

INTERNATIONAL HUMAN RIGHTS AND ISRAEL AS SEEN IN THE WORK OF THE TREATY BODIES: DO THEY WALK THE TALK?

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The purpose of this article is to review the manner in which the human rights treaty bodies (HRTBs) treat Israel, focusing on the system of periodic reporting, with the aim of examining whether Israel is being accorded ‘special treatment’ or, put more simply, whether a bias against Israel can be ascertained in the work of the HRTBs. In analysing the concluding observations (COBs) issued in respect of six of Israel’s recent periodic reports, we identified four distinct population groups within Israeli society, and studied the number and nature of the COBs targeting each of these groups. This we termed the ‘output’. We then looked into the amount of the alternative information provided to the Committees by civil society organisations, which we termed the ‘input’. An examination of the two reveals a clear correlation between the relatively greater weight accorded to the Palestinian population in the occupied territories in the input side of the exercise (the alternative reports) and the output side (the COBs). Thus, what might initially be perceived as proved bias in the treatment of Israel by the HRTBs in light of the seemingly disproportional weight they accord to the conflict, turns out to be at least partially influenced by the information and materials provided to the Committees.

Keywords: human rights treaty bodies, Israel, periodic reporting, concluding observations, bias

1. INTRODUCTION

The human rights treaty bodies (HRTBs or treaty bodies) stand as professional organs, in contrast to the political organs of the United Nations (UN), which include the General Assembly, the Security Council and the Human Rights Council. They consist of independent experts who are nominated by their own countries, and are directly elected for fixed renewable terms of four years by the states parties to the ten core international human rights conventions. Nomination is based on their recognised competence in human rights in general and in the particular area of the relevant convention. Their main task is to monitor the core international human rights conventions and oversee their implementation, by considering the periodic reports submitted by states parties, considering individual complaints, conducting country inquiries (by those Committees entrusted with this power) and the adoption of general comments on the interpretation of treaty provisions.¹

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¹ Nigel Rodley, ‘The Role and Impact of Treaty Bodies’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 621.

A key element in the operation of the HRTBs is their unbiased and neutral treatment of all states parties to the relevant convention. This can be achieved only by ensuring the independence and impartiality of the treaty body members, as was recently emphasised in the ‘Guidelines on the Independence and Impartiality of Members of the Human Rights Treaty Bodies’ (the Addis Ababa Guidelines), adopted by the Chairs of the HRTBs at their annual meeting in June 2012 and endorsed by the General Assembly in April 2014.² The Guidelines state,³ *inter alia*, that

[t]he independence and impartiality of members of the human rights treaty bodies is essential for the performance of their duties and responsibilities and require that they serve in their personal capacity. Treaty body members shall not only be independent and impartial, but shall also be seen by a reasonable observer to be so.

We would like to take this as a brief background to a question that seems to intrigue anybody who is familiar with the treaty bodies system as well as with the ‘special treatment’ that Israel is allegedly accorded by the political UN entities:⁴ can this ‘special treatment’ also be discerned within the treaty bodies system? Is there any basis for claiming that politics overcome professionalism when it comes to Israel’s encounter with the HRTBs? Within the UN’s general functions, especially at the level of the Security Council or the Human Rights Council, the alleged ‘special treatment’ is reflected in the disproportionality in dealing with Israel compared with other countries that carry out human rights violations.⁵ What would be a possible equivalent treatment within the realm of the HRTBs’ work?

To examine this question, we must first address the functions of the HRTBs and identify potential avenues for political treatment. One such area could be in the considerations of individual complaints, which some of the treaty bodies are empowered to do. Under this mechanism, any individual who claims a violation of rights under the relevant treaty by a state party to that treaty may bring a communication before the relevant Committee, provided that the state recognises the competence of the Committee to receive such complaints and domestic remedies

² UNGA, ‘Implementation of Human Rights Instruments’, 2 August 2012, UN Doc A/67/222, Annex I; UNGA Res 68/268, 9 April 2014, ‘Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System’, UN Doc A/68/268.

³ *ibid* para 2.

⁴ This is almost ‘common knowledge’ among Israeli advocates and official representatives: see, eg, Alan M Dershowitz, *The Case for Israel* (John Wiley & Sons 2003) 181–89, and the recent speech of PM Binyamin Netanyahu in which he stated that the ‘UN anti-Israel bias hasn’t changed since the “Zionism is racism” libel’: Lahav Harkov, ‘Netanyahu: UN Anti-Israel Bias Hasn’t Changed since “Zionism is Racism” Libel’, *The Jerusalem Post*, 5 January 2016, <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Netanyahu-UN-anti-Israel-bias-hasnt-changed-since-Zionism-is-racism-libel-439472>.

⁵ According to Ambassador Ido Ahorni, ‘[s]ince its inception in 2006, the UNHRC has released a total of 103 resolutions. Astonishingly, 56 have focused on criticizing Israel. The UNHRC has held a total of 21 special sessions to address dire humanitarian crises throughout the world. One has addressed Sudan, another Sri Lanka, another [the] Ivory Coast and another Libya – while 7 of the 21 special sessions have irrationally targeted Israel’: Ido Ahorni, ‘How the United Nations Human Rights Council Unfairly Targets Israel’, *Time*, 30 July 2014, <http://time.com/3060203/united-nations-human-rights-council-israel>.

have been exhausted.⁶ Israel, however, did not join any of the optional protocols to the conventions that established the individual complaints mechanism, so there is nothing to examine here.⁷

So we then come to the examination of the main function of the HRTBs: consideration of the states parties' reports.⁸ On becoming a party to a human rights treaty, a state assumes the obligation to report periodically to the treaty body on the implementation of the treaty in its territory. The treaty body, as the monitoring mechanism on implementation, assesses the situation in the reporting state, and issues concluding observations, which are basically a set of recommendations that the state party is asked to instigate in order to improve its compliance with the treaty's provisions.

The reporting process is a cycle that begins with the state's submission of a formal report, to which the treaty body responds with a list of questions for the purposes of refinement and clarification, and schedules a date for conducting a dialogue with the state party. The state supplies its answers to the list of questions before this dialogue and, together with the report, they form the basis for the constructive dialogue between the treaty body and the state party. The dialogues are conducted with the state's representatives, usually in the form of high-level delegations, with the aim of discussing all aspects of implementing the treaty in the state. Obviously, not all of the state's official reports or answers are fully exhaustive or reliable, and treaty bodies seek information from other sources, such as UN institutions and international organisations. Within this realm, civil society plays a primary role. Domestic non-governmental organisations (NGOs) and civil society organisations (CSOs) submit what are known as 'alternative' or 'shadow' reports to those submitted by the governments. The information provided in these reports is usually perceived as independent and unbiased. HRTBs regularly rely on these reports in their attempt to formulate an accurate and complete appraisal of the situation. NGOs are involved in the reporting process throughout the cycle, and often meet with the treaty body members in

⁶ Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012) 73.

⁷ For Israel's status of ratification, including the acceptance of individual complaints procedures, see OHCHR treaty bodies database, <http://indicators.ohchr.org>.

⁸ Attention should still be drawn to a less known practice, which has evolved in some Committees, of issuing statements on matters that may be of concern to them. This is not a formally mandated function, and the statements do not hold any legal standing (statements are mentioned in the Note by the Secretariat, 'Other Activities of the Human Rights Treaty Bodies and Participation of Stakeholders in the Human Rights Treaty Body Process', 22 April 2013, UN Doc HRI/MC/2013/3, paras 24–27). Nevertheless, it is safe to say that this exercise reveals some of the Committees' positions even beyond those areas in which they chose to issue statements. By choosing to address a specific matter or a particular situation rather than another, a Committee expresses its priorities and precedence. Since there are no rules of procedure or guidelines here, each Committee is free to choose on which issue, if any, it wishes to pronounce and in what manner (as explained in Rodley (n 1) 631–32). As in this article we wish to focus on the Committees' main task, namely the consideration of state parties' reports, we shall briefly look at one case study here – the practice of the CEDAW Committee on the issuing of statements. The OHCHR's website contains all statements issued by CEDAW since 2008 (<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Statements.aspx>). Significantly, 8 out of the 25 statements issued between 2008 and 2014 addressed conflict areas. Of these, 2 were on Syria (the second statement, in October 2014, addressed 'the situation of women and girls in Iraq and Syria') and 2 related to Gaza. In other words, 25% of the Committee's undertakings with respect to ongoing armed conflicts globally were devoted to the Israeli–Palestinian outbreaks in the conflict in Gaza. Obviously, this sample is far too small, and more comprehensive research is needed before any firm conclusions can be drawn regarding the question of neutrality or politicisation as reflected in the exercise of issuing statements.

correspondence to the dialogue. The concluding observations that result from the reporting process present a summary of the review, and serve as a reference point for the next reporting cycle.⁹

In determining whether bias can be ascertained in the Committee's handling of Israel under this exercise, we suggest that the concluding observations at the end of the consideration of each state party's report should be examined. Bias could be implied if, for instance, conflict-related issues carry what seems to be a disproportional weight in the concluding observations. We are aware that the proportionality criterion is subjective, and what might constitute disproportionality to some could be entirely acceptable to others based, *inter alia*, on the severity of the alleged human rights violations. Moreover, the significant weight given to Israel's policies in the occupied territories could be a mirror reflection of Israel's lack of reporting on treaty implementation in those territories, in light of its formal position that the treaties do not apply extraterritorially.¹⁰ Nevertheless, a critical view of the HRTBs based on perceived disproportionality is still occasionally expressed in closed circles,¹¹ and is taken as another expression of the notorious 'special treatment' referred to above. Our aim in this article is twofold. We first wish to see whether the significant weight given to conflict-related issues is factually grounded. If that is the case, we suggest another explanation for this phenomenon – one that is more technically oriented in building upon the formal elements of the reporting exercise.

Thus, we suggest that the concluding observations should be taken as the 'output'. This output should be quantitatively and qualitatively analysed. Furthermore, the output should be viewed in light of the 'input' of this exercise to see whether there is a link between the two. The input comprises many sources. First and foremost, it includes the state parties' official reports and their replies to the list of questions and issues.¹² Reports by UN agencies and by national human rights institutions are then added. For the purpose of this study, more significant is the information received from civil society organisations, international and local, referred to as 'alternative' or

⁹ Rodley (n 1) 628–29.

¹⁰ For an extensive review and critical analysis of the Israeli position see Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Co-application of Humanitarian Law and Human Rights Law to the Occupied Territories' (2004) 37 *Israel Law Review* 17. Israel has consistently maintained this position in relation to the HRTBs: see, eg, UN Convention on the Elimination of All Forms of Discrimination of Women, 'Responses to the List of Issues and Questions with regard to the Consideration of the Fourth and Fifth Periodic Report: Israel', 4 February 2011, UN Doc CEDAW/C/ISR/Q/5/ADD.1, paras 4–8; and the CEDAW Committee's criticism of this position in 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Israel', 4 February 2011, UN Doc. CEDAW/C/ISR/CO/5, paras 12–13.

¹¹ Ayelet Levin, 'The Reporting Cycle to the United Nations Human Rights Treaty Bodies: Creating a Dialogue between the State and Civil Society – The Israeli Case Study' (2015) 48 *George Washington International Law Review* 315, 346–49. The authors of this article had encountered such views when conducting meetings with state officials following a position paper published in 2013 by the Rackman Center for the Advancement of Women (Bar-Ilan University), aiming to encourage a broader range of CSOs to participate in the reporting process to the HRTBs: 'Israel Reports', <http://rackmancenter.com/wp-content/uploads/2016/03/Israel-reports.pdf> (in Hebrew).

¹² In recent years, and more recently as part of the HRTB strengthening process, there has been a move towards adopting the 'Simplified Reporting Procedure': UNGA Res 68/268 (n 2) 3; Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014) 227–28. However, the basic distribution of sources of information remains the same, and the only difference is that the state party's answers to the list of questions prior to reporting replaces both the periodic report and the answers to the list of questions and issues.

‘shadow’ reports. As civil society generally has a large role in the outcome of the reporting exercise, these alternative reports considerably influence the concluding observations. In another ongoing research exercise conducted by the authors, a clear link was found between the concluding observations of the Committee on the Elimination of Discrimination against Women (CEDAW) and the information provided to it by civil society organisations.¹³

2. RESEARCH METHODOLOGY

To pursue this research avenue, we studied consideration by the HRTB Committees of Israel’s six most recent periodic reports:

- Human Rights Committee (HRC);
- CEDAW;
- Committee on Economic, Social and Cultural Rights (CESCR);
- Committee on the Elimination of Racial Discrimination (CERD);
- Committee on the Rights of the Child (CRC); and
- International Covenant on Civil and Political Rights (ICCPR).¹⁴

As is the case with most states, Israel is not a monolithic political entity, and any examination of its human rights policy and reality must take into consideration the different segments of its society. In the reporting framework of the HRTBs this is often reflected in separate alternative reports which specifically represent the experience of the various groups. In the case of Israel, an additional factor weighs in – namely, the unresolved conflict and Israel’s ongoing control over the occupied territories. Thus, we identified four distinct population groups, each of which is situated differently both within Israel’s human rights framework, and in relation to the treaty bodies’ reporting mechanism. These are:

- the general Israeli population (both Jewish and non-Jewish);
- the non-Jewish Israeli population;

¹³ Ruth Halperin-Kaddari and Marsha Freeman, ‘Multiculturalism on Multiple Fronts: CEDAW, International Norms, and Benign Neglect’, paper presented at the International Symposium on Freedom of Religion and Gender Equality, University of Heidelberg (Germany), May 2012. In this research we found a high correlation between alternative reports that reported harmful practices and their appearance in the concluding observations (COBs). While pointing out certain violations in the alternative reports did not necessarily guarantee their being addressed in the COBs, no violation of these topics appeared in COBs without having been reported in the alternative reports made available to the Committee.

¹⁴ ‘Concluding Observations of the Human Rights Committee: Israel’, 29 July 2010, UN Doc CCPR/C/ISR/CO/3; ‘Concluding Observations of the Committee on the Elimination of Discrimination against Women: Israel’, 4 February 2011, UN Doc CEDAW/C/ISR/CO/5; ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel’, 9 March 2012, UN Doc CERD/C/ISR/CO/14-16; ‘Concluding Observations of the Committee on the Rights of the Child: Israel’, 21 November 2013, UN Doc CRC/C/ISR/CO/2-4; ‘Concluding Observations of the Human Rights Committee: Israel’, 21 November 2014, UN Doc CCPR/C/ISR/CO/4. The reason for this choice is that they are the only reports for which there is full access (through relevant websites) to all information that was provided to the Committees in their examination of the reports.

- refugees and asylum seekers; and
- the Palestinian population in the occupied territories.¹⁵

For each group we identified those alternative reports that addressed its particular situations and concerns, and quantified them (with respect both to the number of reports and their volume, which may also be seen as implicating their breadth and depth). Having examined the input side of the process, we turned to the output, namely the concluding observations (COBs). For each of these reports, we distinguished between the four target population groups which the COBs addressed. We also graded the COBs according to the severity of the language used, and distinguished between ‘soft’ and ‘strong’ language. Soft language includes such terms as ‘calls upon’, ‘recommends’, ‘encourages’, ‘draws attention’, and similar. Strong language refers to where the Committee ‘urges’ the state party to act or to refrain from acting, or to ‘immediately’ do or refrain from doing something.¹⁶ The purpose of this exercise was to learn whether, as is often argued, disproportional attention is accorded to the Palestinian population in the occupied territories, and also whether the Palestinian–Israeli conflict overshadows all other matters within the work of the treaty bodies. However, the full picture can be ascertained only following an analysis of a possible correlation between the input and the output sides of the process.

3. FINDINGS AND DISCUSSION

Since this research set out to investigate whether a form of ‘special treatment’ can be claimed within the treaty bodies system with respect to Israel, in the form of heightened or even disproportionate weight given to conflict-related issues, we will start with presenting the end result of the reporting exercise, namely the concluding observations. Tables 3.1 and 3.2 appear to show a clear pattern of the HRTBs’ main focus regarding Israel.

Table 3.1 merely shows the distribution of the concluding observations (COBs) among the four population groups and, even from this simple counting exercise, the focus on the Palestinian population in the occupied territories is evident: a total of 43 per cent of the COBs addresses them, compared with a total of only 30 per cent for the general Israeli population (Jews and non-Jews) generally. There could be many reasons for this uneven distribution, clearly unrelated to the respective sizes of the population groups. Palestinians in the occupied territories

¹⁵ Notably, Israel’s consistent policy with regard to the human rights treaties in the occupied territories (OT) is to refrain from reporting in writing, but be prepared to answer such questions during the dialogues with the HRTBs. Thus, Israel’s reports do not address the Palestinian population in the OT, but official information is available to the HRTBs as part of the answers provided in the dialogues.

¹⁶ eg, ‘Concluding Observations of the Committee on the Rights of the Child: Israel’ (n 14) para 9: ‘The Committee *urges* the State party to implement as a matter of utmost priority its recommendations relating to children living in the OPT ...’; ‘Concluding Observations of the Committee on the Elimination of Discrimination against Women: Israel’ (n 14) para 23: ‘The Committee *urges* the State party to ...’. This informal categorisation is based on the experience of one of this article’s authors (Halperin-Kaddari) on the CEDAW Committee, having personally participated in the formulation of more than 200 COBs over a period of nine years. Indeed, even within the two groups, the different terms may sometimes carry varying degrees of strength, so that ‘calls upon’ may be viewed as somewhat stronger than ‘encourages’, but such an internal classification is too suggestive and subjective.

Table 3.1: Distribution of Concluding Observations by Target Groups

Report	Year	Total number of COBs	General Israeli population	Refugees and asylum seekers	Israeli Non-Jewish population	Palestinian population in the OT
HRC	2010	20	(10%) 2	–	(20%) 4	(70%) 14
CEDAW	2011	23	(43%) 10	(9%) 2	(13%) 3	(34%) 8
CESCR	2011	35	(28%) 10	(3%) 1	(26%) 9	(43%) 15
CERD	2012	25	(20%) 5	(4%) 1	(36%) 9	(40%) 10
CRC	2013	36	(47%) 17	(5%) 2	(11%) 4	(36%) 13
ICCPR	2014	19	(16%) 3	(5%) 1	(37%) 7	(42%) 8
Total		158	(30%) 47	(4%) 7	(23%) 36	(43%) 68

Note: The numbers have been rounded.

Table 3.2: Distribution of Concluding Observations by Target Groups and Language

TB	Year	General Israeli population		Refugees and asylum seekers		Israeli Non-Jewish population		Palestinian population in the OT		Total
		Soft	Hard	Soft	Hard	Soft	Hard	Soft	Hard	
CEDAW	2011	(8) 35%	(2) 9%	(1) 4%	(1) 4%	(2) 9%	(1) 4%	(3) 13%	(5) 22%	23
CESCR	2011	(9) 26%	(1) 3%	(1) 3%	0%	(9) 26%	0%	(8) 23%	(7) 20%	35
CERD	2012	(4) 16%	(1) 4%	0%	(1) 4%	(5) 20%	(4) 16%	(6) 24%	(4) 16%	25
CRC	2013	(15) 42%	(2) 6%	(1) 3%	(1) 3%	(1) 42%	(3) 8%	(5) 14%	(8) 22%	36
Average		30%	5%	2%	3%	14%	7%	18%	20%	

are disenfranchised persons who are not represented in the political branches of the reporting state. It could be expected that they would receive more attention. However, if that were the only reason, we may not have witnessed such significant variations between the treaty bodies themselves. While the average rate of COBs addressing Palestinians in the occupied territories is 44 per cent, and out of the total number of all COBs given to Israel since 2011 they comprised 43 per cent, the Human Rights Committee clearly stands out: in 2010 it targeted 70 per cent of its COBs at the Palestinian population in the occupied territories.

However, what Table 3.2 shows is even more notable. In this table we distinguished between two types of COB, according to the strength of the language used (CCPR COBs were not categorised since the Human Rights Committee uses the same language throughout its COBs).

This table shows a clear distinction between the nature of the concluding observations directed at the general Israeli population, and those directed at the Palestinian population in the occupied territories. The former use mostly soft language, such as when the Committee ‘encourages’ or ‘recommends’, while the latter use equally soft and strong language (such as ‘urges’ and ‘immediately requests’). Even more interesting is Figure 3.1, which suggests a correlation between soft language used for the general population and strong language used for the

Table 3.3: Distribution of Alternative Reports by Target Groups

TB	Year	General Israeli population			Refugees and asylum seekers			Israeli Non-Jewish population			Palestinian population in the OT		
		Total number of pages	Number of reports	Average pages per report	Total number of pages	Number of reports	Average pages per report	Total number of pages	Number of reports	Average pages per report	Total number of pages	Number of reports	Average pages per report
HRC	2010	25	3	8	–	–	–	115	3	38	632	13	49
CEDAW	2011	22	3	7	36	2	18	70	1	70	114	2	57
CESCR	2011	24	4	6	11	1	11	187	4	47	153	8	19
CERD	2012	10	1	10	28	1	28	119	3	40	190	8	24
CRC	2013	–	–	–	12	1	12	20	1	20	115	5	23
ICCPR	2014	–	–	–	4	1	4	94	6	16	332	15	22
Average		13.5	2.8	7.8	18.2	1.2	14.6	100.8	3.0	38.5	256.0	8.5	32.3

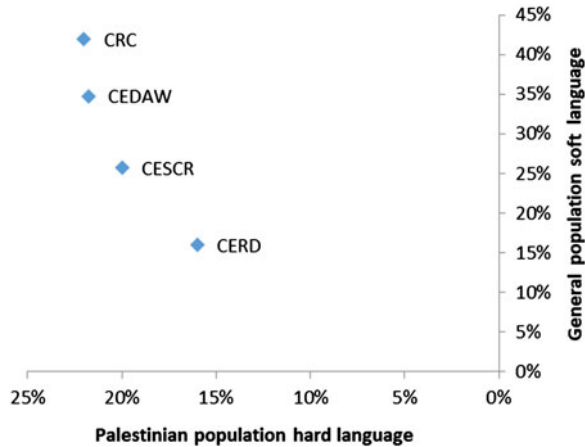


Figure 3.1: Relationship between Types of Concluding Observation and Target Groups

Palestinian population: it seems that a high rate of soft COBs towards the general population correlates with a relatively high rate of strong COBs addressing the Palestinian population.

Once again, one could think of a number of reasons to explain these findings, including the severity of violations leading to the varying strength of the concluding observations. However, as explained above, examination of the output (the COBs) alone is misleading. A serious study of the HRTBs' work must take into consideration the input (the alternative reports) as well as the output. When this is done, the picture changes. Table 3.3 presents several attributes of the alternative reports that were available to the treaty bodies in their consideration of Israel's reports, both in terms of quantity (number of reports and overall number of pages addressing each population group) and quality (volume of each report as a partial indication of its breadth and depth¹⁷).

The differences in the volume and nature of the information that was available to the treaty bodies with respect to the four population groups are striking. The total number of pages dealing with the Palestinian population in the occupied territories was almost 20 times higher than those addressing the general Israeli population. Furthermore, while the volume of information relating to the non-Jewish population was approximately one-third of that concerning the Palestinians, it was still 7.5 times more than that in respect of the general Israeli population. This pattern remains consistent when examining the actual number of reports addressing each of the groups that were available to the Committees, and when reflecting upon the quality of those reports as partially indicated by the average number of pages in each report.

This, we believe, puts the first impression obtained from the concluding observations in a completely different light. Notwithstanding the limits of this study in terms of the lack of feasible

¹⁷ We are well aware of the inadequacy of this parameter as an indication of the quality of the reports. Ideally, quality should be measured by substance, including the actual content, the scope and nature of resources and references. We hope to be able to conduct such an in-depth study in the future. However, since experience shows that the length and breadth of submissions to the HRTBs also prove to be an indication of their seriousness, within the limits of the current study we resort to this parameter.

statistical analysis, a tentative explanation for Israel's experience with the HRTBs can be offered. The correlation between the relatively heavier weight accorded to the Palestinian population in the occupied territories on the input side of the exercise (the alternative reports) and the output side (the concluding observations) can hardly be disputed. The same pattern can be discerned with respect to the two other specific population groups, and the same applies when examining the differences in the severity of the concluding observations. Thus, what might at first sight be perceived as support for the alleged bias in the HRTBs' treatment of Israel, in light of the seemingly disproportional weight they accord to the conflict, eventually turns out to be at least partially influenced by the information and materials provided to the Committees. Even if it does not explain all aspects of the treaty bodies' differential focuses, we believe that the correlation that we found between the input and the output sides of the process seriously questions the alleged 'special treatment' the HRTBs accord Israel. At the very least, it offers another explanation of the treaty bodies' choice of focus and approach – one that is rather devoid of value judgments, political considerations and alleged bias.