THE TREATY BODY COMPLAINT SYSTEM

Expanding protection against refoulement. A survey of recent views by treaty bodies on individual complaints

Photo: Matt Olson

One of the main features of the UN treaty body system is the competence of several of the Committees to receive individual communications regarding violations of their respective treaties.[1] It provides an opportunity for victims who cannot effectively access justice in their home countries to seek an international review of their case. At the same time it presents an opportunity to obtain an international legal assessment of an issue that may be of broader interest in the country in question or to the human rights community at large.

Unfortunately, the effective implementation of the individual communications procedure faces serious challenges, especially in relation to case processing and implementation of decisions. Since the first cases were decided in 1977, UN treaty bodies have adopted decisions on 1,906 individual communications, and there are currently approximately 500 cases pending before the four bodies receiving communications.[2] Violations of the respective treaties have been found in 33 percent of the cases. This is a high number compared to the European Court of Human Rights (ECHR). Nevertheless, it is concerning that the, severely under-resourced, treaty bodies are forced to spend time on processing 67 percent of cases without finding a violation.[3]

HIGH SUCCESS RATES AND SIGNIFICANT BACKLOGS

During the first half of 2010, the Human Rights Committee (HRC) and the Committee against Torture (CAT) decided on 32 individual communications, finding violations of one or more provisions of the respective treaty in 50 percent of the cases.[4] This is a noticeable and welcome improvement from the 33 percent average. Unfortunately, the inadmissibility rate remains high at 34 percent. While it is outside the scope of this article to thoroughly analyse the factors behind these numbers, they do suggest complainants have become better at providing sufficient proof of reported violations. On the other hand, there seems to be a fundamental lack of understanding of the basic premise of the complaints system among many complainants who are refused at the admissibility stage. Common grounds for refusal are non-exhaustion of domestic remedies and an absence of proof of the alleged violation.

A serious backlog of cases and lengthy processing times remain serious problems, with an average wait of 45 months.[5] In reaction to this and its approximate 100 case backlog, CAT, in May, renewed its call to the UN General Assembly to allocate additional meeting time to address the backlog of cases and State reports to be reviewed.[6] One of the key factors contributing to the backlog is the high number of inadmissible cases, which alone have an average processing time of 44 months.

Since only CAT and HRC decided on individual communications in the first half of 2010, the substantive focus of the cases

1 For further information about the competence of individual treaty bodies to receive individual communication, please see ISHR's Simple Guide to the Treaty Bodies pages 23-31. The Simple Guide is available at http://bit.ly/dB7B73.
2 The Human Rights Committee accounts for 80 percent of all cases.
3 In 2009, the ECHR decided on 34,690 cases and in 1,504 of them (4,3 percent) found a violation.
4 During the first half of 2010, no individual communications were decided by the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women.
5 The average processing time for CAT is 30 months, while the HRC spends an average of 47 months per case.
6 A/65/317, §§ 27-30. A decision on this request may already have been made at the time of publication of this article.

Several of the treaty bodies can receive complaints, communications or 'petitions' regarding violations of a right or rights under the relevant treaties. This is provided the State concerned has recognised the competence of the treaty body to consider complaints against it, by ratifying the relevant optional protocol or making the required declaration under the relevant article of the treaty.

While each treaty body has its own specific requirements for receiving communications, there are certain standardised requirements, which must be met:

- The State has ratified the relevant treaty and explicitly recognised the competence of the treaty body to receive communications
- All domestic remedies have been exhausted
- The violation in question is covered by the relevant treaty and was committed while the treaty was in force on the territory of the violating State

Decisions of the treaty bodies can be found by searching for 'jurisprudence' at http://bit.ly/dxR58B.

More information, about whether your State has recognised the competence of any treaty bodies to receive individual communications, can be found by looking at the ratification of relevant treaties and optional protocols at http://bit.ly/aJFNWT.

is limited to a group of core civil and political rights issues, including the right to liberty and security of person, the right to a fair trial, the right to life, protection from torture and refoulement,[7] the right to conscientious objection to military service under article 18, and an unusual case relating to whether taxation of tips given to casino groupiers is discrimination. The majority of these cases related to fair trial, arbitrary detention and torture, and non-refoulement. They were predominantly brought against Western States and Eastern European countries, who collectively accounted for 78 percent of all cases.[8] CAT, which mainly receives communications related to non-refoulement, saw 100 percent of its cases relating to Western countries.[9] While these numbers are not representative of the proportionate levels of civil and political rights violations in these regions compared to the rest of the world, they do tell a story about the degree of acceptance of treaty body complaints competence and the capacity of domestic actors to access these bodies.

BURDEN OF PROOF AND PROTECTION OF ASYLUM SEEKERS

With 32 cases decided in the period in focus, it is not possible to provide a comprehensive overview of all cases and their outcomes. Instead, the following section will focus on two areas that are central in the treaty bodies' work with individual communications. One area relates to how the treaty bodies evaluate refoulement cases, one of the few possibilities for the treaty bodies to act preventatively rather than after violations have occurred. The other focus area is the treaty bodies' evaluation of evidence and the burden of proof.

Among the more interesting developments in treaty body practice during this period, were two cases elaborating on how the principle of non-refoulement is applied to situations where a person is subject to a general, rather than personal, threat of torture from non-State actors. The traditional approach to human rights based refoulement protection requires that a threat is personal and, as a minimum, is expected to materialise with the consent or acquiescence of State officials.[10] In recent case-law, the ECHR has challenged this approach by accepting that threats against distinctive groups[11], and high intensity general threat levels[12], may satisfy the criterion that the threat of torture is specific to the person. In parallel, the UN Special Rapporteur on Torture, Mr Manfred Nowak, has challenged the traditional perception of torture, as acts committed by or with the acquiescence of State actors, by arguing that practices such as female genital mutilation (FGM) and other 'private' violence may constitute torture if the State does not act with due diligence to prevent such crimes.[13]

Now it seems CAT and the HRC have taken significant steps towards incorporating these two lines of theory into their jurisprudence. In the case Eveline Njamba v. Sweden,[14] CAT prohibited Sweden from returning a woman to the Democratic Republic of the Congo (DRC) due to the general, however high, threat of violence against women in the country.

7 Non-refoulement is the right to not be returned to a country where there are substantial grounds for believing the person will be subjected to torture.
8 Complaints against Western States accounted for 50 percent of all cases.
9 Cases related to France, Sweden and Switzerland.
10 The non-refoulement principle is also found in other areas of international law such as refugee law and international humanitarian law, where the requirements for initiating protection are different.
11 ECtHR [GC], Saadi v. Italy (28 February 2008, App. no. 37201/06) §132.
12 ECtHR [Pl], Kabulov v. Ukraine (19 November 2009, App. no. 41015/04) §112.
13 A/HRC/7/3, §§ 53 and 68-76.
14 CAT, Eveline Njamba v. Sweden (14 May 2010, Comm. No. 322/2007).

Referring to several recent UN reports and its 2007 General Comment on Article 2 of the Convention Against Torture,[15] the Committee seems to conclude the threat of violence and rape against women across the country, 'committed by men with guns and civilians', is so severe it equates to a personal threat. Since the DRC Government is not responding to the situation with due diligence the threat is attributable to the State and thus amounts to a risk of torture.[16] In a similar case, the HRC afforded refoulement protection to a woman and her daughter who were to be returned to Guinea, where the daughter risked being subjected to FGM.

Compared to CAT, the HRC took a less expansive approach on the individualised threat requirement, arguing that the majority of the girl's family were in favour of performing FGM. However, the Committee did not pronounce itself in detail on the question of State responsibility and merely concludes that '…there is no question that subjecting a woman to genital mutilation amounts to treatment prohibited under article 7 of the Covenant'.[17]

As to the individualisation requirement, it is interesting to note that CAT, with its exclusive focus on the general threat situation, seems to depart from its traditional requirement that evidence be presented 'to show that the individual concerned would be personally at risk'.[18] This is a big step forward in the protection of individuals at risk, both in relation to the substantive scope of protection and the possibility to prove a threat exists. In the past complainants have often not been able to prove they faced a personal risk of torture. The big question left to CAT is what kind of general threat level is required to activate refoulement protection, in the absence of any specific threat to the individual.

The concept and scope of State responsibility in human rights law has been in constant development during the past decades, both in relation to its extraterritorial application and its application to violations committed by non-State actors. In the cases reviewed in this article, CAT advances a due diligence[19] argument to find State responsibility, while the HRC avoids addressing the issue all together. What makes this situation particularly interesting is that the Committees are required to assess the State's observation of due diligence in a hypothetical situation where non-State actors commit violence or torture against women. This is in contrast to the normal application of the due diligence principle after the fact. Further, considering the unstable situation in the DRC with large parts of the country effectively outside the State's control, it is questionable how far the due diligence responsibilities of the DRC Government reaches.[20]

With their expansion of the concept of State responsibility and relaxation of the individualisation requirement, these two decisions constitute a significant development in treaty body jurisprudence. Furthermore, CAT's approach to applying the due diligence principle seems to be moving towards the concept of finding responsibility when the State is unable or unwilling[21] to protect rights highlighted in refugee law. Indeed, the facts of the case in many ways are more similar to a classic refugee case than a classic human rights refoulement case. Due to the existence of more effective monitoring mechanisms in the human rights field, the rejected asylum seekers in the two cases highlighted have found better protection in the traditionally more narrow human rights refoulement protection avenue.

In July 2010, the Government of Sweden informed CAT it had granted Eveline Njamba a permanent residence permit.[22] While the outcome of this case is welcome, it highlights a clear need to equip the Convention on the Status of Refugees with a monitoring body similar to those established in the human rights field. Doing so would ensure future cases are processed by experts with more specialised knowledge on refugee issues. It would also avoid treaty bodies being flooded by asylum claims, and help ensure the rate of non-compliance with treaty body decisions does not rise as a reaction to the expansive interpretation of human rights refoulement protection.

The ability of complainants to sufficiently substantiate their allegations has long been a key obstacle to improving the success rate for communications before the treaty bodies. Unfortunately, the latest statistics do not alleviate this concern. Of all the alleged violations considered by treaty bodies in this review period, 60 percent were deemed unsubstantiated either at the admissibility or merits stage of the proceedings, and only 22 percent were deemed sufficiently substantiated.[23] While these numbers can be partly ascribed to incomplete communications, lack of legal capacity of the complainant and what appears to be the use of a scattergun technique when submitting complaints, there also appear to exist more structural problems preventing complainants from effectively utilising individual communications procedures.

15 CAT/C/GC/2, available at http://bit.ly/9gejdK.

16 CAT, Eveline Njamba v. Sweden (14 May 2010, Comm. No. 322/2007) §9.5.

17 HRC, Diene Kaba v. Canada (25 March 2010, Comm. No. 1465/2006) §10.1

18 CAT, Eveline Njamba v. Sweden (14 May 2010, Comm. No. 322/2007) §9.3

19 IACtHR, Velasquez Rodriguez v Honduras (29 July 1988) §175.

20 ECtHR [GC], Ilascu and Others v. Moldova and Russia (8 July 2004, App. no. 48787/99) §§333 and 348.

21 Council Directive, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004/83/EC of 29 April 2004) Article 6(c).

22 Human Rights Treaties Division, Newsletter No. 9, (July-August-September 2010), p.13 (http://www2.ohchr.org/english/bodies/docs/HRTDNewsletterNo9.pdf)

23 123 allegations were made regarding violations of specific provisions of the human rights treaties. 74 were considered unsubstantiated; 27 were considered sufficiently substantiated; and 22 were dismissed on other grounds.

Treaty bodies are generally reluctant to engage in evidence evaluation, when this has already been done at the domestic level.[24] Furthermore, the time required to assess evidence is difficult to reconcile with their limited meeting time. The treaty bodies have taken the position that they will only engage in independent evidence assessment if the domestic procedure is found to be manifestly arbitrary or amounting to a denial of justice.[25] When this approach is combined with an inequality of arms[26] in relation to access to information and investigative measure at the domestic level, the complainant is left with limited options for proving the allegations.

This is especially true when the communications relate to countries where there are concerns about the effective and independent functioning of the judiciary, and where public administration documentation and transparency policies are generally less effective than in many old democracies. In the cases reviewed this has manifested itself in different ways. In relation to fair trial, arbitrary detention and torture, complainants have frequently failed to provide documentation relating to court proceedings and any kind of medical certificate to substantiate claims of torture. In refoulement cases, complainants are often unable to provide documentation of an individual threat in the form of wanted notices by the police or evidence of prior incidents of torture. One way of improving this situation would be for treaty bodies to more clearly communicate what level of substantiation they expect from a case, and provide suggestions on how this can be done within the constraints of deficient domestic procedures. This would allow victims to make a more informed decision on whether to petition a treaty body, which again would decrease the workload related to unsubstantiated cases. In this regard, it is positive to note that CAT has recently established a Working Group to focus on evidence assessment.

CONCLUSION

The treaty body system evidently faces significant capacity related obstacles to an effective performance of its mandate to receive individual communications. As highlighted in this article, one problem seems to be related to the excessive submission of communications, which do not fulfil the admissibility criteria. This is an unfortunate situation since negative admissibility decisions are a waste of valuable time, both for the treaty bodies and the complainant. This issue should be seen in close connection with the high number of cases of alleged violations, which are rejected due to lack of sufficient substantiation. To remedy this situation, it may be worth considering providing more explicit guidelines and training for NGOs on admissibility criteria, and the level of substantiation and documentation required for a communication to be fully evaluated on its merits. This process might receive significant input if individual treaty bodies start providing more legal reasoning in their decisions. CAT has recently established a working group on evidence assessment, which gives the Committee an excellent opportunity to pioneer a more transparent evidence evaluation procedure.

The Committees are currently expanding their views on refoulement protection in what seems to be a reflection of recent developments in legal analysis authored by the ECHR and the Special Rapporteur on torture, Mr Manfred Nowak. CAT has considerably expanded protection within the concepts of personal risk and State responsibility. It will be interesting to follow how the treaty bodies further develop these concepts and how the actors most affected by them, persons at risk and States, respond in relation to frequency of complaints and compliance respectively. ■

Article by Asger Kjærum, Legal Officer at the International Rehabilitation Council for Torture Victims.

24 HRC, R.M. v. Finland (23 March 1989, Comm. No. 301/1988) § 6.4; CAT, N.Z.S. v. Sweden (22 November 2006, Comm. No. 277/2005) § 8.6; and CAT, General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22 (21 November 1997, A/53/44, annex IV) § 9.

25 HRC, Bakhrullo Minboev v. Tajikistan (19 March 2010, Comm. No. 1174/2003) § 6.2; HRC, Chelliah Tiyagarajah v. Sri Lanka (19 March 2010, Comm. No. 1523/2006) § 5.2; CAT, E.Y. v. Canada (4 November 2009, Comm. No. 307/2006) § 4.2.

26 When one party to a case is placed at a substantial procedural disadvantage compared to the other party.