8

Not Just Single Events

Calling on UN Treaty Bodies to Expose Patterns or Practices of Violations

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8.1 Introduction

The process of transforming observations about the empirical world into claims of normative right and redress involves three steps: naming, blaming and claiming.[1] First, most challengingly and most significantly, wrongs must be recognised as such, and rendered visible and articulable. Over the past seventy-five years, the evolution of the international human rights system has advanced the potential for different forms of abusive action to be named. Often, however, international human rights advocacy has proceeded as if human rights violations are isolated events, deviations from a norm of rights respect. In reality, the vast majority of human rights violations are not unique, but rather part of one or more patterns or practices of violations.

Coming to see human rights violations not as isolated occurrences, but rather as part of patterns and practices of violations, where they are in fact such, is an important act of naming. It generates in those who undertake and encounter it a different view of the world. It is, in this sense, fundamentally an evidentiary issue, as adopting such an understanding alters baseline presumptions and impacts the sorts of evidence human rights bodies might consider and the conclusions they are likely to reach. Positively, United Nations human rights bodies have gradually

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[1] See W. L. F. Felstiner, R. L. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .', *Law and Society Review* 15 (1981): 631–654.

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come to possess increasingly sophisticated individual communication consideration functions. At the same time, while United Nations human rights treaty bodies (UNTBs) have on occasion recognised one or another pattern or practice of violations, they have done so inconsistently and haphazardly. Reflecting on human rights bodies with the aim of ensuring their ability to recognise and appropriately address patterns or practices of violations suggests the appropriateness of several sorts of approaches, some better and some less well recognised to date. This chapter considers various ways in which the processes undertaken by UNTBs should be shaped in order to better consider evidence of patterns or practices of violations as an input.

The manner in which United Nations human rights treaty bodies contemplate the evidence before them is only one aspect of the relationship between such bodies and evidence of human rights violations. This is because UNTBs are not only receivers of information relating to human rights, but also key sites for the generation of such information. As such, this chapter is not only concerned with how such bodies process evidence, but also with the information they create and disseminate, in recognition of the significance of such findings and their ability to generate positive (or negative) feedback loops.

This chapter has four parts. Section 8.2 reviews the different routes through which quasi-judicial bodies such as United Nations human rights treaty bodies receive information. The section highlights the multiple evidence-collecting functions engaged in by such bodies and their abilities to undertake their own investigations in certain cases, to consider amicus briefs and to introduce evidence proprio motu/sua sponte (i.e. on their own initiative). Section 8.2 also examines what sources such bodies have addressed and should consider appropriate to reference in their decisions. The more widespread one believes human rights violations to be, the more liberally evidence should be admitted. Positively, United Nations human rights treaty bodies have typically adopted fairly liberal approaches to date, though they might be more consistent in doing so.

Section 8.3 reviews two manners in which addressing patterns or practices of violations can impact on the manner in which cases are considered. Section 8.3.1 considers exhaustion of domestic remedies, examining the differently termed but similar manners in which the regional human rights systems have reflected on admissibility issues relative to patterns or practices of violations. Section 8.3.2 analyses whether and how addressing patterns or practices of violations might

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impact on the consideration of evidence and the burden of proof. In both cases, it is argued that UNTBs should adopt special approaches where patterns or practices of violations are encountered, including by emulating the practice of the regional systems relative to exhaustion in particular.

Section 8.4 considers how ensuring optimal openness to both the contemplation and finding of patterns or practices of violations militates in favour of particular approaches to case processing. Section 8.4.1 focuses on the input side, considering two modes of case processing that have been adopted in at least partial recognition of the existence of patterns or practices of violations, the repetitive cases procedure adopted by the Human Rights Committee (HRC) and the pilot judgment procedure employed by the European Court of Human Rights (ECtHR). Section 8.4.2 considers how human rights bodies may best recognise and underscore the existence of particular patterns or practices of violations in their findings. It argues that international human rights bodies should explicitly recognise patterns or practices of violations, and that they should clearly articulate 'general measures' or 'structural' remedies required in response.

Section 8.5 considers the manner in which information concerning patterns or practices of violations is publicly presented. As noted above, international human rights bodies are not only receivers and contemplators of human rights–related evidence and information, but also key nodes in its construction and dissemination. As such, the manner in which they present the information they produce is of great significance. While the information produced by United Nations human rights systems is already presented in several valuable ways, the dissemination of information concerning human rights violations would be enhanced, this chapter argues, by the clearer presentation of information concerning patterns or practices of violations as well. Taking this step would help to ensure a more readily accessible evidential record for future cases, and to produce greater pressure for such situations to be brought to an end.

8.2 Evidential Consideration by Quasi-Judicial Bodies

UNTBs are quasi-judicial bodies. That is to say, they combine court-like functions – considering state and individual communications – with other functions similar to those historically possessed by commissions of inquiry or the like. Typical functions of such bodies include consideration of state party reports and following up on concluding observations,

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special statements and general comments. In reality, such bodies receive information concerning human rights not only (or even primarily) from individual communications, but also from a wide variety of other sources. Sources of information include not only the formal channels of reports received in the context of state party review, but also the connections committee members and staff have to the wider world, including the broader system of human rights mechanisms based in Geneva.[2]

The Committee against Torture (CAT),[3] the Committee on the Elimination of Discrimination against Women (CEDAW),[4] the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CRC)[5] have the ability to initiate inquiries on their own initiative where they have received information that serious or systematic violations of convention rights are taking place.[6] The existence of this expansive fact-finding power suggests general recognition of the appropriateness of

[2] The holistic manner in which such bodies receive and consider information is illustrated, e.g., by the references such bodies sometimes make to information received and concluding observations made as part of their periodic reporting work within their decisions on communications. See, e.g., *A.B.* v. *Finland*, CRC/C/86/D/51/2018, 4 February 2021, para. 8.6 fn. 23; *Abdel Jalil Laaroussi* v. *Morocco*, CAT/C/74/D/891/2018, 15 July 2022, paras 8.4–8.5; *S.R.* v. *Canada*, CAT/C/74/D/973/2019, 21 July 2022, para. 8.3; *A. and B.* v. *Azerbaijan*, CAT/C/74/D/905/2018, 27 July 2022, para. 8.6; *Lauren Henley* v. *Australia*, CRPD/C/27/D/56/2018, 26 August 2022, para. 10.10.

[3] The CAT had used this power on ten occasions as of the end of 2022. See OHCHR Website. UN Treaty Body Database, 'Confidential inquiries under Article 20 of the Convention against Torture'.

[4] The CEDAW had used this power on seven occasions as of the end of 2022. See OHCHR Website. UN Treaty Body Database, 'List of all CEDAW inquiry reports'.

[5] The CRC had used this power on one occasion as of the end of 2022. See OHCHR Website. UN Treaty Body Database, 'List of all CRC inquiry reports'.

[6] See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85, Article 20; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, New York, 10 December 1999, in force 22 December 2000, 2131 UNTS 83, Article 8; Optional Protocol to the Convention on the Rights of Persons with Disabilities, New York, 30 March 2007, in force 3 May 2008, 2518 UNTS 283, Article 6; International Convention for the Protection of All Persons from Enforced Disappearance, New York, 6 February 2007, in force 23 December 2010, 2716 UNTS 3, Article 33; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 24 September 2009, in force 5 May 2013, 2922 UNTS 29, Article 11; Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Geneva, 28 February 2012, in force 14 April 2014, 2983 UNTS 131, Article 13.

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utilising all available avenues to obtain evidence where necessary. However, such investigations rarely prove a feasible tool in practice, as the ability of UNTBs to undertake them runs up against resource and practical constraints.

United Nations human rights treaty bodies have generally been open to third-party interventions, and the CAT, the CEDAW and the Committee on the Elimination of Racial Discrimination (CERD) have all recognised their contributions.[7] Rule 96 of the 2019 Rules of Procedure of the HRC indicates that the Committee 'may accept information and documentation submitted by third parties which may be relevant for the proper determination of the case'.[8] That information will be shared with the parties, who may respond if they so wish.[9] The Guidelines on third-party submissions adopted by the HRC at its 127th Session in October 2019 indicate that the HRC 'may on its own initiative request from an individual or entity a third-party submission (amicus curiae brief)'.[10] The openness UNTBs have shown to third-party interventions is especially positive relative to patterns or practices of human rights violations, as in such cases there are likely to be interested parties beyond those submitting the communication(s) in question.

In addition to their ability to consider and even request third-party interventions, UNTBs should be free to draw on other public information when considering cases as well. The Rules of Procedure of the HRC indicate that 'the Committee shall consider the communication in the light of all the information made available to it'.[11] The Rules of Procedure of the CESCR, in contrast, more clearly (but perhaps more limitingly) indicate:

> At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee . . . may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional

[7] *Slobodan Nikolic and Ljiljana Nikolic* v. *Serbia and Montenegro*, CAT/C/35/D/174/2000, 25 November 2005, para. 3.4; *Maria de Lourds da Silva Pimentel* v. *Brazil*, CEDAW/C/49/D/17/2008, 25 July 2011, para. 1; *T.P.F.* v. *Peru*, CEDAW/C/50/D/22/2009, 17 October 2011, para. 1; *TBB-Turkish Union in Berlin/Brandenburg* v. *Germany*, CERD/C/82/D/48/2010, 26 February 2013, para. 8.1.

[8] HRC, Rules of Procedure (CCPR/C/3/Rev.11), 9 January 2019.

[9] HRC, Rules of Procedure.

[10] HRC, Guidelines on Third-Party Submissions (CCPR/C/160), 3 September 2020, para. 3.

[11] HRC, Rules of Procedure, Rule 102 (1).

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> human rights systems that may assist in the examination of the communication, provided that the Committee shall afford each party an opportunity to comment on such third party documentation or information within fixed time limits.[12]

A broad approach to the proprio motu consideration of information seems appropriate. First, a more limited approach would in many cases require a highly artificial pretence of ignorance, given committee members and staff will typically be aware of human rights information from many sources other than the communication in question. Second, such an approach would be impractical, requiring the duplication of the same information, often repeatedly, in the service of a formal limitation. Third, such an approach would be undesirable, asserting the primacy of compliance with narrow procedural rules over factual accuracy and human rights obligation enforcement.

In addition to how information is received, another issue pertains to the sources human rights bodies consider appropriate to reference in the context of case consideration. One particular question is whether human rights bodies may consult the work of prominent non-governmental organisations (NGOs), which provide much of the evidence of human rights violations in practice. Past practice here is mixed. Out of the total of one admissibility decision and seventy-six merits decisions issued by UNTBs in 2022,[13] Human Rights Watch or Amnesty International were referenced in thirteen cases – ten times by the CAT[14] and once each by the HRC,[15] the CEDAW[16] and the CRC.[17] In seven of those cases, the work of Human Rights Watch and Amnesty International was referenced

[12] Economic, Social and Cultural Rights Committee, Rules of Procedure (E/C.12/49/3), 15 January 2013, Rule 14 (1).

[13] This was the number of distinct cases shown by a search of 2022 decisions via OHCHR's Jurisprudence Database (accessed on 26 February 2023). One case, *A.Y.* v. *Switzerland*, showed up twice in the search, apparently in error.

[14] *D.S.* v. *Australia*, CAT/C/73/D/941/2019, 22 April 2022; *T.B.* v. *Switzerland*, CAT/C/73/D/862/2018, 22 April 2022; *T.A.* v. *Switzerland*, CAT/C/73/D/914/2019, 28 April 2022; *Yacob Berhane* v. *Switzerland*, CAT/C/73/D/872/2018, 28 April 2022; *Abdel Jalil Laaroussi* v. *Morocco* (CAT); *S.R.* v. *Canada* (CAT); *A.Y.* v. *Switzerland,* CAT/C/74/D/887/2018, 22 July 2022; *D.M.* v. *Switzerland*, CAT/C/74/D/880/2018, 22 July 2022; *A. and B.* v. *Azerbaijan* (CAT); *X. and Y.* v. *Switzerland*, CAT/C/75/D/1081/2021, 11 November 2022.

[15] *A.B. and B.D.* v. *Poland*, CCPR/C/135/D/3017/2017, 21 July 2022.

[16] *Jeremy Eugene Matson and others* v. *Canada*, CEDAW/C/81/D/68/2014, 14 February 2022.

[17] *S.K.* v. *Denmark,* CRC/C/90/D/99/2019, 1 June 2022.

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only while considering complainants' arguments, rather than as an explicit basis for any of the findings made.[18] In six cases, the work of such organisations was referenced directly in the context of the committees' findings.[19]

In one of those cases, *A.Y.* v. *Switzerland*, the CAT directly addressed the relevant issues. In particular, the CAT took a moment to consider Switzerland's claim that the reports from human rights NGOs and a Special Rapporteur relied on by the claimant were 'intentionally selective'.[20] In response, the CAT observed that it 'ha[d] nothing before it to indicate that the State party's judicial authorities carried out a detailed assessment of the source material relied on by immigration authorities or the complainant at any stage'.[21] The CAT further reasonably concluded 'that, on balance, if a particular source were to be given less weight, it should be any that were to be assessed as having a clearly vested interest in the narrative provided' – meaning in particular 'information provided by government agents or sources within the country, who might face reprisals for any perceived criticism of the Government of Eritrea'.[22] The CAT further challenged Switzerland's suggestion 'that the refusal of a State to engage with or to accept a fact-finding visit is a reason to dismiss the findings of the report of that fact-finding mission, and that information from individuals who have fled persecution is less reliable'.[23] The CAT observed that adoption of such an approach 'would have a dissuasive effect on States engaging with human rights obligations and reduce transparency and accountability'.[24] On the particulars of the evidence, the CAT observed 'where sources are drawn widely from civil society and citizens in exile, the information provided is more likely on balance to represent reliable, uncensored first-hand accounts, as persons outside the country who have fled are arguably no longer living under censorship'.[25]

[18] See *T.B.* v. *Switzerland* (CAT), para. 3.2; *T.A.* v. *Switzerland* (CAT), para. 3.11; *Yacob Berhane* v. *Switzerland* (CAT), para. 3.1; *S.K.* v. *Denmark* (CRC), para. 3.3; *Abdel Jalil Laaroussi* v. *Morocco* (CAT), paras 2.12, 5.7; *A.B. and B.D.* v. *Poland* (HRC), para. 7.3; *D.M.* v. *Switzerland* (CAT), para. 3.2.

[19] *Jeremy Eugene Matson and others* v. *Canada* (CEDAW), paras 18.3, 18.9; *D.S.* v. *Australia* (CAT), para. 10.3; *S.R.* v. *Canada* (CAT), para. 8.3; *A.Y.* v. *Switzerland* (CAT), para. 8.10; *A. and B.* v. *Azerbaijan* (CAT), para. 8.9; *X. and Y.* v. *Switzerland* (CAT), para. 7.4.

[20] *A.Y.* v. *Switzerland* (CAT), para. 8.10.

[21] *A.Y.* v. *Switzerland* (CAT), para. 8.10.

[22] *A.Y.* v. *Switzerland* (CAT), para. 8.10.

[23] *A.Y.* v. *Switzerland* (CAT), para. 8.10.

[24] *A.Y.* v. *Switzerland* (CAT), para. 8.10.

[25] *A.Y.* v. *Switzerland* (CAT), para. 8.10.

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The willingness of UNTBs to consult the work of human rights organisations in the cases considered above demonstrates that there is no legal rule prohibiting them from directly considering the work of human rights NGOs in the course of reaching their findings. At the same time, the relative paucity of references to the work of such organisations in UNTBs' decisions suggests that the latter exercise a degree of caution in referencing such sources. One reason for such potential caution is readily inferable: human rights bodies' members and staff are aware that states do not always look favourably on information concerning human rights violations made available through the work of such organisations, and hence seek to limit their references to that work in their decisions.

Several factors suggest UNTBs should consider evidence from human rights NGOs more freely than they have in the past. First, human rights NGOs play a key role in the global system of human rights enforcement, including by generating and making available information on human rights violations. Freely citing and relying on such information helps to support that vital work; refusing to do so limits it. Second, in contrast to UNTBs, numerous other United Nations bodies and mandates, including United Nations Special Rapporteurs, have been readily willing to explicitly cite to the work of such organisations.[26] There is no reason for human rights treaty bodies not to do the same. Third, if they want to obtain the broadest possible picture, UNTBs should be open to information from as many sources as possible. Instead of adopting a formalistic rule limiting certain sources of information, UNTBs should follow the CAT's reasoning in *A.Y.*, admitting information while assessing it in light of the potential bias of its sources. Fourth, as the CAT further observed in *A.Y.*, accepting evidence from human rights NGOS is important because failing to rely on such evidence would have a 'dissuasive effect on States engaging with human rights obligations'.[27]

In sum, this brief overview of UNTBs' approaches to evidence reveals most have been fairly liberal to date. This appears to have been facilitated by such bodies' quasi-judicial nature, as well as their recognition of the

[26] See, e.g., Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice (A/76/222), 23 July 2021.

[27] *A.Y.* v. *Switzerland* (CAT) , para. 8.10.

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challenges of gathering information concerning human rights violations. Recognising that many human rights violations constitute part of patterns or practices of violations provides further grounds for the adoption of maximally liberal approaches to the receipt of evidence. This is the case both because there will be multiple sources of information in such cases, and because instances of patterns or practices of violation cannot be recognised or properly understood unless multiple perspectives are taken into account.

8.3 Special Procedural Approaches

In addition to supporting United Nations human rights treaty bodies' adoption of a liberal approach to the receipt of evidence, recognition that human rights violations may form part of patterns or practices of violations suggests the need to adopt special approaches to certain procedural issues. This section argues that special approaches should be adopted in two areas: relative to admissibility and the burden of proof.

8.3.1 Admissibility

The rule of exhaustion requires that claimants 'exhaust' domestic remedies before having recourse to an international human rights body. The rule serves several purposes: placing states on notice; providing them with a first opportunity to remedy the situation in question; helping to ensure that international bodies can consider the issue after legal arguments and evidential submissions have been more fully developed; and promoting efficiency, by encouraging use of the lowest level remedial avenue available. Exhaustion is accomplished by bringing one's claim before national-level judicial bodies and, following a negative finding, taking advantage of judicial appellate procedures to the point that a final decision has been produced and no subsequent judicial appeal is possible.

In both general international law and before various international human rights bodies, several grounds for exception to the rule of exhaustion have been recognised over time. Most significantly for present purposes, European, Inter-American and African human rights bodies have all used different terminologies to find an exception to the rule of exhaustion in situations involving patterns or practices of violations. In Europe, the formerly operative European Commission of Human Rights found an exception applied in cases involving 'legislative measures

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and administrative practices'.[28] For its part, the ECtHR has similarly identified an exception in cases involving 'an administrative practice consisting of a repetition of [human rights violations]'.[29] The Inter-American Court has recognised an exception to the rule of exhaustion in situations involving 'a practice or policy ordered or tolerated by the government'.[30] The African Commission has established an exception where 'serious and massive violations of human rights' are taking place.[31] Elsewhere, in response to another situation involving widespread violations, the African Commission observed that:

> the Respondent State does not point to any legal procedure which makes it practicable for . . . a large number of victims to pursue local remedies, for example as a class. The upshot is that the procedure available to individuals cannot practically be utilized by numerous victims to secure redress of the alleged violations of a range of rights in the present case . . . (as such) the Commission finds it appropriate to exempt [certain claims] from the requirement to exhaust local remedies on the basis that it is practically impossible for the numerous victims to utilize whatever procedure is available to individuals at the domestic level.[32]

Broadly speaking, these precedents suggest an exception to the rule of exhaustion in cases of patterns or practices of violations is justified on several grounds. First, an exception is justified because the existence of a pattern or practice suggests the domestic remedial system is inaccessible or ineffective as such, as a well-functioning remedial system should be able to redress such issues before they rise to such a level. Second, where a

[28] *First Cyprus Case, Greece* v. *UK*, ECmHR, 176/1956, 2 June 1956.
[29] *Akdivar et al.* v. *Turkey*, ECtHR, 21893/93, Judgment, 16 September 1996, para. 67.
[30] See, e.g., *Velásquez Rodríguez* v. *Honduras*, IACtHR, 7920, Merits, 29 July 1988, para. 68.
[31] See, e.g., *Organisation Mondiale Contre la Torture and others* v. *Rwanda*, ACmHPR, 27/89, 46/91, 49/91 and 99/93, 31 October 1996, para. 17. See also *Free Legal Assistance Group et al.* v. *Zaire*, ACmHPR, 25/89, 47/90, 56/91 and 100/93, October 1995, para. 37; *Amnesty International et al.* v. *Sudan*, ACmHPR, 48/90, 50/91, 52/91 and 89/93, 15 November 1999, paras 30–33, 38–39; *Malawi African Association et al.* v. *Mauritania*, ACmHPR, 54/91, 11 May 2000, paras 81, 85; *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, ACmHPR, 245/02, 15 May 2006, para. 71; *Haregewoin Gabre-Selassie and IHRDA* v. *Ethiopia*, ACmHPR, 301/05, 7 November 2011, para. 112. This formula should be understood as referring to patterns or practices of violations, as presumably the 'serious or massive violations' in question must be linked in order to be cognisable together. At the same time, the African system's criterion is potentially more restrictive, making reference to the extensiveness and gravity of the violations in question as well.
[32] *Ali Askouri and Abdel-Hakeem Nasr* v. *Sudan*, ACmHPR, 452/13, Admissibility, February 2016, paras 113f.

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pattern or practice of violations exists, the concern with fairness to the state – which underpins the exhaustion rule – is lessened, as the state can be deemed to have already had a chance to redress the violation in question. Where the violations in question are of sufficient extent and/or severity, an exception is also justified by the fact that even if there is some potential to access remedies, those remedies are likely to be unduly delayed relative to the enhanced urgency involved.[33] It is not apparent that UNTBs have been specific as to the existence of a ground for exception to the rule of exhaustion in cases of patterns or practices of violations. Given the strong rationales for the existence of such an exception, they should follow the regional human rights bodies mentioned above by recognising it.

8.3.2 *The Burden of Proof*

In addition to recognising the need for an exception to the rule of exhaustion in cases of patterns or practices of violations, the Inter-American system has arguably recognised the appropriateness of a reversal of the burden of proof in such cases as well. In *Velásquez Rodríguez* v. *Honduras*, the Inter-American Court held that '[w]hen the existence of ... a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference'.[34] The Inter-American Commission has similarly observed that 'when there is proof of the existence of a policy of disappearances sponsored or tolerated by the Government, it is possible, using circumstantial or indirect evidence, or through relevant logical inference, to prove the disappearance of a specific individual when that would otherwise be impossible given the link between that disappearance and the overall policy'.[35]

This jurisprudence suggests that claimants will succeed in their claims where: (1) a 'policy or practice'[36] of rights violations is shown to exist; and (2) a certain amount of evidence is presented that the person on

[33] For a similar point, see *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* (ACmHPR), para. 67.

[34] *Velásquez Rodríguez* v. *Honduras* (IACtHR), para. 124

[35] *Romer Morales Zegarra, Richard Morales Zigarra, Carmen Teresa Rojas Garcia and Carlos Vega Pizango* v. *Peru*, IACHR, Report No. 57/99, 13 April 1999, para. 50.

[36] This term is presumed equivalent to 'patterns or practices'. While arguments might be made on this point, they are omitted in the interests of space.

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whose behalf the case is filed was a victim of that policy or practice. Relative to (1), a few open questions exist.

First, it is not clear where the burden of proof should lie. Given the structural nature of such claims, it is perhaps appropriate to say human rights bodies should adopt some independent initiative. At the same time, insofar as claimants will be interested in establishing the existence of patterns or practices of violations, the burden clearly also lies on claimants. This is all the more so since in many cases, claimants will fail should the 'policy or practice' in question not be recognised.

Second, it is not clear what standard of proof should apply. Those concerned with the seriousness of the charge against the state might suggest the matter should be proved beyond a reasonable doubt. This would import a standard developed to protect criminal defendants to the human rights sphere, however, and would impose a heavy burden on claimants. The standard of the balance of probabilities will, on the other hand, be challenged on the grounds that it is too light relative to so serious a finding. The standard of clear and convincing evidence represents a compromise between these positions. Ultimately, the question is a policy one, on which differences of perspective will doubtless persist.[37]

The burden of proving element (2) more clearly lies on claimants. A question exists here too, however, as to how much proof should be required: should the claimant be required only to make a prima facie case that the person on whose behalf the claim was filed was a victim of the policy or practice of violations in question, or should they have to show this on the balance of probabilities? The answer must be that only a prima facie case need be advanced, as to do otherwise would obviate the need for the first element (the proof of the pattern or practice of violations) to be shown at all.

While it is thus apparent that some details remain to be fleshed out, the Inter-American system has at least pointed the way towards a special approach to the burden of proof in cases in which a policy or practice of violations has been found. The Inter-American system's findings in this context were reached in the context of enforced disappearance, where the harm is particularly severe and claimants' access to information is especially limited, and hence application of a special approach is particularly compelling.

[37] If the suggestions in Section 8.5 of this chapter are followed, and a set of recognised patterns or practices of violations is established, the argument for application of a lower standard will weaken, as the relevant information will be more readily available.

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Application of a similar approach in all cases of patterns or practices of violations is justifiable on a number of grounds. First, the approach employed may be understood, as the Inter-American system suggests through its reference to 'logical inference', as an application of common sense: where there is evidence of a pattern or practice of certain types of violations, and evidence of a particular violation fitting that general pattern or practice, the likelihood that the particular violation has taken place is enhanced by the information concerning the pattern or practice.

Second, adoption of a special approach may be understood as justified as a response to the pattern or practice of human rights violations in question, which enhances the pressure on concerned states to take steps to address that pattern or practice. To put this another way, broadly speaking, whether or not a human rights body adopts a special approach to cases involving patterns or practices of violations relates to its assessment of the relative risks of erroneous judgments. Failing to adopt such an approach will make it harder for claimants to succeed, and hence makes sense where one is more concerned with a wrongful judgment against the respondent than with the claimant failing to obtain justice. Adopting a special approach, in the alternative, makes sense if one is more concerned with rightful claimants failing to obtain justice than with wrongful decisions against respondents. In the context of patterns or practices of violations, the balance of these contemplations shifts in the direction of the latter – as to find against a rightful claimant would not only deprive that claimant of a remedy but also fail to exert pressure against the state to end the patterns or practices of violations in question. A wrongful judgment against a state, on the other hand, while it would not be just in the individual case, would still have merit in bringing such pressure to bear.[38]

Third, to the extent there are concerns with such a process, they will be heightened in the more formal context of a court than in a quasi-judicial body such as a UNTB. The Inter-American Court's willingness to adopt such an approach makes clear at least one leading international human rights court has no doubts as to the merits of such an approach, however. Quasi-judicial bodies such as the UNTBs should therefore also be willing to adopt such an approach. It is not apparent that UNTBs have adopted such a special approach to the burden of proof in cases involving patterns

[38] For similar observations, see C. Roberts, 'Reversing the Burden of Proof before Human Rights Bodies', *International Journal of Human Rights* 25 (2021): 1682–1703, 1693–1695.

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or practices of violations. Given the strong rationales for such a reversal, they should follow the Inter-American Court in doing so.

8.4 Case Processing

This section considers another component of the UNTBs' work that might require adjustment if patterns or practices of violations are more regularly recognised: the manner in which cases are processed. From one perspective, human rights violations constitute individuated occurrences that should be considered in isolation from one another. From another perspective, the opposite is the case: most human rights violations are part of one or more patterns or practices of violations, and hence are best considered together with other violations that form part of the same pattern or practice.

In practice, many international human rights bodies have largely proceeded from the (generally unexamined) perspective that human rights violations, at least as and when brought forward by individuals rather than states, are individual occurrences. Interestingly, such approaches have come under challenge not on theoretical grounds, but rather due to the fact that situations involving patterns or practices of violations can generate multiple communications over time. While the issue has not become an urgent one in terms of institutional capacity at most UNTBs, it has been recognised at the HRC, as noted below. The potential for a large caseload to lead to new procedural approaches is demonstrated by the ECtHR, however, where the volume of cases received has prompted the adoption of a major new procedural approach – the pilot judgment procedure – specifically geared to address situations involving patterns or practices of violations.

From one perspective, the manner in which human rights bodies process cases concerns operational efficiency. From another perspective, the approaches adopted are closely related to evidential questions. This is true in the first place, on the input side, because the scope with which the matter before the human rights body in question is understood will impact on the evidence that may be considered. If the matter is considered to be a narrow one, evidence of the pattern or practice of which the matter forms a part may be excluded. If, by contrast, the matter is considered from a wider lens – including simply because multiple individual complaints are considered together – information concerning patterns or practices of violations will naturally arise, and it will be harder to exclude further information along such lines.

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In addition, recognising that particular submissions constitute part of patterns or practices of violations also has implications on the output side. Such recognition will allow adjudicatory bodies to better ensure remedial consistency. It will also help them ensure remedies are comprehensive, addressing not only individuated harms but also the broader situation giving rise to the patterns or practices of violations in question. Finally, willingness to recognise patterns or practices of violations explicitly is significant in and of itself, as this recognition will then constitute part of the broader evidential record, enhancing the pressure on the state in question to bring the pattern or practice of violations in question to an end.

Section 8.4.1.) considers two different manners in which human rights bodies can structure individual communications. Section 8.4.1.1 considers the traditional model, under which each communication is considered as it is received. While many systems will likely not be comfortable going beyond this model, substantial variation is possible therein, as the subsection notes. These include streamlined procedures relative to repeat cases, as well as the potential joinder of communications by the human rights body in question. Section 8.4.1.2 considers a major alternative model of case processing, namely the pilot judgment procedure adopted by the ECtHR in 2004. The chapter reflects positively on this approach due to its tendency to make patterns or practices of violations visible.

Section 4.2. considers the findings human rights bodies reach, the orders they issue and the manner in which they engage in follow-up or enforcement of judgments.[39] Here, the chapter argues that UNTBs should adopt clearer findings relative to the existence of patterns or practices of violations as such, as well as concerning general measures or structural remedies that must be adopted in order to bring patterns or practices of violations to an end. Such findings, where made, should moreover be made readily publicly available, including through their incorporation within information presented by the Office of the High Commissioner for Human Rights (OHCHR) concerning particular patterns or practices of violations, as called for in Section 8.5.

[39] Thanks are due to Hanaa Hakiki for pointing the way to follow-up procedures, rather than case processing as such, as the key process through which pressure to address patterns or practices of violations might be most enhanced.

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8.4.1 Case Structure

8.4.1.1 The Traditional Model

The traditional model of case processing sees *individual* cases submitted by lawyers or representatives of one or more victims, which are then processed by the human rights body in question. The speed with which cases are processed varies and appears somewhat flexible within and across human rights bodies. The human rights body considering the case may have a procedure for the issuance of interim orders and may take account of priority factors in relation to the speed of case processing, including, for instance, factors pertaining to the urgency, gravity and extent of the violations in question.[40] Once a decision is reached, that decision is final.

The traditional method can be stretched in various ways that render it a more suitable vehicle for the recognition of patterns or practices of violations. While cases may be submitted on behalf of solitary individuals, they may also be submitted on behalf of larger groups of individuals. While some systems apply tighter rules around standing and representation, others adopt more liberal approaches, which more readily allow claims to be advanced on behalf of groups as such.[41] In some instances, moreover, when human rights systems receive similar communications from different parties in close temporal proximity, they may choose to join them together for collective consideration. This too tends to make it easier to recognise patterns or practices of violations that may be involved in the various cases.[42]

The primary motivation for more liberal approaches to standing and representation historically appears to have been a desire to facilitate access to human rights systems. At the same time, consideration of cases that concern wider sets of victims and violations – regardless of the procedural technique applied to facilitate this – carries other benefits as well. In the first place, considering multiple cases together promotes

[40] The European Court of Human Rights has been comparatively clear on the issue of prioritization, having adopted a case priority policy in 2009, since updated in 2017. See ECtHR, The Court's Priority Policy.

[41] For example, it may be possible to engage in *actio popularis* actions in the interest of the public in general, a procedural potential that implicitly recognises the existence of patterns or practices of violation. For more, see W. J. Aceves, '*Actio popularis? The Class Action in International Law*', *University of Chicago Legal Forum* (2003): 353–402.

[42] Indeed, the act of joinder as such, premised as it may be on the recognition of certain similarities across cases, arguably constitutes a form of recognition of alleged patterns or practices of violations.

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systemic efficiency. In addition, the consideration of cases through a wider-angled lens promotes the development of more expansive, innovative and assertive remedial orders, which are likely to be better designed to holistically address structural situations of violation, rather than to merely provide relief to individual claimants. In this context, the fact that the Inter-American regional system has been more willing to consider cases from a broader perspective may be understood as closely linked to that system's place at the forefront of remedial jurisprudence.[43]

In addition to employing a flexible approach to joinder, human rights bodies may adopt other procedures that enhance their ability to recognise patterns or practices of violations. This may carry other benefits of the sort described above, as well. The HRC, for instance, has adopted a procedural rule allowing for the appointment of special rapporteurs with responsibility for dealing with 'repetitive cases'.[44] In particular, the HRC has received large numbers of similar communications concerning the pattern and practice of forced disappearances in Algeria, to which it has responded with highly similar decisions.[45] Such a procedure constitutes another relatively straightforward way in which human rights bodies can devote more concerted attention to cases involving patterns or practices of violations.

8.4.1.2 The Pilot Judgment Procedure

The traditional approach has been challenged and complicated in the European human rights system. As noted above, the adoption of a new approach there was motivated in substantial part by the system's caseload crisis, resulting from the receipt of so large a number of cases that it was impossible to respond to all within a timely manner. A significant subset

[43] The Inter-American Court's ability to take such an approach has been facilitated by the fact cases there are generally initially considered by a Commission that has interpreted its mandate in a wide and flexible manner. For more on related themes, see T. Antkowiak, 'Remedial approaches to human rights violations: the Inter-American Court of Human Rights and beyond', *Columbia Journal of Transnational Law* 46 (2007): 351–419; C. M. Roberts, *Alternative Approaches to Human Rights: The Disparate Historical Paths of the European, Inter-American and African Regional Human Rights Systems* (Cambridge: Cambridge University Press, 2022).

[44] HRC Rules of Procedure, Rule 105.

[45] See, e.g., *Aicha Habouchi* v. *Algeria*, CCPR/C/128/D/2819/2016, 27 March 2020; *Djegdjigua Cherguit* v. *Algeria*, CCPR/C/128/D/2828/2016, 27 March 2020; *Malika Bendjael et al.* v. *Algeria*, CCPR/C/128/D/2893/2016, 27 March 2020; *Rachid Braih et al.* v. *Algeria*, CCPR/C/128/D/2924/2016, 27 March 2020; *Ahmed Souaiene and Aicha Souaiene* v. *Algeria*, CCPR/C/128/D/3082/2017, 27 March 2020.

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of cases the system was receiving, moreover, were repetitive cases, namely applications concerning different claimants but concerning the same or highly similar factual situations and rights violation claims.[46]

The European human rights system responded by developing the pilot judgment procedure, often traced to an important resolution by the Committee of Ministers in 2004.[47] Essentially, the pilot judgment procedure allows the Court to freeze or adjourn repeat applications concerning certain situations, and instead consider a small subset of such cases as pilot judgments. In particular, Rule 61 of the Court's Rules of Procedure, adopted in 2011, specifies that recourse may be had to the pilot judgment procedure 'where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications'.[48] While the ECtHR has been reluctant for much of its history to issue assertive remedial orders calling for structural reform or the like, these are considered not only possible but essentially required in the pilot judgment context. Here, the Court must order the state to adopt such measures as are necessary to amend the structural situation of violation, addressing not only the pilot case(s) but the situation of all the frozen cases as well. Should such measures not be adopted, the frozen cases may be resumed for consideration.[49]

Some open questions remain in relation to the pilot judgment procedure. Among other issues, the ECtHR has not developed very detailed criteria to ensure all relevant classes and interests of claimants are

[46] See ECtHR, Factsheet – Pilot judgments (November 2022), 1. www.echr.coe.int/documents/pilot_judgment_procedure_eng.pdf.

[47] See Committee of Ministers of the Council of Europe, Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem, 12 May 2004.

[48] ECtHR, Rules of Procedure, Rule 61(1).

[49] For more on the early use of the procedure, see L. Wildhaber, 'Pilot Judgments in Cases of Structural or Systematic Problems on the National Level', in R. Wolfrum and U. Deutsch (eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Heidelberg: Springer, 2009); P. Leach, H. Hardman, S. Stephenson and B. Blitz, *Responding to Systemic Human Rights Violations: An Analysis of Pilot Judgments of the European Court of Human Rights and Their Impact at National Level* (Cambridge: Intersentia, 2010); P. Leach, H. Hardman and S. Stephenson, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia', *Human Rights Law Review* 10 (2010): 346–359; D. Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Leiden: Brill, 2013).

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adequately considered.[50] In addition, the pilot judgment procedure has been challenged on the grounds that it allows the Court to foreclose claims and hence enable rights violations to go unaddressed in certain cases.[51] Despite such objections – which can and should be addressed – the pilot judgment procedure offers one effective, proven method through which patterns or practices of violations may be addressed. This can form a basis for other systems, including those at the United Nations level, to reflect on how optimally to process large numbers of similar cases.

8.4.2 *Findings, Recommendations and Follow-Up*

Recognition that the facts revealed in an individual case may constitute part of broader patterns and practices of violations should inform the manner in which UNTBs structure their decisions and follow-up procedures as well. First and foremost, human rights bodies should explicitly recognise, as clearly, honestly and accurately as possible, the systemic nature of those violations as such.[52] Simply recognising such situations will constitute a valuable first step towards exerting enhanced pressure for them to change.

Second, that recognition should inform the remedial measures that human rights bodies recommend. This means that those remedies should be oriented not only towards providing satisfaction or redress to the individual claimant or claimants, but also towards ensuring non-repetition. In the context of patterns or practices of violations, this entails the adoption of remedial measures aimed at reforming the aspects of law

[50] For some contemplations on this point, see T. Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', *Harvard International Law Journal* 56 (2015): 147–205; L. Glas, 'The Function of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice', *Netherlands Quarterly of Human Rights* 34 (2016): 41–70.

[51] See D. Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations', *Human Rights Law Review*, 16 (2016): 731–769; E. Kindt, 'Giving up on individual justice? The effect of state non-execution of a pilot judgment on victims', *Netherlands Quarterly of Human Rights* 36 (2018): 173–188; E. Wagner, 'How Many Strikeouts Are Too Many? The ECtHR's Evolving Approach to Repetitive Cases and the Limits of Efficiency', in S. Schiedermair, A. Schwarz and D. Steiger (eds.), *Theory and Practice of the European Convention on Human Rights* (London: Bloomsbury, 2022).

[52] While this chapter has preferred the language of pattern or practices of violations, other similar terminologies have been and might be used, including references to structural, systemic, widespread, systematic, massive or gross violations.

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and policy which allowed for the violations to take place. Among other terminologies, these sorts of remedies have been referred to as general measures and as structural remedies. In this, the UNTBs may look to the example set by the Inter-American, African and European human rights systems. The Inter-American and African systems have both demonstrated a longstanding willingness to issue structural orders. The European system has moved in a similar direction more recently, initially in the context of pilot judgments, and later more broadly.[53] The UNTBs might also consider adopting the Committee of Ministers of the Council of Europe's rule that indicates the need to oversee whether 'general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations'.[54]

A challenge may arise in the context of structural orders, however, insofar as they may take broad and vague forms.[55] General orders, calling, for instance, for states to take all measures necessary to remedy the situation in question, are a valuable addition to judgments that otherwise only require individual remedies. However, several scholars and practitioners have noted that specificity is highly desirable in human rights bodies' findings, especially relative to structural orders,[56] as this helps to make clear exactly what measures states should take to end the structural contexts of violation in question. UNTBs should hence work to ensure that the structural remedies they suggest are as clear as possible. Specific remedial recommendations are valuable not only insofar as they

[53] See H. Keller and C. Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments', *European Journal of International Law* 26 (2016): 829–850, 838.

[54] See Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, 18 January 2017, Rule 6(2)(b)(ii); A. von Staden, 'Monitoring Second-order Compliance: The Follow-up Procedures of the UN Human Rights Treaty Bodies', *Czech Yearbook of International Law* 9 (2018): 329–356, 347.

[55] On the vagueness of many human rights bodies' follow-up reports regarding the steps required to comply with the judgment, see von Staden, 'Monitoring Second-Order Compliance'.

[56] See, e.g., T. Antkowiak, 'An Emerging Mandate for International Courts: Victim-centered Remedies and Restorative Justice', *Stanford Journal of International Law* 47 (2011): 279–332, 313; Keller and Marti, 'Reconceptualizing Implementation' 839f. For some nuanced reflections, that nonetheless support the view that 'intrusive[ness]' is more appropriate relative to 'guarantees of non-recurrence', see R. Murray and C. Sandoval, 'Balancing Specificity of Reparation Measures and States' Discretion to Enhance Implementation', *Journal of Human Rights Practice* 12 (2020): 101–124, 120.

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enable stronger and more targeted pressure for compliance, but also because they establish a clearer basis for follow-up investigations.

In addition to more specific remedies, UNTBs should more clearly and accessibly publicise their findings regarding patterns or practices of violations. Pressure on states to comply with findings will be enhanced where those findings are made as publicly available as possible.[57] In this regard, information as to any findings requiring general measures, structural reforms or the like should be prominently included within any compilation or public presentation of information concerning patterns or practices of violations. This information could then be easily followed up on not only by the human rights body that reached the decision in question,[58] but also by all those working in and with OHCHR and affiliated mechanisms, as well as the human rights community at large.

8.5 The Public Presentation of Information Concerning Patterns or Practices of Violations

As emphasised in the introduction, it is important to recognise that there are two different angles from which one may consider evidentiary issues in relation to international human rights bodies. First, as explored in much of the above, there is the question of how these bodies receive and consider evidence. However, such bodies are not only receivers of evidence; they are also key actors in the production, shaping and global dissemination of evidence pertaining to human rights standards in theory and violations understood to have taken place in practice. Maximizing the accessibility, accuracy and impact of the information produced is hence of the greatest importance.

Currently, the work done by the United Nations' various human rights bodies is primarily presented in a functionally disaggregated manner:

[57] For a similar point, see A. Donald, D. Long and A.-K. Speck, 'Identifying and Assessing the Implementation of Human Rights Decisions', *Journal of Human Rights Practice* 12 (2020): 125–148, 143 ('[i]mplementation is hampered when information is outdated or not made public, precluding meaningful participation from all interested actors').

[58] UNTBs may also potentially enhance their follow-up on systemic issues by grouping similar cases together. In this, they may look to the example set by the regional systems: the Inter-American Court has held joint follow-up hearings where similar issues were at play, and the Council of Europe's Committee of Ministers has grouped similar cases together. See C. Sandoval, P. Leach and R. Murray, 'Monitoring, cajoling and promoting dialogue: what role for supranational human rights bodies in the implementation of individual decisions?', *Journal of Human Rights Practice* 12 (2020): 71–100, 77.

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OHCHR statements (including certain outputs by Special Rapporteurs and others) may be found in one place;[59] the outcomes of the Human Rights Council's Universal Periodic Review (UPR) process, whereby states' compliance with their human rights obligations is regularly reviewed by other states, somewhere else;[60] human rights treaty bodies' work may be accessed via their individual pages,[61] or via a database;[62] each of the various Special Rapporteurs' different outputs is primarily accessible from their individual page;[63] and so on. The relevant information is also clustered and presented under particular unifying headings, including by country[64] and by type of violation.[65]

The organisation of human rights information per entity that has produced it, the state it concerns and the types of violation in question makes sense and should persist. However, relevant information may and should be clustered according to particular patterns or practices of violation as well. Such information could include any documentation produced concerning a particular pattern or practice of violations – be it a public statement, the outcome of UPR consideration, part of a Special Rapporteur's report or part of a country review or a case determination by any of the human rights bodies. Grouping together and presenting information in the context of the patterns or practices of which it forms a part would arguably promote efficiency (by preventing the same research work being done by multiple different parties when developing materials addressing that situation); promote consistency, by helping enable different organisations to respond to such situations in similar manners; make the nature, scope and gravity of such situations clearer; and generate more pressure for the violations in question to be addressed.

Ultimately, such an approach could lead to the consolidation of information under particular headings of (what would typically be ongoing but might also be past) patterns or practices of violations. In a particular state, for example, there might be information concerning patterns or practices of violations relative to: use of force by law enforcement; assembly rights; immigrants' rights; prison conditions; over-criminalisation;

[59] See OHCHR website, 'Latest'.
[60] See OHCHR website, 'Universal Periodic Review'.
[61] See, e.g., OHCHR website, 'Human Rights Committee'.
[62] See OHCHR website, 'UN Treaty Body Database'.
[63] See, e.g., OHCHR website, 'Special Rapporteur on freedom of peaceful assembly and of association'.
[64] See OHCHR website, 'Countries'.
[65] See OHCHR website, 'Topics'.

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due process violations; the right to health; surveillance; and so on. OHCHR's Universal Human Rights Index provides a valuable tool through which existing human rights findings relative to particular sorts of violations in different countries may be accessed.[66] However, recognising where the situation in question rises to one of patterns or practices of violations, and presenting that information directly as such, are steps that have not yet been taken.

With time, it will hopefully be possible to provide relatively comprehensive mapping (according to existing standards) of ongoing patterns or practices of violations in different substantive areas of rights concern across all states. The initial launch of such a mode of presenting information will perhaps pose a challenge, insofar as a great deal of novel informational processing will be necessary, and it may not be readily practicable to compile information on all ongoing patterns or practices of violations at the same time. One principled way in which to sequence attention would be through prioritisation criteria, in other words by beginning in those contexts in which violations are the most severe. Due to constraints of space, this chapter will not go further into that issue, but it is worth noting such issues have been dealt with, for example, by the Inter-American Commission in detailing the criteria it will consider when deciding whether or not to list a particular state in the portion of the Commission's Annual Reports that specifies where the most serious human rights violations are taking place (chapter IV.B).[67] Once information has been compiled on the most serious patterns or practices of violations, attention could be expanded to cover patterns or practices of violations which do not rise to the same level of gravity.

8.6 Conclusion

This chapter has argued that UNTBs should more clearly and consistently pay attention to and recognise the existence of patterns or practices of violations. It has considered what impacts this should have on UNTBs' receipt of information generally; their approaches to the exhaustion of domestic remedies, and the burden of proof; the manner in which cases are processed; and UNTBs' findings, remedial recommendations and follow-up practices. The chapter has also argued that OHCHR should

[66] See OHCHR, 'Universal Human Rights Index'.

[67] Inter-American Commission on Human Rights, Rules of Procedure, in force 1 August 2013, Rule 59 (6).

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ensure information concerning patterns or practices of violations is specifically highlighted in their public dissemination of human rights information. Compliance with these recommendations will help to ensure patterns or practices of violation are more consistently recognised, that cases addressing such situations are appropriately handled, that a more readily accessible evidential record is available for future cases, and that information concerning patterns or practices of violations is more extensively publicly shared, resulting in greater pressure for such situations to be brought to an end.

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