being prior prepared and distributed by the OHCHR, which they recommend the committees to integrate in their work *post factum*. Therefore, the committees are excluded from the process of elaboration and adoption of these documents, their positions are not being heard.

In this sense, there is an issue of inconsistent expansion of powers of the chairpersons of treaty bodies and the status of decisions adopted by them.

In this sense, it is unacceptable to blame treaty bodies for not implementing decisions of the chairpersons. The challenge is not in the reluctant reaction if TBs, but the procedures of the work of the meetings of chairpersons and the misuse of the mandate of the chairpersons of the treaty bodies.

## **5. Membership, nomination and election processes**

It is important to remember that under the human rights treaties the State Parties bear exclusive responsibility for the nomination and election of members of treaty bodies, and no requirements may be addressed to States in this respect. Meanwhile, the issue of un-even participation in the work of the treaty bodies in terms of equitable geographical distribution, gender representation, professional background and different legal systems deserves special attention. The GA Resolution 68/268 requests “the Office of the United Nations High Commissioner for Human Rights to include in the documentation prepared for elections of members of human rights treaty bodies at meetings of States parties an information note on the current situation with respect to the composition of the treaty body, reflecting the balance in terms of geographical distribution and gender representation, professional background and different legal systems, as well as the tenure of current members.” This information note could be a useful tool for States, as it would provide them with statistical information that they could take into account during processes of nomination and election of experts.

It is noteworthy that the GA resolution does not contain any recommendations regarding rethinking of nomination and election processes operated by States Parties. This conceptual aspect of the resolution should be observed during the Geneva Academy project and no ideas on the change of the nomination and election processes be introduced. In this sense it is inadmissible to point out that “the nomination and election processes lack transparency and a competitive nature and should be re-thought to achieve the independence & expertise that monitoring international human rights treaties requires”, as provided in the background paper “Fundamental challenges of the UN human rights treaty body system” of 15 Oct 2015.

Thus, no such previous proposals as the establishment of platform for elections of treaty body members, as suggested in the 2012 High Commissioner’s report, be put forward and integrated in the ongoing strengthening process.

Another important point to be stressed deals with the proposals to ensure the more transparent nomination and election processes at national level by providing civil society

organizations with larger role in these processes. Such tendencies are targeting the matters of exclusive discretion of States and could pose a risk of making the nomination and election processes uncontrolled, which would lead to undermining the trust of States as primary beneficiaries of the human rights treaty body system. Therefore, such initiatives should not form the results of the Geneva Academic project.

Apart from the mentioned proposals, the idea to change of procedure for the election of experts to the Committee on Economic, Social and Cultural Rights needs to be considered. Paragraph 11 of the resolution 68/268 “recommends that the Economic and Social Council consider replacing the existing procedure for the election of experts to the Committee on Economic, Social and Cultural Rights with a meeting of States parties to the International Covenant on Economic, Social and Cultural Rights, while preserving the current structure, organization and administrative arrangement”. Such a measure would inevitably touch upon the legal basis of the functioning of this treaty body. The Committee on Economic, Social and Cultural Rights (CESCR) was established by the ECOSOC in its resolution 1985/17 of 28 May 1985. More than 30 years the members of the Committee are being elected by Member-States of the ECOSOC. In case of introduction of the changes proposed, we are facing the issue of changing the UN Charter, as CESCR is a part of ECOSOC – one of the main organs of UN established by the UN Charter. It is not clear, what concrete benefits would the change in the election process bring? How would the work of the Committee be improved?

Therefore, it is important that this proposal should not be recommended to be implemented in terms of the ongoing strengthening process. It is highly desirable to reflect this idea in the outcome of the Geneva Academy project.

### **III. Recommendations:**

- it is vital to ensure that no initiatives to undermine legal basics of the functioning of the treaty bodies, restructure the system or unify the work with imposing the decisions (requirements, measures to be taken) on the treaty bodies are taken at this stage of the strengthening process;

- no initiatives on excessive unification of the activities of treaty bodies shall be taken in order to preserve independence, specificity and autonomous nature of treaty bodies;

- it is necessary to misinterpret of the parameters of the resolution 68/268 in the outcome documents of the Geneva Academic project providing a framework for the strengthening up to 2020 in terms of the aims of the 2020 review;

- the aim of the strengthening process is to ensure the credibility of the human rights treaty body system in the eyes of States, strengthen trustworthy relationship between them, therefore, no proposals should be taken to intervene in the exclusive competencies of States to nominate and elect treaty bodies (no public space for election of treaty bodies and no inclusion of civil society as the primary subjects guiding the process of election) or to implement the decisions of treaty bodies;

- it is reasonable to focus on ensuring even participation in the work of the treaty bodies in terms of equitable geographical distribution, gender representation, professional background and different legal systems;

- considering the need to improve the quality of treaty body output (the legal reasoning and clarity as well as formulation of recommendations in a more concise manner), it seems necessary to put more attention to the need to enlarge the number of experts having

legal experience in the work of the treaty bodies, which could be ensured by addressing States with this idea during the meetings of States Parties to the treaties and including this proposal in the Geneva Academy project outcome;

- idea on inadmissibility of replacement of the existing election procedure for the of experts to the Committee on Economic, Social and Cultural Rights to be enshrined in the outcome of the Geneva Academy project;

- the procedure and mandate of the meetings of the chairpersons of treaty bodies should be changed, since the challenge is not in the reluctant reaction of treaty bodies to the recommendations adopted at these meetings, but the procedures of the work of the meetings of chairpersons and the misuse of the mandate of the chairpersons of the treaty bodies;

- it is suggested to replace meetings of chairpersons with inter-committee meetings with observance of principle of equitable geographical distribution in the composition of these meetings;

- there is a need to establish priorities when elaborating proposals to strengthen the system that would adequately address the challenges faced by the system, thus, the biggest issue, that needs to be addressed, is providing adequate financial support for treaty bodies to deal with the growth of the system effectively, while the growth itself should be perceived only as a positive development of the system;

- introducing all six working languages back into the work of the committees and thus switch to reasonable cost-saving approach that would ensure the accessibility and visibility of treaty bodies.

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