

Justice delayed

Consequences of a dysfunctional petition system on individual communications against North- African States.

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Abstract

This paper is drawing on the author's experience as a human rights lawyer representing victims of torture, enforced disappearance, summary execution and arbitrary detention in the Middle East and North-Africa since 2014. The expansion of the right to individual petition in North-Africa has raised many hopes among lawyers, rights holders and civil society in these countries, particularly for victims who were not able to obtain redress via domestic remedies. However, in recent years, these hopes were replaced by a growing frustration: not only the implementation of treaty bodies' recommendations on individual cases was in itself a challenge, but also the growing case-log and lack of capacity of the petition unit led to lengthy delays, which in fine contradicted the very notion of "reasonable time" in the provision of redress for victims of human rights abuses.

However, in spite of these difficulties, these two treaty bodies had proven themselves to be key in providing redress to many victims of human rights violations in these two countries. They not only offered a much-needed recognition of the suffering of victims of torture and families of victims of enforced disappearance and extrajudicial killings but also led to the successful release of victims of arbitrary detention. Highlighting the importance of the petition system, the author ends with a series of propositions in order to address, as a matter of urgency, the issue of the backlog with the committees in the context of the 2020 review. Such measures are paramount in order to reinstate a positive dynamic between right-holders, civil society and treaty bodies, and strengthen the effectiveness of human rights law.

Introduction

The upcoming 2020 review of treaty bodies is an opportunity to face and solve the issues faced by right-holders in their access to remedy before the treaty bodies. While the periodic reviews of states constitute the main concern of the review and the debate, the challenges faced by the petition unit deserves even more consideration that unresolved issues have a direct impact on the suffering of victims of human rights violations.

This contribution focuses on two treaty bodies, the UN Committee against Torture and the Human Rights Committee and on two countries: Morocco and Algeria. The aim is to bring a practitioner's perspective keeping in mind the academic scholarship on the subject particularly, on the right to remedy and the effectiveness of international human rights law. It also aims at providing a victim-centred analysis of what a reform of the treaty bodies' petitions unit should encompass.

The subject of this paper is also to shed light on the issues at stake when it comes to individual complaints against countries suffering from poor rule law. In this sense, the study of their behaviour toward treaty bodies and rights holders in this context allows us to see how engagement in bad faith can lead to further victimisation of complainants. Put under the light of the challenges faced by the treaty body petition system, engagement in bad faith accentuates the victimisation of complainants.

The dire situation of the petition unit, which can be described as a “crisis” in the petition unit, affects not only the right holder's dignity but also the effectiveness of international human rights law. It is creating a crisis of confidence of rights holders and civil society in international human rights law norms and its mechanisms and in fine to the erosion of *jus cogens* principles.

1. Justice delayed: consequences on the right to remedy

While the reviews are important events for states and civil society, individual communications matter to individuals who have been harmed in their rights, their bodies, and dignity. The challenges that these procedures might have in performing their duties, therefore, have direct consequences on individuals who have been wronged and who expect the international human rights mechanisms to right this wrong.

Justice in this sense, is delayed by two main causes: first the length of the procedure, which is aggravated by a growing backlog of cases. Both issues are due, from our experience to a lack of capacity and support for the petition unit.

1.1. A lengthy procedure

The consequences of the lack of resources of the petition unit to deal with all the cases can be seen at different levels, from the submission to the adoption of view and their publication, as well as the implementation of the views.

The delays in the treatment of cases by the petition unit affect every stage of the procedure:

- 1) In the communication of the unit with states parties and others: for example, requests for additional information add to the lengthy delays;
- 2) In the management of registered cases: processing submission, requests, reminders, updating status, preparing and updating lists of priority cases for examination;
- 3) In informing the parties of a decision: views are sent to right-holders and published well after their adoption.

If we have a look at the individual complaints against Algeria before the HRCtte, the average amount of time elapsing between the submission of the communication to the adoption of the views are adopted is at least four to five years. These four/five year's period can be seen for the adoption of views until 2018, however, since 2018 we have seen a degradation leading to an increase in the delays. This timeframe is actually higher than the average time identified by the Geneva Academy in its report on ICPs – which reported an average time of two to three years¹.

These delays are also due to a lack of automatized follow-up of the cases. Lawyers submit regular follow-ups on cases that are still under consideration by the treaty bodies, in addition to the documents requested by the petitions unit. Since 2018, several issues started emerging including emails sent containing our comments on state replies, as well as follow-ups on important developments of the case, that were not registered. Documents and emails exchanges are not fluid and take more a lot of time for the secretariat to be considered. The lack of automatised system leads to several requests from the petition unit of the same document – despite the fact that it has already been sent.

These important issues highlight the necessity for the petition unit to use Information Technology tools in order for parties to have access to the state to the procedure online. It seems that the system adopted to follow on each case is ad hoc and depends on email boxes rather than effective and adapted CRMs.

¹ Claire Callejon, Kamelia Kamileva, Felix Kirchmeier, Treaty Bodies' Individual Communication Procedures: Providing Redress And Reparation To Victims Of Human Rights Violations, Report of the Geneva Academy, May 2019, p. 16.

Once views are adopted, their dissemination is not only avoided by the State, and therefore remain the sole burden of right-holders and CSOs, they are also incriminated in the case of Algeria. In the latter, clients who were the subject of communication and adoption of views favourable and published it on social media were arrested and prosecuted as the views were considered as “insulting” to the State party.² The notation system put in place on the follow-up on communications is certainly a good practice but which is not visible to civil society and victims themselves.

1.2. The issue of the backlog

The backlog of cases registered with these two treaty bodies has created a situation in which right-holders can neither access remedy at the domestic level – this absence of remedy being the very rationale of the communication – but are also *de facto* denied the only remaining form of remedy available to them, i.e. treaty body communications. This is all the more concerning that the examples of Morocco and Algeria show how states, which are unwilling to provide a remedy to victims of human rights violations domestically, can use the shortcomings of the petition system in bad faith in order to avoid responsibility.

There is an estimation of over than 1000 cases in the backlog of the treaty bodies and from 2015 to 2017 the number of individual communications pending review increased by 28% (from 769 to 977). However, by the end of 2017, the increase of individual communication pending review were by far the greatest for the HRCtee i.e. 71 %.

This situation has consequences on the our lawyers engage with clients before engaging any procedures before a treaty body, as part of our “informed consent” requirement. In this sense, lawyers need to explain that once the complaint is sent, the right holder has to expect to be placed in a long “waiting line” before having the case considered and receiving a case number.

The delays are also to be explained to the right-holders due to the way the treaty bodies function – they only meet for a number of weeks each year during which they go through periodic reviews and other matters. Right-holders are therefore expecting at each session their case to be dealt with and this puts an important pressure on lawyers to contact regularly the secretariat to ensure that their cases are in the agenda.

² Human Rights Council, Thirty-sixth session, 11-29 September 2017, Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, Report of the Secretary-General, A/HRC/36/31, 15 September 2017, para 20: On 31 March 2017, some mandate holders raised concerns with the Government over allegations of reprisals against Mr. Rafik Belamrania, founding member of the Association pour les enfants des disparus forcés en Algérie – Mish'al, for publishing on Facebook on 14 February 2017 the decision of the Human Rights Committee, regarding the summary execution of his father in 1995 (see A/HRC/36/25, DZA 2/2017).

2. An erosion of international human rights law?

One of the main larger and long-term issues that arise in view of what was described in the previous section is the effect on the effectiveness of human rights law standards and the protection of rights-holders. Having such obstacles in claiming rights at the highest level can only negatively affect the effectivity of human rights.

To these structural challenges, one has to add in the case of states unwilling to engage in good faith, the misuse of these shortcomings to make the claiming process as burdensome as possible and therefore punish and/or deter right-holders from claiming their rights. It also perpetuates the systemic inequality between rights-holders between those in countries in which there is a rule of law and countries in which rule of law is absent.

2.1. The (mis)use of the complaint procedures' deficiencies by States

An illustrative example is the misuse of delays before the CAT by the Moroccan authorities to intimidate and deter individuals at risk of extradition in violation of the *non-refoulement* principle from initiating a procedure under article 22 of the UNCAT. The authorities have therefore told individuals who were in detention while awaiting a CAT decision on the legality of their extradition, that they won't be released until a final decision is published. However, with delays running for more than five years, right-holders may find themselves in arbitrary detention for overly long periods of time.³

This situation has led to a significant drop in submissions from individuals at risk of being extradited in violation of the non-refoulement principle in Morocco in the past years. In 2017, several clients reported being summoned by the prosecutor authorities and told that the reason why they were kept in detention was the fact that they had introduced an individual complaint to the CAT. They were told that the authorities had no other choice but to maintain the complainant until the views are adopted and published by the CAT. Neither transferred nor released, complainants find themselves in a sort of legal limbo, kept in detention for an indefinite period of time, without any possibility to challenge the legality of the detention. The fear of being kept in indefinite

³ Working Group On Arbitrary Detention, 28 February 2017, Written submissions on the Draft Revised General Comment on the implementation of article 3, available online : <https://www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx>

detention is then used to put pressure on complainants to accept the transfer, even when this would lead to a violation of article 3. In practice, since detainees awaiting extradition would usually be detained in the same detention centres, the information would circulate quickly. After one complainant is summoned and told the reasons he/she is being kept in detention until the publication of the views, we would receive waves of calls from detainees wary of their own situation and asking for details on the status of their complaint.

States often require that the admissibility and the merits be considered separately in order to lengthen even more the procedure. This is notably the case of Algeria for complaints related to violations committed during the civil war: laws establishing amnesties are systematically used to argue against the admissibility of individual complaints on acts falling under the scope of such law. In this sense, we tackle this issue from the beginning by arguing for a single consideration of both. Despite the systematic common consideration of both admissibility and merits by the HRCtte, Algeria still requires a separate consideration.

2.2. What's in it for me? Consequences on the belief of right-holders in their rights to remedy

Managing expectations in this context is an almost impossible task. Rights-holders expect treaty bodies to help them obtain the appropriate redress when it has been impossible at the domestic level.

Explaining to clients the challenges of using this only remaining process available to obtain redress has to be done using incommensurable care and multiple caveats. In addition to the risk of reprisals, legal ethics commend that our lawyers explain that the case cannot be considered because of a backlog that puts more than a thousand other individuals like them before them, explain a process that takes a minimum of four-years before views are adopted, and then explaining that the conclusions are not necessarily implemented by the State party.

Effects on international human rights law should be seen at the individual and societal level. At the individual level, it remains particularly difficult to advocate for international law and human rights when the procedures that are supposed to reinforce them do not function properly. It gives the impression to those who are already vulnerable to violations due to the absence of respect protection of human rights by their government, that human rights and their international protection mechanisms are “not for them”.

It also reinforces the inequality between right-holders living in countries with versus without the rule of law. It was highlighted in the Geneva academy report, the highest rate of communication is against western states, with a low rate of decisions finding a violation of the treaty by the State

party.⁴ On the contrary, cases brought against countries in which rule of law is weak or inexistent, lead systematically to a decision in favour of the right-holder. While implementation remains a challenge in these countries, CSOs can build on these decisions in order to advocate for victims and push for reforms. However, another challenge is that local support networks are also unevenly distributed and lawyers are not well trained to both initiate proceedings and advocate for the implementation of views.

This lack of capacity and implementation is another issue that furthers this feeling that international human rights law cannot help victims obtain redress. Refusal to implement decisions can be sanctioned by treaty bodies through a system of grades in a follow-up grading system. However, the grading system did not have any effect on the implementation of views of the HRCtte by Algeria despite a downgrading.

3. Conclusion and Recommendations

In spite of these difficulties, these two treaty bodies had proven themselves to be key in providing redress to many victims of human rights violations in these two countries. They not only offered a much-needed recognition of the suffering of victims of torture and families of victims of enforced disappearance and extrajudicial killings but also led to the release of victims of arbitrary detention.

Furthermore, individual communications allow lawyers and CSOs to address not only individual situations but also patterns of violations and their causes. Measures, in order to avoid the repetition of violations, or to remedy a general situation, are therefore primordial. They constitute a powerful strategic tool to not only defend individuals but also change laws and institutionalised practices that violate international law.

These are reasons more to ensure that the petition system function in a way that at least does not perpetuate the inequalities already faced by rights-holders at the national level. If these treaty bodies function like quasi-judicial bodies, there should be an obligation incumbent on State parties to give them the means to perform in accordance with principles related to a fair and efficient judicial process. It is therefore primordial to remind States that their obligations to ensure the functioning of treaty bodies is an international obligation that entails taking the necessary financial and administrative measures.

⁴ Claire Callejon, Kamelia Kamileva, Felix Kirchmeier, Treaty Bodies' Individual Communication Procedures: Providing Redress And Reparation To Victims Of Human Rights Violations, Report of the Geneva Academy, May 2019, p 31.

In light of the issues faced in practice by right-holders and their lawyers, we would formulate the following recommendations:

- 1) First, the backlog needs to be cleared as a matter of urgency with external and temporary consultants if necessary;
- 2) Second, clearing the backlog needs to be complemented by adequate staffing to follow-up on the increase of cases under review;
- 3) Before increasing visibility, there is a need to primarily ensure that the petition system can handle additional cases and be able to meet the expectations of rights-holders. Increasing visibility and cases would only lead to an increase in the backlog and growing frustrations among rights-holders and their defenders;
- 4) There is an urgent need to create a professional registry that automates the reception and sending of documents that solely relies on staff. There is a need to modernise the structure: all tasks that can be automated through an adapted CRM should be taken off the shoulders of staff so that they can focus on the substance of cases;
- 5) Put strict time limits on the parties particularly on States – but take into account the fact that right-holders might not have the same means as states to follow the procedure;
- 6) Use Information technology in order for parties to have access to the state of the procedure at all stages.



MENA Rights Group is a Geneva-based legal advocacy NGO, focusing on the protection and promotion of fundamental rights and freedoms in the Middle East and North Africa. Adopting a holistic approach, we work at both the individual and structural level. We provide legal counselling to victims of human rights violations through recourse to international law mechanisms. In addition, we assess the human rights situation on the ground and bring key issues to the attention of relevant stakeholders to call for legal and policy reform.