

“CONSTRUCTIVE DIALOGUE” AS A CORNERSTONE OF THE HUMAN RIGHTS TREATY BODIES SUPERVISION

by

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I. INTRODUCTION²

United Nations from the very beginning of its existence treats the protection and promotion of human rights as a matter of special care, recognizing the tight connection between human rights violations and internal and international peace. To set clear standards and monitor the human rights observance in the world, a number of general and thematic human rights treaties were adopted, most importantly International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: ICERD), International Covenant on Civil and Political Rights (hereinafter: ICCPR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: CAT), Convention on the Rights of the Child (hereinafter: CRC), International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women and International Covenant on the Rights of the Migrant Workers and Members of Their Families (hereinafter: ICRMW).

To ensure that the letter of the treaties is truly implemented by the Member States, treaties themselves provide for establishment of committees (so called ‘treaty bodies’) responsible for monitoring of their observance. The

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² A. F. Bayefsky, *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International) 2000; M. Piechowiak, R. Hliwa, *Międzynarodowy Pakt Praw Osobistych i Politycznych* (Instytut Nauk Prawnych Polskiej Akademii Nauk – Poznańskie Centrum Praw Człowieka, Poznań) 2001; R. Wieruszewski, *Charakter prawny uwag końcowych Komitetu Praw Człowieka* (unpublished expertise for Ministry of Justice of Poland), 14.12.2004.

Committee on the Elimination of Racial Discrimination (CERD) was the first body created by the United Nations to monitor and review actions by States aimed at fulfilling their obligations under a specific human rights agreement. This precedent was followed by creation of other treaties committees with comparable constitutions and functions, *inter alia* the Human Rights Committee (hereinafter: HRC; which has responsibilities under the International Covenant on Civil and Political Rights), the Committee against Torture, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.³

The committees, composed of a set number of members acting in their own name and considered to be "persons of high moral character and recognized competence in the field of human rights"⁴, although nominated by State Parties from among nationals of States parties to the treaty, are strengthened with two monitoring tools: periodic reporting procedure and, in case of some of the treaties, possibility to consider inter-state and private complains.⁵

This article will focus only on the reporting procedure⁶, as it exists under all UN human rights treaties and seems to engage states much more, at least in the view of the author, than consideration of individual communications.⁷ It is also the very formula of the 'constructive dialogue' of this procedure that gives it a much bigger influence and change potential compared to adversarial procedure that automatically puts the Member state into defensive position. And with the ongoing discussion on the reform of the human rights treaty bodies system, there is a need to reflect not only on the role and mode of operation of the treaty bodies themselves but also on the role that states, i.e. the other partner of that dialogue, play in the universal monitoring system. After all, to have the dialogue in the first place, implies that one needs at least two parties; and to make it constructive they should be aware of what their partner(s) can bring to the dialogue and with what problems affecting its outcome they are faced.

Furthermore, it is widely acknowledged that although the procedure has been in place since 1970 and a lot of experience was gathered⁸, still much can be done to improve the system. And it is the hope of the author that present article will indicate several points where improvement can easily be implemented.

³ Fact Sheet No.12, The Committee on the Elimination of Racial Discrimination, accessed last on 31 January 2006 at <http://www.ohchr.org/english/about/publications/docs/fs12.htm>

⁴ Article 28 of the ICCPR.

⁵ For details see e.g. texts of the mentioned treaties or Fact Sheets published by the OHCHR and accessible at <http://www.ohchr.org/english/about/publications/sheets.htm> (*inter alia* Fact Sheet nr 15 (Rev.1) on Civil and Political Rights: Human Rights Committee).

⁶ Article 9 of the CERD, Article 40 para. 1 of the ICCPR, Article 19 para. 1 of the CAT, Article 16 of the ICESCR, Article 18 of the CEDAW, Article 44 of the CRC, Article 73 of the ICRMW.

⁷ Although, it has to be admitted, that both can led to equally important changes, including the introduction of new legislation at national level. See e.g. *Kudła v. Poland case* - 30210/96 [2000] ECHR 512 (26 October 2000) - under European Convention on Human Rights which led to introduction of an act establishing a new complaint procedure in domestic courts concerning unreasonable length of proceedings.

⁸ Between 1970 and March 1991, CERD alone received 882 reports (including 73 which it had requested in order to obtain additional information). See: Fact Sheet No.12, The Committee on the Elimination of Racial Discrimination, accessed last on 31 January 2006 at: <http://www.ohchr.org/english/about/publications/docs/fs12.htm>);

The article adopts the following chronology of issues in its assessment of States' reporting obligations:

- preparation of the report, through
- composition and preparation of the delegation,
- consideration of the report by the treaty body in the presence of the state representatives, and finally
- realization of the treaty body's concluding observations.

First, the concept of constructive dialogue, for the purpose of this article, relates to practical process that reflects the reality of the reporting process, rather than a theoretical definition. Seen from the practical perspective, 'constructive dialogue' should be seen as an exchange of thoughts on specific topic and be based on openness of the arguments of the partner and readiness to provide all necessary information or advice requested. It includes readiness to admit that the other party may be right on some issues as well as to consider positively proposals aimed at improving human rights observance. Ideally, constructive dialogue will result in introduction of new policies and legal changes and an enhanced understanding by all parties of the problems at hand and possibilities of their solution.

When does the constructive dialogue start? It would not be wise to limit its scope to just one phase of the whole process i.e. consideration of the country reports by the respective treaty body. The very first signal that the country wants to engage itself in the constructive dialogue is sent at the moment of treaty ratification (if not earlier). It is exactly at that moment that the state 'announces' its readiness to enter the dialogue based on consideration of periodic reports on the measures it has adopted "which give effect to the rights recognized in the treaty and on the progress made in the enjoyment of those rights".⁹ Reports are expected to present not only the state of domestic law and practice, but indicate as well "the factors and difficulties, if any, affecting the implementation" of the treaty.¹⁰ If the state is not ready to discuss some elements of its internal policy and domestic law solutions with the independent treaty body, it simply will not bind itself by such treaty, regardless of how widely accepted it is and the risk of bad press.¹¹

II. PREPARATION OF THE REPORT

It varies from state to state, as to which ministry or another institution is responsible for writing the report. For example, in Poland, competence-based division is applied, i.e. Ministry of Justice is responsible for report on the implementation of ICCPR (as many of the rights concerned are in some way

⁹ Rules of procedure of the Human Rights Committee (hereinafter: HRC): 22/09/2005. CCPR/C/3/Rev.8., Rule 66.1.

¹⁰ Rules of procedure of the Human Rights Committee: 22/09/2005. CCPR/C/3/Rev.8., Rule 66.1.

¹¹ See e.g. USA resistance to ratification of the Convention on the Rights of the Child, despite its almost universal ratification. Currently only two states, i.e. USA and Somalia, are not parties to this convention.

connected to the administration of justice), CAT (an issue of criminal law and its enforcement) and until the creation in 2002 of an office of the Government Plenipotentiary for Equal Status of Women and Men¹² (responsible also for prevention policy in respect of other forms of discrimination), also ICERD. Ministry of Education has CRC report within its obligations while Ministry of Labor and Social Policy responsibility is to come up with the report on ICESCR. One fact is indisputable – reports are often drafted at a high level and often, just as in Poland, they require the cabinet of ministers' approval, by which they acquire legitimacy and political-level attention. However, the tricky part of it is the fact, that formulation of certain parts might be subject to weeks-long negotiations between two or more institutions, who happen to have somewhat different views on the issues or the policy in question. This can unintentionally adversely affect timely submission of the report to the UN. Similar problems may appear, when the answers to the questions from preliminary list of issues are being prepared.¹³ There is however a positive side to it; namely that of initiating a proper discussion that has to have an outcome, thus pushing various institutions to cooperate harder than they would in normal circumstances, so as to agree a common, coherent position, that could be presented at international level.

If, as sometimes happens, top officials responsible at political level for the report treat it as an important issue for whatever reason (be it because of its nature or, more simply, because it can make for good press) and put their authority behind it, capacity of the report-drafting process to mobilize various actors at the national level to effectively¹⁴ take part in the reporting process (which also has wider awareness-raising value), is raised noticeably. It thus makes it even easier to gather information, which is either not accessible, gathered, compiled or analyzed otherwise¹⁵. What is even more important, is that such high level involvement sends a clear signal from top to down of the public administration that issues in focus are important and should be regularly monitored and corrected if necessary.

Before the state party undertakes the preparation of the report, not to mention travel to meet up with the UN Committee, the preparatory work towards constructive dialogue is already done by the human rights treaty bodies which with the help of the Office of the High Commission on Human

¹² Recently, as a result of the Regulation of the Council of Ministers of 3 November 2005 on Cancellation of the Government Plenipotentiary for Equal Status of Women and Men, its competences were transferred to the Ministry of Labor and Social Policy. However, the transfer of competences, which never is an easy and straightforward exercise, without any doubts affected the timely submittal of the periodic report on ICERD implementation, which was due in January 2006. We can easily see on this example how easily, despite the good will to approach dialogue with the CERD committee in a constructive way, the process can be affected by political changes and administrative structure transformation. For more information see: <http://www.rownystatus.gov.pl/en/index.php?m=nowosci> accessed last on 16 January 2006

¹³ See footnote nr. 21 below.

¹⁴ E.g. if one of the institutions notoriously provides incomplete information and/or sends every time a new person to the meeting, intervention of the e.g. undersecretary of state at his counterpart at other institution has the power to change such 'behavior' tremendously.

¹⁵ E.g. because of the necessity to provide at one stage of the reporting procedure information on a number of cases, where prisoners complained about racially discriminatory treatment, and a lack of statistical gathering system on this aspect of prison life, a survey of all the complaints in most recent year (i.e. over 13 000 complaints) was conducted by the Prison Service, to find out that only in handful of cases racial discrimination was alleged and not a single one of those was substantiated.

Rights (OHCHR) prepare and update the reporting guidelines, manual on human rights reporting and general comments. Those documents are, from the state point of view, of immense help in drafting the initial list of questions addressed to various actors at the national level, the answers to which constitute the main body of the report.¹⁶ A list of issues to be described in the report and consequently a list of questions dwelling on them can be rather long. For example, in case of the *5th periodic report of Poland on the implementation of provisions of ICCPR* (hereinafter: V ICCPR report) the initial list of questions addressed to various public administration institutions was about 17 pages long, and that does not include all the further questions and requests prepared in reaction to the issues and individual cases raised in the NGOs' submissions. Thanks to the above mentioned documents drafters can be more or less sure not to miss out any important issues in the report.¹⁷

¹⁶ E.g. *Compilation of guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties*, HRI/GEN/2/Rev.2, 7 May 2004, accessed on 14 January 2006 at <http://daccessdds.un.org/doc/UNDOC/GEN/G04/413/80/PDF/G0441380.pdf?OpenElement>; *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents*, HRI/MC/2005/3; 1 June 2005, accessed on 14 January 2006 at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/422/26/PDF/G0542226.pdf?OpenElement>; *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies*: 12/05/2004, HRI/GEN/1/Rev.7, accessed at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ca12c3a4ea8d6c53c1256d500056e56f?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ca12c3a4ea8d6c53c1256d500056e56f?OpenDocument) on 14 January 2006; OHCHR & UNITAR & UNSCP, *Manual on Human Rights Reporting*, HR/PUB/91/1 (Rev.1), accessed at http://www.ohchr.org/english/about/publications/docs/manual_hrr.pdf on 14 January 2006.

¹⁷ It is clear that every state has its own way of preparing the country report, so it is not possible to describe one 'binding' routine. However, to give at least a partial idea how it might look like, the author decided to include here a short description of how it was done in Poland, when she was charged with this task. In order to make the whole process constructive and learning exercise, the following sequence of steps was followed:

- 1) Letters with questions, signed by the undersecretary of State (notice high, political level of endorsement) are sent to all the relevant institutions, requesting that full information be provided within one month. Simultaneously, several major NGOs (like AI or Helsinki Human Rights Foundation) are informed in writing that the drafting process of the report was initiated and that they are welcomed to provide information or indicate type of information they believe should be incorporated in the report. The reason for it was to reflect reality in the country as close as possible. NGOs bottom-line view, thanks to their closeness to the local communities and individual citizens and knowledge of their problems, is often irreplaceable, when it comes to confronting letter of law with practice.
- 2) Answers arrive and are compiled into a framework already created by the report drafter and subsequently filled with further information needed.
- 3) First version of the report is sent to all the institutions and NGOs again, this time with request to provide comments, corrections or any additions within one month.
- 4) Comments arrive and are subsequently cross-sent to respective institutions e.g. Helsinki Foundation comments concerning information provided by Police or Prison Service are sent to those institutions with request to take position on it (which can vary from giving consent to insert HF comments in the report, providing requested information, to stating that given institution does not agree with HF interpretation of facts or refusal to provide information because e.g. investigations are not completed yet).
- 5) After all the answers are received, second draft version is sent to all actors engaged for opinion, or if no major comments are expected than it is forwarded straight to the Cabinet of Ministers for approval, which involves, again, sending the draft report to all the central public administration institutions for comments. Usually only minor clarifications and corrections are expected, however it happens that parts which were altered in cooperation with two parties, are now questioned by yet another institution.

However, in spite of all the support and guidance several problems appear. Although in their periodic reports State parties need not report on every single article of the treaty, but only on those provisions and issues identified by the treaty body in its concluding observations and those articles in respect of which there have been significant developments since the submission of the previous report, the volume of the reports is not decreasing, and often goes beyond the page limits set up by the treaty bodies.

There are several reasons for it. Treaty bodies often request quite specific, detailed information supported by exemplary cases illustrating the practical operation of domestic legislation. In order to present it properly and, if necessary, to enable the understanding of the country specifics in this respect, a thorough introduction and description is often unavoidable. If we sum all such information throughout the whole report, bearing in mind that e.g. ICCPR has 27 substantive articles and that, with the time passing by and society developing, states need to amend their domestic law to reflect those changes rather regularly, we will end up with inevitably long document.

Another element adding to the length of the report are suggestions of non-governmental organizations (hereinafter: NGOs), to raise certain issues, present others in more detail or provide more case-based examples. For example, comments of the Helsinki Human Rights Foundation concerning draft report on CAT were about 10 pages long and varied from merits based discussion of whether all aspects of the definition of torture are currently covered by domestic legislation to requests for explanation of the reasons for reduction of number of teaching hours devoted to human rights in police schools.

Such an approach is highly understandable, particularly that in some cases reports to treaty bodies offer reliable information otherwise not that easily available outside the public administration or simply gathered and analyzed only because of that report.¹⁸ It also happens that due to the fact that during the preparation process majority of NGOs' submissions are very considered seriously as a source of potential questions by the members of the treaty bodies, Ministry of Justice will receive answers to issues raised and

6) Cabinet of Ministers approves of the report. Report is translated into English and subsequently submitted to the UN.

¹⁸ It is worth mentioning that those are often requests from international organizations such as UN, Council of Europe, OECD etc. to provide certain type of information that create certain 'pressure' that might lead to amendments of existing law or initiate changes in its practical application, as was the case with revision of the statistical forms in internal statistical data gathering systems of Ministry of Justice, in order to be able to present gender-split data (causing despair of court administration staff. It has to be remembered that gathering of information on such scale is an enormous task even when all the courts are fully computerized – which unfortunately is not necessarily yet the case at the lowest court level, so it happens that certain amount of the statistical data gathering is based on paper files). While gathering of such detailed data is very important as it allows to observe trends and consequently design and adjust public policy according to them, it should be kept in mind by members of international bodies, that their 'innocent' request for specific data which is not collected on usual basis, might require input of additional resources that state might not have and/or add pressure on units, that e.g. like Polish courts, are already over lasted trying to deal with the backlog of cases and all the administrative case-related work. This is not to say, that countries should be able to use lack of resources as an excuse for not being able to ensure respect for human rights. Particularly, that treaty bodies with support of OHCHR are able to help countries lacking skills or technical or other difficulties preventing them from submitting report, through the specialized technical support schemes. However, members of the treaty bodies should really reflect whether data they are requesting would prove useful to the advancement of the human rights situation in the given country.

questions originally formulated by NGOs, even if earlier NGO enquiries at the competent institution were unsuccessful. Often such answers are included in the report and forwarded, upon consent of the relevant institution, to the respective NGO. Additionally, being accessible directly at the OHCHR and the respective ministry's websites for anyone interested, reports increase degree of transparency of the whole system.¹⁹ It needs to be stressed here, that drafters of such reports are aware of this fact, and attempt not to sacrifice detailed information while trying to keep the report as streamlined as possible, not to mention attempts to stay within the page limits.

Necessity to submit periodic report constitutes a great opportunity for the state to review what has been done during the period covered in the report to increase protection and ensure observation of human rights, and reflect on what contributed to good practice, helped to achieve results wished for or what caused failures. If treated as a kind of self-confession, it can prove to be a helpful learning exercise. The existence of an international obligation to present such report, constitutes certain kind of 'excuse' to devote such immense amount of time (e.g. it took over seven months to prepare the V ICCPR report), resources and energy to the task, which in usual circumstances most probably would not receive so much attention. Indeed, it is really regretful that after such a thorough research, one has to keep all the important and interesting information very short.²⁰

An ideal solution from this perspective would be to submit a short version to the UN, with the full, voluminous one posted on the government websites for information, following the practice of the EU Annual Human Rights Report. However, at present there exist no legal obligation to prepare such reports. And taking account of the fact that resources and time are limited goods in usually understaffed public administrations and that such report (but this time not 100, or 120 pages but about 300-350 pages long) would need to go through the whole procedure of agreeing the final text by all central institutions before eventual formal approval by policy-makers, one should not expect in a near future any decision at political level to produce such report. What can and, in fact, is done, is publishing and making reports and all other documents related to their consideration available on the internet and in the form of a book publication.

When the report is submitted, the treaty body attempts to consider it within one year. The date of consideration of the report is communicated well in advance, thus giving the state possibility to reserve time for it or, if necessary, to request change of date. It has to be kept in mind, that states have reporting obligations towards several international organizations and it might happen that dates of consideration of those reports coincide. Readiness of the treaty bodies to positively consider request for the date change, is one of the indications of the constructive approach on the treaty bodies' side.

¹⁹ E.g.: <http://www.ohchr.org/english/bodies/treaty/index.htm> or www.ms.gov.pl/prawa_czl_onz/prawa_czlow_3.shtml

²⁰ In order not to lose all such tiresomely gathered information, Ministry of Justice practice is to keep the initial working-version of the report on file for future reference (in case of the V ICCPR report over 300 pages long). However, even 'short version', i.e. report submitted to the UN committee, is very useful in day-to-day work as point of reference for public administration and NGOs or anybody who is interested in issues covered in the report (as it gathers a great deal of crucial data about situation in the country in one document).

Also, some two months before the formal meeting a preliminary list of issues is communicated to the state. There are two reasons for it. It sets the ground for discussion during the meeting and allows the state to gather necessary information (between submitting the report and its consideration a lot can change) thus ensuring that answers presented to the treaty body are full, up to date and competent. Additionally, indication of the areas of concern of the treaty body allows the state to compose most competent delegation, able, if possible, to answer all the additional questions of the members of the treaty bodies put forward during the consideration session. Although it is a good practice to send written answers to the preliminary questions in advance of the consideration meeting, so as to allow members of the committee to acquaint themselves with them and be able to devote the time during the meeting only to all the remaining doubts and concerns, it is not always possible simply for objective reasons. Rarely do questions put forward by the treaty bodies fall within the ambit of the competence of only one institution. Most answers need coordination and, as was mentioned earlier, it takes time. For example, HRC question concerning possible amendment to the Law on Family Planning, Protection of the Human Foetus and Conditions for the Admissibility of Abortion and direction it might take,²¹ proved highly controversial and it took over one month to agree a joint text to be presented to the Human Rights Committee and required approval by the respective ministers at both ministries concerned. Surely such text reflects a very fragile compromise and although attempting to be concrete and deliver information expected, can often fall short of clarifying all the doubts of the members of the committee.

At times however, it can be a conscious choice of the head of the delegation to deliver answers to the preliminary questions only during the very consideration of the report. Such decision aims at limiting the time that can be spent on other issues and takes some pressure off the delegation who can deliver answers to the questions raised during the meeting in written form within two working days after the end of the meetings.

III. COMPOSING THE DELEGATION

It was mentioned above that knowing what issues are of concern to the committee allows the state to compose a competent delegation, able to enter a proper, merits-based and constructive discussion. Indeed, utmost effort is given to ensure that it is composed of both competent and high level (e.g. directors of departments) people. Having somebody from the political level (e.g. undersecretary of state) as head of the delegation also is very helpful, as it is a clear indication both for internal actors and international community, that state is taking the monitoring process seriously. There is no point in sending people, who only read out materials prepared by others without being

²¹ List of issues to be taken up in connection with the consideration of the fifth periodic report of POLAND (CCPR/C/POL/2004/5), CCPR/C/82/L/POL, 16 August 2004, last accessed on 31 January 2006 at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/821392a4c8ef0902c1256f42003793d9?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/821392a4c8ef0902c1256f42003793d9?OpenDocument).

able to answer all the additional questions either straight away or next day. It would be an unnecessary waste of tax-payers' money and treaty body's time.

There are several reasons for ensuring participation of high level people in the delegation (if necessary supported by e.g. a member of their staff, who was responsible for preparing this institution input into the periodic report in the first place), that make the reporting procedure more effective and constructive.

First of all the undisputable fact, that such a person has a broader view of all the issues falling within the competence of the given institution (a head of department surely has broader and better view of the whole activity of the department, institution as a whole and all relevant developments, than the line civil servant, assigned usually to specific area of competence). This goes in hand with greater ease (and shorter time in which to obtain necessary information. For example the Deputy Chief Police Commander will find it easier to obtain information needed, than one of the staff members of the Police HQ. If not for other reasons than at least in order not to lose one's face when asked a relatively easy question and not being able to provide an answer.). Furthermore, seeking information on certain issues by such person sends a clear signal throughout all levels of administrative hierarchy that those type of issues are important and have to be monitored on regular bases. Not to mention the fact that person of higher position in the administration hierarchy has greater ability to mobilize people at home institution to stay at work long after office hours on the day of the report consideration, in case additional information is needed to answer one of the additional questions of the committee. It has to be added here however, that usually support from the main coordinating institution can also be expected in the form of a letter signed by the head of the delegation requesting institutions to arrange such support as a matter of superior, top-level order. It is another clear signal of treating consideration of the report very seriously and attempting to meet expectations of the partner in this dialogue as far as requests for information are concerned.

Another factor that speaks for including high level people in the delegation is that although the statements of all members of the delegation in front of the treaty body can and are considered to reflect official government position, still, in case of any misinformation, it would be more shameful to state that such person acted beyond its powers in providing certain information. Additionally, the very fact that they personally stand behind certain statements may have influence on easiness of its contents to be lived up to as they are more likely to be subject to serious follow up by that person.

Last but surely not least, the possibility of a positive, spontaneous 'side-effect' of their participation in the whole procedure. If they realize importance of an issue and/or if it turns out during preparations that all of a sudden in a very short time they need to gather a huge amount of information, which could be easily gathered or monitored on regular basis. For example after consideration of the V ICCPR report of Poland, Deputy Chief Commander of the Police, acting on his own initiative, established a net of regional Plenipotentiaries of the Regional Chief Police Commanders for human rights to 'keep a hand on a pulse', analyze relevant data, follow trends and design and organize necessary training and workshops sessions for police functionaries.

Once delegation composition is known, the preparation process can begin. It is a job of the civil servants in the coordinating institution to find and analyze all possible reports by NGOs, US State Department, Council of Europe High Commission on Human Rights, etc, concerning human rights situation in Poland, statements of NGOs in front of the Commission on Human Rights (e.g. a case concerning discriminatory treatment of professional soldiers brought to the attention of the 2003 CHR (despite the fact that this situation was already corrected by the decision of a court) reappeared during consideration of the V ICCPR report in the late 2004), and analyze from the angle of possible questions. Also an overview of all the major human rights related cases reported by press might be conducted. Results are sent out to all the delegation members with request to ensure that current state of art is known.

Now it is the time to organize several (about 3-4) 'rehearsal' sessions during which answers to the preliminary questions are discussed, brainstorming on possible 'drilling' questions conducted and answers to them presented. At least one session is designed to resemble at least to some extent consideration of the report as such. Additional bonus of such preparation is the fact that it creates good occasion for people to get to know each other and create a real team, that knows its strengths and weaknesses. Such knowledge and close links prove to be extremely helpful also later on, in usual day-to-day working relations – very important and probably the least known aspect of the reporting procedure.

Surely, the approach set out above is descriptive of the way one country deals with it. However, the author is of an opinion that all countries adopt one or other strategy to prepare properly for consideration of its report by the treaty body. After all, even though concluding observations of the committees do not have binding power that would extend beyond *soft law* framework, 'name & shame effect' plays an important role here.

IV. CONSIDERATION OF THE REPORT

Finally the big day arrives. By that time state delegation is fully prepared and answers to the questions from the preliminary list are either already forwarded to the committee members, or at least ready to be presented orally. Two sessions three hours each devoted to consideration of the human rights record of the Member state and possibility of its improvement are about to begin.²²

²² If this is enough to thoroughly discuss the enormous amount of information contained in the periodic report is another matter, as during those 6 hours quite a number of agenda items must be covered. The introduction of the report by the head of the delegation and summary and initial opinion of the *country rapporteur* (designated member of the committee) usually takes about 1,5 hour. Another 1,5 to 2 hours are allotted to answers to the questions from preliminary list of questions. Yet another hour (altogether throughout proceedings) is reserved for the members of the committee to ask additional questions (usually –ty in number). The remaining time is used mostly to give answers to additional questions and to sum up the proceedings. Altogether, the government has barely maximum 3,5 hours to present at least the most general update information, answers to detailed questions from the preliminary list of questions and to numerous additional questions. Is it really sufficient time to discuss all the attention deserving issues covered by the material for the discussion, which like most recent periodic report of Poland can be about 180 pages long plus 35 pages of statistical data? And I am not sure if the page limit introduced by the committee will change

After the introductory speech of the head of the delegation that serves as an update of information on all the new developments in the country that took place since submission of the report and signals answers to be delivered during the meetings, now it is again the committee's turn to take the lead. In recent years a practice was developed, at least in some of the committees, aimed *inter alia* at the reduction of the backlog of reports and individual communications divide the work between 5-6 members task forces. So at least such number of committee members are expected to read the report of the country thoroughly. One way to show, that committee respects the work done by the state, pays enough attention to its report and can be considered competent to put forward recommendations that have a chance of improving state's human rights record, is to ask relevant and targeted questions. Unfortunately here the first disappointment comes. Many of the questions are repeated as if members of the committee did not coordinate it among themselves. Also the fact that committee members do come in and go out during the session does not help: they miss some parts of the state presentation and later ask questions about things which were already explained. What is even worse are questions concerning issues already thoroughly explained in the report. For example during the consideration of the V ICCPR report one of the HRC members asked question about discrimination of professional soldiers, an issue thoroughly explained in the periodic report (including relevant passages from the Constitutional Court judgment declaring certain legal solutions as non-binding).²³ Such a question creates impression that committee members simply do not bother to read the reports in their fullness and I am afraid that length of the report is not an excuse in this case - after all if the state put so much effort into gathering all the information, common courtesy would require some respect for its work. This can be particularly annoying for the drafter of the report, if he/she attempted to phrase certain issues in a way aimed to catch the attention of the committee. Such questions leave no doubt that such efforts are completely void and remain completely unnoticed. And it does not encourage state to remain serious about the whole reporting process, while surely makes it easier to go through - as it is enough to repeat during the oral proceedings all what is already written, while the time is running, leaving less time for all the other issues, some of which could really be difficult to deal with.

Surely not all the questions are of that nature. Indeed, majority of them are highly relevant and up to the point. And surely, state representation is using its utmost energy to give as thorough and complete answers as possible. After all, the more information shared, the most complete answer given, the better the chances that no misunderstandings are created and that concluding observations at the end are reflecting reality and constitute an objective judgment of the steps to improve human rights observance undertaken by state in good faith and their results. If the requested answer is difficult to be given immediately, it may be presented it during the next meeting devoted to consideration of the report (usually taking place the very next morning, thus giving delegation time in the evening to prepare the complete answer).

anything.

²³ *Fifth periodic report: Poland. 26/01/2004. CCPR/C/POL/2004/5. (State Party Report), paragraph 331-332, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.POL.2004.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.POL.2004.5.En?Opendocument)*

What, at least some states do not mind is the fact that some of the questions seem to be 'delivered' to members of the committee as if 'on plate' by NGOs representatives present during report consideration. After all, that is one of not many occasions when the NGO has much bigger chances to receive full answer to its questions, which probably would not be so thorough in other circumstances (although it is not a rule). Possibility, which NGOs have, to organize 'side-event' or briefings between the consequent sittings of the committee, so as to present its own 'shadow report' or raise issues of concern in given country, is great opportunity to influence members of the treaty bodies. Indeed, NGOs play crucial role in consideration of the country reports. Their 'shadow reports' describing human rights record of the country play important role at all stages of the consideration of the state report, in particular when a list of preliminary issues is designed and later on when additional questions are put forward.

What is really fascinating about the consideration of the report, is that sometimes one can hear first time ever official statements on certain, often contentious issues (e.g. assessed number of illegal abortions was indicted by one member of the delegation!). What a pity that those who should, including NGOs, often do not seem to notice it.

Constructive discussion would not be possible without a good interpreter. Even if the majority of the members of the delegation speak English or one of the other official languages, it might happen that decision of the head of the delegation will be to speak in national language. Although it is meant to ensure that no language-based misinformation is given, it can be treated also as a way to 'gain time'. Independent of the reason, it is crucial to ensure that delegation is assisted by a very good interpreter, who is familiar with the specific vocabulary. Ideally the one who translated the report in the first place. It does not solve all the problems, though. If the answers are given in Polish, at least double translation is always taking place: Polish-English-French or Spanish. If the summary protocols are written on the basis of the language second in order of translation (French e.g.), some inaccuracies will appear. To return to the earlier example of the clandestine abortions in Poland, while representative of the Ministry of Justice indicated a number of about 70000, summary protocols indicated only 70. Indeed, the summary protocols issued after consideration of the V ICCPR report, when translated into Polish and included in the book, required rather a large number of footnoted corrections of data provided.²⁴ Surely, the summary protocols can be amended and there is a note allowing the state to report any corrections within one week of the date of this document, but it is not of a much use as for example the text of the summary records of the 2241st meeting of the HRC dated 31 January 2005 (CCPR/C/SR.2241) was in fact made available to the Member State only with a few months delay.

V. REALIZATION OF THE CONCLUDING OBSERVATIONS

²⁴ See: Ministry of Justice of Poland, Realizacja przez Polskę postanowień Międzynarodowego Paktu Praw Obywatelskich i Politycznych. V sprawozdanie okresowe Rzeczypospolitej Polskiej z realizacji postanowień Międzynarodowego Paktu Praw Obywatelskich i Politycznych, Warszawa 2005 at p. 265, 271-272, 277, 279-280, 283-285, 288, 291, 292 as well as errata that includes further 9 corrections ("Errata do publikacji", accessible at http://www.ms.gov.pl/prawa_czl_onz/prawa_czlow_3.shtml as last position under point 2).

When the consideration of the report is over, Committee formulates concluding observations. Their main role is one of recommendations on what could be done to improve human rights record of the country.

Although concluding observations are not of a binding nature, State usually considers them very carefully, at times organizing even conferences/platforms to discuss them in a broader context and with variety of actors. Their translated text is sent out to all the relevant institutions in the country to seek their opinion on the relevance of recommendations, as well as information on what steps are being considered to be taken in order to implement them or to adjust existing policy in line with them. Consequently, periodic progress information is requested to make sure that files are kept on top of the file piles and to monitor the progress of the implementation of the recommendations.

Indeed, majority of the concluding observations are put in one way or the other into implementation phase and some months later a periodic 'review' of the progress is undertaken. There are however also such recommendations with which state does not agree (e.g. necessity to introduce a separate crime of torture into the Polish criminal code²⁵) or finds as being based on misunderstanding of the real situation in the country. Lack of adjustment of the state policy in the areas indicated in the observations will however be fully explained in the next report. And even if no legislative steps will be undertaken, most probably specifically designed and targeted trainings and workshops will be organized on the issues that raised concerns for the treaty body (e.g. in the Polish law system there is a tendency to use general formulation of provisions and avoid, if possible, any casuistic listings. Also the prohibition of discrimination on any grounds is phrased in a most general way, so as not to exclude any possible ground. Still, when considering the Polish report, the Committee against Racial Discrimination and Human Rights Committee almost on every occasion raise the necessity, in their view, of introducing a listing of probable grounds for discrimination such as race, sexual orientation etc. Although state is not intending to change its law in this respect, special, awareness raising trainings are organized and internal guidelines on the topic are circulated.). It might also happen that implementation of certain observations even if already in progress, will be interrupted after parliamentary elections by new political option forming new government, which does not necessarily have to follow the policy of its predecessor or in fact, can have quite opposite view on certain issues.

²⁵ Pursuant to Article 11 of the Penal Code, the same act may constitute only one offence. If, however, an act has features specified in two or more provisions of penal law, the court shall sentence the perpetrator for one offence on the basis of all concurrent provisions. In such a case the court shall impose the penalty on the basis of the provision providing for the most severe penalty, which shall not prevent the court from imposing other measures provided for in law on the basis of all concurrent provisions. Moreover, pursuant to Article 12 of the Penal Code, two or more prohibited acts of conduct undertaken at short intervals with premeditated intent shall be regarded as one prohibited act; if the subject of the assault is a personal interest, the condition for regarding many acts as a single prohibited act, is the specific identity of the injured. Taking into account the above, and the fact that all elements of torture are already prohibited in Polish law, it is the official position of the government for the time being that there is no need to introduce a separate provision into the Criminal Code. Particularly, that due to the fact that ratified international treaties (such as Convention Against Torture) prevail over domestic law (although not Constitution) and if detailed enough can be directly referred to by judges in their judgements, definition of torture is already 'present' in Polish law system.

It has to be kept in mind however, that implementation does not depend solely on government action. In order to amend existing law or introduce a new one, parliamentary involvement is necessary, as only Parliament can pass an act. And being a political body, where many interests meet, it may not necessarily follow the line government would like to see. For example, some of the Human Rights Committee recommended and government proposed solutions included in the draft law on national minorities, were successfully blocked in Sejm (lower chamber of the Parliament) by a group of members of the parliament, and managed to get through only in the higher-chamber of the parliament (Senat).

Another relevant factor is the response of NGOs. It would be wrong to believe that treaty bodies' recommendations are always cherished by the entirety of the civil society. A series of letters written by one of the Pro-Life type NGOs, enraged by the point of the concluding observation raising the need for the liberalization of the law and practice of abortion and stressing the need for the widespread sexual education in public schools, addressed to the Prime minister, Minister of Justice as well as to the Human Rights Committee itself, proves contrary. Sometimes, it is also lack of cooperation from the side of vulnerable group that makes implementation of the recommendations if not impossible, then more difficult than expected.

One element that keeps dialogue between committee and government ongoing before submission of the next report is the practice of the treaty bodies to request progress information in writing on three to four issues indicated in the concluding observations as being subject of biggest concern, within one year of the issuance of the concluding observations. Willingness to fulfill those new obligations/tasks is a good indicator of whether the whole procedure initiated any changes at all.

One thing is sure: readiness to make all the information concerning the reporting procedure, where possible in Polish, available on the internet or in the form of a book publication (that includes also information on individual communications and specimen of complains), indicates state readiness to generate discussion on the report and also committee recommendations with the civil society in the country.

VI. CONCLUSIONS

Is there a constructive dialogue ongoing than in the UN system? I believe that this article proves that there is. There is no doubt that reporting is a two way communication process, with a huge amount of information exchanged and feedback given. A lot of work is put into it by both sides, as usefulness of the final outcome, i.e. concluding observations, in terms of addressing the real problems on the ground depends a lot on the quality of the state report and critical reading of the shadow reports. To ensure that a realistic picture of the human rights protection in the given state finds its way to the report, it is necessary for the report to be drafted by apolitical civil servants, and not policy makers, but at the same time to have highest possible political endorsement and support.

As was described earlier, the reporting circle constitutes an important element in improving human rights situation in the country. It creates opportunity to discuss issues, which probably would not be raised at the given

time. Thus wise recommendations of the treaty bodies are extremely helpful in marking the areas that need improvement and in initiating discussions and changes in those areas. Indeed, the need to give an answer to the treaty body can be used to put an issue on the public agenda.

However, much greater progress can be achieved, if the administrative side of the reporting process is run responsibly and on a wide scale, so as to involve the broadest circles of public administration and as many policy making people as possible. In fact, often those can be exactly the 'side effects' of the reporting procedure that will make the biggest difference on the ground.

What is needed however, is the confidence of both state representatives and of the members of the human rights treaty bodies, not to forget the NGOs, that they all have the same goal when they enter the discussion – the improvement of the human rights situation at home and discussion of how obstacles to such improvement can be overcome. That goal of the consideration of the report is to discuss whether certain policies and approaches can be improved and show possible solutions. That it is aimed to be a constructive dialogue and not a battlefield with state defending each and every word in its report.

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