

**UNITED NATIONS HUMAN RIGHTS COUNCIL
AND ITS MECHANISMS**

*O CONSELHO DE DIREITOS HUMANOS DAS NAÇÕES UNIDAS
E SEUS MECANISMOS*

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ABSTRACT

The distinction between legal and political mechanisms of monitoring and enforcing international human rights law is clear although it may not always appear to be the case specially to anyone who is not dealing with this subject-matter daily. The reason for the confusion comes from the essence of international legal institutions which do not have powers that are common in domestic jurisdictions. In this regard, sometimes political mechanisms play a part in international legal institutions that are not quite usual in their domestic counterparts. In this essay, I will explain where the distinction between these mechanisms is and why it is clear even though sometimes it seems to be the opposite. First, I will explain what the political and legal mechanisms of monitoring and enforcing international human rights law are. Second, I will examine where lies the distinction between them. Third, I will list the points of convergence between these mechanisms. In conclusion, I will finish by suggesting some guidelines that will help to identify the separation between legal and political mechanisms.

Keywords: Human rights. Monitoring. Enforcement of legal and political mechanisms.

RESUMO

A distinção entre mecanismos jurídicos e políticos de monitorização e aplicação do direito internacional em matéria de direitos humanos é clara, embora possa nem sempre parecer ser o caso, especialmente para quem não

lida diariamente com esse assunto. A razão para a confusão vem da essência das instituições jurídicas internacionais que não possuem poderes comuns nas jurisdições nacionais. A esse respeito, por vezes, os mecanismos políticos desempenham um papel nas instituições jurídicas internacionais que não é muito habitual nos seus homólogos nacionais. Neste estudo, explicarei onde está a distinção entre esses mecanismos e por que ela é clara, embora às vezes pareça ser o contrário. Em primeiro lugar, explicarei quais são os mecanismos políticos e jurídicos de monitorização e aplicação do direito internacional dos direitos humanos. Em segundo lugar, examinarei onde reside a distinção entre eles. Terceiro, listarei os pontos de convergência entre esses mecanismos. Para concluir, terminarei sugerindo algumas orientações que ajudarão a identificar a separação entre mecanismos jurídicos e políticos.

Palavras-chave: Direitos humanos. Monitoramento. Aplicação de mecanismos legais e políticos.

SUMMARY

1. LEGAL AND POLITICAL MECHANISMS OF MONITORING AND ENFORCING THE IHRL. 2. DISTINCTION BETWEEN LEGAL AND POLITICAL MECHANISMS OF IHRL. 3. POINTS OF CONVERGENCE BETWEEN LEGAL AND POLITICAL MECHANISMS OF IHRL. 4. CONCLUSION.

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1. LEGAL AND POLITICAL MECHANISMS OF MONITORING AND ENFORCING THE IHRL

The human rights global system was established after World War II due to a consensus that the tragedies which occurred during the conflict could not take place anymore. Although the idea of international human rights was not new, it gained traction while building a new world order after 1945. The key documents that established human rights as one of the foundations of this order are the Charter of the United Nations (UN) and the Universal Declaration of Human Rights (UDHR). These texts are the

starting point to understand the charter-based mechanisms and the treaty-based mechanisms of monitoring and enforcement of IHRL. As explained by Steven Wheatley, “[o]nce it was accepted the human rights provisions in the Charter created legal commitments for Member States, the next step was to explain the content of the obligation to promote human rights”¹.

Despite using the language of international law, the charter-based mechanisms “are often determined by circumstances on an ad hoc basis; their outcome is frequently influenced by political considerations; and result in resolutions and recommendations which derive their authority mainly from their political significance”². The UDHR turned into concrete terms what was the idea of human rights law. It “marked a turning point in international human rights protection due to its comprehensive content and wide geographic remit”³. The UN Charter specifically mandated the Economic and Social Council (ECOSOC) to set up a commission for the promotion of human rights⁴ which “operated from 1946 until 2005, and its work can be divided into two main areas: standard-setting and the protection and promotion of human rights”⁵.

The Commission on Human Rights was the starting point of the charter-based mechanisms where it was understood that all States have human rights obligations as members of the UN. However, in the beginning the UN “gave priority to human rights promotion actions, such as drafting the international human rights instruments, and repeatedly rejected the notion that it had a protection mandate”⁶ which was known as the “no power to act doctrine”. In this regard, ECOSOC Resolutions 1235 (1967) and 1503 (1970) represented a turning point in the mandate of the UN regarding human rights for they “made clear that some human rights issues did not fall within the reserved domain of UN Member States, but they drew a clear distinction between the rights in the UDHR and the limited circumstances

¹ WHEATLEY, S. **The idea of International Human Rights Law**, 2019, p. 69.

² KÄLIN, W.; KÜNZLI, J. **The Law of International Human Rights Protection**, 2019, p. 192.

³ O’BOYLE, M.; LAFFERTY, M. General Principles and Constitutions as Sources of Human Rights Law. *In*: SHELTON, D. (ed.). **The Oxford Handbook of International Human Rights Law**, 2015, p. 195.

⁴ United Nations Charter, article 68.

⁵ FREEDMAN, R. The Human Rights Council. *In*: MÉGRET, E.; ALSTON, P. (ed.). **The United Nations and Human Rights**, 2020, p. 183.

⁶ LIMON, M.; POWER, H. **History of the United Nations Special Procedures Mechanism: Origins, Evolution and Reform**, 2014, p. 4.

in which the Organization would intervene, where there was evidence of ‘gross and systematic violations’”⁷.

Finally, the establishment of the Human Rights Council by Resolution 60/251 marked the last chapter of the charter-based mechanisms. The Council due to its universal reach represents the political expression of the United Nations human rights protection through the charter-based mechanisms: the Universal Periodic Review and the Special Sessions, besides the special procedures of the Council for being “a unique body, combining the most intensely political elements, a high degree of reliance on expertise, and in situ human rights investigations in order to fulfil its duties to protect, to promote and to develop international human rights law”⁸.

The tools of the Human Rights Council to address human rights violations have global reach. The Universal Periodic Review is a mechanism based on dialogue in a manner that the State under review submits itself to the evaluation of other States regarding its human rights obligations. Even though international law maybe the starting point of the constructive dialogue, it goes beyond the law since recommendations regarding human rights policies are often produced. According to Resolution 5/1 the UPR should “[b]e a cooperative mechanism based on objective and reliable information and on interactive dialogue”⁹.

In turn, the special sessions of the HRC, “may focus on any grave or crisis human rights situations, either country-specific or thematic”¹⁰ and, finally, special procedures mandate holders are experts in their individual capacity who may address any subject-matter according to their mandate. The mechanism covers “all UN Member States, unlike at treaty bodies which only deal with states party to the relevant treaty”¹¹. The Human Rights Council also has a complaint procedure which is not designed to deal with individual cases¹² but rather “to address consistent patterns of gross and

⁷ WHEATLEY, S. **The idea of International Human Rights Law**, 2019, p. 88.

⁸ FREEDMAN, R. The Human Rights Council. *In*: MÉGRET, F.; ALSTON, P. (ed.). **The United Nations and Human Rights**, 2020, p. 181.

⁹ UNITED NATIONS. Resolution A/HRC/RES/5/1, par. 3(b), 2006.

¹⁰ FREEDMAN, *op. cit.*, p. 225.

¹¹ *Ibidem*, p. 228.

¹² KÄLIN, W.; KÜNZLI, J. **The Law of International Human Rights Protection**, 2019, p. 242.

reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances”¹³.

Treaty-based mechanisms, on the other hand, serve as the legal tools for monitoring and enforcing IHRL. They “follow detailed and strict procedural rules, exclusively apply the substantial guarantees of the treaty concerned; and, depending on the treaty, result in full-fledged judgements (regional courts) or decisions or conclusions with considerable quasi-judicial authority (UN treaty bodies)”¹⁴. These mechanisms are the committees responsible for monitoring the core UN human rights treaty system and the human rights courts and even the International Court of Justice. The Committees basically have five functions:

[...] first, review of reports that states undertake to submit after becoming party to the treaty; second, at least implicitly, general comments on the nature and scope of the treaties’ provisions; third, interstate complaints; fourth, individual complaints; and fifth, inquiries into general practices that violate the respective treaty¹⁵.

The views and opinions taken in litigation procedures (individual and interstate complaints)¹⁶ in treaty-bodies are known as quasi-judicial mechanisms for they are not legally binding even though some authors “argue the quasi-judicial nature of the mechanisms means the outcomes have precedential value”¹⁷. The International Court of Justice has expressed its own view about the legal nature of opinions adopted by treaty-bodies by saying that:

[...] [a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that

¹³ UNITED NATIONS. Resolution A/HRC/RES/5/1, par. 85, 2006.

¹⁴ KÄLIN, W.; KÜNZLI, J. **The Law of International Human Rights Protection**, 2019, p. 192.

¹⁵ RODLEY, N. S. The role and impact of treaty bodies. *In*: SHELTON, D. (ed). **The Oxford Handbook of International Human Rights Law**, 2015, p. 626.

¹⁶ KÄLIN, KÜNZLI, *op. cit.*, p. 193.

¹⁷ WHEATLEY, S. **The idea of International Human Rights Law**, 2019, p. 115.

was established specifically to supervise the application of that treaty¹⁸.

The decisions issued by regional courts such as the Inter-American Court of Human Rights and the European Court of Human Rights, by their turn, are legally binding on States that are parties in a litigation procedure which means that they have a legal obligation to comply with the outcomes of judgements. The biggest distinction between the legal phase and the political phase of procedures is in the implementation of decisions.

2. DISTINCTION BETWEEN LEGAL AND POLITICAL MECHANISMS OF IHRL

The procedures before quasi-judicial and judicial bodies are regulated by law until the implementation of opinions or views and decisions. In the case of treaty-bodies, “implementation has become one of the Achilles heels of complaints procedures given the prevalence of partial or complete non-compliance”¹⁹. Since “the UN system has no political organ with a mandate to follow up treaty body decisions”²⁰. In order to help the implementation of its views and opinions, the Human Rights Committee has issued a General Comment establishing that “[i]t is to be noted that failure by a State party to implement the Views of the Committee in a given case becomes a matter of public record through the publication of the Committee’s decisions, inter alia, in its annual reports to the General Meeting”²¹.

The execution of judgements is also the subject of political debates specially regarding pressures and sanctions. In the European system of human rights, “[t]he Committee of Ministers is the organ of the Council of Europe which is alone charged with the task of supervising the execution of these judgements”²². There are some sanctions that the Committee may take but “the ultimate sanction available to the Committee is the threat of expulsion

¹⁸ INTERNATIONAL COURT OF JUSTICE. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), Merits, Judgement, ICJ Rep 2010, p. 639, par. 66. WHEATLEY, S. **The idea of International Human Rights Law**, 2019, p. 115.

¹⁹ BANTEKAS, I.; OETTE, L. **International Human Rights Law and Practice**, 2016, p. 323.

²⁰ KÄLIN, W.; KÜNZLI, J. **The Law of International Human Rights Protection**, 2019, p. 218.

²¹ UNITED NATIONS. CCPR/C/GC/33, 25 June 2009, par. 17

²² WHYTE, R. C. A.; OVEY, C. **The European Convention on Human Rights**, 2010, p. 52.

from the Council of Europe under Articles 3 and 8 of the Council's Statute"²³. Article 3 of the Statute of the Council of Europe establishes that "[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms [...]"²⁴ and Article 8 says that "[a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation [...]"²⁵.

In this topic, the Inter-American system is different from its European equivalent since it "does not contemplate compliance oversight by a Committee of Ministers. Instead, the Inter-American Court has jurisdiction to monitor compliance with its own judgements until a State fully complies with its orders"²⁶. The cases before the Inter-American Court of Human Rights (IACHR) have a supervision phase which is conducted by the Court itself. The reason why such supervision is important is that "[i]f its decisions are not implemented in State domestic systems, the protections of the Inter-American human rights system are merely illusory and more akin to declaratory judgements"²⁷. According to the American Convention on Human Rights:

[...] [t]o each regular session of the General Meeting of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations²⁸.

The OAS/GA in this regard:

[...] does not take action to influence those States that have not complied, but it has passed a resolution informing State Parties that they must deliver the information on compliance to the Court in a timely manner for the Court to comply with its obligation to

²³ WHYTE, R. C. A.; OVEY, C. **The European Convention on Human Rights**, 2010, p. 62.

²⁴ Statute of the Council of Europe, Article 3.

²⁵ Statute of the Council of Europe, Article 8.

²⁶ CAVALLARO, J. L. *et al.* **Doctrine, Practice, and Advocacy in the Inter-American Human Rights System**, 2019, p. 485.

²⁷ PASQUALUCCI, J. M. **The Practice and Procedure of the Inter-American Court of Human Rights**, 2013, p. 303.

²⁸ American Convention on Human Rights, article 65.

inform the General Assembly of State compliance with its judgements²⁹.

Such Resolution also expresses that “the judgments of the Inter-American Court of Human Rights are final and may not be appealed, and that the states parties to the American Convention on Human Rights undertake to comply with the decisions of the Court in all cases to which they are party”³⁰. Thus, even though the General Assembly would not take any concrete action towards the implementation of decisions issued by the IACHR, the mere mention that a State-party is not complying with these decisions, brings political pressure on such a State.

Thus, the biggest distinction between legal and political mechanisms of IHRL is based on the fact that both use international law as a source for their decisions but the former still needs support from political bodies to implement them when there is non-compliance since the international order is decentralized whilst the latter can rely on a higher degree of pressure since its decisions are political from the very beginning. A decision issued by regional courts or treaty-bodies if is not implemented by the State-party can be the object of political pressure, but the result of such pressure will depend on the actors and the subject-matter involved whilst a decision taken by a political body such as the Human Rights Council is likely to get more attention as it is the result of dialogue between States and other stakeholders.

3. POINTS OF CONVERGENCE BETWEEN LEGAL AND POLITICAL MECHANISMS OF IHRL

Lack of compliance of international human rights norms and decisions by States is what approaches legal and political mechanisms. There are several reasons why States follow international rules. The normative behavior explains that “[a]n actor follow a law or norm when compliance is motivated by the inherent validity of the norm or law”³¹ whilst the

²⁹ PASQUALUCCI, J. M. **The Practice and Procedure of the Inter-American Court of Human Rights**, 2013, p. 305.

³⁰ ORGANIZATION OF AMERICAN STATES. Resolution AG/RES. 2292 (XXXVII-O/07), 2007, par. 3

³¹ SCICLUNA, N. **The Politics of International Law**, 2021, p. 94.

instrumentalist behavior explains “an actor merely conforms to a law or norm when compliance is motivated by other considerations, such as the costs and benefits of compliance/non-compliance”³². Norm internalization is an excellent starting point to measure compliance in the sense that “[t]he proclamation of certain standards at the international level, whether via formally codified agreements or soft law instruments, may also be picked up by domestic actors, which then put pressure on their governments to comply”³³.

In this scenario, organized civil societies can pressure domestic actors in the sense making it more difficult for their States to disregard international decisions and therefore, there is no need to go into political mechanisms. However, in the case of States that do not have well organized civil societies, the international community must be involved to put pressure on these States to obtain compliance with international decisions. It can do so using some tools such as positive or negative inducements which are incentives given to States to comply with international legal decisions.

Positive inducements “may take various forms, including foreign aid, preferential loans, military cooperation, access to trade or other economic benefits”³⁴. Negative inducements, on the other hand, “may include sanctions, expulsion from international organizations, exclusion from the benefits of participation in international regimes, the breaking off of international relations, and even the use of force”³⁵. Also, the power of reputation plays an important role in compliance. A State which is perceived by the international community as follower of international decisions in human rights will find it easier to make deals in other areas of international law such as trade law. *A contrario sensu*, “an actor with a poor reputation for compliance with international agreements may find it harder to strike new agreements”³⁶. However, it is still argued whether reputation in human rights affects other areas as “China’s poor human rights record does not seem to have seriously impeded its economic relations with other states”³⁷.

³² SCICLUNA, N. **The Politics of International Law**, 2021, p. 94.

³³ *Ibidem*, p. 102.

³⁴ *Ibidem*, p. 95.

³⁵ *Ibidem*, p. 95.

³⁶ *Ibidem*, p. 98.

³⁷ *Ibidem*, p. 98.

In other words, IHRL legal decisions tend to reach a certain point and if they are not complied with by States, it is the role of IHRL political mechanisms to force compliance by using inducements or by appealing to the power of reputation.

4. CONCLUSION

Decisions issued by legal and political mechanisms of monitoring and enforcing the IHRL must be complied with by State parties. However, since international law is decentralized, compliance is not always a reality. IHRL has evolved since the days of the “no power to act” doctrine and nowadays, these bodies establish human rights standards that no country can disobey although sometimes even decisions originated from legal mechanisms are not followed and here lies the biggest distinction between international and domestic legal orders: the fact that the former needs support from political bodies to implement its decisions whilst the latter prescinds such support.

The reason why such distinction does not seem to be clear sometimes is because both mechanisms use international law as a source to sustain their decisions but whilst legal mechanisms have a stricter mandate to confront the acts attributable to the State and check whether they violate the respective treaty, political mechanisms go further by maintaining a permanent dialogue with States, including those responsible for human rights violations. The global human rights system as it stands nowadays has two roads that go to the same direction but choosing different paths. The legal and political paths seek the same goal, but they adopt different strategies which sometimes are intertwined, hence the need to distinguish them.

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