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How to cite this publication

Please cite the final published version:

Neumann, L., & Van Ho, T. (2017). A Tribute to Professor Sir Nigel Rodley, KBE: Reflections on 50 Years of the Covenant on Civil and Political Rights. *Nordic Journal of Human Rights*, 35(3), 173-185. DOI: 10.1080/18918131.2017.1369224

Publication metadata

Title:	A Tribute to Professor Sir Nigel Rodley, KBE: Reflections on 50 Years of the Covenant on Civil and Political Rights
Author(s):	Neumann, L., & Van Ho, T.
Journal:	<i>Nordic Journal of Human Rights</i> , 35(3), 173-185
DOI/Link:	https://doi.org/10.1080/18918131.2017.1369224
Document version:	Accepted manuscript (post-print)

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**A Tribute to Professor Sir Nigel Rodley, KBE:
Reflections on 50 Years of the Covenant on Civil and Political Rights
Lauren Neumann* and Tara Van Ho****

The INTRAlaw colloquium celebrating the 50th anniversary of the two International Covenants on human rights was opened by Professor Sir Nigel Rodley, KBE. He was the natural choice for this role; when the International Covenant on Civil and Political Rights (ICCPR)¹ entered into force on 23 March 1976, Nigel was already a force for human rights as the first legal director of Amnesty International.² For the first forty years the Covenant was in force, Nigel – who despite being a man with many titles preferred to eschew formalities – played a series of important roles in its development. He has been rightly recognised as a founding father of international human rights law.³ During his opening remarks at the 2016 colloquium, he extrapolated lessons learned from his time at Amnesty International, during which he championed the passage of the Declaration against Torture⁴ and later the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,⁵ from his time as the second UN Special Rapporteur on Torture, and finally from his fifteen years as member and Chair of the Human Rights Committee (the Committee).⁶ His colloquium address was well-articulated, inspiring, and hopeful. It was with great sadness that we learned of Nigel's passing on 25 January 2017.⁷

We want to honour Nigel's contribution to the promotion of and respect for human rights, and to reflect on his address at the colloquium. Given the circumstances, and as work on this Special Issue was in its relative infancy in January 2017 this could unfortunately not be in the form of Nigel's own words through a directly authored contribution. We instead offer here a brief reflection on his comments regarding the development of the

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** Post-doctoral research fellow, INTRAlaw, Department of Law, Aarhus University. Van Ho was fortunate to have had Nigel as her LL.M. supervisor and the chair of her Ph.D. board at the University of Essex. At the time of his death, they were editing the *Research Handbook on Human Rights: Institutions and Enforcement*, which is scheduled to be published by Elgar in 2018. Email: tvh@law.au.dk.

¹ 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976.

² See Amnesty International, 'Nigel Rodley: 1941-2017' (26 January 2017), available at <https://www.amnesty.org/en/latest/news/2017/01/nigel-rodley-1941-2017/> (accessed 9 March 2017).

³ Geoff Gilbert, et al., 'Professor Sir Nigel Rodley Obituary' University of Essex (22 March 2017), available at http://www.essex.ac.uk/news/event.aspx?e_id=12022 (accessed 30 March 2017).

⁴ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," Adopted by General Assembly resolution 3452 (XXX) (9 December 1975).

⁵ Geoffrey Robertson, 'Sir Nigel Rodley obituary: Human Rights Lawyer Committed to Eradicating Torture' The Guardian (2 February 2017), available at <https://www.theguardian.com/law/2017/feb/02/sir-nigel-rodley-obituary> (accessed 30 March 2017). See, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/36, UN Doc. A/39/1 (1984), entered into force 26 June 1987.

⁶ Gilbert (n 3).

⁷ Robertson (n 5).

Committee's work, its relationship to the other treaty bodies and special procedures, the challenges it currently faces, and proposals for reforming the current treaty body system. Naturally, we neither presume to speak for Nigel nor offer a comprehensive account of his comments. Instead, this piece is perhaps best understood in artistic terms: we offer an impressionist's adaptation of a classic photograph, and as such our reflections should not be attributed to the original artist, though we endeavour to be true to Nigel's writings and legal opinions. Where appropriate, we refer to his other publications to support our understanding of his comments. We conclude this piece by reflecting on Nigel's commitment to a stringently accurate, rather than aspirational, approach to international law.

I. The Development of the Covenants and the Human Rights Committees

A. Development of the Covenants – fifty years on

In 1948 the Universal Declaration of Human Rights, the first of the three documents that would eventually make up the so-called international bill of rights, was adopted.⁸ It took another 18 years before the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹ were opened for signature in 1966, and yet another ten years before these two Covenants entered into force. The First Optional Protocol to the ICCPR, which allows for individual complaints to be made against state parties, followed the same timeline, although it has significantly fewer ratifications.¹⁰ The Second Optional Protocol on abolishing the death penalty was opened for signature in 1989 and entered into force in 1991. The ability of the Committee on Economic, Social and Cultural Rights (CESCR) to accept individual complaints had an even longer and more difficult gestation. The CESCR was not created by the treaty it oversees, but was established by a political body - the Economic and Social Council - to oversee state reports and develop general comments.¹¹ When the Optional Protocol to the ICESCR finally entered into force in 2013, it ensured the justiciability of economic, social and cultural rights under international law for the first time since the adoption of the ICESCR 47 years prior.

On the 50th anniversary of the drafting of the Covenants, this timeline gives food for thought. On the one hand, it demonstrates – in a condensed form – the ongoing development of the international human rights regime; the ripening fruits of a seemingly endless struggle to enshrine in treaties and effectively enforce the human rights norms found in international law.¹² On the other hand, the timespan over which the human rights regime has developed does not demonstrate rapid development and firm, unequivocal commitment, but rather indicates that international human rights law suffers

⁸ UNGA Res. 217A (III), UN Doc. A/810 at 71 (1948).

⁹ 993 UNTS 3, adopted 16 December 1966, entered into force 3 January 1976.

¹⁰ 115 ratifications as of 15 March 2017.

¹¹ See, Economic and Social Council resolution 1985/17, UN Doc. E/RES/1985/17 (28 May 1985) at para f.

¹² For a more detailed consideration see Nigel Rodley, 'The Universal Declaration of Human Rights: Learning from Experience' and especially p. 6 for a conclusion as to the possible future of international human rights protection.

many challenges, *inter alia*, ‘the dead hand of tradition prevent[ing] the United Nations from moving beyond the standard-setting phase to one of implementation’.¹³

Whether 50 years of the Covenants was an occasion for celebration or despair (or a state in between) was a running theme throughout INTRAlaw’s 2016 human rights colloquium. The development and enforcement of norms and the new directions taken in the protection of human rights over the past decades were discussed and debated. As a long-serving member of the Human Rights Committee, Nigel was in a unique position to discuss the development and role of the Committee throughout its 40-year history. In his presentation, he chose to focus on three of the Committee’s key functions (a structure we will repeat here): reviewing state reports, issuing General Comments, and considering individual complaints.

B. The Human Rights Committee

The review of state reports is a key role of the Human Rights Committee. States are required to submit regular reports for review, after which they enter into oral dialogue with the Committee regarding the content of the report and potential concerns, and finally the state receives a written report of the Concluding Observations and recommendations of the Committee.¹⁴ As is now well-known, this process has evolved in response to challenges encountered by both states and the Committee. For example, depending on the seriousness of the reports and the concerns of the Committee, states are now granted more flexible reporting timelines of between three and six years in order to aid in reducing the so-called reporting burden.¹⁵ Furthermore, in order to streamline the dialogue process and ensure that the limited time available for oral discussion (between two to three half-days) is best utilised, the Committee now provides a list of issues (LOI) to states. The LOI is designed to alert state delegations to the areas of concern prioritised by the Committee for the oral dialogue.¹⁶

Further flexibility has been shown by the Committee over the years with regard to temporal challenges of reporting. For a variety of reasons not all states submit reports to the Committee despite having committed to do so by signing and ratifying the ICCPR. To combat this and ensure the universality of the reporting process, the Committee has undertaken reviews of states parties absent a report.¹⁷

The nature of General Comments,¹⁸ a second key function of the Committee, has also changed over the years. General Comments were initially the only pronouncements made by the Committee, whereas the country-neutral General Comments are now issued alongside country-specific comments and recommendations in the form of Concluding

¹³ Ibid., 2.

¹⁴ Nigel S. Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed.) *The Oxford Handbook of International Human Rights Law*, (Oxford, United Kingdom; New York, NY: OUP 2013) 627–629.

¹⁵ Ibid., 627.

¹⁶ Ibid., 629–630.

¹⁷ Ibid.

¹⁸ ICCPR art 40(4).

Observations responding to State Reports.¹⁹ In addition, the content of General Comments has changed in accordance with developments in international law and norms.

General Comments are issued to the state party constituency as a whole, providing guidance as to the Committee's interpretation of the ICCPR and its expectations of state behaviour.²⁰ They are both based on and inform state periodic reports/Concluding Observations and individual complaints. Once adopted and issued, General Comments 'effectively amount to something close to a codification of evolving practice' in international law.²¹

The time taken to produce a General Comment has increased significantly since the work of the Committee began. As an example, the current work on a new General Comment on article 6 ICCPR (the right to life) has already stretched beyond two years. The Committee's first nine General Comments were issued over a two-year period. There can be any number of reasons for this. As noted in Nigel's address, there is an increased volume of practice in the area, debate as to the extent of the right to life, and the influence of an increasingly close relationship between the previously distinct civil and political rights, and economic, social, and cultural rights.

Furthermore, the Committee has developed an individual complaints mechanism. The First Optional Protocol to the ICCPR allows for individual complaints to the Human Rights Committee, and the Committee has been empowered to receive such complaints since 1976 (with the entry into force of the first Optional Protocol). In his colloquium address, Nigel considered the 'common law nature' of the committee's work with regard to individual complaints. He was referring to the step-by-step way in which the jurisprudence of the Committee has developed and the rarity of sudden or radical change in the Committee's position on the interpretation and application of the ICCPR. Such an approach clearly provides stability and predictability in the work of the Committee – a rare thing in the sometimes volatile world of human rights law and politics.

C. Relationship between treaty bodies and special procedures

There has been a proliferation of bodies, procedures, and initiatives aimed at reaching a seamless and comprehensive international system for human rights protection. As with any such expansion, however, questions can be raised as to whether 'more' is 'better' and how the various bodies can and should work together. These questions are too large and complicated to be dealt with comprehensively here, however some general points can be made.

Nigel made clear that the treaty bodies and UN Special Procedures could indeed work together effectively. It should be recognised that the historical and political background against which the different bodies were created is significant when considering both their role and even their existence in the first place. While continually expanding the number

¹⁹ Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 628, 631.

²⁰ Ibid., 631.

²¹ Ibid.

of experts and expert groups working on a particular issue may lead to a complex and, at times, unwieldy system of protection, such development is frequently the result of or a reaction to a political or practical challenge in ensuring effective international protection.²² This explanation is not intended as justification for inefficiency or political stonewalling, but may partially explain the complexity of the system and demonstrate the realistic and persistent approach Nigel took to international human rights law and the regimes established to protect it.

That the human rights regime is complex is not enough to render it useless. On the contrary, multiple expert voices raised in unison on a particular issue can have a more significant impact than just one.²³ The ‘thematic machinery’²⁴ of the human rights system – including Special Rapporteurs, Working Groups, and the treaty bodies, has given focus, expertise and impetus to the different situations in which human rights may be at risk. This is arguably to the benefit of the system as a whole. Similarly, the development of international criminal law and its associated mechanisms (including the *ad hoc* criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the International Criminal Court) has strengthened the protection of human rights in fighting impunity and strengthening transitional justice initiatives.²⁵ Further, as Nigel noted in 2008, ‘[i]t is significant that the only crimes currently indictable before the Court are what may be considered human rights crimes: genocide, crimes against humanity, and war crimes’.²⁶ While this is a bold statement that could be debated at length, the development of international courts was undeniably influenced by the intersection of international human rights, humanitarian, and criminal law, particularly when it comes to the protection of civilians.

D. Cooperation with civil society

With regard to the work of the Committee, Nigel expressed great appreciation for the work and contribution of civil society and non-government organisations (NGOs).

The Human Rights Committee uses a wide range of resources available to it in reviewing state reports, issuing General Comments, considering individual complaints, assessing and being alerted to particular situations in individual states. Nigel recognised that non-government organisations are ‘key sources of information’,²⁷ and their determination to defend human rights is necessary in securing and protecting rights for others.²⁸ The cooperation between NGOs and UN treaty bodies can also be seen in the role NGOs play

²² See for example Rodley, ‘The Universal Declaration of Human Rights: Learning from Experience’ (n 12).

²³ Ibid., 3–4; Nigel S. Rodley, ‘UN Treaty Bodies and the Human Rights Council’ in Helen Keller & Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 326.

²⁴ Rodley, ‘The Universal Declaration of Human Rights: Learning from Experience’ (n 12) 2.

²⁵ Ibid., 4–5.

²⁶ Ibid., 4. It should be noted that the crime of aggression is now also within the jurisdiction of the International Criminal Court.

²⁷ Nigel Rodley, ‘Securing Redress and Overcoming Impunity – Some Reflections’ (2012) 16(5) *The International Journal of Human Rights* 692; see also Rodley, ‘The Role and Impact of Treaty Bodies’ (n 14) 628–630.

²⁸ Rodley, ‘The Universal Declaration of Human Rights: Learning from Experience’ (n 12) 6.

in advancing individual complaints to the committees and championing both specific and general enforcement of human rights obligations found in the various human rights treaties.²⁹

II. Challenges to Committee work

There is a certain fragility to the impact of the work of the Human Rights Committee due to legal, political, and practical challenges. Legally, the Committee's mandate does not allow it to issue binding conclusions, either through the state reporting process, General Comments, or in its review of individual complaints. The lack of binding and enforceable substantive determinations³⁰ limits the effectiveness of the Committee's role as guardian of the ICCPR.³¹ Politically, the Committee has faced state reticence to accept and act on its recommendations, while the UN General Assembly has, albeit rarely, undermined the position of the Committee in a way that, if repeated, could make the Committee's work more difficult. Practically, the members of the Committee are tasked with a significant workload but with limited resources. Each of these challenges is discussed briefly here before potential and actual reforms to the Committee's work are addressed.

A. Legal challenges

Even with the existence, purpose, and work of the Human Rights Committee, '[a]ny reader familiar with human rights work will know that . . . in most cases, the only international sanction for human rights violations is in the verdict of the court of public opinion.'³² The Committee's mandate does not give it the power to enforce its decisions, either through the state reporting process or when reviewing individual complaints, although its decisions are sometimes incorporated into domestic judicial decisions.³³ Moreover, the International Court of Justice, among other international bodies, has relied upon the Committee's decisions in developing human rights jurisprudence.³⁴

The Committee's legal limitations were intentionally crafted by states unwilling to accept significant oversight over issues that had been viewed as a matter of internal affairs for

²⁹ See generally Rodley, 'Securing Redress and Overcoming Impunity – Some Reflections' (n 27). While NGOs cannot file individual complaints with the Human Rights Committee, they can work with victims to support the bringing of such complaints.

³⁰ See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 639; 'in certain procedural matters, [the treaty bodies'] decisions are binding.'

³¹ Rodley, 'UN Treaty Bodies and the Human Rights Council' (n 24) 344.

³² *Ibid.*, at 326.

³³ As Nigel pointed out, however, the fact that the Committee's determinations had the "formal status" of recommendations 'does not dispose of the matter', as the Committee's work can 'contribute to community expectations of appropriate state behavior under human rights treaty obligations' and are often subsequently incorporated into the determinations of judicial bodies whose judgments are binding. See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 639-640.

³⁴ See e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ reports 2004, p. 136 (9 July), at paras 109-110.

which international intervention was inappropriate.³⁵ As Nigel wrote early in his career, '[t]he possibility of meaningful international action in the field of human rights has always stumbled against the obstacle of "domestic jurisdiction".'³⁶ A great deal of uncertainty hung over the relationship between the UN's remit in regards to human rights and article 2(7) of the organisation's Charter, which noted that the Charter does not 'authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.'³⁷ In 1950, the late Sir Hersch Lauterpacht argued that states could consent to human rights investigations and oversight by the UN, while the organisation's Charter did not prohibit even non-consensual 'investigation[s] conducted outside [a state's territory] and not requiring its co-operation.'³⁸ Still, states and the leadership of the UN were initially reluctant to exercise such oversight, especially absent state consent.³⁹ By allowing states to consent to oversight, and to consent to the recommendations subsequently made by the treaty body, the role of the Committee could balance the interest of the UN in protecting human rights with the limits imposed on its mandate under the Charter.⁴⁰

The narrow legal mandate has posed a variety of challenges for the Committee and at the same time limited the impact of its work. In its early years, this included a reticence to adopt conclusions about state reports,⁴¹ and, by some members, to utilise information provided by NGOs.⁴² The most problematic legal challenge currently, which is also partially a political challenge, remains the inability of the Committee to force states to comply, either with its request for reports or with its conclusions and recommendations. Consequently, the real and practical power of the Committee comes not from the mandate itself, but from the moral authority with which it speaks, from that court of public opinion that serves as the primary means for international justice,⁴³ and from the willingness of judicial bodies to incorporate the work of the Committee into binding determinations.⁴⁴

B. Political challenges

Committee members are elected by states parties, but report to the General Assembly.⁴⁵ The meetings of states parties occur before the Human Rights Committee issues its report

³⁵ See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 621; Rodley, 'UN Treaty Bodies and the Human Rights Council' (n 24) 322.

³⁶ Nigel S. Rodley, 'The United Nations and Human Rights in the Middle East' (1971) 38 Social Research 218.

³⁷ Charter of the United Nations, 1 UNTS XVI (24 October 1945), art 2(7); Rodley, 'The United Nations and Human Rights in the Middle East' (n 37) 218-219.

³⁸ See Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons Limited: London, 1950) 232. See also Rodley, 'The United Nations and Human Rights in the Middle East' (n 37) 219.

³⁹ See Rodley, 'The United Nations and Human Rights in the Middle East' (n 37) 218-221.

⁴⁰ Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 621-622.

⁴¹ Rodley, 'UN Treaty Bodies and the Human Rights Council' (n 24) 333. Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 628.

⁴² Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 628.

⁴³ Rodley, 'UN Treaty Bodies and the Human Rights Council' (n 24) 326.

⁴⁴ See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 639.

⁴⁵ Rodley, 'UN Treaty Bodies and the Human Rights Council' (n 24) 332.

to the General Assembly.⁴⁶ Consequently, the regular meeting of states parties to the ICCPR never engages with the Committee's reports, or by extension its General Comments, Concluding Observations on state reports, and conclusions and recommendations regarding individual complaints.⁴⁷ 'Meanwhile, the General Assembly similarly ignores the country-specific substance of the reports,' perhaps because it could be understood as inappropriate for the General Assembly, which includes states not party to the treaty, to comment on the compliance of states with obligations not all the members have undertaken.⁴⁸ This renders 'the essential relationship' in treaty discussions to the one 'between the treaty bodies and each individual state',⁴⁹ which can have benefits, but which can also blunt the international pressure necessary for the Committee's conclusions to have significant force.

While the General Assembly has generally been positive towards the Committee, it has not always been so.⁵⁰ One troubling incident found the General Assembly removing the 'traditional language of welcoming General Comments of treaty bodies', failing even to take note of the Committee's General Comment No. 33⁵¹ on the obligations of states parties under the Optional Protocol to the ICCPR.⁵² The General Assembly is not the UN most routinely engaged with issues of human rights.⁵³ While the Human Rights Council, and its predecessor the Commission on Human Rights, 'have been wholly supportive of the work of the treaty bodies,' Nigel expressed concern that were the General Assembly to become dismissive of the work of the treaty bodies, this could affect the relationship between the three bodies, ultimately undermining and negatively impacting the Committees' work.⁵⁴

The duplication of treaty body work has caused some consternation amongst states parties, who suggest the reporting requirements for nine treaty bodies is cumbersome.⁵⁵ As will be discussed in section III., below, this has led some to suggest reforming and consolidating the treaty bodies into 'one unified, full-time professional treaty body'.⁵⁶ This proposal has met significant resistance, which means it is now unlikely to be adopted,⁵⁷ however, ongoing state dissatisfaction with the reporting requirements could result in a challenge to the Committee's mandate and means of operation.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ See *ibid.*, 352.

⁵¹ *Ibid.*, 352; *see, also*, UNGA Res. 64/152 (26 March 2010), UN Doc. A/Res/64/152, paras 9-10.

⁵² UN Doc. CCPR/C/GC/33 (25 June 2009).

⁵³ Rodley, 'UN Treaty Bodies and the Human Rights Council' (n 24) 352.

⁵⁴ See *ibid.*, 352.

⁵⁵ See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 642; *see also*, Nigel Rodley, 'Duplication and Divergence in the Work of the United Nations Human Rights Treaty Bodies: A Perspective from a Treaty Body Member' (2011) 105 *American Society of International Law Proceedings* 512.

⁵⁶ See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 645.

⁵⁷ See *Ibid.*, 645-646.

Perhaps a less obvious political limitation comes from the commitment to reach consensus in decision-making.⁵⁸ The ICCPR ‘envisages a majority voting’ process for Committee decisions, but the Committee itself, through its Rules of Procedure, has adopted a policy to “seek” consensus, resulting in a practice where ‘all substantive outputs except the adoption of ‘views’ on individual complaints’, meaning General Comments and Concluding Observations, are reached by consensus.⁵⁹ The exception made for individual complaints stems from the ability of members to issue separate or dissenting opinions, which is a common practice.⁶⁰ The Cold War, however, necessitated this approach and ensured that the substantive outputs of the Committee enjoyed ‘the authority that accompanies the corporate expression of a membership reflecting the broad cultural and political geography of the world’.⁶¹ While consensus can cause challenges for the Committee, most notably by delaying findings or resulting in what some might consider to be more reserved findings, the product more often ‘resembles the highest common factor, rather than the lowest common denominator’ in human rights jurisprudence.⁶²

A significant political challenge to the Committee comes, in an unusual manner, from state recommendations at the Universal Periodic Review (UPR).⁶³ Nigel conducted research examining the response of states at the UPR to recommendations that either explicitly or implicitly invoked the conclusions and recommendations of treaty bodies.⁶⁴ The distinction made was between those recommendations that identified their treaty body source and those that ‘so resembled treaty body recommendations that could be said to be based *implicitly* on the latter recommendations, but without express reference to the treaty body source’.⁶⁵ While the examination was ‘evidently unscientific’,⁶⁶ the findings were nonetheless simultaneously intriguing and worrisome. Receiving states rejected almost half of the UPR recommendations that explicitly invoked the Human Rights Committee as their source.⁶⁷ When the recommendation only implicitly invoked the Human Rights Committee, the receiving state was much more likely to accept the recommendation.⁶⁸ This is worrisome because the UPR gives states the opportunity to reject ‘with impunity’ treaty body recommendations and may ‘embolden the state concerned to ignore the treaty body recommendations directly’.⁶⁹ While one might hope that the UPR and treaty bodies would be mutually reinforcing, this finding suggests the more political nature of the UPR can undermine sharper criticisms made by the Committee.

C. Practical challenges

⁵⁸ Ibid., 625.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid., 626.

⁶² Ibid.

⁶³ See Rodley, ‘Duplication and Divergence’ (n 55) 514.

⁶⁴ See *ibid.*, 514; Rodley, ‘UN Treaty Bodies and the Human Rights Council’ (n 24) 328.

⁶⁵ Rodley, ‘Duplication and Divergence’ (n 55) 515.

⁶⁶ Rodley, ‘UN Treaty Bodies and the Human Rights Council’ (n 24) 328.

⁶⁷ *Ibid.*, 329.

⁶⁸ *Ibid.*

⁶⁹ Rodley, ‘Duplication and Divergence’ (n 55) 514.

‘The long-standing and intensifying central challenge confronting the [treaty-body] system is that there is too much work to be done, in too short a time, with inadequate resources.’⁷⁰ The work of the Committee requires knowledge of and consideration for the application of each of the rights in the ICCPR in each of the treaty’s 169 state parties. Because of the enormity of this task and the limited resources available, most treaty bodies are incapable of handling the increase in state party reports and individual complaints that are filed.⁷¹ Treaty bodies sometimes request ‘extra meeting time on an ad hoc basis’, but this is rarely allowed by the General Assembly because of budgetary constraints.⁷²

The Office of the High Commissioner for Human Rights offers valuable assistance, but it too is limited by budgetary realities. While additional staff members are available during the sessions, on an ongoing basis there are only a few staff members for each committee and these staff members often have responsibilities for more than one committee at a time. Reports and individual complaints also need to be translated and at times ‘the Secretariat does not have the resources to translate the reports promptly, or translate at all states’ written responses to the list of issues.’⁷³ While there are various causes for the Secretariat’s contribution to the backlog, ‘[o]ne obvious one . . . is the expansion of the number of bodies dealing with individual cases and the number of cases being submitted to them, without commensurate new resources being put in place to process them’.⁷⁴ The extensive amount of work required coupled with the limited resources available means that backlog is common and, even if states parties did submit reports on time, the Committee would struggle to keep up.⁷⁵

An additional concern arises from the amount of work required of, and the lack of resources available to, the Committee. Members of the Human Rights Committee need to be present in Geneva for three-week sessions every three months, and engage in Committee work throughout the year. While the ICCPR indicates Committee members should receive emoluments, the treaty entrusted the UN General Assembly to determine the appropriate amount.⁷⁶ In 2002, the General Assembly termed these emoluments ‘honoraria’ and reduced compensation for the work done by Committee members to one US dollar per year.⁷⁷ Without authentic compensation, Committee members are granted only travel expenses and a *per diem* for the period of time that they attend sessions in Geneva.⁷⁸ The effectively voluntary nature of the treaty body also impacts who is available for committee work. This effectively limits membership primarily to individuals in those academic or government posts that would allow for routine time off to serve the Committee. While one might perceive a legitimate concern over the

⁷⁰ Rodley, ‘The Role and Impact of Treaty Bodies’ (n 14) 642.

⁷¹ Ibid., 629.

⁷² Ibid., 630.

⁷³ Ibid., 642.

⁷⁴ Ibid., 643.

⁷⁵ Ibid., 629-631.

⁷⁶ ICCPR (n 1) art 35.

⁷⁷ UN General Assembly Resolution 56/272 (23 April 2002), UN Doc. A/Res/56/272. See also, Rodley, ‘The Role and Impact of Treaty Bodies’ (n 14) 630, fn 32.

⁷⁸ See Rodley, ‘The Role and Impact of Treaty Bodies’ (n 14) 630-631.

independence of those members with formal affiliations to their state's government, particularly in reviewing allies of the state, Nigel's experience indicates that 'some holders of national office have been able to evince more evident and rigorous independence, not to mention genuine expertise, than some of those not formally holding any such office'.⁷⁹ The individuals selected have been of a high quality, both in terms of moral and professional competence, but the limited pool from which the Committee members come gives legitimacy to some concern about the diversity of Committee members' backgrounds.

III. Human Rights Committee reforms

There have been various discussions about reforming the treaty body system, most aimed at addressing the practical challenges (as opposed to the legal and political ones) outlined above.⁸⁰ It must be noted, however, that the duplication of reports and treaty body work could have been avoided. During the drafting of the UN Convention against Torture, a draft by Sweden would have given the treaty body powers for that Convention to the Human Rights Committee.⁸¹ A memorandum from United Nations Legal Counsel suggested this proposal 'would require an amendment to the [ICCPR]'.⁸² Nigel expressed doubts about this reform proposal.⁸³ Subsequent treaties each included their own body, and even though the Legal Counsel's position does not seem to still hold sway, victims sometimes request a unique body, as happened with the Convention for the Protection of All Persons from Enforced Disappearances⁸⁴ specifically to highlight a targeted group or a particularly problematic criminal violation of human rights.⁸⁵

One of the more radical proposals for reform, championed by former High Commissioner for Human Rights Louise Arbour, was to consolidate the treaty bodies into a single entity,

⁷⁹ Ibid., 624.

⁸⁰ See e.g., Martin Scheinin, 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties' (2006) 6 Human Rights Law Review 131; Michael Bowman, 'Towards a Unified Treaty Body for Monitoring Compliance with UN Human rights Conventions? Legal Mechanisms for Treaty Reform' (2007) 7 Human Rights Law Review 225; Michael O'Flaherty, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10 Human Rights Law Review 319; John Morijn, 'Reforming the United Nations Human Rights Treaty Monitoring Reform' (2011) 58 Netherlands International Law Review 295; Suzanne Egan, 'Strengthening the United Nations Human Rights Treaty Body System' (2013) 13 Human Rights Law Review 209; Yuval Shany, 'The Effectiveness of the Human Rights Committee and the Treaty Body Reform' in Martin Breuer et al (eds.), *Der Staat im Recht: Festschrift für Eckart Klein Zum 70. Geburtstag* (Duncker & Humblot, Berlin 2013) 1307; Manfred Nowak, 'Comments on the UN High Commissioner's Proposals Aimed at Strengthening the UN Human Rights Treaty Body System' (2013) 31 Netherlands Quarterly of Human Rights 3.

⁸¹ Rodley, 'Duplication and Divergence' (n 55) 512; Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 643.

⁸² Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 643.

⁸³ See *ibid.*, 643, n 73.

⁸⁴ International Convention for the Protection of All Persons from Enforced Disappearance, UNGA Res. 61/177, UN Doc. A/Res/61/177 (2006), adopted 20 December 2006, entered into force 23 December 2010.

⁸⁵ Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 643-644.

with full-time and professional members.⁸⁶ Certain constituencies of victims, particularly those protected by the more specialised treaties, opposed this recommendation, fearful that they would lose some of the focus on their issues.⁸⁷ The Committee on the Elimination of Racial Discrimination alternatively proposed moving only the function of reviewing the individual complaints to the consolidated single body.⁸⁸ Neither of these proposals garnered sufficient support.⁸⁹ A later proposal from the then-Secretary-General of the UN would have required the treaty bodies to consolidate their reporting calendar.⁹⁰ This has also failed to gain traction.

While political efforts at reforming the treaty body process have stymied, the treaty bodies themselves, often led by the Human Rights Committee, have adopted a number of internal reforms aimed at increasing efficiency, effectiveness, and productivity.⁹¹ In response to the backlog issue, the Human Rights Committee adopted a simplified reporting procedure, under which the Committee provides the state with a list of issues it wishes to discuss and the state's response to those issues functions in place of the more traditional report.⁹² While the Committee assumed this process would help reduce the backlog 'and perhaps this could have freed some meeting time for considering more reports', that expectation has not yet come to fruition.⁹³ Instead, 'it merely permitted the use of the same amount of time for more effective consideration and analysis of each report'.⁹⁴

Two more effective internal reforms have been (1) the Committee's willingness to proceed with the review of a state even in the absence of a report; and (2) the use of an individual country rapporteur or a small task force to develop the list of issues.⁹⁵ By deciding that it would review a state's compliance even if the state failed to produce a timely report, the Committee hoped to reduce its backlog while encouraging states to

⁸⁶ See 'Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' UN Doc. HRI/MC/2006/2 (22 March 2006) at paras 27, et seq.

⁸⁷ Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 645.

⁸⁸ Ibid., 646.

⁸⁹ See 'Report of the Working Group on the Harmonization of Working Methods of Treaty Bodies' UN Doc. HRI/MC/2007/2 (9 January 2007) para 5; Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights' (2012) p. 68. Available at www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf. This proposal followed internal debate within the Committee on the Elimination of Racial Discrimination, which generated several other suggestions from committee members. 'Report of the Committee on the Elimination of Racial Discrimination, 66th and 67th Sessions' (2005), UN Doc. A/60/18 (Supp), para 478.

⁹⁰ See 'Strengthening of the United Nations: an agenda for further change' Report of the Secretary-General, UN doc. A/57/387 (9 September 2002), at para 54. See also, 'Report of the Working Group on the Harmonization of Working Methods of Treaty Bodies' UN Doc. HRI/MC/2007/2 (9 January 2007), paras 6, 14; Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 646.

⁹¹ See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 647.

⁹² HRC, 'Focused reports based on replies to list of issues prior to reporting (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure)' (29 September 2010), UN Doc. CCPR/C/99/4.

⁹³ See Rodley, 'The Role and Impact of Treaty Bodies' (n 14) 630.

⁹⁴ Ibid.

⁹⁵ See *ibid.*

submit reports as required.⁹⁶ Using an individual rapporteur or, occasionally, a task force, allows the Committee to streamline its work and manage more reports at one time.⁹⁷ While they are significant reforms, neither has substantially reduced the backlog associated with the reports.⁹⁸

IV. Concluding thoughts

Nigel's comments at the colloquium represented not only a reflection on where the body of international human rights law has come from but also a sincere hope that the work done to date sets a solid course for the on-going protection of human rights. His comments came with knowledge of a growing resentment of the discourse of human rights, not only in those states who have long objected to universal human rights standards but also in traditionally 'friendly' states. Nigel called for studied analysis of the breadth, depth, and limitations of human rights. He recognised the difficult path taken to protect human rights has not always been based on ideals, but sometimes has developed out of political necessity, in an effort to protect the field as a whole. With his passing, it is important to reflect on the lessons his own work provides for us.

Nigel is known for his strong opposition to both the notion of ESCR as justiciable and the proposition that businesses have direct obligations under international law. To understand Nigel's position, it is worth understanding how he saw himself (or at least how he presented himself to students). Nigel worked for approximately two decades with the late Professor Kevin Boyle at the University of Essex Human Rights Centre.⁹⁹ Kevin often encouraged students to be each of what he called 'the three As': academic, activist, and advocate. Nigel, despite some of the roles in which he served, did not consider himself an activist; instead, he considered himself a public international lawyer first and an international human rights lawyer second. He was committed to international law generally, and human rights law specifically, as a discipline, accepting its limitations even while working for its advancement. In doing so, Nigel believed the significance of the development of the law, and its place in securing human rights, could be better protected.

Nigel's approach, centred on the need for accuracy in discussions of international law, even where one may be left personally dissatisfied, led him to reject the claim that ESCRs were justiciable until the development and adoption of the Optional Protocol to the ICESCR.¹⁰⁰ It is also why, as he boarded the bus to Aarhus airport towards the end of the colloquium, he again insisted that international human rights law did not and should not attach to the conduct of businesses. Rather, the law should require states to regulate businesses instead of businesses regulating themselves, as businesses would perhaps interpret the law in a manner that best suits their own interests rather than the interests of human rights and the law.

⁹⁶ Ibid., 629.

⁹⁷ Ibid., 630.

⁹⁸ Ibid., 629-630.

⁹⁹ The two served at Essex together from Nigel's appointment in 1990 until Kevin Boyle's passing in 2010. See also Nigel Rodley, 'Obituary of Christopher Kevin Boyle' (2011) 33 Human Rights Quarterly 586.

¹⁰⁰ UN Doc. A/63/435, adopted 10 December 2008, entered into force 5 May 2013.

Nigel was a self-described realist,¹⁰¹ and yet a tireless advocate for the improvement of the human rights situation in the world, and the robust use of a clearly articulated international legal system. In a short essay in 2008, Nigel outlined the development of the UN human rights system, and against that backdrop gave a brief but incisive analysis of the then (as perhaps now) current normative and procedural challenges to human rights protection resulting from ‘the atrocities of 11 September 2001’.¹⁰² He concluded thus: ‘Yet, at the risk of appearing hopelessly naïve, I would venture that the norms that have been challenged will, if anything, emerge strengthened, precisely by virtue of their having been so vigorously defended. After all, the development of the whole human rights regime was itself wholly “unrealistic”’.¹⁰³

This apparent incongruity between realism, naivety, optimism, and progressivism perhaps demonstrates Nigel’s clear yet humble insight into the political environment in which the human rights regime operates, and the importance of passion, persistence and perseverance. It is perhaps Nigel’s simultaneously dogged commitment to the law that made his contribution to human rights protection one of both the fierce advocate and the committed lawyer, loyal to the boundaries of the ‘positive law’. Such legal conservatism (for lack of a better word) was not a result of a devotion to tradition for tradition’s sake. It represented a clear appreciation that distending international law beyond a reasonable interpretation of the texts of treaties, and the consent of states to customary international law, can have significant (and negative) consequences for the on-going battle against narrowing interpretations of the law by states. His accomplishments in human rights are a tribute to the wisdom of this position, and worthy of consideration when facing the current challenges to protecting human rights.

¹⁰¹ Rodley, ‘The Universal Declaration of Human Rights: Learning from Experience’ (n 12) 4.

¹⁰² Ibid., 6; See also Nigel S. Rodley, ‘The Prohibition of Torture: Absolute Means Absolute’ (2006) 34(1) *Denver Journal of International Law and Policy* 145–60, especially pp. 146-147.

¹⁰³ Rodley, ‘The Universal Declaration of Human Rights: Learning from Experience’ (n 12) 6.